OFFICE OF ADMINISTRATIVE LAW JUDGES
U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C. 20001

In the Matter of

U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES,	)	
Prosecuting Party,	)	
v.	)	Case Nos. 2002-CCP-1, 2003-CCP-1
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,	)	
Respondent,	)	
and	)	
CALIFORNIA APPRENTICESHIP COUNCIL,	)	
Respondent.	)	

PROSECUTING PARTY'S MOTION FOR SUMMARY DECISION

INTRODUCTION

The National Apprenticeship Act of 1937 ("NAA") and its implementing regulations set up the National Apprenticeship System, a nation-wide dual registration system, whereby either the federal government, through Prosecuting Party U.S. Department of Labor ("DOL"), Office of Apprenticeship Training, Employer and Labor Services ("OATELS"), and/or the state apprenticeship councils ("SACs") that OATELS recognizes as its agents, register local apprenticeship programs for federal purposes. See NAA, § 1, 29 U.S.C. § 50; 29 C.F.R. Part 29,

especially § 29.2(l) & (o); infra, pp. 7-8, 10.[1] In registering apprenticeship programs for federal purposes, both OATELS and the recognized SACs must comply with federal requirements. These requirements include the NAA's directives to promote apprenticeship opportunities while protecting the welfare of apprentices, see infra, pp. 9-11, and the federal regulatory registration provisions, see 29 C.F.R.§ 29.12(a)-(b), Administrative File ("AF") 852-53.

As the administrator of the National Apprenticeship System, OATELS is responsible for ensuring that all SACs that it recognizes as its registration agents comply with federal requirements. SACs qualify for recognition by obtaining OATELS' approval of acceptable, conforming state apprenticeship requirements. See 29 C.F.R. § 29.12(a)-(b), AF 852-53. To ensure that recognized SACs remain in conformity with federal requirements, OATELS requires such SACs to obtain its prior approval of changes to state apprenticeship requirements made after recognition. See infra, pp. 11-13. Although OATELS attempts to resolve all conformity disputes with the SACs through informal consultation, OATELS is authorized to derecognize SACs that fail to fulfill, or operate in conformity with, federal requirements, see § 29.13, AF 855-56.

These two consolidated cases arise from OATELS' initiation of derecogniton proceedings against Respondents California Department of Industrial Relations ("CDIR") and California Apprenticeship Council ("CAC") after consultations about a disputed change to a California state apprenticeship law failed to resolve the dispute. OATELS found that, by setting restrictive need criteria for approval of new apprenticeship programs, section 3075(b) of the California Labor Code violated the NAA's directive to promote apprenticeship opportunities.

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[1] For the federal regulatory definition of "federal purposes," see infra, p. 15 n.10. OATELS has no authority over registration of apprenticeship programs for non-federal purposes, and such registration is not at issue here.

Subject to certain narrow exceptions, section 3075(b) blocks approval of new apprenticeship programs in the California construction trades unless there is no existing approved program serving the same craft or trade and geographic area that is willing or able to supply the needed apprentices. OATELS also determined that CDIR and CAC, the state apprenticeship agencies that operate under section 3075(b), violated the NAA's implementing regulations by failing to obtain OATELS' prior approval of that statutory provision.

Under 29 C.F.R. § 18.40, OATELS now moves for summary decision affirming its determinations that CDIR and CAC should be derecognized on the basis of California's adoption of the restrictive need criteria and violation of the "prior approval" requirement. As shown below, the need criteria of section 3075(b) violate the NAA by restricting, rather than promoting, apprenticeship opportunities, depriving current and prospective construction apprentices of valuable training and career opportunities and limiting the supply of skilled workers in an industry that is suffering from great shortages of such workers. The need criteria limit or eliminate apprenticeship opportunities for current and prospective apprentices by generally restricting approval of apprenticeship programs. Such restricted approval denies apprentices and the public, the intended beneficiaries of the NAA, the benefits of competition among programs serving the same craft or trade and geographic area, such as more openings for apprentices, the opportunity to choose the program that best suits the apprentice's needs, better instruction and training for reasonable fees, and better value for the taxpayer's money on public works contracts.

Furthermore, as also demonstrated below, the "prior approval" requirement is not a mere procedural formality but a necessary means of implementing the statutory and regulatory requirement that apprentices throughout the nation be continuously protected by acceptable, conforming state requirements. CDIR and CAC's failure to obtain OATELS' prior approval of

section 3075(b) harmed prospective and current apprentices by depriving them of OATELS' protective review of a restrictive, nonconforming law that may have denied many of them the opportunity to start or complete apprenticeships. Thus, California's violation of the "prior approval" requirement was a separate violation from the state's statutory adoption of the restrictive need criteria for approval of construction apprenticeship programs. Even if OATELS had found that the need criteria did not violate the NAA or its implementing regulations, by not securing prior approval for state requirements that went beyond federal requirements, California would still have violated an independent federal oversight requirement that is an essential to OATELS' ability to protect the welfare of apprentices throughout the National Apprenticeship System.

These two grounds for derecognition of CDIR and CAC are independently sufficient for summary decision for OATELS. Acceptance of either ground will completely dispose of this case.

STATEMENT OF THE CASE

This case arises from CDIR and CAC's appeals of OATELS' determination that California's delegated federal apprenticeship registration authority should be withdrawn. Under the NAA's implementing regulations, OATELS can delegate such authority to a SAC if the state's apprenticeship requirements conform to federal requirements or are acceptable if they exceed federal requirements. See 29 C.F.R. § 29.12, AF 852-54. To ensure continuing conformity with federal requirements, OATELS requires recognized SACs to obtain its prior approval of changes to state apprenticeship requirements made after recognition. See infra, pp. 11-13. Registration of an apprenticeship program for federal purposes is not mandatory but permits employers to pay apprentices lower wages on--and thus make lower bids for--federal

public works projects under the Davis-Bacon Act. See infra, p. 18, para. 8 The NAA's implementing regulations also permit OATELS to withdraw recognition from a SAC when the state's apprenticeship requirements fall out of conformity with federal requirements. See 29 C.F.R. § 29.13, AF 855-56.

In February 1978, OATELS' predecessor agency, the Bureau of Apprenticeship and Training ("BAT"), recognized the California SAC as the federal registration agent for the state of California. See infra, p. 20, para. 14. The California state apprenticeship law that BAT then found in conformity with federal requirements permitted establishment of a new apprenticeship committee whenever justified by the apprenticeship training needs of the trade in question. See Cal. Lab. Code, § 3075 (1976), AF 1059.[2] Since this provision did not generally restrict approval of apprenticeship programs to existing programs, BAT did not object to it.

In October 1999, without OATELS' prior approval, California amended its apprenticeship law by specifying criteria for a "needs test" for approval of new apprenticeship programs in the building and construction trades. See Cal. Lab. Code, § 3075(b) (1999), AF 859, quoted in full, infra, p. 20, para. 15.[3] Subject to certain narrow exceptions, the needs test for these trades permits a new program to be registered only where there is no existing approved

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[2] Under the state apprenticeship regulations in effect when California was recognized, an "apprenticeship committee" meant the body responsible for supervising the administration and operation of an apprenticeship program. See Cal. Code Regs., tit. 8, § 218 (1974), AF 1045-46.

[3] Although the statute does not refer to expanded programs, California's apprenticeship regulations make such programs subject to the same application and approval process as new programs. See Cal. Code Regs. tit. 8, § 212.2(a), AF 968. Even though California never issued implementing regulations for section 3075(b), CDIR applied the statutory need criteria for new programs to an expanded program in a recent decision approving an application for expansion. See Findings of Fact and Decision on the Application of the W. Elec. Contractors Ass'n Inc. ("WECA") to Expand the Geographic Area of Operation of its Apprenticeship Program for the Occupation of Electrician, Constr. DOT 824.261.010, DAS File No. 19602 at 4-5 (Jan. 16, 2004) ("WECA I") (approving application), SAF 713-14, appeal filed (CAC Feb. 13, 2004).

program serving the same craft or trade and geographic area that is willing or able to supply the needed apprentices. Ibid. The needs test effectively protects existing construction apprenticeship programs, the vast majority of which are run by joint labor-management committees ("joint programs"), from competition from new or expanded programs run by unilateral management committees ("unilateral programs").[4]

Many California non-union construction contractors complained to OATELS that the needs test makes it impossible for new and expanded unilateral programs to be approved. See, e.g., Letter from Ronald Brown, Esq., Cook, Brown & Prager, LLP (attorney for several unilateral programs, including Plumbing-Heating-Cooling Contractors of California ("PHCC") and Western Electrical Contractors Association ("WECA")), to Anthony Swoope, Administrator, OATELS (Mar. 27, 2002) at 1 n.1, AF 153; letter from Attorney Brown to Administrator Swoope (Aug. 17, 2001) at 2, AF 232; see generally AF, Tab 3A (containing scores of letters from California non-union construction contractors alleging that section 3075(b) severely restricts the formation and expansion of apprenticeship programs).

After investigating these complaints and reviewing California apprenticeship law, OATELS informed CDIR, in January 2001, that the needs test appeared to be contrary to federal requirements, and asked CDIR to justify it. See AF 47-48. Over the next fifteen months, OATELS and CDIR attempted to resolve the issue informally through correspondence and a series of meetings. See AF, Tab 2. On May 10, 2002, after these consultations failed and California refused to repeal the needs test, or to take action not to implement it, OATELS began

[4] Joint committees are composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s). See 29 C.F.R. § 29.2(i). Unilateral committees have only management members. See ibid. As of March 18, 2003, CDIR records listed 210 registered joint and 37 registered unilateral apprenticeship programs in the construction trades in California. See infra, pp. 17-18, para. 7.

derecognition proceedings against CDIR. See AF 6-8. On June 7, 2002, invoking 29 C.F.R. § 29.13(c)(3), CDIR requested a hearing on OATELS' derecognition determination. See AF 3-5.

On April 8, 2003, in accordance with the parties' agreement and the Administrative Law Judge's ("ALJ") instructions, OATELS also started derecognition proceedings against CAC, the state body that reviews CDIR's apprenticeship registration decisions and adopts state apprenticeship regulations. Although OATELS believed that derecognition of CAC was unnecessary, OATELS also proceeded against CAC to prevent jurisdictional challenges that might delay the final resolution of this litigation. On April 25, 2003, CAC requested a hearing on OATELS' derecognition determination, and on May 21, the ALJ consolidated the CAC appeal with the pending CDIR appeal.

OATELS started these derecognition proceedings because it determined (1) that the California needs test violated the NAA and its implementing regulations by limiting, rather than promoting, apprenticeship opportunities in the construction trades; and (2) that CDIR and CAC violated the NAA's implementing regulations by not obtaining OATELS' prior approval for the needs test. See infra, pp. 22-23, para. 21.

STATUTORY AND REGULATORY BACKGROUND

I. Federal Apprenticeship Statute and Regulations

A. The NAA

Responding to the need for organized training for skilled trades and for a permanent federal agency to establish a nationally integrated apprenticeship system, the NAA directs DOL, in cooperation with state apprenticeship agencies, to formulate, promote, and extend the

application of "labor standards necessary to safeguard the welfare of apprentices."[5] The NAA also directs DOL to bring together employers and labor for the formulation of apprenticeship programs. NAA, § 1, 29 U.S.C. § 50. The purpose of the statute is to encourage American youth to learn and enter the skilled trades to assure an adequate supply of skilled workers and provide much-needed employment. 81 Cong. Rec. 6,632 (1937); H.R. Rep. No. 75-945 at 2, AF 733.

The legislative history of the NAA reveals that representatives of government agencies, labor and management testified unanimously in favor of the proposed bill, repeatedly citing the need for a nationally coordinated apprenticeship system, with uniform apprenticeship standards and DOL as the permanent coordinator or administrator. See To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before the Subcomm. on Labor of the House Comm. on Labor, 75th Cong. 2, 6, 10-11, 18-19, 21, 28, 41, 83 (1937), AF 741, 745, 749-50, 757-58, 760, 767, 779, 821. Management witnesses stressed the importance of having a national apprenticeship system in which an apprentice trained in a trade in one plant would be accepted as qualified in that trade in other plants and states. See id. at 6, 28, AF 745, 767. Based in part on the testimony it heard, the House of Representatives Subcommittee on Labor found that there was a constant need for DOL to bring employers and employees together in the formulation of national programs of apprenticeship. H.R. Rep. No. 75-945, at 2-4 (reproducing the subcommittee report), AF 733-35.

From the earliest cases interpreting the NAA, the courts have recognized that the Act gives DOL "a wide grant of authority" to develop and promote apprenticeship standards and give them "the widest possible application." Gregory Elec. Co. v. DOL, 268 F. Supp. 987, 991

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[5] See NAA, § 1, 29 U.S.C. § 50; H.R. Rep. No. 75-945, at 2-3 (1937), AF 733-34; Assoc'd Builders & Contractors v. Reich ("ABC 2"), 978 F. Supp. 338, 340 (D.D.C. 1997).

(D.S.C. 1967); Daugherty v. United States, No. CIV.A.70-H-1096, 1974 WL 215, at *3 (S.D. Tex. July 22, 1974), AF 724, 726. The courts have also construed the statute as "intended to bring employers and labor unions together for the benefit of apprentices and the public." ABC 2, 978 F. Supp. at 340. The NAA "is neither pro-industry nor pro-labor union . . . [but] pro-apprentice." Assoc'd Builders & Contractors v. Reich, ("ABC 1"), 963 F. Supp. 35, 38 (D.D.C. 1997).

DOL interprets the NAA as directing the federal apprenticeship agency and the federally recognized SACs to promote apprenticeship opportunities while protecting the welfare of apprentices. See letter from OATELS Administrator Swoope to Stephen J. Smith, then-Director, CDIR (May 10, 2002), AF 6; letter from DOL Assistant Secretary DeRocco to then-CDIR Director Smith (Feb. 15, 2002) at 1, AF 17; letter from OATELS Administrator Swoope to Henry Nunn, then-Chief, CDIR's DAS (Mar. 1, 2001) at 1, AF 19; letter from Administrator Swoope to then-Chief Nunn (Jan. 23, 2001) at 1, AF 47. DOL has carried out this statutory directive by encouraging both labor and management to establish or expand apprenticeship programs that conform to federal standards. See 29 C.F.R. §§ 29.3(a), 29.5; James P. Mitchell, then-Secretary of Labor, "Functions of Training Service to Supplement Apprenticeship" (May 7, 1957) ("Former Labor Secretary Mitchell's Statement"), AF 887; BAT Circular 88-12 (July 27, 1988), AF 880.[6] As the Daugherty court observed, "[a]n increase in the number of registered

[6] There is a close connection between the NAA's directive to promote apprenticeship opportunities and DOL's own statutory mission "to foster, promote, and develop the welfare of . . . wage earners . . ., improve their working conditions, and . . . advance their opportunities for profitable employment." See 29 U.S.C. § 551, AF 848. At least two former Secretaries of Labor have publicly stated that promotion of apprenticeship opportunities is a means of carrying out DOL's statutory purpose. See H.R. Rep. No. 75-945 at 5 (Joint Memorandum of Frances Perkins, then-Secretary of Labor, and J.C. Wright, then-Assistant Commissioner for Vocational Education, U.S. Office of Education, Mar. 1, 1937), AF 736; Former Labor Secretary Mitchell's Statement, AF 887.

programs in a given area will provide more opportunities for people to be apprentices, to learn and practice the skills of the trade which they desire to enter in apprenticeship programs that . . . meet certain [federal] minimum standards . . . ." Daugherty, 1974 WL 215, at *4, AF 727.

In fulfillment of its statutory duties to promote apprenticeship opportunities and protect the welfare of apprentices, OATELS administers the National Apprenticeship System. See OATELS, A Brighter Tomorrow: Apprenticeship for the 21st Century (July 2003) at 12-13, SAF 608-09. That system serves over 32,000 registered apprenticeship program sponsors and more than 480,000 apprentices and 250,000 employers in the United States and its territories. Id. at 12, 16, SAF 608, 612. In addition to its regulatory recognition, approval and derecognition authority, see infra, pp. 11-13, OATELS' responsibilities as administrator include establishing national apprenticeship standards, approving apprenticeable occupations, see 29 C.F.R. § 29.4, registering programs exclusively in 23 states, supporting state registration systems in the recognized SAC states, and providing technical assistance. NAA, § 1, 29 U.S.C. § 50; 29 C.F.R. § 29.1; OATELS, A Brighter Tomorrow at 12-13, SAF 608-09. In administering the National Apprenticeship System, OATELS coordinates with the recognized SACs to ensure uniform minimum apprenticeship standards and portability of apprenticeship credentials from state to state, OATELS, A Brighter Tomorrow at 12, SAF 608, thereby achieving the goals stated by the many witnesses who advocated such a nationally integrated system at the Congressional hearings on the NAA, see supra, p. 8.

Furthermore, in promoting apprenticeship opportunities, DOL requires the recognized SACs to give all apprenticeship programs fair and equitable consideration and to base all registration decisions strictly on the merits of the program, not on whether it is a joint or unilateral program. See BAT Circular 88-12, AF 880; BAT Memo No. 87-73 at 1, "Letter to

State Apprenticeship Departments," (July 6, 1987), AF 881; Letter from Roger D. Semerad, Assistant Secretary of Labor to Rudolph A. Johnson, Director, Division of Apprenticeship and Training, Department of Labor, U.S. Virgin Islands at 1 (June 29, 1987), AF 883. DOL has publicly informed the recognized SACs that compliance with this requirement is necessary for continued recognition. See BAT Memo No. 87-73 at 1-2, AF 881-82; Semerad Letter at 1, AF 883.

B. The NAA's Implementing Regulations

Under its statutory mandate to develop and extend the application of apprenticeship standards, DOL has issued implementing regulations, at 29 C.F.R. Part 29, authorizing either OATELS, and/or its agents, the federally recognized SACs, to register local apprenticeship programs for federal purposes in accordance with specified requirements. See §§ 29.1(b), 29.2(l) & (o), 29.12(a)-(b), AF 851-53.[7] To qualify for federal recognition, a SAC must submit, and obtain DOL's approval of, its state apprenticeship laws, registration requirements, policies, and operating procedures. See 29 C.F.R. § 29.12(a), AF 852. The SAC state's apprenticeship laws and other requirements must conform to the requirements of Part 29, or be acceptable if they go beyond Part 29. See § 29.12(a)-(b), AF 852-53. In particular, a SAC must secure DOL's approval of a "description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in [P]art [29]." § 29.12(a)(5), AF 852.

The preamble to 29 C.F.R. Part 29 states that the purpose of the approval requirement of section 29.12(a)(5) is to "allow[] the Secretary to be informed of the policies and procedures of the SACs to which [she] has accorded recognition. The Department can then make its own

[7] OATELS registers apprenticeship programs exclusively in 23 states, and OATELS and the recognized SACs register programs concurrently in 24 of the 27 recognized SAC states, including California. See infra, p. 18, para. 9.

judgment on whether these policies and procedures conflict with the requirements of this part." DOL, Labor Standards for the Registration of Apprenticeship Programs, 42 Fed. Reg. 10,138, 10,139, § 8, para. 4 (1977), AF 863.

Under section 29.12(a), DOL issued BAT Circulars 88-5, 88-9, and 88-12, which require recognized SACs to submit and obtain DOL's prior written approval of all proposed changes to state apprenticeship requirements. See BAT Circulars 88-5 (Dec. 15, 1987), AF 858, 88-9 (Mar. 30, 1988), AF 857, 88-12, AF 880.[8] BAT Circular 88-5 stipulates that any modification to SAC policies or procedures approved at recognition must be approved by BAT. See ibid., AF 858. In language tracking section 29.12(a)(5), the circular also specifies that SACs are "expressly prohibited from unilaterally adopting policies and operating procedures which depart from, or impose requirements in addition to, those . . . of . . . Part 29." Ibid., AF 858. BAT Circular 88-9 clarifies that SAC proposals must be submitted to BAT for prior clearance, see ibid., AF 857, and BAT Circular 88-12 adds that new criteria should not be applied without BAT's written approval, see ibid., AF 880.

Although these three circulars focus on changes to SAC policies and procedures, the "prior approval" requirement also applies to the proposed state laws, executive orders, and regulations that create such new policies and procedures. See 29 C.F.R. § 29.12(a)(1) (requiring SACs to submit, and obtain OATELS' approval of, an acceptable apprenticeship law (or executive order) and implementing regulations), AF 852. DOL has always implemented the "prior approval" requirement in this way, and has informed the SACs of their obligation to submit all proposed new or revised state apprenticeship laws, executive orders, and regulations

[8] As indicated by the distribution code "A-547 SD + RD/SAC; Lab. Comm." (i.e., BAT state directors and regional directors/SACs; state labor commissioners) at the top middle of each of these circulars, all three were distributed to the recognized SACs.

for prior approval. BAT Circular 62-88 (May 1, 1962) (instructing BAT field personnel to forward copies of all proposed state apprenticeship legislation to the national office at the earliest possible time so that BAT can advise SACs of harmful and nonconforming proposed laws), AF 885; BAT Circular 95-02 (Nov. 17, 1994) (transmitting to BAT regional and state directors a SAC compliance review checklist requiring OATELS' approval of any changes to state apprenticeship laws, executive orders, and regulations made since recognition), AF 869, 873; letter from Gail Jesswein, then-Chief, CDIR's DAS, to Donald Grabowski, National Association of State and Territorial Apprenticeship Directors (Feb. 4, 1988) (acknowledging that, in their last two operational reviews of the California SAC, BAT representatives explained that BAT Circular 88-5 requires DOL's prior approval of any changes to state apprenticeship policy, regulations or statutes made since recognition), AF 1028-29.[9]

Thus, the "prior approval" requirement enables OATELS to ensure that any changes that a recognized SAC state makes to its apprenticeship requirements after recognition, including new or revised state laws, executive orders, and regulations, conform to the requirements of Part 29, or are acceptable if those changes go beyond Part 29. See §§ 29.12(b)-(c), AF 852-53. If DOL determines that a recognized SAC has failed to fulfill, or operate in conformity with, the federal regulations, then DOL may derecognize the SAC. See § 29.13, AF 855.

II. The California Needs Test

Section 3075(b) of the California Labor Code ("the needs test") provides that a new apprenticeship program in the construction and building trades will be registered only if there is

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[9] BAT gave similar notice of the "prior approval" requirement to CAC. See letter from Jerry G. Tabaracci, then-BAT state director, California, to Gerrit J. Buddingh, then-chair, CAC, with enclosure of BAT Circular 88-5 (Oct. 5, 1994) (discussing that circular and the "prior approval" requirement), SAF 778; transcript of tape of CAC meeting (Oct. 28, 1994) at 1-5 (same), SAF 780-84.

no existing approved program serving the same craft or trade and geographic area that is willing or able to supply the needed apprentices, or the eligible existing programs have not met their state statutory obligations. See ibid., AF 859, quoted in full, infra, p. 20, para. 15.

The legislative history of the bill containing the needs test, Assembly Bill No. 921 ("AB 921"), names the State Building and Construction Trades Council ("SBCTC") as the bill's "source" and "sponsor." See, e.g., Office of Senate Floor Analyses, Senate Rules Committee, AB 921 Assembly Bill - Bill Analysis, Third Reading, 1999-00 Reg. Sess. 5-6 (Cal. Sept. 8, 1999), SAF 789. The SBCTC, an applicant for amicus curiae status here, is an AFL-CIO member that claims to represent "[t]he vast majority of the apprentices registered in state-approved apprenticeship programs in California." Request of SBCTC for Leave to Participate as Amicus Curiae (Aug. 28, 2002), Declaration of Robert L. Balgenorth at 2. The SBCTC further asserts that the apprentices it purports to represent are enrolled in joint programs. See ibid. The first version of the needs test expressed a preference for joint programs and barred the approval of new unilateral programs where existing approved joint programs adequately meet apprenticeship training needs:

> It is the public policy of this state to favor the training of apprentices in jointly sponsored programs. Where an approved jointly sponsored program exists for the trade and geographic area, and has the capacity to meet the apprenticeship training needs, the chief shall not approve a new unilateral program unless special circumstances justify the establishment of the program.

AB 921 § 7, First Reading, 1999-00 Reg. Sess. 11 (Cal. Feb. 25, 1999), SAF 802.

Although the final version of the needs test does not include the first version's stated preference for joint programs, the final version still generally blocks approval of new programs in the construction trades unless there is no existing approved program serving the same craft or trade and geographic area that is willing or able to supply the needed apprentices. Since the

overwhelming majority of existing approved programs in the California construction trades are joint programs, see infra, p. 18, para. 7, the needs test thus effectuates the original bill's preference for existing approved joint programs over unilateral and other programs.

STATEMENT OF FACTS

I. Stipulated Facts

The parties' stipulated facts, from the September 3, 2003 joint stipulation, are set out below verbatim:

1. Apprenticeship has long been an area of government regulation and concern, and apprentices may be registered for state and/or federal purposes.[10] The federal apprenticeship statute is the National Apprenticeship Act of 1937 ("NAA"), 29 U.S.C. § 50, commonly known as "the Fitzgerald Act," and in California, where apprenticeship statutes were in effect before the NAA was enacted, the current law is the Shelley-Maloney Apprentice Labor Standards Act of 1939, California Labor Code §§ 3070-3099.5, Administrative File ("AF") 893-946. In California, a program may voluntarily seek state approval and registration for state and federal purposes. Apprentices in such approved programs, and in other approved programs throughout the United States, are referred to as "registered apprentices."

2. Apprenticeship combines supervised on-the-job training with related classroom instruction and benefits employees, employers, and the nation by producing skilled, knowledgeable workers who are qualified for jobs throughout a specific industry. See OATELS, Registered Apprenticeship: A Solution to the Skills Shortage (undated), front side, Supplemental Administrative File ("SAF") 695. The apprenticeship program sponsor pays most of the

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[10] Federal apprenticeship regulations define "Federal purposes" as including "any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship." 29 C.F.R. § 29.2(k).

apprentice's training costs, see id., back side, SAF 696. Construction apprentices are commonly required to buy their own tools, manuals, and textbooks. Olivia Crosby, Apprenticeships: Career Training, Credentials—and a Paycheck in Your Pocket, Occupational Outlook Q. (Bureau of Labor Statistics, Dep't of Labor ("DOL")), Summer 2002 at 10, SAF 653. Apprenticeship generally lasts from one to six years, depending on the occupation. See OATELS, Registered Apprenticeship, Building a Skilled Workforce in the 21st Century (May 2003), "What is Registered Apprenticeship?" SAF 641.

3. Registered apprentices are generally paid substantially less than a skilled journey worker's wage at the start of their apprenticeship and receive wage raises at regular intervals as their skills increase. See, e.g., OATELS, Registered Apprenticeship, High Wage, High Skill Career Opportunities in the 21st Century (Sept. 2000), "[T]he [W]ages to [B]uild [F]inancial [S]ecurity," SAF 694; Cal. Code Regs. tit. 8, § 208, AF 957-58. Registered apprentices who successfully complete their training become skilled certified journey-level workers, and receive a portable, nationally recognized certificate. Ibid.; OATELS, Registered Apprenticeship: A Solution to the Skills Shortage, back side, SAF 696. While any type of apprenticeship, whether registered or unregistered, may result in higher wages for apprentices depending on the demand for their particular craft or trade, OATELS estimates that the educational benefit of registered apprenticeship, with its nation-wide standards and nationally recognized, portable completion certificates, is worth $40,000 to $150,000 in increased lifetime earnings to the apprentice. See OATELS, Registered Apprenticeship: A Solution to the Skills Shortage, back side, SAF 696; Crosby, Apprenticeship, Occupational Outlook Q. at 9-10, SAF 652-53.

4. OATELS is the office in DOL that administers the NAA and its implementing regulations, 29 C.F.R. Part 29. Under the NAA and these regulations, either the federal

government, through OATELS, or the state apprenticeship councils ("SACs") that OATELS recognizes as its agents, register local apprenticeship programs for federal purposes. See NAA, § 1, 29 U.S.C. § 50; 29 C.F.R. Part 29.

5. CDIR, through its Division of Apprenticeship Standards, is the California state agency that registers local apprenticeship programs for state and federal purposes in California. See Cal. Lab. Code, § 3073, AF 899.

6. CAC is the California state body that reviews CDIR's apprenticeship registration decisions and adopts state apprenticeship regulations. See Cal. Lab. Code, § 3071, AF 895; Cal. Code Regs. tit. 8, § 212.2(k)-(m), AF 969.

7. In 2003, CDIR's records listed more than 69,000 registered apprentices in over 1,400 approved programs in California. CDIR's Supplemental Response to Interrogatory No. 5 of OATELS' First Set of Interrogatories and Request for Production of Documents (Oct. 7, 2003), SAF 450; CDIR's Answers to OATELS' First Set of Interrogatories (Mar. 18, 2003), Attachment to Response to Interrogatory No. 5, SAF 568. Nearly 70%, or 47,593, of these apprentices were being trained as construction workers. See CDIR's Supplemental Response to Interrogatory No. 5, SAF 450. Of these registered California construction apprentices, 42,813 were enrolled in approved joint programs, 4,726 were in approved unilateral programs, and 54 were in plant (single-employer) and school-to-career apprenticeship programs ("STC/A" in CDIR's records), which CDIR treats as a separate category. See ibid; CDIR's Answers to OATELS' First Set of Interrogatories, Attachment to Response to Interrogatory No. 5, SAF 568; CDIR, 1998-99 Biennial Report at 24, SAF 709. As of March 18, 2003, the registered apprenticeship programs in the California construction trades consisted of 210 joint, 37 unilateral, and 29 plant and

school-to-career programs. CDIR's Answers to OATELS' First Set of Interrogatories, Attachment to Response to Interrogatory No. 5, SAF 568.

8. OATELS and the recognized SACs do not provide apprenticeship training, but set and apply the standards for registering apprenticeship programs. Registration of an apprenticeship program for federal purposes is not mandatory but permits employers to pay apprentices lower wages on--and thus make lower bids for--federal public works projects under the Davis-Bacon Act. See Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-7, and its implementing regulations at 29 C.F.R. § 5.5(a)(4).

9. OATELS exclusively registers apprenticeship programs in 23 states; the recognized SACs register programs in the other 27 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, but OATELS is also registering programs in 24 of the 27 recognized SAC states and territories, including California. See OATELS, A Brighter Tomorrow: Apprenticeship for the 21st Century (July 2003) at 8, 12, SAF 605, 608. To gain OATELS' recognition, a SAC state's apprenticeship requirements must conform to the requirements of the NAA and its implementing regulations. See 29 C.F.R. § 29.12(a)-(b), AF 852-53. Thus, in registering apprenticeship programs, a recognized SAC applies one set of apprenticeship standards, the state standards, for state and federal purposes.

10. To determine whether recognized SAC states are still in conformity with federal requirements, OATELS reviews the changes that the recognized SAC states make to their apprenticeship requirements after recognition. See Bureau of Apprenticeship and Training ("BAT") Circulars 95-02 (Nov. 17, 1994), AF 869, 873; 88-12 (July 27, 1988), AF 880; 88-9 (Mar. 30, 1988); 88-5 (Dec. 15, 1987), AF 858.

11. OATELS and individual SACs sometimes disagree about whether the SAC's proposed changes conform to federal requirements. See letter from Scott Glabman, Esq., OATELS attorney to Fred D. Lonsdale, Esq., CDIR attorney, with enclosures on OATELS' pending disputes with the Washington, Oregon and Florida SACs and on a rejected nonconforming North Carolina law (Dec. 12, 2003), SAF 65-66, 229-445. OATELS attempts to resolve such disputes informally through consultations with the SAC. See, e.g., BAT Circular 62-88, AF 885. It can take several months or years to resolve these disputes. See letter from Attorney Glabman to Attorney Lonsdale and cited enclosures, SAF 65-66, 229-445.

12. In the past fifteen years, OATELS has approved proposed changes from Arizona, New York, New Mexico, and Florida, and rejected proposed revisions from Washington, Oregon, and North Carolina. See letter from OATELS Attorney Glabman to CDIR Attorney Lonsdale and enclosures (Dec. 12, 2003), SAF 65, 67-369; Prosecuting Party's Supplemental Responses to Respondent's First Set of Interrogatories (Feb. 20, 2003) at 2-3, SAF 571-72; OATELS' Responses to CDIR's First Set of Interrogatories (Jan. 22, 2003) at 6-7, SAF 580-81.

13. In 1976, the California legislature enacted section 3075 of the state labor code, which provided that

> Local or state joint apprenticeship committees may be selected by the employer and the employee organizations, in any trade in the state or in a city or trade area, whenever the apprenticeship training needs of such trade justifies [sic] such establishment.

Cal. Lab. Code, § 3075, AF 1059.[11]

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[11] Although section 3075 refers to the selection of "joint" apprenticeship committees, the California Attorney General's Office construed that language as permissive and concluded that it did not preclude the establishment of unilateral committees. See Letter from Asher Rubin, California Deputy Attorney General, to H. Edward White, then-Director, CDIR, at 2 (Apr. 23, 1973), AF 1068 (citing 14 Ops. Cal. Atty. Gen. 203).

14. On February 13, 1978, OATELS' predecessor agency, BAT, recognized the California SAC as the federal registration agent for the state of California. See Letter from BAT Administrator Murphy to then-CDIR DAS Chief Wallace, AF 1030.

15. In October 1999, California's Assembly Bill ("AB") 921 was signed into law. Among other things, AB 921 amended section 3075 of the state labor code to read as follows:

> (b) For purposes of this section, the apprentice training needs in the building and construction trades shall be deemed to justify the approval of a new apprenticeship program only if any of the following conditions are met:
>
> (1) There is no existing apprenticeship program approved under this chapter serving the same craft or trade and geographic area.
>
> (2) Existing apprenticeship programs approved under this chapter that serve the same craft or trade and geographic area do not have the capacity, or neglect or refuse, to dispatch sufficient apprentices to qualified employers at a public works site who are willing to abide by the applicable apprenticeship standards.
>
> (3) Existing apprenticeship programs approved under this chapter that serve the same trade and geographic area have been identified by the California Apprenticeship Council as deficient in meeting their obligations under this chapter.

Cal. Lab. Code § 3075(b).

16. Neither CDIR nor CAC requested or received OATELS' prior approval for section 3075(b) of the California Labor Code ("the needs test"). See Respondent CDIR's Response to Prosecuting Party's First Set of Requests for Admissions ("CDIR's Response to OATELS' Requests for Admissions") (Sept. 15, 2003) at 8, SAF 459; Prosecuting Party's First Set of Requests for Admissions from Respondent CAC ("OATELS' Requests for Admissions from CAC") (Aug. 14, 2003) at 3, SAF 482; CAC's Responses to OATELS' Second Set of Requests

for Admissions (Sept. 15, 2003) at 3, Response to Request for Admission 5, SAF 478.[12]

17. CDIR/CAC distributed the public notice and a copy of the July 2000 proposed implementing regulations to OATELS some nine or ten months after the law was enacted. See Memo from Rita H. Tsuda, Regulation Coordinator, CAC, to Apprenticeship Program Sponsors and Other Interested Persons ("Notice of Proposed CAC Regulations") (July 7, 2000), SAF 744. In January 2001, OATELS acknowledged receipt of a copy of section 3075(b) of the California Labor Code, the statute establishing the needs test, and of a later version of the proposed implementing regulations, and the requested justification of the needs test. See letter from OATELS Administrator Swoope to then-CDIR DAS Chief Nunn (Jan. 23, 2001) at 1, AF 47.[13]

18. CDIR has identified four new or expanded unilateral programs in the construction trades that the agency approved in the almost five years since the needs test became effective. See CDIR's Response to OATELS' Requests for Admissions at 7-8 (citing Western Burglar and Fire Alarm Association, and Walton & Sons Masonry Inc.), SAF 458-59; Findings of Fact and Decision on the Application of the W. Elec. Contractors Ass'n Inc. ("WECA") to Expand the Geographic Area of Operation of its Apprenticeship Program for the Occupation of Electrician, Constr. DOT 824.261.010, DAS File No. 19602 at 4-5 (Jan. 16, 2004) ("WECA I"), SAF 713-14, appeal filed (CAC Feb. 13, 2004); Findings of Fact and Decision on the Application of WECA for Approval of Apprenticeship Standards in the Occupation of Sound & Communication

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[12] Despite the title of CAC's responses, the document that CAC answered was actually OATELS' first (not second) set of requests for admissions. See OATELS' Requests for Admissions from CAC at 1, SAF 480.

[13] These proposed regulations, distributed for comment on February 9, 2001, were subsequently withdrawn, partly because of OATELS' objections. See CDIR's Answers to OATELS' First Set of Interrogatories at 14, SAF 553; letter from OATELS Administrator Swoope to then-CDIR DAS Chief Nunn (Mar. 1, 2001) at 1, AF 19.

Installer, DOT 829.281 022, DAS File No. 105047 (Jan. 16, 2004) ("WECA II"), SAF 715, appeal filed (CAC Feb. 13, 2004).[14]

19. Since August 2003, when it began concurrently registering local apprenticeship programs in California for federal purposes, OATELS has registered 17 new or expanded unilateral construction programs and two new or expanded joint programs.

20. In consultations from January 2001 to April 2002, OATELS attempted to persuade CDIR to seek repeal of the needs test. See AF, Tab 2. On May 10, 2002, after these consultations failed, OATELS began derecognition proceedings against CDIR, the first time OATELS has ever invoked its authority to derecognize a SAC. See AF 6-8. On April 8, 2003, in accordance with the parties' agreement and the Administrative Law Judge's ("ALJ") instructions, OATELS also started derecognition proceedings against CAC.

21. OATELS' determination that each respondent should be derecognized is based on the same two grounds:

[14] One of these four unilateral construction programs, Western Burglar and Fire Alarm Association (occupation: protective signal installer), was approved, and the approval affirmed by CAC, because, among other reasons, no existing program in the state served the same craft or trade. See CDIR's Response to OATELS' Requests for Admissions at 7-8, SAF 458-59; Northern California Sound & Communication JATC v. Div. of Apprenticeship Standards, DAS File No. 10837 (CAC, July 24, 2003) (finding that the need criteria of section 3075(b) did not apply because there was no existing program serving the same craft or trade), SAF 743. The DAS file for another approved unilateral construction program, Walton & Sons Masonry, Inc., DAS File No. 05022 (approved Feb. 13, 2003), does not reveal whether or how Walton complied with section 3075(b), or whether any existing programs commented on Walton's proposed standards, as permitted by Cal. Code Regs. tit. 8, § 212.2(g). See SAF 720-38. The other two unilateral construction programs, both unilateral WECA programs, one an expanded program for electricians, the other a new program for sound and communication installers, were both approved recently on the basis of a DAS finding of an electrician shortage in California. See WECA I, DAS File No. 19602, slip op. at 4-5, SAF 713-14; WECA II, DAS File No. 105047, slip op. at 3-4, SAF 717-18. Both WECA approvals have been appealed to CAC, and thus are not final decisions, see Cal. Code Regs. tit. 8, § 212.2(k).

(1) that the needs test violates the NAA and its implementing regulations by limiting, rather than promoting, apprenticeship opportunities in the construction trades; and

(2) that CDIR and CAC violated the NAA's implementing regulations by not obtaining OATELS' prior approval for the needs test.

See Letter from Emily Stover DeRocco, Assistant Secretary for Employment and Training, DOL, to John M. Vittone, DOL's Chief ALJ at 1 (June 24, 2002), AF 1; Letter from Assistant Secretary DeRocco to Chief ALJ Vittone at 1 (May 12, 2003).

22. OATELS does not contend that CDIR or CAC has discriminated against non-union apprenticeship programs or treated such programs differently, but OATELS reserves the right to argue that the needs test does so.

Parties' Joint Stipulation of Facts ("Parties' Stipulation") at 1-10 (Sept. 3, 2004).

II. OATELS' Supplemental Facts

In addition to the above stipulated facts, OATELS also relies on the following supplemental facts, which are supported by the record as indicated:

1. Registered apprentices who successfully complete their training and become skilled certified journey-level workers can earn salaries that are competitive with those of college graduates and even holders of advanced degrees. OATELS, Registered Apprenticeship, High Wage, High Skill Career Opportunities, SAF 694.

2. In its first biennial report after the enactment of AB 921, the law that adopted the California needs test, CDIR acknowledged that "[i]n the construction industry[,] AB 921 slows formation of new apprenticeship programs where an existing program is already approved." CDIR, 1998-99 Biennial Report at 24, SAF 709.

3. The present status of the disputes between OATELS and the four SAC states discussed in paragraphs 11-12 of the Parties' Stipulation, see supra, p.19, is as follows: After OATELS rejected its proposed revision, North Carolina dropped the revision, and consultations with Washington and Oregon are continuing. See letter from OATELS Attorney Glabman to CDIR Attorney Lonsdale and applicable enclosures (Dec. 12, 2003), SAF 65, 229-369; letter from Attorney Glabman to Attorney Lonsdale and enclosures (Dec. 19, 2003), SAF 1-64. OATELS is also having discussions with Florida about nonconforming revisions the state made after getting OATELS' approval of earlier changes. See letter from Attorney Glabman to Attorney Lonsdale and applicable enclosure (Dec. 12, 2003), SAF 370-445.

4. In recently approving the WECA application for a new program for sound and communication installers, see Parties' Stipulation at para. 18, supra, pp. 21-22 & n.14, CDIR found that there is "a great need for trained workers" in the construction trades that greatly exceeds the number of trained workers graduating from existing approved construction apprenticeship programs. See WECA II, DAS File No. 105047, slip op. at 3-4, SAF 717-18.

5. Nonunion contractors claim to employ approximately 80% of the construction workers in California. See WECA's Request to Participate as Amicus Curiae (Aug. 25, 2004), Declaration of Laura "Terry" Seabury at 2; letter from Attorney Brown to OATELS Administrator Swoope (Mar. 27, 2002) at 1, AF 153.

6. OATELS never approved the California needs test. See letter from OATELS Administrator Swoope to then-CDIR Director Smith at 2 (May 10, 2002) (initiating derecognition proceedings against CDIR and calling on the state of California to repeal or immediately suspend the operation of section 3075(b) of the California Labor Code), AF 6A.

ARGUMENT

I. Standard of Review

According to the Office of Administrative Law Judges rules at 29 C.F.R. § 18.40(d), the ALJ "may enter summary judgment for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Ibid. Since this standard is essentially identical to that of Rule 56(c) of the Federal Rules of Civil Procedure, see ibid.; In re Hardy v. Mail Contractors of America, No. 03-007, 2004 WL 230776, at *2 (DOL Admin. Rev. Bd. Jan. 30, 2004), the case law interpreting Rule 56(c) applies also to its administrative counterpart.

On a motion for summary decision, the facts and the inferences therefrom must be viewed in the light most favorable to the opposing party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Hardy, 2004 WL 230776, at *2. The party opposing the motion may not rest on the mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue of fact. See 29 C.F.R. § 18.40(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Hardy, 2004 WL 230776, at *2. Where the record taken as a whole could not lead a rational trier of fact to find for the opponent of the motion, there is no genuine issue for hearing and summary decision is appropriate. See Matsushita, 475 U.S. at 587.

As demonstrated below, application of the relevant legal principles to the undisputed facts shows that the California needs test violates the NAA's directive to promote apprenticeship opportunities and that CDIR and CAC violated the NAA's implementing regulations by not obtaining OATELS' prior approval for the needs test.

II. OATELS Properly Found That The California Needs Test Violated the NAA and/or Its Implementing Regulations by Limiting, Rather than Promoting, Apprenticeship Opportunities in the Construction Trades.

1. Contrary to the NAA's directive to formulate, promote and extend the application of apprenticeship standards, see supra, pp. 7-11, the California needs test, on its face, limits, rather than promotes, apprenticeship opportunities by severely restricting registration of new and expanded apprenticeship programs in the California construction trades. Although the federal statute and its implementing regulations direct DOL, in cooperation with the SACs, to give apprenticeship standards "the widest possible application," see supra, pp. 7-9; 29 C.F.R. § 29.1(a)-(b), AF 851, the needs test gives such standards an exceptionally narrow application in the construction trades by limiting registration, with certain very narrow exceptions, to one existing approved program for each craft or trade in a geographic area, see supra, p. 20, para. 15.

By generally barring approval of new and expanded programs in the construction trades, the needs test limits apprenticeship opportunities because, as the Daugherty court noted, "[a]n increase in the number of registered programs in a given area will provide more opportunities for people to be apprentices . . . ." Daugherty, 1974 WL 215, at *4 (rejecting plaintiffs' argument that no new apprenticeship programs should be registered in areas where an existing approved program already served the same trade), AF 727. Such a restriction of apprenticeship opportunities frustrates the NAA's purpose of encouraging American youth to learn and enter the skilled trades to assure an adequate supply of skilled workers and provide much-needed employment, see supra, p. 8, at a time of great shortages of trained workers in the California construction industry, see supra, pp. 22 n.14; 24, para. 4.

Besides limiting apprenticeship opportunities, the California needs test generally deprives apprentices of the option of choosing among registered programs in their own craft and

geographic area. Thus, for example, if the existing approved program for a craft in a given area is a joint (union) program, someone who wants to join a unilateral (non-union) program in that craft and area will not have that option. Conversely, if the existing program is unilateral, someone who wants to join a joint program in that craft and area will not be able to do so.

Moreover, even in the same occupation, apprenticeship programs vary widely in the pay, benefits, facilities, and type of instruction they offer. Crosby, Apprenticeship, Occupational Outlook Q. at 9-10, SAF 652-53. Some programs provide classroom instruction; others allow apprentices to take on-line or correspondence courses. Id. at 10, SAF 653. Instruction may be given at community colleges or trade schools, near or far from the apprentice's work site, after work or full-time periodically throughout the year. Ibid. By generally restricting the number of registered apprenticeship programs to one per craft and geographical area, the California needs test deprives prospective apprentices of the opportunity to choose the program that best suits their needs. Since choosing the right program may be just as important to a prospective apprentice's future livelihood as selecting the right university is to a prospective student's future career, see supra, pp. 16, para. 3; 23, para. 1, the needs test's elimination of the opportunity to choose may severely restrict a prospective apprentice's career options. In addition, because apprenticeships in some occupations are highly competitive, with more applicants than openings, Crosby, Apprenticeship, Occupational Outlook Q. at 11, SAF 654, the needs test's general restriction of approved apprenticeship programs limits the number of qualified people who can become apprentices.[15]

[15] Just as a prospective college student would be well advised to apply to several colleges to increase his or her chances of admission, a prospective apprentice would also be prudent to apply to several apprenticeship programs in his occupation and geographical area to improve his or her odds of obtaining an apprenticeship. The needs test generally denies prospective apprentices that option, thereby reducing their chances of receiving an apprenticeship.

Further, the California needs test's restrictions on apprenticeship programs also deny apprentices the other by-products of competition such as lower course fees and better instruction and training. See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (competition favorably affects all elements of a bargain—quality, service, safety and durability—and not just the immediate cost); accord FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423-24 (1990). Accordingly, the needs test ensures that joint programs will have a near monopoly on registered programs to the detriment of apprentices and contrary to the NAA, which is neither pro-management nor pro-union but pro-apprentice, see supra, p. 9.

2. The California needs test also violates the NAA and its implementing regulations by benefiting existing registered apprenticeship programs in the California construction trades, the vast majority of which are joint programs, see supra, p. 17-18, para. 7, at the expense of apprentices, the federal statute's intended beneficiaries, see supra, p. 9. The NAA was intended to protect apprentices and increase opportunities for apprenticeship, see supra, pp. 7-10, not to protect existing registered programs from competition from new and expanded programs. Because the overwhelming majority of all registered construction apprenticeship programs in California are joint programs, the needs test effectively favors the use of existing approved joint programs in the construction trades, discouraging formation, and blocking approval, of unilateral programs. See supra, pp. 6, 17-18, para. 7; 21-22, paras. 18-19; 23, para. 2. Indeed, the needs test has virtually shut down state registration of new and expanded unilateral construction programs in California as CDIR has approved only three such programs (none before this derecognition proceeding was started) in crafts and geographical areas served by existing registered programs since the test became effective. See supra, pp. 21-22, para. 18 & n.14. Only

one of these three approvals is a final decision, and the record does not indicate whether the needs test even applied to the program approved by that decision. Supra, pp. 21-22 n.14.[16]

If, in fact, nonunion contractors employ 80% of the construction workers in California, as such contractors claim, see supra, p. 24, para. 5, then the curtailment of existing registered unilateral programs and discouragement of new ones deny current and prospective apprentices apprenticeship opportunities with the contractors who employ the great majority of workers in the industry. Indeed, the needs test may force many nonunion construction contractors to give up their apprenticeship programs altogether, depriving present and would-be apprentices of valuable training and career opportunities with many employers. In addition, as shown above, this statutory preference for existing registered programs also denies existing and prospective apprentices the benefits of competition, such as the option of choosing among programs in the apprentice's own craft and geographic area, and of obtaining better instruction and training for reasonable fees.[17]

Furthermore, because the vast majority of approved existing construction apprenticeship programs are joint programs, the California needs test forces non-union contractors to become unionized or affiliated with unions, employ union apprentices, or give up the economic benefits

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[16] In August 2003, to reduce the time necessary to process registration applications from California's regulatory estimate of a median of two years to a maximum of three years, see Cal. Code Regs., tit. 8, § 212.2(j), AF 969, to no more than a few months, OATELS began concurrent registration of apprenticeship programs for federal purposes in the state. Although OATELS has registered 17 new or expanded unilateral construction programs in California, see supra, p. 22, para. 19, such federal registration does not remedy the state's violations of federal requirements here. Only withdrawal of California's federal registration authority until the state repeals the needs test, and CDIR and CAC agree to observe the "prior approval" requirement, will give OATELS its requested relief for the state's continuing nonconformity with federal requirements.

[17] The same restriction of opportunities and options occurs whether the existing program in a craft and geographic area is a unilateral program or a joint program, and is equally objectionable and contrary to federal law and policy in either case, see supra, pp. 9, 10-11.

of using registered apprentices. See Gregory, 268 F. Supp. at 994-95 (refusal to approve employer's unilateral program has the practical effect of either requiring the employer to participate in a joint program or be denied an equal basis to bid on government contracts). Thus, the needs test effectively either requires nonunion contractors to affiliate with unions or forces such contractors to rely on unwanted union labor. By giving existing approved joint construction apprenticeship programs a virtual monopoly on approved construction programs, the needs test economically strangles unilateral programs, contrary to the NAA, which is neither pro-union nor pro-management, see supra, p. 9, to the NAA's implementing regulations, which expressly authorize unilateral programs, see 29 C.F.R. §§ 29.2(i), 29.12(b)(10), and to federal registration policy, which requires equitable treatment of all programs, regardless of program type, see supra, p. 11.

3. The California needs test further harms the public interest and contravenes federal procurement policy by reducing the number of construction contractors who can make competitive bids for federal public works projects. As noted earlier, registration for federal purposes enables contractors to pay apprentices lower wages on--and thus make lower bids for--federal public works projects. See supra, p.18, para. 8. Federal procurement law generally requires full and open competition for federal contracts, and such contracts are, normally, other things being equal, awarded to the lowest bidder. See the Competition in Contracting Act of 1984, 41 U.S.C. § 253(a); the Federal Acquisition Regulation, 48 C.F.R., ch. 1, subpart 6.1; Pan Am World Servs. v. United States, No. CIV.A. 88-0304 (RCL), 1988 WL 25480 at *1 (D.D.C. Mar. 9, 1988) (citing the strong public policy in favor of competition as a way to get the best value for the taxpayer’s money).

California law similarly attempts to encourage competition for public contracts by

generally requiring such contracts to be awarded to the lowest responsible bidder. See Cal. Pub. Cont. Code §§ 100 (b)-(c), 102, 20,128, 20,162; Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth., 1 P.3d 63, 68 (Cal. 2000); Valley Crest Landscape, Inc. v. City Council of the City of Davis, 49 Cal. Rptr. 2d 184, 188 (Cal. Ct. App. 1996). Like their federal counterparts, California bidding laws are intended to obtain the best economic result for the public, not to enrich the bidders. See M & B Contr. v. Yuba County Water Agency, 81 Cal. Rptr. 2d 231, 234 (Cal. Ct. App. 1999).

By essentially limiting the number of registered construction apprenticeship programs to one for each craft or trade in a geographic area, the California needs test drastically restricts the number of construction contractors, particularly those that are not unionized, who qualify to pay the lower apprentice wage on--and thus can make competitive bids for--federal public works projects. Therefore, contractors with unregistered unilateral programs will usually not be able to compete for such government contracts on an equal basis with those contractors who participate in registered programs, which are overwhelmingly joint. See Gregory, 268 F. Supp. at 994-95. As a result of reducing the number of competitive bidders, the needs test tends to drive up the cost of public works projects. Thus, by severely restricting registration of new and expanded construction programs, and thereby sharply restricting the number of contractors who qualify to pay apprentice wages, the needs test tends to reduce competition for public works projects. In so doing, the needs test increases the amount of the project awards at the taxpayer's expense, and enriches the bidders who use approved, predominantly joint, programs.[18]

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[18] Although it might be thought that the general Davis-Bacon Act requirement of paying the prevailing wage and the equal eligibility of all bidders who use registered apprentices to pay them the lower apprentice wage would cancel out any reduction in the price of bids produced by greater competition, wages are only one element of price, and there can still be competition on other price elements of the bid. Also, price is only one component of a bid. Increasing the

The NAA is designed to promote apprenticeship opportunities through the formulation of apprenticeship programs for the benefit of apprentices and the public, and to protect the welfare of apprentices. See supra, pp. 7-11. As shown above, the California needs test thwarts these federal statutory goals. By generally blocking approval of new and expanded, especially unilateral, programs, the California needs test limits, rather than promotes, apprenticeship opportunities. Moreover, the needs test harms, rather than protects, apprentices by restricting competition among registered programs in the same craft or trade and geographical area, thereby limiting the apprentice's opportunity to choose the program that best serves his or her needs and offers the best deal. Furthermore, by severely restricting approval of new and expanded programs and thereby sharply limiting the number of contractors eligible to pay apprentice wages on public works projects, the needs test reduces the competition for such project awards and the value federal taxpayers receive for them. In so doing, the needs test frustrates Congress' intent that apprenticeship programs be formulated for the benefit of the public, rather than the program.

By contrast, as argued above, current and prospective apprentices are more likely to be able to start and complete apprenticeships in the program of their choice, programs are more likely to be able to offer good instruction and training for reasonable fees, and the taxpayer is more likely to receive the best value for public works awards if competition among programs is promoted, not restricted. See Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy has long been faith in the value of competition"); accord Nat'l Soc'y, 435 U.S. at 695.

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number of bidders will have the effect of forcing each bidder to make its bid more competitive in other ways, such as, e.g., offering more building options, an earlier completion date, greater safety features, less pollution and noise, even if all bidders are offering about the same price.

4. Even if it were determined that the California needs test does not violate any of the specific requirements of the NAA and its implementing regulations, OATELS still reasonably found that the needs test was unacceptable and warrants derecognition of California. As the administrator of the federal apprenticeship program, OATELS has authority to review SAC state requirements that go beyond the scope of federal requirements. See 29 C.F.R. § 29.12(a)(5), AF 852; BAT Circular 88-5 ("Approval of augmented [state] policies and procedures is subject to BAT's discretion"), AF 858. No apprenticeship statute or regulation can anticipate all the conceivable apprenticeship requirements that a SAC state might adopt, and thus an exhaustive list of acceptable and unacceptable requirements is impossible. Accordingly, the NAA's implementing regulations explicitly require SACs to submit and obtain DOL's approval of a "description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in [P]art [29]." § 29.12(a)(5) (emphasis added), AF 852. The California needs test is such an additional requirement.

The NAA's implementing regulations provide that a SAC shall be recognized when, among other things, DOL has approved an acceptable state apprenticeship law and implementing regulations. See 29 C.F.R. § 29.12(a)(1), AF 852. While the federal regulations at section 29.12(b) list criteria for acceptable state provisions, these criteria are not exhaustive. Therefore OATELS, as the administrator of the federal statute and regulations, has broad discretion to determine whether state provisions not covered by the regulatory criteria are acceptable as long as such determinations are reasonable and not plainly erroneous or inconsistent with the regulations. See Auer v. Robbins, 519 U.S. 452, 461 (1997); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150-51 (1991); Road Sprinkler Fitters Local Union 669 v. Herman, 234 F.3d 1316, 1320 (D.C. Cir. 2000).

Neither the NAA nor its implementing regulations address needs tests. Even assuming that the California needs test does not violate any specific requirements of the federal statute and regulations, OATELS still reasonably found the needs test unacceptable because, as discussed above, it limits openings for apprentices, restricts their opportunities to choose the best program for their needs, and decreases the value federal taxpayers receive for public works awards. OATELS properly concluded that the needs test is harmful to apprentices and the public interest, and warrants derecognition of California.

III. OATELS Properly Found that CDIR and CAC Violated the Federal Apprenticeship Regulations by not Obtaining OATELS' Prior Approval for the Needs Test.

1. As noted earlier, see supra, p. 20, para. 14, OATELS' predecessor, BAT, recognized the California SAC as the federal apprenticeship registration agent for California in February 1978. The California apprenticeship law that BAT approved then, the old section 3075 of the California Labor Code, permitted establishment of a new apprenticeship committee whenever justified by the apprenticeship training needs of the trade in question. See ibid., AF 1059, quoted in full supra, p. 19, para. 13. Unlike the current law, section 3075(b), the older law did not generally bar approval of new and expanded construction apprenticeship programs where existing approved programs served the same craft or trade and geographic area. Thus, the old section 3075 allowed new local programs to be established "in any trade in the state or in a city or trade area" whenever justified by apprenticeship training needs. Ibid.

The present law, by contrast, prohibits approval of new and expanded construction apprenticeship programs serving the same craft or trade and geographic area as existing approved programs unless the approved programs lack the capacity, or refuse, to dispatch the needed apprentices, or unless these programs fail to meet their state statutory obligations. See Cal. Lab. Code, section 3075(b), AF 859, quoted in full supra, p. 20, para. 15. Accordingly, the

old section 3075 did not have the restrictive conditions of the current section 3075(b) ("the needs test"), and BAT therefore did not object to the former law.

It is undisputed, however, that neither CDIR nor CAC requested or received OATELS' prior approval for the needs test. See supra, pp. 20-21, para. 16. Indeed, California did not even formally notify OATELS of the proposed law, let alone provide a written justification for it, but only distributed the public notice and a copy of the July 2000 proposed implementing regulations to OATELS some nine or ten months after section 3075(b) was enacted. See supra, p. 21, para. 17.[19]

2. By failing to obtain OATELS' prior approval for the needs test, CDIR and CAC violated 29 C.F.R. § 29.12(a), and the interpretive BAT Circulars 88-5, 88-9, and 88-12, see supra, pp. 11-13. Section 29.12(a)(5) requires a SAC to submit, and obtain DOL's approval of, a "description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in [P]art [29]." See ibid., AF 852. This approval requirement ensures that state requirements conform to Part 29 or are acceptable if they exceed it. See supra, pp. 11-13. In determining whether state requirements that go beyond Part 29 are acceptable, OATELS considers whether these requirements are beneficial or detrimental to apprenticeship, i.e., among other things, whether the state requirements comply with or are contrary to the

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[19] CDIR asserts that on four occasions before the adoption of the needs test, OATELS representatives were present at CAC meetings at which AB 921 was discussed. See Letter from Fred D. Lonsdale, Esq., CDIR's attorney, to Stephen R. Jones, Esq., and Scott Glabman, Esq., OATELS' attorneys at 2 (Dec. 5, 2003), SAF 447. Even if this assertion is true, it would not show that California complied with the applicable federal regulations. Merely making OATELS regional representatives aware of the proposed law is not an acceptable substitute for securing OATELS' prior approval of the change. California's failure to get such approval deprived current and prospective apprentices of OATELS' protective review of a restrictive, nonconforming law that may have denied many of them the opportunity to start or complete apprenticeships.

NAA's directives of promoting apprenticeship opportunities and protecting the welfare of apprentices, see supra, pp. 9-11.

The three specified BAT circulars simply clarify that section 29.12(a) imposes a continuing requirement that recognized SACs obtain DOL's prior approval of changes to previously approved state requirements. As noted earlier, see supra, pp. 11-13, the regulatory approval requirement applies to all proposed new and revised state apprenticeship requirements, not only those state requirements that deviate from federal requirements, but also those state requirements that simply go beyond federal requirements. There is no express federal requirement concerning a needs test. Therefore, even if it were determined that the California needs test's limitation of apprenticeship opportunities and other restrictions, see supra, pp. 26-32, do not violate the NAA and its implementing regulations, California would still have violated the federal regulations by not meeting the independent requirement of obtaining OATELS' prior approval for a state provision that goes beyond federal requirements. See supra, pp. 33-34.

Precisely because the California needs test's restrictions do violate the NAA and its implementing regulations and have harmful consequences, however, the state's violation of the "prior approval" requirement is even more serious here. California did not formally notify OATELS of the proposed law, and OATELS never approved it. Had California complied with the "prior approval" requirement, OATELS could have informed the state that the law was unacceptable before it was adopted, the consultative process would have been given a chance to work before apprenticeship opportunities were limited, and the state might have been persuaded not to enact the law.[20] Therefore, the "prior approval" requirement protects recognized SAC

[20] The fact that the consultative process was unsuccessful after the needs test was adopted does not show that consultation would also have failed before the enactment of the law. It is generally easier to persuade a legislature not to pass a law than it is to convince such a body to repeal an

states, as well as apprentices, by giving a state an opportunity to avoid adopting an apprenticeship requirement that the state may not have realized was nonconforming or harmful.

Thus, the "prior approval" requirement is not a mere procedural formality, whose violation has no impact on apprentices, but an essential oversight requirement that ensures that the recognized SACs follow the NAA's directives. The "prior approval" requirement protects apprentices by allowing OATELS to determine whether the state's proposed changes are consistent with federal requirements or acceptable if they exceed them, and by giving OATELS a chance to persuade the state not to accept detrimental changes before they are adopted. Submission or approval of the changes after the state has made them would expose apprentices to potentially harmful nonconforming or otherwise unacceptable requirements during the long consultative period that may be necessary to persuade the SAC to drop its adopted nonconforming requirement, see supra, pp. 6-7, 19, para. 11.

By contrast, compliance with the "prior approval" requirement—that is, refraining from making proposed changes during any period of consultations with OATELS, no matter how extended--would protect apprentices from exposure to harmful, nonconforming state requirements because the change would not be adopted unless OATELS approves it. Thus, the "prior approval" requirement is a necessary means of continuously carrying out the NAA's directive to protect the welfare of apprentices. Compliance with this requirement ensures that apprentices throughout the nation are always protected by acceptable, conforming state

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existing law. Had CDIR and/or CAC informed the state legislature before it adopted the needs test that OATELS considered it harmful and contrary to federal requirements and that the SAC might be derecognized if the measure was passed, the legislature might have rejected it. Even if the state legislature would not have done so, exhaustive consultation before, rather than after, the legislature acted and positions hardened on both sides might have made this dispute more tractable.

requirements, and that such protection is not interrupted by conformity disputes between OATELS and the recognized SACs.

CONCLUSION

For these reasons, OATELS respectfully requests that the ALJ grant this motion for summary decision, affirming OATELS' determinations that CDIR and CAC should be derecognized.

Respectfully submitted,

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