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 RELATIONS' REPLY BRIEF

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The California Department of Industrial Relations ("CDIR") submits the following Reply to the Motion for Summary Decision of the U.S. Department of Labor, Office of Apprenticeship Training, Employer and Labor Services ("OATELS"). OATELS has not shown that CDIR is operating in a way that is not in conformity with the requirements of 29 C.F.R. Part 29, and has not shown that CDIR is failing to promote apprenticeship opportunities. OATELS' Motion should be denied.

I. INTRODUCTION

Reading OATELS' Motion one might assume that the Fitzgerald Act was a Congressional directive to the Department of Labor to take over all apprenticeship training, crushing any non-conforming state laws along the way. Reading the Fitzgerald Act however presents a very different picture. OATELS' moving papers are replete with terminology like "ensur[ing] continuing conformity with federal requirements," page 4, "violat[ing] the NAA," page 3,"uniform apprenticeship standards," page 8, or similar language suggesting that the Fitzgerald Act mandates substantive regulation of apprenticeship by the federal government. Quite the contrary, the Fitzgerald Act speaks of the role of the Secretary as bringing labor and management together to formulate programs of apprenticeship and cooperating with state agencies engaged in the formulation and promotion of standards of apprenticeship. It is the States that formulate standards, and labor and management that formulate programs. 29 U.S.C. §50.

Rather than spelling out substantive requirements for how to teach carpentry or plumbing, the federal regulations identify areas that must be provided for in a program, if the program is to be approved for federal purposes. The regulation addresses areas such as the number of hours of work experience, the wage schedule, adequate and safe equipment. Under 29

C.F.R. §29.5 an "apprenticeship program" is "an organized written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation...." In 29 C.F.R. §29.5(b)(2) the federal regulations expressly defer to "industry practice" in formulating the number of hours of on-the-job training that a program must provide. Approval of a program by a State Apprenticeship Council ("SAC") state gives the program approval for federal purposes, but does *not* confer "national" approval. States that become SAC states are required to give reciprocity *only* to joint union and employer programs in industries *other* than the building and construction trades. In the building and construction industry each program must be approved by the State in which it operates or by BAT in that State. 29 C.F.R. §29.12(a)(8).

In *Calif. Div. of Labor Stds. Enf. v. Dillingham,* 519 U.S.316, 117 S.Ct. 832 (1997), the Supreme Court noted that both education and workplace standards were a part of the historic police powers of the state. As the Court observed "Congress, in the Fitzgerald Act, recognized pre-existing state efforts in regulating apprenticeship programs and apparently expected that those efforts would continue." *Id.* at 330, 117, S.Ct. at 840. In the brief of the United States as Amicus Curiae it was argued that ERISA preemption of State apprenticeship laws would leave States "without the authority to do just what Congress was expressly trying to induce them to do by enacting the Fitzgerald Act." *Id.* at 331, n.7, 117 S.Ct. at 840, n.7.

The Fitzgerald Act contemplated a federalist approach that would both encourage apprenticeship as a method of training and promote standards that would protect apprentices but that would not involve federal mandates. Different states may be expected to take different approaches to promote apprenticeship under unique local conditions. The role of OATELS in

the SAC state is to foster State and private activity in this area and to promote the inclusion of standards in contracts of apprenticeship, not to police the historic police powers of the States.

OATELS cited a portion of the legislative history for the proposition that the Act contemplated "national standards." OATELS' Motion, p. 8. It is instructive to review the actual testimony for a picture of what that concept meant:

Mr. C. R. Dooley, [a member of the Federal Committee on Apprenticeship Training]:

> ...From the employer's point of view there has not been any thought of dictation...There was, as I sensed a fear that a Government agency would attempt to dictate to them.
>
> It has been my pleasure to discuss the position of our committee in the whole picture. It is a coordinating agency; it is one of help and it is not trying to run the programs of private industry.

To Safeguard the Welfare of Apprentices, Hearings before a Subcommittee of the Committee on Labor, House of Representatives, 75th Cong., p. 6. AF Vol.2, p. 745.

Another witness, Mr. Oscar Rosenthal, [National Association of Building Trades Employers and also Associated General Contractors]:

> Some committee, body, organization must initiate, stimulate, act as a clearing house, if you will, of the various viewpoints with reference to this tremendously important subject.

To Safeguard the Welfare of Apprentices, Hearings before a Subcommittee of the Committee on Labor, House of Representatives, 75th Cong., p. 21. AF Vol.2, p.760.

This legislative history suggests that Congress wanted to foster voluntary adoption of apprenticeship standards nationwide, not to create a uniform federal apprenticeship law that would dictate either to employers and labor or to the States. The regulations provide a reference point, and outline the minimum standards that a State must meet to have state approval of programs serve as approval for federal purposes as well. Neither the Fitzgerald Act nor 29 C.F.R. Part 29 impose mandatory federal requirements on States, and no State is required to conform its apprenticeship law to these federal minimums.

II. LABOR CODE SECTION 3075(B) PROMOTES MEANINGFUL APPRENTICESHIP OPPORTUNITIES

OATELS has moved to derecognize CDIR because OATELS contends Labor Code section 3075(b) "on its face" limits rather than promotes apprenticeship. OATELS' Motion, p. 26. OATELS acknowledges that in considering its motion, "the facts and the inferences therefrom must be viewed in the light most favorable to the opposing party." OATELS' Motion, p. 25. OATELS then goes on to make a series of inferences that are not justified from the facts, let alone drawn most favorably to the "opposing party."

OATELS makes the unwarranted inference that Labor Code section 3075(b) will prevent the establishment of more than one apprenticeship program in any given trade and geographic area. If indeed Labor Code section 3075(b) were a statute that limited opportunities for apprenticeship by preventing the establishment of more than one program in any given trade and geographic area there might be an argument for derecognition. While some of the complaints received by OATELS from unilateral programs seem to make this assumption, *see*, AF, Vol. 1 p. 153, as do some comments from some joint programs received by CDIR, SAF, Vol. 2 pp. 711-713, former Director Smith has clearly stated that CDIR did not view Labor Code section 3075(b) as meaning only one program per trade and area:

> 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, p. 11.

We ask the ALJ to reject the inference that Labor Code section 3075(b) limits program approval in order to protect existing programs in favor of the view expressed by former Director Smith

that focuses on the training needs of the State. CDIR's interpretation is focused on the needs of California's economy and the prospects for apprentice employment, and these are appropriate guides for what programs should receive the State's time and education funds.

OATELS makes other assumptions that do not reflect either the purpose of the statute or the reality of existing programs. Labor Code section 3075(b) finds that there *is* a training need for a new program if there is no program in a trade or geographic area. OATELS makes the illogical inference that this means that if there is one program there is no need for another. This is not the case. Take, for example, the Western Electrical Contractor Association's ("WECA") program recently approved by the Chief, Division of Apprenticeship Standards. SAF Vol. 2, pp. 710-719. In that matter, existing IBEW-NECA joint programs were established for the purpose of training apprentices of the contactors that were signatory to the IBEW collective bargaining agreements in various counties in California. If one makes the logical inference that the purpose of those training programs was to train for those NECA member contractors and not for WECA member contractors, then the existence of these joint programs does not mean that there are no unmet training needs. In fact, the most logical inference would be that the existing joint programs did not have the capacity to meet the training needs of the WECA member contactors because that was never their purpose. Moreover, this is not just a union vs. non-union perspective. Presumably, WECA is in the business of training apprentices for contractors who are members of WECA but not for those who are members of some other "merit shop" contractor's group such as the Associated Builders and Contractors ("ABC").

OATELS argues that the fact that there are more apprentices in joint programs somehow mandates the inference that Labor Code section 3075(b) has been the cause of this difference. Again, there is no basis for this inference. ABC in its Amicus brief states that ABC is the

"leading representative" of merit shop contractors, which it says are 80% of the industry. Amicus Brief of ABC National, p. 20. ABC chapters have not been prevented from establishing programs in California. In the Amicus brief for a number of California ABC chapters ABC tells us they have programs in San Diego, in Los Angeles and Ventura and in other parts of Southern California as well as in counties in Northern California. Amicus Brief of San Diego ABC *et al.*, p. 3. If there are more apprentices in the joint programs in those areas it is not because ABC does not have programs. Indeed one could easily make the inference that there have been few applications for new "merit shop" programs because ABC programs *have already been approved and are operating*.

OATELS argues that need for low bidders and competition for jobs under the Davis-Bacon Act warrants approval of apprenticeship programs. Leaving aside for a moment the fact that this justification is not based on the Fitzgerald Act, and indeed runs counter to the purpose of the Fitzgerald Act, Labor Code section 3075(b) does not prevent the approval of programs sufficient to meet the needs of bidders on public works projects. By its terms, Labor Code section 3075(b) finds that there are "training needs" if the existing program will not, or does not, dispatch apprentices to a contractor requesting apprentices on a public works project. Thus, if a contactor wants to figure the apprentice wage into a bid, it can be done. Either the contractor can request apprentices from existing programs or if they will not, or cannot, or for whatever reason do not dispatch apprentices, the "training needs" for a new program are established.

The Fitzgerald Act however was not enacted to benefit contactors. "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). There may be a temptation to create an apprenticeship program solely to secure a low bid on a federal project. This is one of the reasons the State, and surely OATELS as well, looks to whether the contractor can fulfill the promise to the apprentice of on-the-job training in all work processes of a trade as well as all the related and supplemental instruction necessary for a worker to hold him or herself out as a fully qualified journeyperson.

The Fitzgerald Act's mission as protective legislation for the apprentices is alive and well. The courts recognize that, under the Act, the need for such protection trumps the interests of contractors and provides some restraint on the market forces that left unchecked might turn apprenticeship programs into sources of cheap labor for contactors rather than sources of training and advancement for apprentices. In *ABC v. Reich,* 963 F. Supp. 35 (D.C.D.C. 1997), the court found that the Act was "enacted to address the fact that young men and women employed in skilled grades were not receiving organized training, to the detriment of our Nation.", and also that "The Act is neither pro-industry nor pro-labor union. It is pro-apprentice." *Id.,* at 38. Apprenticeship legislation has historically been focused on the protection of the apprentice.

OATELS refers to a number of cases in support of its position that competition among apprenticeship programs is itself a worthy objective under the Fitzgerald Act. None of these cases involve apprenticeship. Rather, they involve the disputes of professionals and companies in the world of business.[1] Indeed, the conclusion is inescapable that OATELS has mistaken the

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[1] *National Society of Professional Engineers v. U.S.,* 435 U.S. 679, 695 (1978) is a case where the U.S. Supreme Court found that the canon of ethics of an association of professional engineers prohibiting competitive bidding for engineering services constituted a violation of the Sherman Anti-Trust Act. It does not involve apprenticeship. *FTC v. Superior Court Trial Lawyers Ass'n.,* 493 U.S. 411, 423-24 (1990) is a case where the Supreme Court held that a boycott to compensation by a group of lawyers regularly acting as court-appointed counsel for indigent defendants in criminal cases also violated antitrust laws. It does not involve apprenticeship. *Pan Am World Servs. v. U.S.,* No. CIV.A.88-0304 (RCL), 1988 WL 25480 at *1 (D.D.C. Mar. 9, 1988) is a case where the court found that Pan Am had given up any right to trade secret

best interests of the contractors who sponsor apprenticeship programs for the best interests of apprentices, and in so doing has misconstrued the legal import of California's apprenticeship law change in respect to the Fitzgerald Act. Labor Code section 3075(b) clarifies a pre-existing statute to provide that training programs will be approved where need exists. This is hardly incompatible with the Fitzgerald Act's express purpose to safeguard apprentices and promote apprenticeship standards.

III. THERE IS NO "PRIOR APPROVAL" REQUIREMENT IN LAW OR REGULATION

OATELS contends that the undisputed facts show that it is entitled to a decision that *any* change in state law is grounds for derecognition, absent its "prior approval," as a violation of 29 C.F.R. § 29.12(a) and various of its circulars. There are a number of problems with that argument. First, 29 C.F.R. § 29.12(a)[2] sets forth only what requirements a State must meet when

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protection in the contract it signed with the Air Force for operation of a missile testing range, and thus could not block the Air Force in putting a new contract out for bid. It does not involve apprenticeship. *Kajima / Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal. 4th 305, 1 P.3d 63, 68 (Cal. 2000), *Valley Crest Landscape, Inc. v. City Council of the City of Davis,* 41 Cal. App. 4th 1432, 49 Cal. Rptr. 2d 184, 188 (Cal. Ct. App. 1996), and *M & B Contr. v. Yuba County Water Agency,* 68 Cal. App. 4th 1353, 81 Cal. Rptr. 231, 234 (Cal. Ct. App. 1999) all involve suits by unsuccessful bidders regarding the awarding of contracts on public works projects. These cases do not involve apprenticeship. *Standard Oil Co. v. FTC,* 340 U.S. 231, 248 (1951) involves Standard Oil's challenge to a Federal Trade Commission order preventing it from selling gasoline to "jobber" customers for less than it sold to small service stations. It does not involve apprenticeship.

[2] 29 C.F.R. § 29.12(a) provides as follows: (a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;

applying to become a SAC state. It does not impose obligations on the States to continuously reapply for approval once they have become SAC states.[3] The Secretary of Labor's published comments when it promulgated the Fitzgerald Act's implementing regulations clarify that the purpose of this provision is not to enable the BAT to control SACs or to dictate policies and procedures of the SACs to which the Secretary has accorded recognition.[4] This is consistent with the view that the apprenticeship system is *not* one of national uniformity, but rather in the nature of a cooperative, working relationship between the federal government and the various SAC states.

The regulations contain no requirement for "prior approval" and instead provide for the derecognition of a State that fails to operate in conformity with 29 C.F.R. Part 29. A review of the record regarding the other States that OATELS contends have requested or been granted "prior approval" reveals that OATELS' communications have addressed the content of the laws and not any alleged failure by a State to obtain "prior approval" in the lawmaking or regulatory process.[5]

OATELS contends that various unpublished BAT circulars establish that Reg. 29.12(a) were intended to impose some sort of continuing obligations on States. However, BAT circulars are not binding, either on the Secretary of Labor or on anyone else, and create no legal rights for

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(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

[3] Of course, CDIR would agree that communicating about proposed law changes is an important component of a cooperative partnership, such as the one between the federal government and the SAC states. However, care should be taken not to read mandatory requirements into the law where none exist.

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

anyone.[6] Moreover, any BAT circular that did profess to read language into Reg. 29.12(a) in order to impose continuing obligations would directly contradict the plain language of the published comments in the Federal Register.

OATELS concedes that there is no "formal process" for obtaining "prior approval."[7] Yet incredibly, OATELS also complains that CDIR did not "formally" notify OATELS of the proposed law. OATELS' Motion, p. 35. How can CDIR be charged with failure to "formally" notify if there is no "formal" process? CDIR agrees that it did not ask for or receive OATELS' "prior approval," but OATELS must admit that there was no formal process for asking or receiving "prior approval."

Finally, OATELS utterly fails to articulate how the nebulous "prior approval" requirement they assert could serve any useful function. It opines that if California had "complied" with this requirement, OATELS could have started its consultative process earlier, and might have persuaded the California Legislature not to enact Labor Code section 3075(b). OATELS' Motion, p. 36. "Prior notice" would serve this function just as well. Giving OATELS "prior notice" would allow OATELS to raise its objections without placing an unlimited hold on the State's legislative or regulatory activity.

OATELS also opines that if California had refrained from making proposed changes during any period of consultations with OATELS, "no matter how extended," this would protect

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[5] SAF, Vol. 1, Florida (pp.199-200, 222-224, 371-372); North Carolina (pp. 363-364); New Mexico (pp.125, 149,150, 165, 167); Oregon (pp. 359-360); Washington (pp. 231-232).

[6] OATELS has apparently ignored two of the cases it cites. In both, the courts expressly found that BAT circulars are not binding and do not create any legal rights in anyone. *Gregory Electric Co., Inc. v. U.S.D.O.L.*, 268 F. Supp. 987, 994 (D.S.C. 1967); *Daugherty v. U.S., Secretary of Labor, et al.* 1974 WL 215 (S.D.Tex. 1974). Interestingly, *Gregory*, BAT had acted contrary to the terms of its own circular in refusing to register a program.

[7] OATELS' Response to CDIR Interrogatory No. 7, SAF, Vol. 2, p. 579.

apprentices from exposure to harmful, nonconforming state requirements. OATELS' Motion p. 37. OATELS however asserts that "prior approval" is required for all changes. OATELS' failure to act would prevent the apprentices from benefiting from favorable laws to the same extent as it might protect apprentices from unfavorable laws.

How can a "prior approval" requirement that serves no function not otherwise served by derecognition, possibly benefit apprentices and promote apprenticeship standards? No answer appears from OATELS' papers. On the other hand, a requirement to obtain "prior approval," unaccompanied by any process for doing so, may well discourage a State from taking on the voluntary role as SAC state. In the current budget environment it seems foolish to provide such a substantial disincentive to a State to act as a SAC state. If a State finds "prior approval" too intrusive and burdensome and returns the federal registration responsibilities to OATELS, it would force OATELS to increase dramatically the staff to review programs and handle apprentice complaints and do all the other things required of a vital apprenticeship system.

IV. CONCLUSION

For all the reasons discussed above, OATELS' motion should be denied and CDIR's motion granted. Labor Code section 3075(b) does not restrict apprenticeship programs to one per trade and geographic area. Rather, it directs CDIR to be sensitive to labor market needs when approving apprenticeship programs. OATELS' has not shown that there is any "prior approval" requirement, and in any case such a rule is neither necessary nor desirable.

Respectfully submitted,

Dated: October 4, 2004

FRED D. LONSDALE
CAROL BELCHER
Attorneys, Office of the Director, Legal Unit,
California Department of Industrial Relations