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. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, Respondent, and CALIFORNIA APPRENTICESHIP COUNCIL, Respondent.	)	Case Nos. 2002-CCP-1, 2003-CCP-1

REPLY BRIEF IN SUPPORT OF PROSECUTING PARTY'S MOTION FOR SUMMARY DECISION

INTRODUCTION

1. Respondent California Department of Industrial Relations' ("CDIR") motion for summary judgment rests on two fundamental misconceptions about the National Apprenticeship Act ("NAA") and the relationship between its federal administrator, Prosecuting Party U.S. Department of Labor ("DOL"), Office of Apprenticeship Training, Employer and Labor Services ("OATELS"), and the state apprenticeship council ("SAC") states OATELS recognizes as its registration agents. CDIR asserts first that there is no basis in the NAA for a national apprenticeship system or for promoting

apprenticeship opportunities, as opposed to apprenticeship standards. See Respondent CDIR's Points and Authorities in Support of Its Motion for Summary Judgment ("CDIR's Motion for Summary Judgment") at 6, 17-19 (Sept. 20, 2004). Secondly, CDIR also claims that OATELS has no authority to require or reject specific state apprenticeship requirements because the states are not subject to the NAA at all, because the recognized SAC states' participation in the federal-state apprenticeship partnership is voluntary, and because regulation of apprenticeship is a traditional state prerogative. See id. at 6-7, 17. As shown below, neither contention has merit.

The appropriate method of interpreting the NAA on the two questions at issue (the basis for a national apprenticeship system and for a directive to promote apprenticeship opportunities) is to follow the U.S. Supreme Court's two-step analysis for reviewing an agency's construction of the statute the agency administers. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Using the traditional tools of statutory construction, including legislative history, the reviewing court first attempts to determine Congress' intent on the precise question at issue. See id. at 842. If that intent is clear, it is the law and must be given effect. See id. at 842-43. If the statute is silent or ambiguous on the precise question at issue, however, the court proceeds to determine whether the agency's construction is permissible. See id. at 843. Here, only the first step of the Chevron analysis is necessary to determine Congress' intent on the two questions at issue because, although the NAA, on its face, does not address them, the legislative history does. The NAA's legislative history reveals that Congress intended (1) to establish a national apprenticeship system, administered by

DOL in cooperation with the states; and (2) to have DOL and the states promote apprenticeship opportunities (as well as apprenticeship standards) as part of that system.

Much of the relevant legislative history supporting point (1) was cited in OATELS' Motion for Summary Decision. See id. at 8. Additional support is provided by the remarks of Representative Fitzgerald, the sponsor of the NAA, who noted the forceful testimony showing that the United States had never had a national system for development of apprentices, cited ibid., and called for a federal-state apprenticeship system stimulated and coordinated by DOL. See 81 Cong. Rec. App. 1674, 1674-75 (1937).

Representative Fitzgerald's remarks also support point (2). Speaking during the Great Depression, the congressman observed that there were between three-and-a-half and four million unemployed young people in the country and suggested that apprenticeship would be the best road to give them the opportunity to enter the skilled trades. See 81 Cong. Rec. App. at 1674. The House Subcommittee on Labor report also noted the need, during a growing skilled labor shortage, to afford apprenticeship training opportunities to thousands of young people to develop an adequate supply of skilled workers and provide much-needed employment. See H.R. Rep. No. 75-945, at 2-3 (reproducing the subcommittee report), Administrative File ("AF") 733-34.

In addition, Representative Fitzgerald remarked further that he introduced the bill that became the NAA to establish the temporary Federal Committee on Apprentice Training as a permanent function in DOL. See 81 Cong. Rec. App. at 1674. The representative also introduced a memorandum on the three-year-old committee's objectives. See 81 Cong. Rec. 2600. These objectives were

> to promote apprenticeship as a sound employment policy and to open up to young people opportunities to obtain training that will equip them for profitable employment. To this end, the Committee has been active in . . . [inter alia] [s]timulating the States to set up the necessary machinery for safeguarding and promoting the training of youth for the skilled trades."

Ibid. Since Congress determined that the committee's work was so effective that it deserved to be continued on a permanent basis, H.R. Rep. No. 75-945, at 2, AF 733, it follows that Congress also intended to retain the committee's objectives: i.e., the promotion of apprenticeship opportunities and the protection of apprentices' welfare.

2. CDIR's second contention, which alleges that OATELS lacks authority to require or reject state apprenticeship requirements, rests on a confusion between registration of apprenticeship programs for state and federal purposes. There is no dispute that a state has exclusive jurisdiction over registration of programs for state purposes, see OATELS' Motion for Summary Decision at 2 n.1, or that a state's participation in the National Apprenticeship System (i.e., the state's registration of local programs for federal purposes) is voluntary. A state need not seek to join that system, and a recognized SAC state may withdraw from it (i.e., may decide to stop registering programs for federal purposes) at any time.

As long as a recognized SAC state registers apprenticeship programs for federal purposes, however, the state is subject to federal apprenticeship requirements, including the NAA. Legally, a recognized SAC state stands in the shoes of OATELS in registering programs for federal purposes: the state exercises delegated federal registration authority; is subject to the same legal requirements that govern OATELS when it registers programs; and the state's registration of programs has the same legal effect as if OATELS had registered them itself. See 29 C.F.R. §§ 29.2(o), 29.12(a). The state's

delegated federal registration authority, however, is revocable. See § 29.13. OATELS may revoke the state's recognition if OATELS determines that, in registering programs for federal purposes, the state is applying requirements that are inconsistent with federal requirements or otherwise unacceptable. See §§ 29.12(a)-(b), 29.13.

Even if OATELS derecognizes the SAC state, i.e., withdraws its federal registration authority, however, OATELS has no authority to nullify the offending state requirements. The state can always retain its apprenticeship requirements in registering programs for state purposes. Therefore, contrary to CDIR's assertions, the NAA does apply to recognized SACs (because of their delegated federal authority and responsibilities); and OATELS does have regulatory authority to reject nonconforming or unacceptable state requirements that are used to register programs for federal purposes, see 29 C.F.R. § 29.12(a)-(b).[1] The states, however, always have the option of retaining

[1] OATELS' authority to approve or reject such state apprenticeship requirements and its continuing oversight responsibility are legacies of the Federal Committee on Apprentice Training. See Ansel R. Cleary, former Bureau of Apprentice and Training ("BAT") Deputy Administrator, remarks in Highlights of Conference Observing the 25th Anniversary of the National Apprenticeship Program (BAT, DOL), August 21, 1962 at 5, Apprendix ("App.") A hereto at 2. Pursuant to a 1934 executive order, see Executive Order No. 6750-C at 1 (June 27, 1934), para. 1, App. B hereto at 1-2, DOL created the committee to set federal apprenticeship standards and grant wage exemptions for apprentices from the prevailing code of fair competition wage rates, see National Industrial Recovery Act Regulations of the Secretary of Labor, Apprentice Training, General Regulation No. 1, §§ 1-3 (Aug. 14, 1934), App. B at 3-5. Subject to the approval of DOL, the committee delegated the authority to grant such wage exemptions to designated state apprenticeship agencies, which were authorized to approve apprenticeship programs that conformed to federal standards. See General Regulation No. 1, § 3, App. B at 4-5. The state apprenticeship agencies were also required to "prepare and execute a general plan for the supervision of apprenticeship training approved by the Secretary of Labor." Id. at § 3(c)(4), App. B at 5.

federally rejected requirements by withdrawing from the National Apprenticeship System.[2]

I. The California Needs Test Violates the NAA and/or Its Implementing Regulations by Limiting, Rather than Promoting, Apprenticeship Opportunities in the Construction Trades.

1. In its motion for summary judgment, CDIR makes two principal arguments in defense of the California needs test, section 3075(b) of the California Labor Code. CDIR argues that needs test does not restrict apprenticeship opportunities in the construction trades because the test permits approval of a new or expanded program after the program shows that existing approved programs lack training capacity. See CDIR's Motion for Summary Judgment at 22. CDIR also argues that the needs test is justified as a means of preventing employers and apprenticeship programs from exploiting apprentices as a source of cheap labor without providing proper training or genuine job opportunities. See id. at 17-20, 22. In this regard, CDIR claims further that the needs test ensures that a registered apprenticeship program will meet the federal regulatory requirement of having a numeric ratio of apprentices to journey workers consistent with "continuity of employment." See id. at 20, 23 (citing 29 C.F.R. § 29.5(b)(7). As shown below, neither argument justifies the challenged state statute.

CDIR's argument that the needs test is not restrictive is based on the statute's provision that a new program in the construction trades may be approved if existing

[2] Thus, CDIR's citation of Cal. Div. Of Labor Standards Enforce v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997 (absent clear Congressional intent, the states' historic police powers must not be superseded), see CDIR's Motion for Summary Judgment at 6 n.5, is inapposite. Registration of apprenticeship programs for federal (as opposed to state) purposes is not a historic state police power, but only a state exercise of revocably delegated federal authority.

approved programs serving the same craft or trade and geographic area lack the capacity to dispatch sufficient apprentices to qualified employers at a public works site. See Cal. Lab. Code § 3075(b)(2), AF 859. As CDIR points out, see CDIR's Motion for Summary Judgment at 22, its former director Stephen Smith interpreted this provision as follows:

> I have thought all along that the test of the 'need' for a program is whether the existing programs lack the capacity to train all the apprentices we need. While a public process of comment will let the existing programs make their case that they have unused capacity available, no one has demonstrated to me that we have all the capacity to train that we need for California's future skilled workforce.

Letter from then-CDIR Director Smith to DOL Assistant Secretary DeRocco at 3 (Apr. 11, 2002), AF 11.

CDIR's interpretation of the needs test as referring to existing approved programs' capacity to train for California's future skilled work force, is considerably more expansive than the statutory language, which is limited to such programs' capacity to dispatch sufficient apprentices to qualified employers at a public works site. An existing approved program might well be able to dispatch sufficient apprentices for a qualified employer's needs at a public works site, but lack the capacity to meet all of a craft or trade's future needs in the program's geographic area.

But even under CDIR's expansive interpretation, the California needs test is still unacceptably restrictive. First, by artificially restricting approval of new and expanded apprenticeship programs, instead of letting the labor market determine whether there is a need for such programs, the California needs test reduces the ability of unilateral program sponsors to compete for federal public works contracts. By putting unilateral program sponsors at a competitive disadvantage in bidding for these lucrative contracts, the needs test forces unilateral programs to cut back or go out of business, thereby limiting current

and prospective apprentices' opportunities and options, and reducing the value that the taxpayer receives for awards of such contracts See OATELS' Motion for Summary Decision at 26-32.

The needs test has these harmful economic consequences because, without approval of their programs, unilateral program sponsors cannot qualify for the registered apprentice exemption from Davis-Bacon Act prevailing wage rates on federal public works contracts. See Parties' Stipulation at 4-5, para. 8. As the Ninth Circuit has explained, "for . . . an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training. Prevailing wage statutes for public works thus present a significant obstacle, unless apprenticeship programs are exempted." Elec. Joint Apprenticeship Comm. V. MacDonald, 949 F.2d 270, 274 (9th Cir. 1991). See also Cleary, 25th Anniversary at 5 (Federal Committee on Apprentice Training established to grant wage exemptions for apprentices in response to complaints that minimum wage rates were putting apprenticeship programs out of business), App. A at 2; accord supra p. 5 n.1; Western Electrical Contractors Association's ("WECA") Amicus Curiae Brief in Support of OATELS at 6-7, L. Terry Seabury's Declaration at 1, para. 3 (Sept. 20, 2004) (following CDIR's reduction of the approved operating area of WECA's commercial electrician apprenticeship program from state-wide to the eleven counties originally approved, enrollment dropped from 650 to 314 apprentices).[3]

[3] CDIR subsequently approved WECA's resubmitted application for state-wide expansion of the commercial electrician program, the approval was appealed to Respondent California Apprenticeship Council ("CAC"), and the appeal is still pending. See WECA's Amicus Brief at 8-9; Parties' Stipulation at 8-9 n.5.

Although CDIR claims that its interpretation of the California needs test allows it to approve new programs based on labor market conditions, CDIR cannot measure and regulate the constantly fluctuating supply of, and demand for, skilled construction workers as accurately or as quickly as the labor market can. For example, in accepting WECA's application for approval of a new unilateral construction apprenticeship program for the occupation of sound and communication installer, CDIR could not measure either the current demand or supply for that specific occupation.

Instead, CDIR was forced to rely on a nine-month-old labor market survey of the generic occupation, electrician, projecting the number of electricians needed from 2000 through 2010, and on agency statistics concerning the number of apprentice electrician graduates from approved California sponsors from 2001 through 2003. See Findings of Fact and Decision on the Application of WECA for Approval of Apprenticeship Standards in the Occupation of Sound & Communication Installer, DOT 829.281 022, DAS File No. 105047, slip op. at 3-4, (Jan. 16, 2004) ("WECA II") Supplemental Administrative File ("SAF") 717-18; Employment and Training Admin., Dictionary of Occupational Titles ## 824.261-010 Electrician, 829.281-022 Sound Technician . . .: inter-com installer (4th ed. rev. 1991) (DOL Office of Admin. Law Judges elec. version), SAF 698-99, 701.[4]

[4] Furthermore, as recent events demonstrate, CDIR's assessments of essentially the same industry-wide labor market conditions are not always uniform. From the enactment of the needs test in October 1999 until January 2004, CDIR approved only one unilateral construction apprenticeship program in an area where an existing program served the same craft or trade (another program was approved where no existing program in the state served the same craft or trade). See Parties' Joint Stipulation of Facts ("Parties' Stipulation") at 8-9 & n.5 (Sept. 3, 2004). On January 16, 2004, CDIR approved two unilateral construction programs, see ibid., finding "a great need for trained workers" in the construction industry, WECA II, DAS File No. 105047, slip op. at 3, SAF 717, appeal

By contrast, the labor market reflects the current balance of supply and demand for every specific occupation and adjusts itself in every transaction. If there are too many skilled workers for a specific occupation in the construction trades, the diminished demand will tend to force apprenticeship programs for that occupation to cut back. If there are too few workers, the increased demand will give programs for that occupation an economic incentive to expand. But by sharply limiting approval of unilateral programs, the California needs test, as discussed above, reduces unilateral program sponsors' ability to compete for federal public works contracts, and, ultimately, to continue operating their programs, to the detriment of apprentices and the public.[5]

Secondly, contrary to the intent of the NAA and its implementing regulations, which promote a national apprenticeship system of registered apprentices with portable credentials who are qualified for jobs in their trade anywhere in the country, see OATELS' Motion for Summary Decision at 8, 10; infra, p. 14, the California needs test restricts the measurement of the need for apprentices to a program's geographical area. Yet, especially during the current state-wide shortage of skilled construction workers in California, see infra, pp. 11-12, there may be a pressing need for registered apprentices outside the geographical area even if there is no demand for additional registered apprentices in the area. Thus, by restricting the determination of the need for apprentices

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filed (CAC Feb. 13, 2004), that CDIR previously either did not discern or did not think warranted approval of new programs.

[5] Even if the needs test did not have these restrictive effects, the test would still be objectionable because it is also restrictive on its face. No matter how much an expansive interpretation may mitigate the restrictiveness of the needs test, CDIR and CAC could adopt a more restrictive interpretation at any time.

to an existing program's geographical area, the needs test limits job opportunities for trained apprentices who are willing to work outside the area.

2. CDIR's second argument, that the California needs test is necessary to prevent exploitation of apprentices, implies that there are apprenticeship programs that, but for the needs test's restrictions, would use their registered apprentices as a source of cheap labor on public works projects and not provide adequate training or permanent jobs. See CDIR's Motion for Summary Judgment at 17-20, 22. CDIR does not identify any such programs or say how many it denied because they were exploitative, or describe the evidence on which it concluded that such programs did not offer genuine training and job opportunities. Indeed, CDIR provides no basis for concluding that the needs test has actually been used to reject any exploitative programs, or that it has discouraged any such programs, as opposed to legitimate, qualified programs, from applying for registration.

Moreover, CDIR also implies that few apprenticeship programs are being approved under the California needs test because genuine job opportunities do not exist for apprentices in programs that cannot pass the needs test. See CDIR's Motion for Summary Judgment at 17-18. The suggestion that there are no genuine job opportunities for such apprentices, however, is undermined by CDIR's own finding 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 (approving application on the basis of that shortage), SAF 717-18; see also Findings of Fact and Decision on the Application of 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) (approving application on the basis of an electrician shortage in California). Since one of Congress' intentions in the NAA was to reduce shortages of skilled workers by promoting apprenticeship opportunities, see supra, p. 3, the needs test's restriction of such opportunities during skilled labor shortages in the California construction trades frustrates the Congressional intent.

Additionally, contrary to CDIR's assertion, the "continuity of employment" requirement of 29 C.F.R. § 29.5(b)(7) does not justify the California needs test's general restriction of approval of new and expanded apprenticeship programs in the construction trades, or the needs test's effective preference for existing joint programs. The "continuity of employment" requirement is program-specific and part of a larger requirement that stipulates that the ratio of apprentices to journey workers be such that it permits the program to provide proper supervision, training, safety and continuous employment for apprentices during their term of apprenticeship. See ibid. The "continuity of employment" requirement does not condone the needs test's effective restrictions on types of programs, but simply ensures that there are not so many apprentices relative to journey workers in an individual program that the program sponsor is unable to employ the apprentices continuously. Thus, the needs test is not necessary to meet the "continuity of employment" requirement. Rather, a SAC can determine whether an applying program meets this requirement by carefully examining the program's apprenticeship standards to see whether they warrant the program's ratio of apprentices to journey workers.

Furthermore, even though preventing exploitation of apprentices is consistent with the NAA's directive to protect the welfare of apprentices, CDIR has not demonstrated that such exploitation can be prevented only by frustrating the NAA's other directive to promote apprenticeship opportunities. Indeed, CDIR itself acknowledges that the California needs test "reflects a legislative choice of methods and as such is not 'necessary,' as there are many possible methods for protecting apprentices from exploitation." Respondent CDIR's Response to Prosecuting Party's Second Set of Interrogatories and Requests for Production of Documents at 3 (Sept. 15, 2003), SAF 467. Among these other methods are careful application of existing California apprenticeship standards and continuing audits and monitoring of program operations.

In fact, California's AB 921, the very law that adopted the needs test, provides several means of preventing exploitation of apprentices. AB 921 includes provisions for random audits of approved programs to ensure that a program is complying with its standards, that all required training and instruction are provided, and that graduates have completed the program's requirements. See AB 921, § 5, Cal. Lab. Code § 3073.1(a), AF 901. The statute also requires CDIR to determine whether the program's apprentices are graduating on schedule and whether they have found jobs as journey workers. See ibid. The law further provides that CDIR shall recommend remedial action to correct deficiencies, and makes failure to make such corrections within a reasonable time grounds for withdrawing approval of the program. See id., Cal. Lab. Code § 3073.1(b), AF 901. CDIR has touted the effectiveness of these random program audits, reporting that by September 30, 2001, almost two years after the enactment of AB 921, 104 audits were initiated, leading to cancellation of 31 programs as a result of inactivity. See CDIR,

2000-01 Biennial Report at 26, SAF 707. In addition, California's apprenticeship regulations also authorize non-random program audits for repeated violations and failure to remedy identified violations. See Cal. Code Regs. tit. 8, § 212.3(d), AF 972.

Similarly, California's participation as a recognized SAC in the National Apprenticeship System, a system with uniform minimum registration standards and portable apprentice credentials, see 29 C.F.R. § 29.5; Parties' Stipulation at 3, para. 3, also protects apprentices from exploitation. Registered apprentices in that system who successfully complete their training become skilled journey-level workers and receive a nationally recognized certificate that is accepted as a qualification for their occupation throughout their industry, not just by the employer who sponsors their apprenticeship program. See Parties' Stipulation at 2-3, paras. 2-3. Thus, even if the employer whose unilateral program trained the apprentices cannot give them jobs, the trained, certified apprentices in the national system are qualified for jobs in their occupation anywhere in the country. At a time of great shortages of trained workers in the California construction trades, see supra, pp. 10-11, approving more construction apprenticeship programs is much more likely to increase job opportunities for apprentices in the newly approved programs than to leave such apprentices with no job prospects when the training is over.

Thus, there are adequate means of preventing exploitation of apprentices and ensuring continuity of employment without the California needs test, such as careful examination of the applying apprenticeship program's standards, enforcement of the state's statutory and regulatory audit provisions, and participation in the National Apprenticeship System. As a federal registration agent, California is required both to

protect the welfare of apprentices and to promote apprenticeship opportunities, and may not try to carry out one of these statutory directives by thwarting the other.

II. CDIR and CAC Violated the Federal Apprenticeship Regulations by not Obtaining OATELS' Prior Approval for the California Needs Test.

1. In its motion for summary judgment, CDIR maintains that CAC and it have not violated the "prior approval" requirement because there is no such requirement. See CDIR's Motion for Summary Judgment at 4-16. CDIR contends that there is no statutory or regulatory basis for the "prior approval" requirement, that the underlying Bureau of Apprenticeship and Training ("BAT") circulars do not require such approval, and that, even if they did, they do not have the force of law. See CDIR's Motion for Summary Judgment at 10-14. CDIR also asserts that the "prior approval" requirement would have unworkable consequences for the federal-state apprenticeship partnership. See id. at 7-9, 16. As demonstrated below, CDIR's contentions are without merit.

In the first place, CDIR misconceives the basis of the "prior approval" requirement. Contrary to CDIR's assertion, BAT circulars do not create that requirement but simply interpret an ambiguous existing requirement in the NAA's implementing regulations at 29 C.F.R. § 29.12(a).[6] Those regulations provide that recognized SACs must obtain DOL's approval of their state apprenticeship requirements to be recognized

[6] Thus, as explained in OATELS' Motion for Summary Decision, the "prior approval" requirement applies to all new or revised state apprenticeship requirements (e.g., proposed state laws, executive orders and regulations) and not just SAC policies and procedures because the requirement derives from the regulatory requirement of obtaining OATELS' approval of all such state requirements to qualify for recognition. See OATELS' Motion for Summary Decision at 12-13 (citing 29 C.F.R. § 29.12(a)(1)). As noted in that motion, OATELS notified the recognized SACs that the "prior approval" requirement included any modifications to the materials originally submitted and approved for recognition, including new or revised state apprenticeship laws, executive orders and regulations. See ibid.

as DOL's agents in registering local programs for federal purposes. The state requirements that had to be approved for recognition included state apprenticeship laws, executive orders, regulations, basic registration standards, criteria and requirements, and SAC policies and procedures. See §§ 29.12(a)(1), (4)-(5). DOL recognizes only SACs with acceptable, conforming apprenticeship requirements, and is authorized to derecognize SACs that fail to fulfill, or operate in conformity with, the regulations. See §§ 29.12(a) & (b), 29.13. The regulations do not specify, however, whether the approval requirement of section 29.12(a) is continuing one, or whether the SACs must obtain DOL's approval for state requirements before they are adopted.

As explained more fully below, OATELS reasonably interprets the regulatory approval requirement as a continuing (not one-time) requirement that requires the recognized SACs to obtain OATELS' prior approval of additions or modifications to the materials originally approved for recognition, including new requirements. Accordingly, contrary to CDIR's contention, OATELS' finding of a violation of the "prior approval" requirement is based on NAA's implementing regulations. See Parties' Stipulation at 9-10, para. 21. The interpretive BAT circulars simply clarify an existing requirement and do not create a new one.

In any case, CDIR misreads the applicable BAT circulars in suggesting that they do not address state apprenticeship statutes and regulations or require recognized SACs to obtain prior approval of changes in state apprenticeship law. By reference to the regulatory requirements for submission and approval of specified state materials for recognition, BAT Circular 88-5 covers all the state apprenticeship requirements (i.e., state laws, executive orders, and regulations as well as SAC operating policies and

procedures) that had to be approved for recognition. See BAT Circular 88-5 (Dec. 15, 1987), "Background" (citing 29 C.F.R. § 29.12), AF 858.

The clear intent of the circular is to ensure that OATELS has the chance to review any state changes to the approved materials and determine whether they are acceptable before the state adopts them. See BAT Circular 88-5, AF 858 (SACs are "expressly prohibited from unilaterally adopting policies and operating procedures which depart from, or impose requirements in addition to, those . . . of . . . Part 29"). To interpret the circular restrictively, as applying only to SAC operating policies and procedures, as CDIR does, would defeat the purpose of the circular by leaving out the most important state requirements submitted and approved for recognition. It would make no sense to require prior approval of SAC operating policies and procedures but not of the substantive laws, regulations and executive orders, such as the California needs test, that create those policies and procedures.[7]

CDIR also claims that OATELS has not applied the above interpretation of the BAT circulars in practice. See CDIR's Motion for Summary Judgment at 14. The only evidence that CDIR cites for this claim is the fact that OATELS' predecessor agency, BAT, did not cite California, let alone try to derecognize the state, for failure to obtain prior approval for the numerous changes CDIR asserts the state made to its apprenticeship statute and regulations in the 1970's to 1990's. See ibid.

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[7] The same argument applies to the other applicable circulars, BAT Circulars 88-9 and 88-12. By referring to Circular 88-5, 88-9 incorporates the full scope of the regulatory approval requirement that 88-5 interprets. See BAT Circular 88-9 (Mar. 30, 1988), AF 857. Since BAT Circular 88-12 refers explicitly to the criteria that recognized SACs use to make final registration decisions on new and existing approved programs, the circular's statement that new criteria should not be applied unless BAT approves them first in writing applies to statutory provisions such as the California needs test, which would be a source of such criteria. See BAT Circular 88-12 (July 27, 1988), AF 880.

The fact that DOL did not inform California that its unilateral adoption of these changes violated the "prior approval" requirement, however, does not show that DOL had no such requirement. CDIR does not assert that it notified DOL before these changes were made, and DOL may not have been aware of them before they were adopted. Since DOL has prosecutorial discretion to decide when a state change is out of conformity with federal requirements or otherwise unacceptable and when such a change warrants derecognition, see infra, pp. 25-26, DOL could have reasonably decided that the violations of the "prior approval" requirement did not warrant prosecution if the new laws and regulations conformed to federal requirements, or were otherwise acceptable. Such a decision not to derecognize would not show an absence of the "prior approval" requirement but only that DOL did not choose to use its resources to prosecute these violations. See Heckler v. Chaney, 470 U.S. at 831.

Contrary to CDIR's assertions, OATELS reasonably interprets the approval requirement of 29 C.F.R. § 29.12(a) as imposing a continuing obligation on the recognized SACs to obtain OATELS' prior approval of any changes or modifications to the materials submitted and approved for recognition. It is reasonable to interpret the approval requirement of section 29.12(a) as granting DOL authority to ensure the recognized SAC states' continuing conformity with the requirements of 29 C.F.R. Part 29. Otherwise, a recognized SAC state could negate its conformity with impunity after recognition by simply modifying at will the approved state requirements that qualified the state for recognition. It is also reasonable to interpret the approval requirement of section 29.12(a) as a continuing "prior approval" requirement for recognized SACs because otherwise DOL could not ensure uninterrupted conformity. Instead, the lack of the "prior

approval" requirement would expose apprentices to potentially harmful nonconforming or otherwise unacceptable requirements after recognized SAC states made unapproved changes in their apprenticeship requirements.

CDIR's contrary argument, that there is no "prior approval" requirement in the regulations, would frustrate a statutory and regulatory scheme intended to protect apprentices and promote apprenticeship opportunities by permitting a recognized SAC state to have a requirement that is out of conformity or otherwise unacceptable during the long consultative period that may be necessary to resolve disputes about such requirements. See Parties' Stipulation at 5, para. 11, 9, para. 20. Unlike CDIR's argument, OATELS' position is not contrary to the statutory and regulatory scheme because the "prior approval" requirement is designed to ensure that SACs seek OATELS' approval for proposed changes, not adopted requirements. Thus, if a SAC complies with the "prior approval" requirement--i.e., refrains from making proposed changes until approved--, any consultations with OATELS, no matter how extended, about a proposed change would not expose apprentices to a harmful, nonconforming requirement because the change would not be adopted unless OATELS approves it. The "prior approval" requirement, then, ensures that apprentices throughout the nation are always protected by acceptable, conforming state requirements, and that such protection is not interrupted by conformity disputes between OATELS and the recognized SACs.

2. Thus, the "prior approval" requirement is a reasonable interpretation of the regulations and is consistent with the statutory and regulatory scheme. OATELS has broad discretion to interpret its own regulations, see Road Sprinkler Fitters Local Union 669 v. Herman, 234 F.3d 1316, 1320 (D.C. Cir. 2000), and its interpretation of an

ambiguous regulation is controlling, as long as the interpretation is reasonable and not plainly erroneous or inconsistent with the regulation, see Auer v. Robbins, 519 U.S. 452, 461-63 (1997); Humanoids Group v. Rogan, 375 F.3d 301, 305-06 (4th Cir. 2004); A.J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 332 (D.C. Cir. 2002).[8] The agency's interpretation is controlling even if expressed in a legal brief, an opinion letter, policy statement, or manual. See Auer, 519 U.S. at 462; Humanoids, 375 F.3d at 306; Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n, 212 F.3d 1301, 1304 (D.C. Cir. 2000).

It is no objection to the "prior approval" requirement that the regulations do not explicitly say that it is a continuing requirement for recognized SACs because there is no rigid requirement that an agency fill interstices in its organic statute through rule-making. See SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); accord NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-93 (1974); Laborers' Int'l Union of North America, AFL-CIO v. Foster Wheeler Corp., 26 F.3d 375, 387-88 n.8 (3rd Cir. 1994). As the Supreme Court observed in Chenery:

> [A]ny rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. [citation omitted] Not every principle essential to the effective administration of a statute can or should be cast immediately in the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.

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[8] The approval requirement of 29 C.F.R. § 29.12(a) is ambiguous because the regulation neither expressly compels nor precludes OATELS' interpretation that the requirement is continuing and that approval of the specified state materials must be obtained in advance. See Humanoids, 375 F.3d at 306.

See Chenery, 332 U.S. at 202; accord Bell, 416 U.S. at 292-93; Laborers' Int'l, 26 F.3d at 387-88 n.8.

Nor, contrary to CDIR's assertion, see CDIR's Motion for Summary Judgment at 13, was it necessary for the three BAT circulars in question to go through Administrative Procedure Act ("APA") notice-and-comment rule-making because the circulars only interpreted an ambiguous existing rule and did not create a new requirement. See APA, 5 U.S.C. § 553(b)(A); Nat'l Org. of Veterans' Advocates v. Secretary of Veterans Affairs, 260 F.3d 1365, 1375 (Fed. Cir. 2001); D.H. Blattner & Sons, Inc. v. Secretary of Labor, 152 F.3d 1102, 1108-09 (9th Cir. 1998). Such interpretive rules merely say what an administrative officer thinks the regulations mean, but do not intend to create new rights or duties. See Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993); Nason v. Kennebec County CETA, 646 F.2d 10, 18 (1st Cir. 1981). An interpretive rule "only reminds affected parties of existing duties." Veterans' Advocates, 260 F.3d at 1375 (citation omitted). Furthermore, interpretive rules are not limited to paraphrasing regulatory language, but may also "supply crisper and more detailed lines than the authority being interpreted." See Caraballo, 11 F.3d at 195 (citation omitted). By contrast, legislative or substantive rules effect a change in existing law or policy, or affect individual rights or obligations, and are subject to notice-and-comment rule-making. See APA, 5 U.S.C. § 553; Veterans' Advocates, 260 F.3d at 1375.

Notwithstanding CDIR's contentions, BAT Circulars 88-5, 88-9 and 88-12 are valid and binding interpretations of the NAA's implementing regulations because the circulars were issued pursuant to DOL's Congressionally delegated authority to administer the NAA. See United States v. Mead, 533 U.S. 218, 226-27 (2001);

Daugherty, 1974 WL 215, at *4, AF 726. Interpretive rules issued in the exercise of properly delegated authority bind affected parties. See Shalala v. Guernsey Hosp., 514 U.S. 87, 101-02 (U.S. 1995) (upholding Secretary of Health and Human Services' use of an informal guideline interpreting the agency's regulation to deny a claim for full reimbursement of a bond defeasance loss); Reutter v. Barnhart, 372 F.3d 946, 950-51 (8th Cir. 2004) (upholding Social Security Administration's use of a program manual interpretation of the agency's regulation to deny benefits); United States v. Deaton, 332 F.2d 698, 712-13 (4th Cir. 2003 (upholding Army Corps of Engineers' use of wetlands manual interpretation of a Corps regulation to find that the Corps had jurisdiction to regulate appellants' wetlands).

Accordingly, DOL's publication of the three BAT circulars interpreting the approval requirement of 29 C.F.R. § 29.12(a) was a permissible means of fulfilling the agency's Congressionally delegated responsibilities under the NAA. Therefore, the circulars' interpretation of the approval requirement of 29 C.F.R. § 29.12(a) is valid, as long as that interpretation is reasonable and not plainly erroneous or inconsistent with the regulation, see supra, pp. 19-20, and binds the recognized SACs, including California.

The nine cases that CDIR cites are not to the contrary. See CDIR's Motion for Summary Judgment at 12 n.11.[9] Although CDIR claims that these cases show that agency internal guidelines, not required by a statute or the Constitution, are

[9] See United States v. Craveiro, 907 F.2d 260, 264 (1st Cir. 1990); Reno v. Koray, 515 U.S. 50, 61 (1995); Schweiker v. Hansen, 450 U.S. 785, 789 (1981); United States v. Caceres, 440 U.S. 741, 753-55 (1979); Jacks v. Crabtree, 114 F.3d 983, 985 n.1 (9th Cir. 1997); Jacobo v. United States, 853 F.2d 640, 641-42 (9th Cir. 1988); United States v. Busher, 817 F.2d 1409, 1411-12 (9th Cir. 1987); Rank v. Nimmo, 677 F.2d 692, 698 (9th Cir. 1982); Thompson v. United States, 592 F.2d 1104, 1110 (9th Cir. 1979).

unenforceable, CDIR misreads these cases.[10] What these cases actually say is that an agency's internal guidelines, such as those contained in an internal manual or handbook, do not bind the agency to follow those guidelines or give someone else a right of action to compel the agency to enforce them.

In this respect, CDIR's cases are consistent with Daugherty and Gregory, NAA cases that held that BAT circulars do not give other parties a right of action to compel BAT to enforce the circulars. See Daugherty, 1974 WL 215, at *4 (BAT circular did not give plaintiff union right to sue BAT to prohibit registration of new apprenticeship programs where there was an existing registered program in the same trade and geographic area), AF 726; Gregory Elec. Co. v. DOL, 268 F. Supp. 987, 994 (D.S.C. 1967) (BAT circular did not bind BAT to approve plaintiffs' nonunion apprenticeship program or give plaintiffs a right of action against BAT for failure to do so). Thus, CDIR's cases do not show that the BAT circulars in question fail to bind California.[11]

3. CDIR also asserts that the "prior approval" requirement would have unworkable consequences for the federal-state apprenticeship partnership. CDIR claims that the requirement would thrust OATELS into the heart of the state decision-making process, and that the approval process would be chaotic because there are no procedures

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[10] In any case, the BAT circulars in question are not internal guidelines but were distributed to the recognized SACs. See OATELS' Motion for Summary Decision at 12 n.8.

[11] Assoc. Builders & Contractors v. Reich, 922 F. Supp. 676 (D.D.C. 1996), discussed in CDIR's Motion for Summary Judgment at 13, is distinguishable. There, the court found that a BAT circular and policy letter constituted legislative rules because the BAT documents filled in gaps and imposed new obligations on the recognized SACs. See id. at 681-82. Here, by contrast, the three BAT circulars in question simply clarify an ambiguous existing requirement in the NAA's implementing regulations and inform the SACs of their existing duties.

for requesting prior approval, no standards for granting it, no time limits for approval decisions, and no appeal process. See CDIR's Motion for Summary Judgment at 7-9, 16. CDIR also alleges that the "prior approval" requirement is inconsistent with the NAA because the requirement would allow OATELS to derecognize a SAC state for adopting a substantively conforming apprenticeship requirement without prior approval. See id. at 9.

As shown below, CDIR's claims are not well-founded. First, the "prior approval" requirement does not impose a new requirement on the recognized SACs but clarifies an existing approval requirement. The requirement lets the SACs know that the approval requirement of 29 C.F.R. § 29.12(a) was not a one-time rule, but is a continuing requirement and that approval of new apprenticeship requirements must be obtained in advance, not after adoption. Far from putting OATELS in the middle of the state apprenticeship decision-making process, the "prior approval" requirement has the beneficial effect of letting a recognized SAC know before its state has adopted a new requirement whether that requirement conforms with federal requirements or is otherwise acceptable. That knowledge will enable the state to avoid the dilemma of deciding whether to repeal a nonconforming law or risk derecognition. That decision is the state's, not OATELS', but it helps everyone concerned—the state, OATELS, and the apprenticeship community—to know whether the proposed requirement is acceptable before, rather than after, adoption.

Secondly, it is not true that there are no procedures for requesting prior approval. Although the BAT circulars do not contain a detailed check-list of steps, two requirements are explicit: (1) any proposed modifications or additions to the state

apprenticeship requirements approved at recognition must be submitted to OATELS for prior clearance; and (2) the proposed new or revised requirements should not be applied without OATELS' written approval. See BAT Circulars 88-5, 88-9 & 88-12, AF 857-58, 880. These requirements are sufficiently clear to let the recognized SACs know what to do. OATELS representatives can answer any questions about who should receive the proposals and who will respond.

Thirdly, contrary to CDIR's assertion, the NAA and its implementing regulations do provide directives and standards that OATELS uses in making nonconformity decisions. See, e.g., OATELS' Motion for Summary Decision at 7-11; 29 C.F.R. § 29.12(a)-(b). But to the extent that these directives and standards do not provide sufficient guidance to an outsider, the lack of such guidance and the absence of an appeal process reflect Congress' decision to delegate authority to administer the statute to DOL. That delegation reflects Congress' recognition of DOL's particular expertise in the area of apprenticeship, and the legislative intent not to have the courts substitute their judgment for DOL's in matters of administrative discretion. See Gregory, 268 F. Supp. at 991; Daugherty, 1974 WL 215 at *3, AF 726. DOL has reasonably exercised that discretion by giving recognized SACs the right to appeal derecognition determinations, see 29 C.F.R. 29.13(c), but not nonconformity decisions. OATELS, however, never makes such decisions without first consulting with the state in question, see Parties' Stipulation at 5-6, para. 11, and an aggrieved state always has the remedy of leaving the National Apprenticeship System instead of accepting OATELS' decision.

Fourthly, the lack of time limits for OATELS' nonconformity decisions is necessary to protect the welfare of apprentices. Time limits would frustrate this purpose

by forcing OATELS to waive objections to unacceptable changes that it did not detect promptly. If the SAC state must act before OATELS has made its decision, the state can always protect itself by including a savings clause in the adopted change specifying that the change would not be effective unless and until the state receives written approval from OATELS.

Finally, as explained above, see supra, pp. 18-19, the "prior approval" requirement is not inconsistent with the NAA but an essential means of carrying out the statute's directive to protect the welfare of apprentices by ensuring that they are always protected by acceptable, conforming state requirements. Failure to get prior approval would not automatically result in derecognition. OATELS would consider each violation on its merits. Derecognition for failure to get prior approval would be much less likely if the proposed change is an acceptable one rather than a nonconforming, or otherwise unacceptable, requirement that OATELS found to be harmful to apprenticeship. Nevertheless, if OATELS did contemplate derecognition for violation of the "prior approval" requirement (or for any other reason), the affected SAC would have the opportunity, as California did here, to resolve the matter through consultation first and the right to appeal the derecognition determination if the consultations are unsuccessful.

CONCLUSION

For these reasons and the reasons presented in its motion for summary decision, OATELS respectfully requests that the ALJ enter summary decision in its favor, recommending that the Secretary affirm OATELS' determinations that CDIR and CAC should be derecognized.[12]

[12] The NAA's implementing regulations require hearing officers, now administrative law judges, to recommend their decisions pursuant thereto to the Secretary of Labor, see 29

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C.F.R. §§ 29.13(c), 29.9(b), who has delegated her authority to review such recommended decisions to DOL's Administrative Review Board, see Secretary's Order 1-2002, § 4(c)(25), 67 Fed. Reg. 64,272, 64,272 (2002).