

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

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.

REPLY BRIEF FOR APPELLANTS

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REPLY ARGUMENT

I. THE COURT SHOULD SET ASIDE THE APPRENTICESHIP COUNCIL'S ORDER AS THE CITC COMMITTEE DOES NOT COMPLY WITH MINIMUM REQUIREMENTS FOR THE GRANTING OF THE LICENSE.

A. There Is No Evidence That CITC Complied With The Requirement That Employee-Side Committee Members Be Chosen So That They are Truly Employee Representatives.

This appeal does not call for “judicial micromanagement” (CITC Brief, 13) but simply a straightforward application of the law. RCW 49.04.040 mandates that apprenticeship committees must be “chosen . . . in a manner which selects representatives of management and nonmanagement[.]”¹ The only evidence is that CITC asked employers to find employee representatives, and from that emerged two employees and one general foreman willing to serve. That is the sum total of the evidence and of the Council’s findings of fact.

There being no disputed facts on this subject, it is the Court’s role to apply the law de novo to determine whether the Council’s approval of the CITC committee complied with law. “While an agency’s findings of fact are granted deference, applying the law to the facts is a question of

¹ The federal Fitzgerald Act, 29 U.S.C. § 50, does not contain a provision resembling RCW 49.04.040, hence there is no basis to refer to federal law.

law which we review de novo.” Mader v. Health Care Authority, 149 Wn.2d 458, 470, 70 P.3d 931 (2003).

Neither appellee seriously questions the proposition that the statute requires that employees choose their own representatives. Contrary to appellees’ straw man argument, the JATCs have not insisted on a particular form of choice such as an election. Their point is that whether by election, employee meeting, or some other method, the law requires that employees choose.

There is no evidence that happened here. Indeed, the Council makes a crucial admission: “the JATCs argue there is no evidence the employee members were chosen by the employees. While this may be true . . . ” (Council/L&I Br., 11-12). Again, the Council admits that “the only evidence in the record on this issue is that CITC asked employers to solicit volunteers for the committee positions” (*id.*, 13 n. 7).

The Council claims that “the employee representatives were selected from volunteers . . . ” (*id.*, 14). Not so. The record is silent on how the three employee-side people were selected. All we know is that after the fact, they signed a statement expressing their willingness to serve. That could come equally from a true request for volunteers, or from an employee being “volunteered” by his or her boss. The fact that they are

employees does not establish what the law requires: that they be chosen in a way so that they are representatives of employees.

The JATCs acknowledge that they carry the burden of showing that the Council's decision was erroneous. They have done so by identifying the applicable law and the absence of any record fact showing that the employee-side committee members were chosen in a manner that the Council reasonably could conclude that they were "representatives" of employees. The JATCs need do no more.

Appellees confuse the burden of proving agency error with the burden of producing evidence at an adjudicatory hearing over a license application. The JATCs have no burden to produce evidence. CITC, as the license applicant, must show that its application complies with applicable law including RCW 49.04.040. If the evidence is insufficient to show legal compliance, then the JATCs have satisfied their burden of proof by pointing that out.²

CITC's representation that it conducted an employee election, nine months after the Council Order, will not do. Even assuming it is true, the

² Seattle Building Trades v. Apprenticeship Council, 129 Wn.2d 787 (1996), cited by CITC (Br., 13), nowhere states that a license may be granted when the evidence before the agency does not show compliance with basic requirements. The "contest," after all, occurs at the time of license application and before license approval. At the adjudicatory hearing, there is no presumption that the license applicant meets legal requirements.

fact is not in the agency record and could not have provided a basis for the Council's decision. New evidence cannot be accepted, even if a motion were filed at this late date, because it would not "relate to the validity of the agency action at the time it was taken." RCW 34.05.562(1).

The law is premised on the proposition that apprenticeship committees be jointly administered by labor and management. In the unionized sector, the employee representation requirement is satisfied by appointments to the committee by unions, the employees' legal representative. In the non-union sector in which CITC exists, the law similarly requires that employee-side members be "chosen" so that they are true representatives independent of management. That is an essential safeguard for all apprentices whose craft training is in the control of others.

B. The Council's Findings of Fact Do Not Support Their Conclusion That Three Committee Members Possessed Required Knowledge of Apprenticeship.

We start with the facts as actually found by the Council. CITC confirmed with *employee* members that "they understood the duties of an employee committee member" (R 274: 19-20). CITC "is prepared to provide" *employee* and *management* members with information "for them to understand the law governing apprenticeship," the Standards, and their duties (*id.*, 20-23). The *management* members "have, or will be given

adequate information” regarding the program and apprenticeship (R 275: 22-24).³ That is the sum total of the facts found by the Council to support its conclusion that CITC’s committee complied with the “knowledge” requirement of WAC 296-05-313(4).⁴

From this, the Council concluded that the committee members “have, or will be given” adequate information (R 276: 9). There was no finding that all six members possessed the requisite knowledge at the time of their appointment.

These facts do not support the Council’s conclusion. First, an “understanding of the duties” of committee membership does not equate with knowledge of apprenticeship, and the Council found only that *employee* members had such an understanding. Second, CITC provided a packet of Standards, regulations, and the RCW to Dotson and Bogardus, but did not instruct them to read the materials (R 70-71). There is no evidence that they read them. Moreover, the Council could not properly characterize the handing of a stack of paper to a person, with no apparent study or training, with “knowledge.” Third, as to Whiteis, the Council simply ignores the fact (as shown by his resume – R 200) that his work

³ This appears under the heading “Decision” but is a finding of fact.

⁴ The Council also found that the employee members had sufficient work experience in the craft and that the management members came from employers served by the committee – separate regulatory requirements found at WAC 296-05-313(3).

experience does not list anything relating to apprenticeship.⁵ Appellees assume that someone working with a construction firm would brush up against some knowledge of apprenticeship, but there is no reason to accept that proposition.

Again, appellees blame the absence of necessary evidence on the JATCs. But, as shown above, the JATCs are not the entity applying for the license. No presumption of compliance attaches to the license application. The JATCs carry the only burden placed on them by showing, as they have here, that substantial evidence does not support the Council's conclusion that three of CITC's six committee members possessed the minimum knowledge to serve.

The Council's conclusion, that a sponsor complies with WAC 296-05-313(4) by appointing committee members without knowledge, and training them sometime in the future, is so plainly wrong that deference should not be extended to it. Once a committee is approved as part of the Standards process, the committee is responsible for daily operations,

⁵ Under "substantial evidence" review, contradictory evidence may not be disregarded. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." The "body of evidence opposed to" the agency's view must be considered. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed 456 (1951); RCW 34.05.001 (state APA to be read consistently with federal agency law).

accepting and rejecting applicants,⁶ disciplining apprentices, and other major functions central to apprenticeship. WAC 296-05-303(3). These matters require an able committee that is cognizant of the nature of apprenticeship and their responsibilities. While the regulation specifies no particular quantum of knowledge, it necessarily assumes that the committee member will be able to capably perform his or her mandated functions. The regulation does not provide for a probationary or training period, and it is error for the Council to allow one.

C. CITC Agent Sigmund's Unsworn Testimony Was Pivotal To The Council's Decision.

As part of its rationale concerning committee selection, the Council concluded (R 276: 5-8):

[T]he 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. [emphasis added]

The Council approved CITC's application by a 4 – 3 vote (R 267). The member casting the deciding vote explicitly relied on her understanding

⁶ The Council has promulgated detailed equal employment opportunity regulations governing the application process. WAC 296-05-400 *et seq.*

that the Council previously approved employee representatives “who have been selected in a similar manner” (R 267: 22 – 23).

There was no testimony at the adjudicatory hearing that compared the 2005 appointment of employee representatives to 2000 events. Only CITC agent Sigmund’s later statement, resulting from a pointed question by the Council’s chair, did so (R 246: 20 – 23).⁷ Sigmund was not sworn at that time.

The Council’s defenses are meritless. First, Ms. Sigmund’s statement was “testimony” within the meaning of the APA because it responded to an agency question and related to a matter of fact not argument. Nor did it simply recapitulate the Council’s earlier actions. It affirmatively represented that the 2005 event occurred in the same fashion as the 2000 event. Second, the APA requires that testimony be taken under oath. There are no exceptions. Civil law analogies to failure to timely object do not apply given the APA’s strict requirement. Third, the error was not harmless. The outcome hinged on one vote. The only Council member who explained her vote on the record pointed specifically to this matter as a reason for her vote. Her voting statement was reiterated virtually verbatim in the Council’s written Order.

⁷ The Council’s brief, at page 18, mistakenly cited the record source for the exchange between Chair Nichols and Ms. Sigmund.

The JATCs withdraw their Assignment of Error No. 4 pertaining to official notice, but note that the earlier Council decision referred to is the very one that this Court earlier found that the JATCs wrongly were denied the right to challenge.

II. CITC FAILED TO SHOW THAT ITS HANDS-ON TRAINING WAS REASONABLY CONSISTENT WITH EXISTING PROGRAMS OR THAT ITS COURSE CONTENT AND DELIVERY METHOD WAS DESIGNED TO ACHIEVE THE SAME SKILL SET AS EXISTING PROGRAMS.

This Court concluded in the first appeal that CITC's hands-on training did not match that of existing programs. Because the Council failed to explain how CITC could produce the same level of skills required by WAC 296-05-316(26), or was consistent with other programs, the Court remanded (R 16, 19).

CITC attempted to fix the problem by amending its standards to provide for hands-on training equivalent to existing programs. The 2006 adjudicatory hearing was called to permit questioning on that point. CITC's Training Director at first testified that some of the supposed practical training was really classroom training, then could not furnish a coherent answer at all.

CITC did not adequately answer the Court's question, because it could not show that its stated amount of hands-on training really was, in fact, hands-on training.

The Council's answer was to rest on the formality that CITC's written standards contained the required verbiage, and to ignore the Training Director's record testimony by claiming that compliance could be the subject of later oversight (R 274: 11).

The regulation requires more than paper formalities. The proposed standards must contain course content and delivery methods designed to achieve the same level of skills as existing programs. That calls for evaluation. Because CITC's person in charge of training could not verify that CITC actually furnished the amount of hands-on training it said it did, CITC and the Council failed to carry the burden placed upon them by the remand.

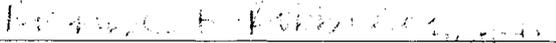
CONCLUSION

Neither CITC nor the Council responded to the JATCs' request that the Court set aside the Council's Order in the event the Order is

deficient in one or more respects. No remand for yet further hearings,
time, and expense can be justified.

The JATCs renew their request for attorney fees.

DATED this 31st day of August, 2007.


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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2007, I caused the original and one copy of the foregoing **REPLY BRIEF FOR APPELLANTS** to be filed with the Court of Appeals, Division II, via first class mail, postage prepaid, to the following address:

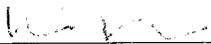
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