U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 19 February 2004

CASE NOS.: 2002-CCP-1, 2003-CCP-1

In the Matters 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.

ORDER DENYING MOTION TO COMPEL

On January 20, 2004, California Apprenticeship Council ("CAC") filed a Motion to Compel Further Responses to Interrogatories. Three groups of interrogatories are at issue: the first group of twelve interrogatories deals with communications between OATELS and the Secretary, the next interrogatory deals with OATELS' reasons for derecognition of CAC and CDIR, and the third group of four interrogatories deals with OATELS' identification of certain program denials.

The first group of interrogatories relates to alleged improper *ex parte* communications between OATELS and the Secretary regarding apprenticeship in California and specifically, a decision by OATELS to begin registering apprenticeship programs in California (hereinafter "the registration decision"). CAC argues that discovery regarding this decision is relevant because OATELS' rationale for the registration decision was CAC and CDIR's delay in registering apprenticeship programs, a subject on which OATELS has conducted discovery. CAC seeks discovery of alleged improper *ex parte* communications between OATELS and the Secretary that would indicate a determination by the Secretary on the issue of delay in apprenticeship program registration. CAC has not clearly articulated how these communications would be improper *ex parte* or how the registration decision indicates a prejudgment of the issues by the Secretary.

OATELS filed its Opposition to CAC's Motion to Compel on January 30, 2004, arguing that any alleged communications were irrelevant to this proceeding, as the registration decision is not at issue in this proceeding. OATELS notes that any communications between OATELS and the Secretary were not improper *ex parte* communications because the Secretary is not the final decision maker in this proceeding.

Discovery may be obtained regarding any matter, not privileged, relevant to the subject matter of the proceeding. The discovery sought must be reasonably calculated to lead to the discovery of admissible evidence. 29 C.F.R. § 18.14. As noted by the ARB in *Hasan v. Burns & Roe Enterprises*, 2000-ERA-6 (ARB Jan. 30, 2001), administrative law judges have "wide discretion to limit the scope of discovery," as only relevant information is discoverable.

OATELS has objected to the interrogatories regarding communications between OATELS and the Secretary as irrelevant. Specifically, OATELS argues that this discovery is irrelevant because the registration decision is unrelated to these proceedings. OATELS claims that these derecognition proceedings are separate and distinct from the registration decision and that the registration decision is not at issue in these proceedings.

CAC relies on the argument that any communications between OATELS and the Secretary regarding the delay in registration would be improper *ex parte* and that the registration decision indicates a prejudgment of the issues by the Secretary. CAC's argument is based on the characterization of communications between OATELS and the Secretary as improper *ex parte* due to CAC's assumption that the Secretary is the final decision maker in this proceeding. CAC asserts that because the underlying reason for the registration decision, as articulated by OATELS, is delay by CAC and CDIR, CAC is entitled to discovery regarding any potential communications between OATELS and the Secretary regarding this delay. CAC believes that these communications would be improper *ex parte* because the issue of delay could arise during the proceeding and thus, any potential exchanges could taint the Secretary's consideration of this issue.

As OATELS has correctly noted, the Secretary is not the final decision maker in this proceeding. Under Secretary's Order 1-2002, the Secretary delegated the authority to hear appeals in proceedings under the National Apprenticeship Act, 29 U.S.C. § 50, to the Administrative Review Board ("ARB"). *See Secretary's Order 1-2002 § 4(c)(25), 67 Fed. Reg. 64272 (Oct. 17, 2002), (canceling Secretary's Order 2-96).* The Secretary's Order delegated authority to the ARB to hear appeals of administrative decisions for which the Secretary had statutory authority. The Secretary established the ARB and delegated such authority to it to create uniformity and judicial efficiency in the review process. *Id., § 2.* As such, the ARB functions as the final decision maker in these types of proceedings, among many others.

In the Motion to Compel, CAC argued that it was uncertain that the Secretary's delegation of authority covered this proceeding. As cited above, the Secretary's order specifically addresses proceedings under the National Apprenticeship Act and clearly covers this matter. *Id., § 4(c)(25).*

CAC also stated that it was unclear whether the delegation of authority is revocable; CAC indicated that if the delegation is not irrevocable, there is a possibility that the Secretary could assume decision making authority over this proceeding. It would be a highly unusual and difficult process for the Secretary to intervene and overrule a decision of the ARB. This circumstance has never occurred and the possibility of it occurring is too remote to allow this type of discovery on this basis. Even if this highly unusual eventuality occurred, CAC would have the opportunity to file a motion to recuse.

CAC further claimed that even if the ARB had jurisdiction over appeals from administrative decisions in these types of proceedings, the final agency decision, whether to appeal or to defend the decision in federal court, would rest with the Secretary. CAC has misconstrued the definition of final agency decision. Agency action is final when it is "the terminal, complete resolution of a case before the agency." *Capital Network System, Inc. v. Federal Communications Commission, 3 F.3d 1526, 1530 (1993).* Thus, to be considered the final agency action, the decision must resolve the case at the agency level such that it determines rights or obligations and accords legal consequences. *Id.* In this case, the final agency action rests with the ARB, not the Secretary, as the ARB would be the appropriate authority to decide the resolution of the case before the agency.

As such, the Secretary is not the final decision maker in this proceeding and thus, any alleged communications between the Secretary and OATELS would not be improper *ex parte* communications. At this time, CAC has failed to demonstrate the relevance of discovery relating to these alleged communications and accordingly, CAC's Motion to Compel is hereby denied with respect to Interrogatories 2-13.

CAC also requested a further response to Interrogatory 16, requesting identification of OATELS' reasons for derecognizing CAC and CDIR. OATELS originally replied by stating that the reasons were noted in Administrator Swoope's letter dated April 8, 2003. CAC failed to present any argument why this response was insufficient, stating only "see discussion of response to Interrogatory No. 15." However, the cited discussion is not included in the Motion to Compel. Under 29 C.F.R. § 18.21(b)(3), a motion to compel must set forth arguments in support of the motion. CAC has not provided any argument is support of the motion to compel further response to Interrogatory 16. Therefore, OATELS response to this interrogatory is considered sufficient and CAC's Motion to Compel is hereby denied with respect to Interrogatory 16.

CAC requested further responses to Interrogatory 17-20, identification of any apprenticeship programs that OATELS contends were denied by CAC or CDIR in violation of either California Labor Code § 3075 or 29 C.F.R. Part 29. OATELS responded to these interrogatories by stating that the question could not be answered until OATELS had reviewed all discovery received from CAC and CDIR. CAC, in the Motion to Compel, argued that OATELS failed to answer the question and must disclose, subject to a duty to supplement, whether it had knowledge of programs denied pursuant to the referenced statutes. OATELS, in response to CAC's motion, indicated that in its January 20, 2004 discovery responses to CAC, OATELS stated that it had not yet found any denials of programs on these bases. OATELS also stated that their review of CAC and CDIR files was not yet complete and it was possible that

such denials would be found. OATELS objected to the Motion to Compel on the basis that these interrogatories seek to discover OATELS' trial posture before the telephone conference scheduled for February 17, 2004.

OATELS has adequately answered the interrogatories in question. OATELS stated that it did not contend that any apprenticeship programs had been denied by CAC or CDIR pursuant to California Labor Code § 3075 or 29 C.F.R. Part 29. At this time, CAC has not presented any argument as to how this answer is insufficient or requires further explanation. Accordingly, CAC's Motion to Compel is hereby denied with respect to Interrogatories 17-20.

A

JOHN M. VITTONE
Chief Administrative Law Judge