

No. 36103-5-II

COURT OF APPEALS, DIVISION TWO,  
OF THE STATE OF WASHINGTON

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WESTERN WASHINGTON OPERATING ENGINEERS  
APPRENTICESHIP COMMITTEE; WESTERN STATES OPERATING  
ENGINEERS INSTITUTE OF TRAINING APPRENTICESHIP  
COMMITTEE; and OREGON/SOUTHWEST WASHINGTON IUOE  
701 & AGC HEAVY EQUIPMENT OPERATORS JATC

Petitioners/Appellants,

v.

WASHINGTON STATE APPRENTICESHIP AND TRAINING  
COUNCIL,

Respondent/Appellee,

and

CONSTRUCTION INDUSTRY TRAINING COUNCIL OF  
WASHINGTON and DEPARTMENT OF LABOR AND INDUSTRIES  
of the STATE OF WASHINGTON,

Interested Parties Aligned with Respondent.

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**OPENING BRIEF FOR APPELLANTS**

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred by entering its Order of February 22, 2007 denying the appellant JATCs' Petition for Judicial Review of Agency Action.

2. The trial court erred by entering its Order of February 22, 2007 denying appellant JATCs' motion for award of attorney fees and costs.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did respondent Washington State Apprenticeship and Training Council ("Council") correctly find that Interested Party Construction Industry Training Council of Washington ("CITC") complied with RCW 49.04.040, which requires that members of apprenticeship committees be chosen "in a manner which selects representatives of management and nonmanagement," when CITC asked employers to find employee-side representatives and there was no other evidence regarding how the employee-side members were selected? (Assignment of Error 1)

2. Did the Council correctly find that CITC complied with WAC 296-05-313(4), which requires that all apprenticeship committee members "must be knowledgeable in the process of apprenticeship and/or

the application of chapter 49.04 and these rules,” when there was no evidence that three of six committee members were experienced in apprenticeship or apprenticeship rules but where CITC promised to supply relevant information following their appointment? (Assignment of Error 1)

3. Did the Council comply with provisions of the Administrative Procedures Act, RCW 34.05.449(2) and .452(3), requiring that testimony be taken under oath subject to cross-examination, when it solicited unsworn testimony, not subject to cross-examination, from CITC at an open public meeting that related CITC’s committee member selection process to earlier cases decided by the Council? (Assignment of Error 1)

4. Was the Council required to follow the requirement for the taking of official notice, RCW 34.05.452(5), when it grounded its decision on earlier minutes of Council meetings describing CITC’s committee selection process followed in former cases without complying with the APA provision for the taking of official notice? (Assignment of Error 1)

5. Did the Council properly find that CITC’s proposed apprenticeship standards satisfied the requirements of WAC 296-05-316(26) that proposed standards be reasonably consistent with the standards of existing approved apprenticeship programs and that the

proposed course content and delivery method be designed to achieve the same level of skills as existing standards, where CITC did not demonstrate in the adjudicatory hearing that the hours per year devoted to ‘hands-on’ practical training component matched those of existing programs and where there was no other evidence demonstrating practical training on heavy construction equipment? (Assignment of Error 1)

6. Did the Council comply with the same regulation, WAC 296-05-316(26), when the CITC standards that ultimately were approved by the Department of Labor and Industries, as the staffing agency to the Council, lacked any reference to CITC’s promise to provide a specified amount of practical ‘hands-on’ training? (Assignment of Error 1)

7. Should attorney fees and costs be awarded to the JATCs under RCW 4.84.350 for work in the superior court and before this Court? (Assignment of Error 2)

#### **STATEMENT OF THE CASE**

1. Procedural History. This matter was before this Court earlier. Western Washington Operating Engineers Apprenticeship Committee v. Washington State Apprenticeship and Training Council, 130 Wn. App. 510, 123 P.3d 533 (2005). The Court reversed the Council’s decision approving CITC’s proposed Operating Engineer Apprenticeship

Standards on two relevant grounds.<sup>1</sup> The Council had denied the JATCs, who are sponsors of existing apprenticeship programs, the right to challenge the composition of CITC's apprenticeship committee in an adjudicatory hearing. This Court ordered the Council to conduct an adjudicatory hearing on the matter. Also, the Court vacated the Council's findings that CITC's standards were consistent with existing programs for 'hands-on' practical training and remanded for agency review.

Both subjects are presented again, albeit in a different guise.

First, apprenticeship committee members must be "chosen" "in a manner which selects representatives of management and nonmanagement." RCW 49.04.040. Committee members "must be knowledgeable in the process of apprenticeship and/or the application of chapter 49.04 RCW and [Council] rules." WAC 296-05-313(4). After the Court's decision, the Council conducted an adjudicatory hearing concerning CITC's committee. The Council concluded that the Committee was selected and composed in accord with the statute and its regulations (R 275-276). The JATCs believe otherwise, and also challenge the Council's decision-making procedure in three respects.

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<sup>1</sup> The Court also remanded for review of a third issue. However, since CITC adequately articulated an apprentice's disciplinary appeal rights in its revised proposed standards, that issue no longer is before the Court.

Second, Council regulations require that standards of applicant programs be “reasonably consistent” with those of existing programs, and that the course content and delivery method of off-the-job instruction be designed to achieve the same levels of skills as existing standards. WAC 296-05-316(26). As the Court will recall, an apprenticeship program is a mix of on-the-job work supervised by journeymen and craft foremen (OTJ), and what the apprenticeship world calls ‘classroom’ training or related and supplemental instruction (RSI). All operating engineer programs devote a portion of ‘classroom’ RSI to practical or hands-on training. Due to the size of the construction equipment, this training is conducted outside, not in a classroom lab.

CITC planned to conduct no more than 50% of RSI as practical hands-on training, while the competing JATCs devoted between 60% and 80% of RSI to such training (R 16). The Court of Appeals found that the JATC programs spent between 25% and 50% more time on practical training. The Court vacated the Council’s decision because there was no evidence that CITC could produce the same skill level as the JATCs with substantially less hands-on training (R 16). The JATCs challenge the Council’s conclusion that CITC complied with the regulation by placing in its standards a promise that between 60% and 80% of its off-the-job training would consist of practical hands-on training (R 154, 275).

2. Council Proceedings Following Remand. The Council's actions following remand divide into five phases: the adjudicatory hearing when testimony was taken under oath and subject to cross-examination before two members of the seven-member Council; the argument of counsel to the full Council where CITC's vice-president of apprenticeship offered substantive comments and responded to Council members' questions; the deliberations of the Council; the written Council order; and the Council's adoption of the formal approved Standards. Each phase is critical to judicial review.

a. *The Adjudicatory Hearing.* Halene Sigmund, CITC's vice-president for apprenticeship, testified about how the three employee-representative committee members were identified, and the knowledge base of all six members concerning apprenticeship. She identified employee representatives by contacting the owners or managers of three contractors participating in the program ("training agents") (R 65). She did not know how each employer got word of CITC's need for employee representatives to their employees (R 67). She did not know if the contractor's employees had any role in selecting their representative (R 69). One of the employee representatives, Myers, was a general foreman at the time (R 158, 202). CITC did not make available any of the committee members for testimony (R 69).

Two of the six committee members, Myers and Majors, were program instructors (R 58, 68). A third, Solt, was a recent graduate of the program (R 57). The resume for a fourth committee member, Whiteis, did not contain any reference to apprenticeship experience as a former apprentice, an instructor, a former committee member, or otherwise (R 200). No record information was provided for the two remaining committee members, Dotson and Bogardus.

Sigmund testified that she provided Dotson and Bogardus with the Standards, the Council regulations, and the RCW but did not instruct them to read the documents (R 70-71). As of the hearing, she had not mailed any materials to Whiteis (R 71-72). She represented that it was her intention to review the Standards and the committee responsibilities of these people at some unspecified date in the future (R 75).

David Perrin is responsible for the RSI program. He identified a new amendment to the CITC proposed Standards calling for RSI to consist of between 60% and 80% practical hands-on training (R 90, 154). Perrin stated that the amendment did not amount to a change because the program already offered practical training at that level (R 90-91). However, Perrin admitted that he did not have firsthand information as he relied on the input of his apprenticeship instructors (R 87-89). CITC did not present any training schedules (R 89). Perrin could identify few of the

components of hands-on training: “I’m not the one who implements the program; so it’s hard for me to capture all of them” (R 90: 12-13). Perrin testified that the 60% - 80% figure actually could include classroom time (R 92-93). Perrin answered (R 93: 9-14):

Q You said you’re already at 60 to 80 percent; yet I’m not clear that you’re able to draw the line. Do you count, towards that 60 to 80 percent, anything that goes on in the classroom?

A I’d have to go back and review the records. I’m sorry. I can’t answer that unequivocally.

Following the hearing, the JATCs and CITC submitted post-hearing briefs (R 210, 220).

b. *The Council Meeting.* Counsel for the JATCs and CITC presented argument to the Council at its next meeting (R 237 *et seq.*). However, the Council allowed CITC vice-president Sigmund to answer questions on matters of substance (R 242-244, 246-247, 251-253). Sigmund was not placed under oath, and the JATC counsel protested that fact and asked the Council to rely solely on sworn record testimony (R 256).

The Council chair engaged in the following colloquy with Sigmund (R 246: 16-23):

CHAIRWOMAN NICHOLS: I have a question. Historically for your other programs, is this a selection process that was approved by this Council?

MS. SIGMUND: I'm sorry?

CHAIRWOMAN NICHOLS: Historically for your other approved programs, was this a process that was utilized in order to select committee members?

MS. SIGMUND: Yes.

c. *The Council Deliberations.* The Council met the day following its public meeting to vote on the CITC Standards (R 263 *et seq.*). Councilmember Crane spoke in favor of the Standards (R 267: 21 to 268:4):

Also, because the Council has previously approved employee representatives who have been selected in the same manner. In July of 2000, the Council minutes indicate that the original approval of CITC's Construction Equipment Operator program was based on a determination that selection was based on volunteer participation from appropriate contractors with journey level experience, as they are here.

The Council approved the Standards by a 4-3 vote (R 268). Councilmember Crane voted to approve the Standards (*id.*). The Council, neither at the adjudicatory hearing, its open public meeting or in its deliberations the next day, provided notice to the parties of what it officially noticed or provided the parties with an opportunity to contest the material so noticed. RCW 34.05.452(5).

d. *The Council's Order.* The Council issued its written Order on May 4, 2006, shortly after the meeting (R 273). By a

four-to-three vote, the Council approved the 'hands-on' training amendment to the Standards because the proposed Standards recited the appropriate level of practical training: "The standards are consistent with existing program standards. Compliance with the standards as approved is a matter for future review" (R 274, ¶ 3).

The Council also approved the CITC committee (R 274, ¶ 4). The Council observed that CITC contacted employers to have them solicit volunteers (*id.*). In selecting employee representatives, CITC had no direct contact with the employees (*id.*). As to the knowledge level of the committee members, the Council found that CITC "is prepared to provide each of the committee members, whether employer or employee, with the necessary information for them to understand the law governing apprenticeship, the program standards and their duties in administering the law and the standards" (*id.*).

The Council then declared its rationale for approving the CITC committee (R 276). One of its reasons was former Council action (*id.*):

Further, the Council has previously approved nonmanagement representatives selected in a similar manner. In July of 2000, the Council minutes indicate that the original approval of CITC's Construction Equipment Operator committee was based on a determination that selection was based on volunteer participation from appropriate contractors with journey level experience.

e. *The Standards As Approved.* The Council published the written Standards as “approved and registered with the Washington State Apprenticeship and Training Council at the regular quarterly meeting on April 21, 2006” (R 278). The “official copy” was mailed to CITC, but not to the JATCs (*id.*).<sup>2</sup> The Standards do not contain any provision concerning hands-on practical training, much less the percentage of training (see R 290).

3. The Petition for Judicial Review. The JATCs filed their Petition for Judicial Review on May 31, 2006. The Court entered an order on February 22, 2007 denying the Petition (CP 86-87).

#### ARGUMENT

**I. THE COUNCIL WRONGLY APPROVED CITC’S COMMITTEE, BECAUSE THERE WAS NO EVIDENCE EMPLOYEES CHOSE THEIR REPRESENTATIVES OR THAT THREE COMMITTEE MEMBERS POSSESSED REQUIRED KNOWLEDGE AT THE TIME OF THEIR APPOINTMENT. ALSO, THE COUNCIL’S DECISION WAS BASED ON ILLEGAL PROCEDURE.**

We discuss the issues below without regard to the reasoning of the trial court. “When the trial court’s review of an agency decision does not entail additional evidence, we do not defer to the trial court’s decision.”

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<sup>2</sup> As a result, the JATCs were unaware of the defect and could not submit the matter as part of its Petition for Judicial Review which had to be filed within thirty days of the Council’s formal order. The JATCs, without objection from the other parties, briefed the issue before the trial court (CP 36, 41-59, 60-76).

Western Wash. Operating Engineers v. Apprenticeship Council, 130 Wn.

App. 510, 518, 123 P.3d 533 (2005).

A. The Law Requires That Employees, Not Employers, Choose Employee-Side Members of An Apprenticeship Committee. There Is No Evidence That CITC's Employee-Side Committee Members Were Chosen By Employees.

RCW 49.04.040 specifies that committee members must be “representatives” of employees or management:

Such apprenticeship committees shall be composed of an equal number of employer and employee representatives who may be chosen:

(1) From names submitted by the respective local or state employer and employee organizations served by the apprenticeship committee; or

(2) In a manner which selects representatives of management and nonmanagement served by the apprenticeship committee. The council may act as the apprentice representative when the council determines there is no feasible method to choose nonmanagement representatives.

Employee representation on apprenticeship committees is central to this state's scheme for apprenticeship. The committee is the overseer of program operations. WAC 296-05-305(3) (committees are responsible for day-to-day operations of the training program, accepting applicants, removing apprentices from the program, and operating the program in accord with legal requirements). As noted, the statute requires that employee representatives be selected and that they be equal in number to

representatives of management. RCW 49.04.040.<sup>3</sup> The statute further emphasizes the importance of equal employee representation to counterbalance management by providing that the Council itself may act as the employee representative where “there is no feasible method to choose nonmanagement representatives.” *Id.*

“Representative” is not a defined term. Therefore, we resort to the term’s “plain and ordinary meaning.” Construction Industry Training Council v. Apprenticeship Council, 91 Wn. App. 470, 474, 957 P.2d 1267 (1998), *rev. den.* 137 Wn.2d 1009 (1999). A “representative” is someone selected by the group being represented to speak for their interests. “To represent a person is to stand in his place; to speak or act with authority on behalf of such person; to supply his place; to act as his substitute or agent.” Black’s Law Dictionary (6<sup>th</sup> ed.), 1301. The American Heritage Dictionary of the English Language defines “represent” as “to serve as the official and authorized delegate or agent for; act as a spokesman for.” The statutory term connotes a conferral of authority by the represented upon the representative.

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<sup>3</sup> The statute states that the representatives “may” be chosen in one of two ways. The “may” plainly refers to the option of selecting names from those submitted by unions and employer organizations, or in another manner. There is no indication that the use of the term “may” permits a program sponsor to disregard the statute altogether. Nor has that proposition been advanced to date by any party to this action.

There is no evidence that the employee-side members were chosen in a manner which selects “representatives” of employees. To the contrary, CITC contacted *employers* and asked *them* to solicit employees to serve on the committee. There is no evidence how the employers went about doing so. There is no evidence of an employee vote, or an employee meeting. There is not even any evidence that any of the employee-side members volunteered.<sup>4</sup> This is not a merely academic point: one of the three employee committee members that were “selected” is Al Myers, a general foreman for one of the contractors.

The statute assumes that employees and their employer do not share identical interests. Yet CITC went to the employers to select employee representatives, and accepted the three names that resulted without any investigation of how the persons were chosen. That is like

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<sup>4</sup> A CITC official was asked how committee members were selected. Her response (R 49: 14-24):

Q And how are you involved?

A I am involved in that I go out for and ask from the current training agents or employers involved with CITC that currently have apprentices in the program, and I request volunteers.

Q Volunteers for employer and employee Committee members?

A Correct.

Q Okay. And how do you ask for volunteers?

A I go out to the contractors who participate and request that – for volunteers. And I use a form for that, which we’re not at yet, Exhibit –

going to the Republican members of the House of Representatives to select a Democratic Speaker of the House, then accepting the identified person without checking with the Democrats to see if that is indeed their representative.

The Council's findings of fact (R 274) accurately reflect the record. CITC contacted contractors and asked them to obtain employee volunteers. The Council made no finding that the employee-side members actually volunteered, and no finding on how they were selected. The Council acknowledged that "CITC had no direct general contact with employees" (*id.*).

The Council's error is that it failed to draw the proper conclusion from these findings. The Council did not find (nor could it have found) that the employees were chosen in a way designed to assure that they were true employee representatives. Yet that is the key fact which must exist for valid approval of a representative committee. Since evidence of representative status is missing, the Council's Order approving the committee violates RCW 49.04.040 and must be set aside.

The Council also attempted to buttress its conclusion by noting that the three employee-side members were "employees" (R 276), and that it previously approved CITC committees selected in the same manner (*id.*). Merely being an employee does not mean that the person is a

“representative” of employees. The employers just as likely could have selected the employee-side committee members. As to the latter finding, agency adherence to bad decisions made in the past does not constitute compliance with law.

As the proponent of the license application, it was CITC’s obligation to show that it complied with legal requirements. If affirmative evidence of legal compliance is lacking, there is no basis to approve the license. Nor on this record could the Council presume compliance even if the law permitted the use of presumption in place of affirmative evidence. The objecting JATCs carried their burden of proof under RCW 34.05.570(1)(a) by showing that the record lacked necessary support for the Council’s Order.

B. The Council Wrongly Concluded That The “Knowledge” In Apprenticeship Required By Its Regulation Could Be Supplied At Some Unspecified Time Following Selection As a Committee Member.

WAC 296-05-313(4) provides: “All committee members must be knowledgeable in the process of apprenticeship and/or the application of chapter 49.04 and these rules.” The regulation does not provide a probationary or in-training period for obtaining the requisite knowledge after appointment to the committee. Rather, the requirement is absolute.

Although three of the committee members had sufficient previous involvement with the apprenticeship program to satisfy this requirement, there is no evidence that the three others, Whiteis, Dotson, and Bogardus, had any required knowledge at the time they were selected. The JATCs submitted the resume of Whiteis, which demonstrated no background in apprenticeship. CITC provided no evidence regarding Dotson or Bogardus. As the applicant for the license, it was CITC's obligation to provide evidence of compliance with the Council regulation.

CITC promised that, at some point in the future, it would furnish the committee members with information about apprenticeship (R 71-72; 75; 274: 20-22; 275: 22). The Council entered a finding of fact in that regard (R 274: 20-23), and concluded that employer and employee-side committee members were "or will be given adequate information regarding the program and apprenticeship in general to function effectively as apprenticeship committee members" (R 275: 22-24; 276: 9-11).

The regulation is not drafted to permit committee members to learn on the job. It states, affirmatively, that "all committee members must be knowledgeable." This plainly means that committee members, at the time they begin their service, must possess knowledge of the system they are

helping to run.<sup>5</sup> The Council's conclusion that CITC complied with the regulation is unsupported by substantial evidence and is erroneous as a matter of law.

C. The Council's Order Must Be Set Aside Because It Relied On Unsworn Testimony Not Subject To Cross-Examination, and Grounded Its Decision On Official Notice Of Prior Agency Action Without Following APA Requirements For Doing So.

The APA requires that the Council conduct adjudicatory proceedings by placing witnesses under oath and by providing the right of cross-examination. RCW 34.05.449(2); 34.05.452(3). The Council permitted CITC officer Sigmund to verbally provide substantive material without being placed under oath. She answered that the process followed in this matter was the same CITC used for selecting committee members for other program applications that came before the Council earlier (R 246: 20-23).

The Council supported its decision on the committee selection issue as follows (R 276: 4-8):

Further, the Council has previously approved nonmanagement representatives **selected in a similar**

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<sup>5</sup> CITC's 'we'll deal with it later' treatment of this requirement resembles its effort to avoid placing required language in the standards concerning ways for apprentices to appeal adverse disciplinary decisions. CITC convinced the Council that its agreement to provide separate notice to apprentices was sufficient. In its first decision, this Court pointedly disagreed: "A representation at the adjudicatory hearing that CITC would later provide notice of this appeal right does not satisfy [the regulation] and must be set aside" Western Washington, *supra*, 130 Wn. App. at 527.

**manner.** In July of 2000, the Council minutes indicate that the original approval of CITC's Construction Equipment Operator committee was based on a determination that selection was based on volunteer participation from appropriate contractors with journey level experience. [emphasis added]

Sigmund's unsworn testimony was the only material in the agency record that tied CITC's committee selection process, used in the instant case, to any earlier cases. The testimony was germane to the Council's decision (indeed, it provided the basis for it), and was not subject to cross-examination or under oath.

Similarly, the Council took official notice of its earlier treatment of CITC's committee (R 276).<sup>6</sup> The Council violated RCW 34.05.452(5) by taking official notice without advising the parties beforehand and permitting them to contest the matter. This is not harmless error. The Council member who cast the deciding vote referenced the Council's earlier actions, and the Council was so impressed by its understanding (confirmed by CITC in unsworn testimony) of its earlier official actions that it grounded its decision on the supposed fact.

Agencies cannot adjudicate based on unsworn testimony not subject to cross-examination. Nor can agencies rely on official notice without complying with the APA. Because the Council engaged in

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<sup>6</sup> The observation is classic bootstrap, as the Council relies on the July 2000 "recognition" of the CITC committee that this Court held should have been subject to adjudicatory challenge.

unlawful procedure and decision-making process, its decision must be set aside under RCW 34.05.570(3)(c).

**II. THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE COUNCIL'S DECISION THAT CITC COMPLIED WITH THE 'COMPARABILITY' REGULATION CONCERNING HANDS-ON PRACTICAL TRAINING.**

WAC 296-05-316(26) provides that apprenticeship standards must include:

Provisions to ensure any proposed standards for apprenticeship are reasonably consistent with any standards for apprenticeship already approved by the WSATC for the industry, craft or trade in question taking into account the WSATC's determination of the apprenticeship needs of the trade and geographic area. . . . In addition, the course content and delivery method must be designed to achieve the same levels of skills as existing standards within the state for that industry, trade, or craft.

This regulation has two operative principles. First, the standards of the applicant program must be "reasonably consistent" with those of existing programs. Second, the "course content and delivery method" must be designed to achieve the same level of skills as existing standards. The first principle involves comparison of written standards. The second principle is more extensive, calling for a determination that RSI is designed to achieve the same skill level as that of existing programs.

In its earlier decision, this Court concluded that the Council relied on a misreading of the agency record to find that CITC's hands-on

practical training was “reasonably consistent” with training provided under the standards of existing programs. *Western Washington, supra*, 130 Wn. App. at 524. The Court also concluded that there was no evidence of any “unique characteristics of CITC’s program that would produce the same level of skill in operating heavy machinery with the reduced hands-on training hours.” 130 Wn. App. at 525.

After remand, CITC placed the following language in its proposed standards: “Related/supplemental instruction shall consist of between 60 and 80 percent practical training (skill training or seat-time)” (R 154). But when queried on the subject at the remand hearing, CITC’s training director first expressed the belief that some classroom time was part of the practical training percentage, then admitted that he could not answer whether CITC counted classroom training as part of the 60%-80% figure (R 92-93). No testimony from CITC instructors, and no documentary evidence was placed on the record.

The existing JATCs argued the point to the Council (R 210-217). After reviewing the testimony, the existing JATCs observed: “[E]ven in a second hearing CITC could not prove that it provided RSI [related and supplemental instruction] that satisfies the Council’s regulation requiring consistency with existing programs” (R 216).

The Council resolved the question in a highly formalistic way. It found that CITC proposed proper language in its revised proposed standards. That language was reasonably consistent with existing program standards, said the Council. The Council then side-stepped the real question by reasoning thus (R 274: 7-11):

Until the program standards are approved and the manner in which the program is operated [sic], the Council is not in a position to determine that CITC has no intention of conforming to the standards as they have been approved, as suggested by the Objectors in the post hearing brief. The standards are consistent with existing program standards. Compliance with the standards as approved is a matter for future review.

We now return to the regulation. As noted, it has two components. First, an applicant's proposed standards must be reasonably consistent with existing standards. This Court's earlier decision showed that this involves a review of the substance of the program, one that goes beyond mere inspection of words on paper. After all, the percentage of hands-on training was not part of written standards for CITC or most of the objecting JATCs. Nonetheless, the Court looked beyond the written standards to the actual amount of hands-on training provided by CITC and the competing programs. Noting the disparity between the amount of hands-on training of existing programs and that which CITC intended to

offer, the Court searched for evidence of how CITC would make up the gap so as to provide “the same level of skill.” 130 Wn. App. at 525.

But the regulation has an additional component that unquestionably required the Council to examine the substance of CITC’s proposed training regimen. The regulation requires that “the course content and delivery method must be designed to achieve the same levels of skills as existing standards within the state for that industry, trade, or craft.” Hands-on training is an element of course content and method of instruction. The Council must evaluate the reality of those matters in order to determine whether CITC has proposed a plan that is “designed to achieve the same level of skills as existing standards[.]” It ducked the question by postponing the inquiring to some unspecified future time.

There is no competent record testimony that could support a finding that CITC has proposed a training regimen reasonably equivalent to existing programs in the area of hands-on training, or that its course content and delivery method is designed to produce the same level of skills as that of existing programs. Would the regulation be satisfied if CITC actually devoted between 60% and 80% of related and supplemental instruction to “seat time” training, as the CITC proposed standards call it? It is not necessary to answer that question, as CITC’s top training official could not confirm that CITC actually provided the advertised 60% to 80%

practical hands-on ‘seat time’ training. CITC propounded no evidence to fill the gap left by its training official.

Finally, the final “official” Standards do not incorporate any reference to practical hands-on training (R 278, 279-302; *see* R 290). While the proposed standard submitted by CITC contained such a reference, the Council failed to adopt the proposed standard when it issued the official Standards (R 154). This simple defect inexplicably was overlooked by the Council as well as by the trial court. Therefore, the Council failed to approve standards that met even its own crabbed view of appropriate standards.

### **III. THE JATCs WILL REQUEST AN AWARD OF ATTORNEY’S FEES AT THE APPROPRIATE TIME.**

In their Petition for Judicial Review, the JATCs requested an award of fees under this state’s equivalent of the Equal Access to Justice Act, RCW 4.84.350 (CP 8-9, ¶ 12). The JATCs alleged that they are “qualified parties” under the Act (*id.*).

RCW 4.84.350(1) provides that fees and costs shall be awarded to a qualified prevailing party “unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.” The Council’s treatment of the issues following remand was not

substantially justified. The majority of the Council simply closed its eyes to each substantive issue before it:

- It found compliance with the committee selection process, even though CITC approached only the *employers* for selection of *employee* representatives, and there was no other evidence credited by the Council of how the employee-side members were selected.
- It found compliance with the requirement that committee members be knowledgeable about apprenticeship, when the record lacked any evidence that several were knowledgeable and the Council attempted to end-run that deficiency by allowing CITC to satisfy the defect after the fact. Moreover, this Court earlier had chided the Council for its similar cavalier treatment of deficiencies in CITC's notice to apprentices of disciplinary appeal rights.
- The Council breached basic rules of administrative procedure.
- The Council, notwithstanding this Court's focus on the substance of training, adhered to a formalistic "paper" comparison of CITC's proposed standards with those of existing programs. By doing so, it disregarded testimony

from CITC's own training director that he could not confirm that CITC actually provided the kind of training it said it did in its proposed standards.

- The Council couldn't even issue standards on the hands-on training matter that corresponded with the standards proposed by CITC

This is not a record of substantial justification. To the contrary, it represents an abysmal example of agency decision-making. No countervailing circumstances are presented. (We note also that this Court awarded fees to another JATC even while affirming the Council on several challenged issues. *See*: unpublished order following Seattle Area Plumbers Apprenticeship Committee v. Apprenticeship Council, 131 Wn. App. 862, 129 P.3d 838 (2006).

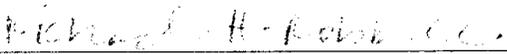
### CONCLUSION

For the foregoing reasons, the Council's decision should be vacated and set aside. This is the same result adopted by the state Supreme Court in Seattle Building Trades v. Apprenticeship and Training Council, 129 Wn.2d 787, 804, 920 P.2d 581 (1996), by this Court in its previous decision, and by Division One in CITC v. Apprenticeship and Training Council, 91 Wn. App. 470, 957 P.2d 1267 (1998), *rev. denied*

137 Wn.2d 1009. Moreover, this Court denied CITC's motion for stay following the previous decision.

There is nothing to remand for further Council review. CITC has had its opportunity to present its case in favor of its standards. It failed to provide sufficient evidence that it satisfied legal requirements.

DATED this 14<sup>th</sup> day of June, 2007.

  
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Attorneys for JATCs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of June, 2007, I caused the original and one copy of the foregoing **OPENING BRIEF FOR APPELLANTS** to be filed with the Court of Appeals, Division II, via first class mail, postage prepaid, to the following address:

David Ponzoha  
Clerk of the Court  
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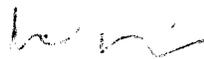
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