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

RESPONDENT CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATION'S

POINTS AND AUTHORITIES IN SUPPORT OF ITS

MOTION FOR SUMMARY JUDGMENT

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This is an action brought by the U.S. Department Of Labor, Office Of Apprenticeship Training, Employer And Labor Services ("OATELS") to derecognize the State of California as a State Apprenticeship Council ("SAC") state under the regulations set out at 29 C.F.R. Part 29. The state agencies recognized are the California Department of Industrial Relations ("CDIR") and the California Apprenticeship Council ("CAC"). The regulations at 29 C.F.R. Part 29 were issued under the National Apprenticeship Act, 29 U.S.C. §50, commonly known as the Fitzgerald Act. Under these regulations a State that has apprenticeship law and regulations that meet the Secretary of Labor's published standards may ask for recognition as a SAC state. Thereafter, approval of programs by the State automatically confers approval for federal purposes. After a State is approved, OATELS may bring an action such as this to derecognize the State if the State fails to fulfill or operate in conformity with the requirements of the regulations. 29 C.F.R. §29.13. The parties agree that the issues in this case are legal. As will be shown below, it is OATELS' actions that are in excess of its authority, and fail to conform with the regulations. As will be shown below, CDIR and CAC have not done anything wrong.

I. BACKGROUND FACTS

Apprenticeship, Historically. State-approved apprenticeship derives from a unique relationship between a master, or employer, and apprentice. The apprentice agreed to work for the master, often for little or no wages, in return for the promise of training and the future prospect of higher wages as a fully trained craftsperson. Historically, the State's role was to protect the apprentice, often as a form of child protection.[1] Modern apprenticeship has evolved

[1] For example, the English Statute of Artificers (1563) fixed the length of an apprenticeship at seven years. W.J. RORABAUGH, THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE IN AMERICA 4 (1986). An early California statute on apprenticeship required the master to

to combine on-the-job training – the foundation of apprenticeship – with related and supplemental classroom instruction. Apprenticeship regulation has evolved to develop standards that ensure adequate provisions for on-the-job training and instruction, and to set forth the mutual obligations of the employers, apprentices, and apprenticeship programs involved.[2]

The Role of the Federal Government. Congress did not enact legislation regarding apprenticeship until the 1937 Fitzgerald Act ("Act"), which builds upon the pre-existing active regulation of apprenticeship by the States. Joint Stipulation of Facts, ("Stip. Fact") No. 1. It was enacted for the purposes of protecting apprentices through the establishment of *minimum* labor standards, promoting apprenticeship as a system of training skilled workers, and encouraging the federal government to *cooperate* with state agencies in formulating apprentice standards.[3] *See* 29 U.S.C. § 50; 81 Cong. Rec. 6632 (1937) (statement of Rep. William J. Fitzgerald); *see also* 81 Cong. Rec. App. 1675 (1937) (statement of Rep. William J. Fitzgerald); 81 Cong. Rec. 2600 (1937) (same).

The Federal-State Partnership in Apprenticeship. It was not until 1977 that the Department of Labor issued regulations to implement the Act. *See* 29 C.F.R. §§ 29.1 *et seq.* (1992). These regulations permit States to be recognized as "State Apprenticeship Council"

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provide the apprentice with $50 in gold and two new suits at the completion of the indenture. Cal. Civ. Code §268, 1905:417:560. See, Stip. Fact Nos. 1-3.

[2] *See,* Tit. 8 C.C.R. § 212.

[3] The Act defines the scope of the federal role as follows: 'The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship...." 29 U.S.C.§50. "The wording of the National Apprenticeship Act, mandating the Secretary 'to safeguard the welfare of apprentices,' leads also to the conclusion that this type of statutory and regulatory scheme was intended to promote the interest of laborers and not contractors." *Gregory Electric Co., Inc., v. U.S.D.O.L.,* 268 F.Supp. 987, 993 (D.S.C. 1967).

("SAC") states. California has been recognized as a SAC state since 1978. Administrative File ("AF"), Vol. 2, Tab 5D, p. 1030. The instant proceeding is the first time that the federal government has moved to derecognize a SAC state.

What it means, and what it does not mean, to be a SAC State. As part of its duty to cooperate with the States, the Secretary may recognize State Apprenticeship Councils. *See,* 29 C.F.R. § 29.12(a). If the Secretary recognizes a SAC, any apprenticeship program approved by the SAC for state purposes is automatically approved for federal purposes. *Id.* A State's law and regulations must meet minimum standards in order for the State to be recognized as a SAC state. A State may have higher or different standards than the federal minimums, but must submit a description of them to BAT for its consideration.[4] 27 States are recognized as SAC states, 23 are not. Stip. Fact No. 9.

Just as the Fitzgerald Act does not mandate that employers or programs have federal (or state) approval, it does not require that a State become recognized for federal purposes. Also, unlike some other examples of cooperative federalism, there are no financial incentives for becoming a SAC state as there are for certain highway construction or welfare programs. Nor is there a jurisdictional incentive, as in the occupational safety and health field, where a State's only option if it wishes to have its own occupational labor standards is with a federally approved state plan. *Cf.,* 29 C.F.R. §667 (a) and (b).

Derecognition. Should the Secretary of Labor determine that a State is failing to fulfill or operate in conformity with the requirements of the Act or its regulations, its recourse is to

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[4] See 29 C.F.R. §29.12 "Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following ...(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part."

institute derecognition proceedings. 29 C.F.R. §29.13. If recognition is withdrawn, apprenticeship programs in the State must be advised that they will not maintain their federally approved status unless they request registration directly from BAT and are in compliance with the minimum federal standards. This process is accomplished in a 30-day period following notice to the program. A program's status as state-approved is unaffected by the withdrawal of federal recognition of the State as a SAC state.

Genesis of the present dispute. In 1999, California's legislature amended a statute relating to program approval, Labor Code section 3075, to set out in Labor Code section 3075(b) specific criteria for the showing of training needs deemed to justify the approval of a new program. A BAT representative attended a CAC legislative committee meeting about the statute in 1999. Supplemental Administrative File, ("SAF"), Vol. 2, Tab 1 (cont'd), p. 447. BAT first wrote to CDIR complaining of the statute in 2001, well over a year after it had been enacted. AF, Vol. 1, Tab 2, pp. 47-48. A meeting was held in Washington D.C. to discuss BAT concerns. AF, Vol. 1, Tab 2, pp. 9-11. When the matter was not resolved, in May 2002 OATELS moved to derecognize the State of California as a SAC state, on two counts that CDIR failed to "fulfill or operate in conformity with the requirements of 29 C.F.R. Part 29." AF, Vol. 1, Tab 1, pp. 1-2.

II. WHILE OATELS RETAINS THE AUTHORITY TO PASS ON CHANGES TO SAC STATE APPRENTICESHIP LAW AND REGULATION, THERE IS NO REQUIREMENT THAT THE STATE SECURE "PRIOR APPROVAL."

The second of the two counts alleges that a 1988 internal circular, 88-5, from the Bureau of Apprenticeship Training required CDIR to obtain "prior approval" from OATELS before the California State Legislature (not a party to this proceeding) could enact Labor Code sec. 3075(b), and that the failure to obtain "prior approval" alone establishes cause for derecognition, even if the legislation is found to be in conformity with 29 C.F.R. Part 29.

This claim is wrong for many different reasons. First, the assertion that a State must seek "prior approval" from OATELS before enacting its own apprenticeship legislation is based on a fundamental misstatement of the federal-state partnership introduced in federal apprenticeship law. Second, contrary to OATELS' assertion, the internal BAT circular underpinning this argument does *not* forbid a SAC state from making changes to state apprenticeship law absent "prior approval" from BAT. Third, BAT circulars do not in any event have the force of law. Fourth, OATELS' own practices and conduct demonstrate that even OATELS does not truly consider the BAT circular in question to create an enforceable obligation on SAC states to secure "prior approval" from BAT for changes in state apprenticeship law.

A. The "prior approval" count is based on a fundamental misstatement of the federal-state partnership introduced in federal apprenticeship law.

OATELS contends that California apprenticeship law is no longer in compliance with the Act. As will be discussed in Section III below, CDIR strongly disputes that assertion and considers that the law is in compliance with the Fitzgerald Act and its implementing regulations. OATELS, however, also makes the claim that CDIR and CAC should be derecognized even if the law does conform to the Act and its regulations! OATELS claims it may derecognize the State solely because the State did not ask permission from OATELS before enacting a statute on apprenticeship. This is an incredible departure from the statutory scheme, not based on any law or regulation, and grossly contrary to the nature of the federal-state partnership introduced in federal apprenticeship law. While OATELS does not go so far as to claim that the "offending" statute is invalid as a matter of California state law, the prospect of derecognition is disruptive and should not be taken lightly.

Nowhere in the Act is an intent expressed to federalize apprenticeship.[5] Nowhere in the Act is an intent expressed to regulate apprenticeship directly. Nowhere does the Act mandate that States must enact, or refrain from enacting, specific state laws about apprenticeship.[6]

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[5] OATELS' arguments suggest that the purpose behind the Act and its promulgated regulations is to create a single, uniform national standard for apprenticeship training. However, this interpretation is simply unsupportable. The enabling legislation of the Act provides that the purpose is "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." 29 U.S.C. § 50. That national standards was the goal is negated by the fact that the entire regulatory scheme is completely voluntary. "[W]here federal law is said to bar state action in fields of traditional state regulation, [the courts] have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Calif. Div. of Labor Standards v. Dillingham,* 519 U.S. 316 at 325, 117 S.Ct. 832 (1997). Without express authority that Congress intended the Act to create national standards, such an argument must fail.

[6] The legislative history is crystal clear on the point that the federal-state partnership is a voluntary one, and that the States are to adopt their own plan, and are free to accept the Act or not:

"Mr. DITTER. Mr. Speaker, I reserve the right to object. Will the gentleman from Connecticut please tell us what the power of the National Advisory Committee will be? Under section 2 the Secretary of Labor is authorized to appoint a National Advisory Committee, to serve without compensation. Will the gentleman tell us what the duties and powers of that committee will be?

Mr. FITZGERALD. They will set up a voluntary plan. It is national because some association wrote and asked that the name be changed to the National Association or the National Committee, to make it function with the States.

Mr. DITTER. Then to that extent the Secretary of Labor will be able to carry out and formulate a policy with respect to the several States.

Mr. FITZGERALD. Not unless the States agree to it.

Mr. DITTER. But the Secretary of Labor is authorized to appoint the members of the committee. There is no reservation, no limitation with respect to the authority of the Secretary of Labor.

Mr. FITZGERALD. The States adopt their own plan.

Mr. DITTER. I am speaking now of the National Advisory Committee. The gentleman said the National Advisory Committee's duties and powers would be to formulate policies. I say to that extent the influence of the Secretary of Labor will be expressed through the appointees of this committee.

Mr. FITZGERALD. The committees will be appointed through the State agencies.

Mr. DITTER. I am afraid that the gentleman and I are in disagreement. Under section 2 the Secretary of Labor has authority to appoint the committee. It does not say anything except to appoint this national committee. It delegates that authority directly to the Secretary of Labor.

Mr. FITZGERALD. That is, the national committee sets up with the State organization a voluntary plan. Everything in this is voluntary.

Indeed, the Act does not impose requirements on the States at all. Rather, it imposes obligations upon the Secretary of Labor to *cooperate* with the State agencies *already* engaged in the formulation and promotion of standards of apprenticeship, and to ensure that *minimum* standards are met. The Act envisions the federal-state partnership fundamentally as a tool to *raise* labor standards for apprentices, by ensuring that the SAC states to which the DOL delegates apprentice registration functions operates consistent with federal *minimum* standards.

OATELS's mistaken interpretation would wreak havoc on the dynamic system of the federal-state apprenticeship partnership.

OATELS is apparently oblivious to the monumental transformation in the heretofore cooperative state-federal relationship that would inevitably result from inferring a veto right by OATELS over California law from California's voluntary participation as a SAC state. Apprenticeship councils are mandated to contain conflicting factions, with equal representation given to employer and employee representatives. In California, SAC members are appointed by the Governor, serve staggered terms, and may overlap a change in administration. Labor Code § 3070. To suggest that approval from a federal agency could be grafted onto such a system without fundamentally altering the dynamic of the decision-making process in the institution is folly. Such a rule would thrust the federal agency into the heart of a state decision-making process.

Mr. DITTER. And to that extent, then, the Secretary of Labor's influence will be felt in the administration of the proposed act.

Mr. FITZGERALD. I would not say so.

Mr. DITTER. How is it to be obviated?

Mr. FITZGERALD. Because it will be voluntary on the part of a State whether it accepts the act or not.

Mr. DITTER. What is the power of the committee?

Mr. FITZGERALD. Just making recommendations; that is all.

81 Cong. Rec. H6633 (daily ed., June 30, 1937) (statement of Reps. Fitzgerald and Ditter.)

Moreover, while OATELS now claims some right of "prior approval," OATELS does not have any process for conferring "prior approval" for proposed changes. Grafting a federal "prior approval" requirement onto the state council's decision-making process without any procedure in place is an invitation to chaos. There are no regulations, policies, or procedures that spell out any kind of process either for applying for, or for obtaining, "prior approval." OATELS' Response to CDIR Interrogatory No. 7, SAF, Vol. 2, Tab 1 (cont'd), p. 579.[7] This "lack of process" is consistent with the statements of the BAT representative present at a 1994 CAC meeting. When asked to explain the alleged "approval process" by BAT for a pending regulation including a controversial provision concerning apprentice wages, Mr. Tabaracci stated:

> Aah . . . . . Well, number one I'm going to have to deal with it and I haven't seen what was sent to OAL. Okay. I'll have to review it and it will have to go up to the Regional Director and he will have to review it then it will have to go into Washington, D.C. And if it goes directly into Washington, D.C. what their [sic] going to do is send it right back down to me. And .. aah .. I'm sure I'm going to have a number of comments because of the type of regulations and I'm sure that Mr. Turner will have a number of comments because of Federal Regulations. I'm sure that the National Office will have a number of comments because of the Federal regulations.

Supp. AF, Vol. 2, Tab 1 (cont'd), p. 782.

Notably, there has also been no indication as to how long OATELS contends it has to exercise "prior approval" one way or the other. It appears that, according to OATELS, a State could be required to wait *for years* for OATELS to decide whether it would confer or withhold

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[7] The response in full reads as follows: "There are no written procedures other than the requirement to submit copies of all proposed legislation to the applicable BAT regional or national office and not to implement the proposed laws until DOL has approved them in writing. See BAT Circular 88-12, AF 880; Circular 88-9; AF 857; Circular 88-5, AF 858." This response does not even describe any type of formal procedure for applying for "prior approval;" it merely describes hypothetical directives to the SAC states.

its "prior approval" on a change in apprenticeship law. This is hardly consistent with the notion of *cooperative federal-state partnership* on which the Act is founded.[8]

Not surprisingly, there is also no appeal process by which a State could seek review of a determination issuing from the non-existent "prior approval" process. If OATELS mistakenly withheld approval, even on an arbitrary or capricious, or discriminatory basis, the SAC state would have no remedy. OATELS' Response to CDIR Interrogatory No. 9, Supp. AF, Vol. 2, Tab 1 (cont'd), p. 579-580.

Finally, what meaningful need could OATELS have for a "prior approval" rule? If a State adopts a regulation that is in conformity with the Act and its regulations, where is the harm? If the State adopts a law that is not in compliance, then OATELS' remedy is to initiate derecognition. What possible good could come from derecognizing a State that adopts a valid and conforming regulation? For example, were a State to adopt a policy that mirrored Circular 88-5 and required the State to secure "prior approval" before making any changes in its policy, OATELS could claim, under the theory asserted in this case, that the action was in violation of Circular 88-5 and the SAC accordingly subject to derecognition. How could this possibly be consistent with the Fitzgerald Act?

B. The internal circular underpinning OATELS' argument does not say what OATELS says it says.

OATELS's argument that SAC states must obtain "prior approval" from OATELS before enacting changes in state apprenticeship law rests on the slender reed of one internal BAT

[8] We note that in connection with recently proposed regulations, the OATELS representative expressly *failed* to comment on the entirety of the proposed legislation due to his alleged lack of time, stating only that "The absence of comment . . . should not be construed as an expression of approval or disapproval . . . by any DOL agency." AF, Vol. 1, Tab 2, p. 19.

circular, Circular 88-5,[9] and OATELS' startling interpretation thereof. There is no statute or regulation that requires SAC states to get permission to enact changes in state laws. As will be shown, the circular itself does not even stand for this proposition or even address this subject. The circular clarifies for BAT internal staff that changes in SAC policies and procedures should be reviewed by BAT for consistency with 29 C.F.R. Part 29, and should be submitted by the SAC to BAT for that purpose.

BAT circular 88-5, issued December 15, 1987, states that its purpose is to clarify for apprenticeship technical staff the BAT's position regarding SACs unilaterally adopting apprenticeship policies and procedures. BAT circular 88-5 provides the following policy:

> Any modification to SAC policies or procedures regarding the recognized State apprenticeship program that results in changes in the materials submitted to, and approved by, the Secretary when granting recognition for Federal purposes must be approved by BAT. State Apprenticeship councils/Agencies are expressly prohibited from unilaterally adopting policies and operating procedures which depart from, or impose requirements in addition to, those which meet the requirements of Title 29 C.F.R. Part 29. Approval of augmented policies and operating procedures is subject to BAT's discretion. (Emphasis added)

AF, Vol. 2, Tab 4C, p. 858.

By its own terms, Circular 88-5 does not purport to regulate the States, or to address itself to the subject of state statutes and regulations. Rather it sets forth BAT policy, specifying that the policies and procedures of SAC councils after SAC state recognition should continue to be compliant with 29 C.F.R. Part 29 for the State to remain SAC-approved to register programs for federal purposes. This follows precisely from the logic of the federal-state partnership set forth by the Act. 29 C.F.R. part 29 provides that when a State applies for SAC state recognition, it

[9] AF, Vol. 2, Tab 4C, p. 858.

must advise BAT of any policies that "depart from or impose requirements in addition to those prescribed in this part." 29 C.F.R. Part 29.12(a)(5).

The Office of the Secretary of Labor itself provided elucidating comment in the Federal Register when the implementing regulations, including 29.12(a)(5), were promulgated in 1977:

> Some persons have read Section 29.12(a)(5) in a manner which does not appear justified by the text. It requires a SAC to submit to the Bureau 'a description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.' While the Bureau has the right to approve or disapprove such variations, the purpose of this provision is not to enable the Bureau to control SACs or to dictate policies and procedures of the SACs to which the Secretary has accorded recognition. The Department can then make its own judgment on whether these policies and procedures conflict with the requirements of this part.

Federal Register, Vol. 42, No. 34, p. 10139 (Friday, February 18, 1977) (Emphasis added), at AF, Vol. 2, Tab 5A, p. 863.

The follow-up circular to Circular 88-5 provides express clarification. Circular 88-9[10] issued March 30, 1980 to inform BAT field staff of the review of Circular 88-5 in light of Executive Order 12612 entitled "Federalism." By way of background, Circular 88-9 explained that Circular 88-5 was found not to be inconsistent with the executive order, as Circular 88-5 "merely requires that modifications to SAC policies and procedures on which recognition for Federal purposes was approved be submitted to BAT for clearance. The Circular does not mandate national uniformity."

Circular 88-9 then clarified the policy set forth in Circular 88-5 as follows:

> BAT, when possible, will strive to favorably consider the SAC's proposals for change, however, before such determinations can be made, the State modifications must be submitted to BAT for appropriate review and appraisal. . . . . [W]e need to ensure full cooperation between BAT and the SACs. BAT staff are urged to be

[10] AF, Vol. 2, Tab 4C, p. 857.

> aware of the needs . . . for reviewing SAC policies and procedures to assure that they are in consort with those goals. All significant modifications in policies and procedures planned, or implemented by the SACs are to be submitted to the BAT Director, along with appropriate comments and recommendations.

AF, Vol. 2, Tab 4C, p. 857 (Emphasis added).

Thus, BAT's own circulars clarify that SAC states are to *inform* BAT of changes, "planned, or implemented" for BAT's review of their continued status as a SAC state, and *not* that BAT has any power to require "prior approval" of changes in state apprenticeship law.

C. BAT circulars do not have the force of law.

OATELS asserts that Circular 88-5 dictates a substantive rule of "prior approval" to SAC states and their agencies and councils that is judicially enforceable. Yet even if that were what the circular said, BAT circulars do not have the force of law. "[T]he internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party."[11]

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[11] *U.S. v. Craveiro,* 907 F.2d 260, 264 (1st Cir. 1990); *see also, e.g., Reno v. Korzay,* 515 U.S. 50, 61 (1995); 115 S.Ct. 2021 (Bureau of Prisons Program Statements are simply interpretive rules); *Schweiker v. Hansen,* 450 U.S. 785, 789 (1981); 101 S.Ct. 1468(Social Security Administration Manual was only regulation, had no legal force, and did not bind government); *U.S. v. Caceres,* 440 U.S. 741, 753-55 (1979); 99 S.Ct. 1465 (failure to follow internal IRS regulations did not violate federal law); *Jacks v. Crabtree,* 114 F.3d 983, 985, n. 1 (9th Cir. 1997) (violation of Bureau of Prisons Program Statement is not violation of federal law because they are "internal agency guidelines" not "subject to the rigors of the Administrative Procedure Act, including public notice and comment"); *Jacobo v. U.S.,* 853 F.2d 640, 641-42 (9th Cir. 1988) (Navy Manual "not a regulation and does not have the force of law"); *U.S. v. Busher,* 817 F.2d 1409, 1411 (9th Cir. 1987) (United States Attorneys' internal guidelines do not create any rights enforceable at law); *Rank v. Nimmo,* 677 F.2d 692, 698 (9th Cir. 1982) (Veterans Administration Handbook and Circulars did not have force and effect of law because they were neither published in Federal Register nor disseminated to public for scrutiny and comment); *Thompson v. U.S.,* 592 F.2d 1104, 1110 (9th Cir. 1979) (government safety manual and safety programs do not grant right to have them followed).

Documents published by an agency can have the force and effect of law if certain requirements are met, such as promulgating a regulation pursuant to the rulemaking procedures of the federal Administrative Procedures Act ("APA"). *See, Chrysler Corp. v. Brown,* 441 U.S. 281, 301 (1979); 99 S.Ct. 1705. In this case, there is no evidence Circular 88-5 was ever subject to the APA's rulemaking procedures, published in the Code of Federal Regulations, or disseminated to the public in such a way as to have the force and effect of law. As such, Circular 88-5 only provides guidelines on BAT policy. These guidelines are similar to the type listed in footnote 11 that courts have found do not carry the force and effect of law.

A substantive rule which an agency intends to impose obligations on the regulated public must be promulgated in accordance with the federal APA, notably 5 U.S.C. §553 which requires that an agency give notice of proposed rulemaking and interested persons an opportunity to participate in the rulemaking. Circular 88-5 would be just such a "legislative rule," if it were interpreted as OATELS suggests.

In *Associated Builders & Contractors, Inc. v. Reich*, 922 F. Supp. 676 (D.C. Cir. 1996), employers and employees brought an action against the Secretary of Labor and the Director of the BAT challenging the validity of a circular and policy letter issued by BAT purporting to restrict registration of certain apprenticeship programs. The Court held that the circular and policy letter were "legislative" rules subject to notice and comment requirements of the APA, and enjoined the defendants from enforcing the new policies unless and until adopted in a rulemaking.

Even the far more modest requirement that a State advise BAT of policies that depart from or impose requirements in addition to the federal requirements required properly promulgated regulations. See 29 C.F.R. §12(a)(5). Nothing in the regulations promulgated on non-

conforming state rules suggests that BAT claims the authority to pre-approve state law or regulation. Rather, at most, a State that does enact "non-conforming" rules subjects itself to "derecognition."

D. OATELS' own practices and conduct demonstrate that even OATELS doesn't understand the circular to say what OATELS is asserting here.

BAT practice has conformed to the view that its jurisdiction does not require prior approval of amendments to or changes in state apprenticeship law or policy. For example, both before and after the promulgation of the Act's implementing regulations in 1977, California made numerous amendments to and changes in its statutes and regulations governing apprenticeship. Multiple changes were made to the 1939 Shelley-Maloney Apprentice Labor Standards Act over the subsequent decades, including 1976, 1980, 1984, 1985, and 1991.[12] Multiple changes have also been made to California's apprenticeship regulations, including in 1976, 1978, 1979, 1982, 1985, 1990, 1991, and 1992.[13] BAT did not assert that these changes were unlawful or grounds for derecognition for lack of "prior approval."

The conclusion is unmistakable that while OATELS now claims some right of "prior approval," there is not now and never has been any process for requesting or conferring "prior approval" from OATELS for proposed state law changes. Instead, OATELS has the ability to initiate derecognition proceedings when it considers that a State is not acting in conformity with the federal regulations.

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[12] AF, Vol. 2, Tab 5D, p. 893, 895.
[13] AF, Vol. 2, Tab 5D, pp. 947, 949.

E. State law changes subject a SAC State to derecognition only if the changes are not in conformity with 29 C.F.R. Part 29.

OATELS' regulations authorize the Secretary of Labor, following an administrative process, to derecognize state programs from acting as registration agents for federal purposes. This is undisputed. The scope of OATELS' authority over state programs was discussed in a review of the current regulations in 1989. See, 54 Fed. Reg. 15, 3757-3760 (1989). One issue was how BAT could encourage compliance by the SACs with federal regulations. The Notice questioned whether the existing option of derecognition should be supplemented with other options when a SAC is out of compliance. The Notice asked whether the SAC states should be subject to periodic recertification, or other options rather than the available option of derecognition. No formal rulemaking resulted from this request for comments. There was no suggestion that a State must have "prior approval" for changes in its apprenticeship law.

In a cooperative relationship one would expect that the State would, as California did, provide notice to OATELS of changes in law and regulation. See, *e.g.*, SAF 447. Likewise, OATELS would be expected to comment and provide input in the rulemaking process. See, *e.g.*, AF Vol. 1, Tab 2 47-48. "Prior approval" is, however, neither necessary nor helpful, and most certainly not a part of 29 C.F.R. Part 29.

Sadly, apprenticeship training has at times become a political football, and the welfare of the apprentice is not always the primary focus of the players. CDIR and CAC share with BAT the enmity of one side or the other of the "apprenticeship wars" for almost any action that is taken. The California apprentice wage regulation was characterized by the plaintiff program in one case as favoring unions, a claim rejected by the 9th Circuit Court of Appeals. *Associated Builders and Contractors of Southern California, Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004). In yet another case, the District Court for the D.C. Circuit quoted the District Judge's observation

that a BAT *ad hoc* decision "certainly gives the appearance that [BAT is] taking sides in the labor dispute." *Associated Builders and Contractors v. Herman,* 166 F.3d 1248, 1254 (D.C. Cir. 1999).

Were BAT given the ability to grant or withhold "prior approval," it would place the agency in an untenable position. Since there are no standards for granting "prior approval," nor any appeal process were it exercised, nor even any timeline for BAT making a decision, the temptation to take sides in some future labor dispute may be too great to resist. Indeed, the possibility of creating even an unintentional ability to delay or interfere with the normal workings of an Apprenticeship Council would militate against the creation of a "prior approval" rule.

III. ON THE MERITS OATELS IS WRONG BECAUSE LABOR CODE § 3075(B) IS NOT A NON CONFORMING CHANGE.

A. CAC and CDIR are operating in conformity with the federal requirements.

The second ground on which the Department of Labor initiated derecognition of the State of California was that CDIR failed to "fulfill or operate in conformity with the requirements of 29 C.F.R. Part 29." This claim is based on the allegation that Labor Code §3075(b) "limits, rather than promotes, apprenticeship opportunities contrary to 29 C.F.R. 29.1."

Labor Code § 3075(b) was enacted by the California Legislature in 1999.[14] California has long required that apprenticeship programs be approved based on "training needs." Indeed,

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[14] (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

that language was in the statute approved by BAT in 1978 when California became a SAC state. The amendments to Labor Code section 3075, not the model of clarity, defines certain conditions that will be deemed to show the existence of "training needs," and include an "escape hatch" allowing approval of programs not meeting these conditions where special circumstances exist. The purpose of the section is to define the term "training needs."

This state law does not violate 29 C.F.R. §29.1. That C.F.R. section provides only the general description of the purpose of the Department of Labor's regulations, and implements the Fitzgerald Act, which imposes obligations *not* on the States, but on the Secretary of Labor. 29 C.F.R. §29.1 directs the Secretary of Labor to formulate and promote "labor standards necessary to safeguard the welfare of apprentices..." and to "cooperate with" – *not* dictate to – "state agencies engaged in the formulation and promotion of standards of apprenticeship. It does not require a State to expand the number of apprenticeship programs, nor does it require States to promote apprenticeship by ignoring the ability of a program to actually provide opportunities.

In determining whether a state law is consistent with the Fitzgerald Act and its implementing regulations, the issue is not whether the state law restricts program approval, but rather whether approval of programs that are being proposed for reasons other than training needs will "safeguard the welfare of apprentices." Approval of a program that was intended to provide cheap labor on public works projects rather than training does not "promote labor standards necessary to safeguard the welfare of apprentices...." Promoting standards, not the

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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.

unthinking multiplication of exploitative and contentless programs was the thrust of the Fitzgerald Act. The problem faced by Congress at the time of the Fitzgerald Act was not that America had the need for limitless low-quality training programs that were nominal apprenticeship programs. America had the need for standards in apprenticeship that would protect the apprentice while at the same time produce qualified mechanics and craftspersons.

The Fitzgerald Act is not violated by the adoption of a definition of "training needs." There is however a proper federal zone of concern. The structure of the Secretary's regulations allow the Secretary to set forth minimum standards for apprenticeship programs that are then approved for federal purposes. The BAT regulations allow the federal government to recognize programs that meet the Secretary's published standards as being approved for federal purposes. Likewise, a State that voluntarily asks for federal recognition may approve programs for both state and federal purposes. 29 C.F.R. §21.12. This approval function is consistent with the Fitzgerald Act's mission to promote standards and the welfare of apprentices.

Even within the context of seeking approval to be a SAC state and approve programs for federal as well as state purposes, the Secretary's regulations do not require States to lower their standards to the federal minimum standards set out in 29 C.F.R. §29.5. Rather, the regulations allow States that meet or exceed the federal standards to act as the registration agency for federal purposes. It turns the Fitzgerald Act on its head to argue, as OATELS does, that a State's higher standards disqualify a State from giving registration approval for federal purposes. There is absolutely nothing to suggest that Congress was concerned that apprenticeship programs would have standards that were too high. There is nothing to suggest that the minimums in 29 C.F.R.

(c) Notwithstanding subdivision (b), the California Apprenticeship Council may approve a new apprenticeship program if special circumstances, as established by regulation, justify the establishment of the program.

Part 29 were intended as maximums. Surely Congress, in enacting the Fitzgerald Act, never contemplated that if a State wanted to require more school hours than the federal minimum OATELS would move in with the full weight of the federal bureaucracy to prevent that State from raising the quality of apprenticeship.

B. Apprenticeship opportunity is only meaningful if jobs exist for the apprentices.

The "need" standard promotes quality and promotes real apprenticeship opportunities. As President George W. Bush has observed:

> Some of you who have been around long enough may remember the old days when they had work force training requirements that said, just go train people. So they'd go out and train a thousand hairdressers for 50 jobs. You'd have 950 well-trained hairdressers, but they weren't working.
> We've got to make sure the work force training programs focus on the needs of the employers.

Remarks by the President to the U.S. Conference of Mayors, Capital Hilton Hotel, Washington, D.C. 1/23/04. http://www.whitehouse.gov/news/releases/2004/01/20040123-2.html.

Even accepting for the sake of argument OATELS' position that the Fitzgerald Act is primarily about promoting apprenticeship opportunities and not apprenticeship standards does not help OATELS in this case. Approving programs where there is no "training need" does not promote apprenticeship opportunity. Rather, it promotes the opportunity for exploitation. If there are no jobs for journey-level workers, and no real intent to train, but instead a need for low-wage helpers on public works projects, then there will be no real apprenticeship. Instead, a worker will be placed in a program to avoid the higher wages required by the Davis Bacon Act, or similar state law, and as soon as that public works job is over, the "apprentice" will be told "You're Fired."

If there is no "need" for the trained worker, the apprenticeship will fail even if the contractor has the best intentions and is not a scofflaw seeking a price advantage on public works bids. Apprenticeship depends on the existence of on-the-job training. Apprenticeship is not just a classroom experience. Its value as a system of training depends on the unique relationship between the journey-level worker and the apprentice. The typical program requires years, not months. If 1000 apprentice plumbers are brought into a program where the work force only needs 50, how will those 950 without jobs get their on-the-job training?

The federal regulations recognize the importance of there being an actual labor market need for the trained workers. One of the mandatory criteria for approval of a program is that the numeric ratio of apprentices to journeymen be consistent with "continuity of employment." 29 C.F.R. §29.5(b)(7). Where there is no "need" for the workers, journey-level or apprentice, there can be no continuity of employment. Rather, as in the example above, where a deceitful contractor intent only on exploitation hires an "apprentice" for a single public works job, there will be no continuity of employment, just a few weeks or months of work followed by unemployment checks.

The requirement that apprenticeship be market-sensitive is found throughout the legislative history of the Fitzgerald Act. Speaking before the Committee on Labor concerning what was to become the Fitzgerald Act, Mrs. Clara M. Beyer, Assistant Director of the Division of Labor Standards of the Department of Labor testified as follows:

> We always will have need for apprentices, and there will always be need for coordinating their work, having them attend school and work on jobs. Moreover, there is the need of determining properly the number of apprentices necessary to meet the demands of industries. The number of apprentices may fluctuate with industrial activity, but the necessity of maintaining adequate labor standards and training facilities for those who are employed can and for relating the number

> of apprentices to the employment needs of the trades remains constant.

To Safeguard the Welfare of Apprentices, Hearings before a Subcommittee of the Committee on Labor, House of Representatives, 75th Congress, April 22, 23, and 26, 1937, at 2. AF Vol.2, Tab 4A, 741.

Mr. Richard Brown of the National Youth Administration testified as follows:

> In addition to preventing exploitation and lowering the standard of apprenticeship, I think it is important to control the number of workers in any particular occupation so that we will not have a tremendous movement into one set-up and then not have opportunities for the workers there.

Id. at 11, AF Vol.2, Tab 4A, 750.

The "training needs" language at the heart of this discussion was not a creation of the California Legislature in 1999. It came directly from the Federal Committee on Apprenticeship. The Department of Labor's Federal Committee's Proposed Model State Law provides as follows:

> A local joint apprenticeship Committee shall be appointed, in any trade or group of trades in a city or trade area, by the Apprenticeship Council, whenever the apprenticeship training needs justifies such establishment.

The Child and the State, Grace Abbott, University of Chicago Press, P.250.

California's statute first adopted in 1939 and as amended through 1976 followed this model calling for the establishment of training programs to meet training needs.

> 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. Stip. Fact No. 13.

Thus, OATELS' reaction to California's amendment to this statute is extreme and unwarranted. The statute as originally approved by the Secretary in 1978 provided that programs

be approved whenever "training needs" justified their establishment. Labor Code §3075(b) makes clear that "training needs" exist when 1) there is no existing program, 2) when existing programs have been found deficient, 3) when existing programs fail or refuse to dispatch apprentices to a contractor making a request for public works purposes. None of these provisions restrict the approval of new programs. Where there is an existing program that is not deficient, that does dispatch to non-member contractors, then approval is still warranted when that program lacks the capacity to provide all the apprentices needed for California's workforce. Director Stephen Smith, on behalf of CDIR and in response to a federal Department of Labor inquiry stated in a letter of April 11, 2002:

> 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.

AF Vol.1, Tab 2, p. 9.

Where a program is proposed that complies with the Labor Code and regulations, that program will be approved. Where a program is proposed to provide cheap labor for contractors and disappointment and incomplete and unfinished training for apprentices, that program will not be approved. It is entirely consistent with the Fitzgerald Act for the State to promote apprenticeship standards and protect the welfare of the apprentice. The welfare of the apprentice will not be ignored by California. It is hard to understand why OATELS would be opposing standards and quality in apprenticeship that take the welfare of the apprentice into account. It is even more difficult to see how promoting high standards would amount to acts that show that CDIR or CAC failed to "fulfill or operate in conformity with the requirements of 29 C.F.R. Part 29."

29 C.F.R. 29(b)(7) mandates that apprenticeship programs provide for a ratio of apprentices consistent with "proper supervision, training, safety and continuity of employment." The "need" standard in Labor Code section 3075 ensures that a program is sensitive to the "training needs" of the craft so that a program realistically can provide continuity of employment. This statute advances, rather than departs from, the requirements of 29 C.F.R. Part 29.

As should be clear from the above discussion, there has been no suggestion that California is approving programs that fall below the bar set by the federal regulations. In August 2003, OATELS began approving programs that did not meet the California standards but did meet the 29 C.F.R. minimums. Stip. Fact No. 19. This should be sufficient to serve the present needs of OATELS. California's CDIR and CAC have continued to fulfill and operate in conformity with the historic requirements of 29 C.F.R. Part 29. The welfare of apprentices would not be served by California's derecognition.

VI. CONCLUSION

For all the reasons discussed above, the Secretary's request for derecognition should be denied. There is no "prior approval" rule, and the California law in question promotes labor standards and safeguards the welfare of the apprentice consistent with the role of a SAC state under the Fitzgerald Act and regulations.

Respectfully submitted,

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