

NO. 36103-5-II

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
07 JUL 16 PM 2:50  
BY DEPUTY

---

**COURT OF APPEALS FOR DIVISION II  
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,

Appellants,

v.

WASHINGTON STATE APPRENTICESHIP AND TRAINING  
COUNCIL,

Respondent,

and

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

Interested Parties.

---

**BRIEF OF INTERESTED PARTY  
CONSTRUCTION INDUSTRY TRAINING COUNCIL OF  
WASHINGTON**

---

---

Judd H. Lees, WSBA #10673  
Williams, Kastner & Gibbs PLLC  
Two Union Square  
601 Union Street, Suite 4100  
P.O. Box 21926  
Seattle, WA 98111-3926  
(206) 628-6600  
Attorneys for Interested Party

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR .....	1
II. COUNTERSTATEMENT OF THE CASE.....	2
A. Remand Order .....	2
B. Council’s Adjudicative Proceeding .....	3
C. Trial Court Review .....	7
D. Appeal.....	10
III. ARGUMENT.....	10
A. Appellants Have the Burden of Demonstrating the Invalidity of the Council’s Action. ....	10
B. Since Substantial Evidence in the Records Supports the Correctness of the Council’s Approval of the CITC Committee, the Appeal Should Be Dismissed.....	14
1. CITC Established that it Adhered to a Consistent and Logical Procedure for Selecting Committee Members in Compliance with RCW 49.04.040.....	15
2. Substantial Evidence Supports the Fact that CITC’s Proposed Apprenticeship Committee Members Possessed the Requisite Knowledge of Apprenticeship. ....	18
3. There is no Evidence that the Council Relied Upon Non-Record Evidence or Unsworn Testimony. ....	19
C. Substantial Evidence Supports the Council’s Determination that Amendment of the Standards Regarding Hands-On Training Was Sufficient.....	21
IV. CONCLUSION.....	24

**TABLE OF AUTHORITIES**

**CASES**

Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus., 122 Wn. App. 402, 409, 97 P.3d 17 (2004), review granted, 154 Wn.2d 1001, 113 P.3d 481 (2005).....11

Daugherty v. U.S.,  
86 L.R.R.M. 3075 (D.S.D. Tex. 1974) .....12

Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982).....17, 18, 19

Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 860 P.2d 390 (1993) .....17

Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology,  
146 Wn.2d 778, 51 P.3d 744 (2002).....11

Seattle Bldg. and Const. Trades Council, v. Apprenticeship and Training Council, 129 Wn.2d 787, 920 P.2d 581 (1996).....3, 4, 5, 6, 9, 13

Snohomish County v. State,  
69 Wn. App. 655, 850 P.2d 546 (1993) .....17

State v. McAllister,  
31 Wn. App. 554, 644 P.2d 677 (1981) .....14, 15

State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 88 P.3d 375 (2004).....11

Vergeyle v. Employment Security,  
28 Wn. App. 399, 623 P.2d 736 (1981) .....19

Western Washington Operating Engineers Apprenticeship Committee, et al. v. Washington State Apprenticeship and Training Council, 130 Wn. App. 510, 123 P.3d 533 (2005).....  
..... 2, 13, 14

**STATUTES AND ADMINISTRATIVE CODES**

28 U.S.C. § 50 .....12

National Apprenticeship Act, 29 U.S.C. § 50.....12

RCW 34.05.422(1)(b) .....3, 13

RCW 34.05.452(5).....19

RCW 34.05.470 .....20

RCW 34.05.562 .....20

RCW 34.05.570(a) .....10

RCW 34.05.570(d) .....11

RCW 34.05.570(3)(c) .....11

RCW 34.05.570(3)(e) .....11

RCW 34.05.570(3)(h).....19

RCW 34.05.570(3)(i) .....11

RCW 34.05.574 .....11

RCW 49.04 .....14, 18

RCW 49.04.010 .....17

RCW 49.04.040 .....15

RCW 49.04.040(1).....17

RCW 49.04.040(2).....15

WAC 296-05-009.....6

WAC 296-05-303 .....18

WAC 296-05-313(1).....15  
WAC 296-05-313(4).....18

**COURT RULES**

Rule of Appellate Procedure (RAP) 9.11 .....16

## **I. ASSIGNMENTS OF ERROR**

Interested Party Construction Industry Training Council of Washington (“CITC”) takes issue with Appellants’ statement of the assignments of error and issues pertaining to assignments of error and responds with the following:

1. Did the Trial Court err in affirming the Washington State Apprenticeship and Training Council’s (“Council”) approval of the proposed employee-members of the CITC Apprenticeship Committee based upon the Appellants’ failure to provide any evidence at the adjudicative proceeding that employers hand-selected the proposed employee representatives?

2. Did the Trial Court err in affirming the Council’s determination that the proposed Apprenticeship Committee members were “knowledgeable in the process of apprenticeship” based upon Appellants’ failure to provide any evidence at the adjudicative proceeding that three of the six Committee members at issue were not knowledgeable?

3. Did the Trial Court err in affirming the Council’s reliance upon precedent relating to the selection process for proposed Committee representatives?

4. Did the Trial Court err in affirming the Council's approval of an amendment to the CITC standards requiring "hands on" training reasonably consistent with existing standards?

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. Remand Order**

This appeal arises from the Council's response to the Washington Court of Appeals' November 22, 2005 decision partially granting Appellants' appeal of the Council's initial approval of CITC's Operating Engineers' apprenticeship training standards.<sup>1</sup> Pursuant to this Court's decision, the Council's approval of CITC's standards was vacated and the matter remanded for a second adjudicatory hearing on: (1) the composition of CITC's apprenticeship committee; (2) the "hands-on" training component of the related supplemental instruction ("RSI") to verify that the RSI includes 60-80% hands-on training reasonably consistent with other related programs; and (3) amendment of the standards to reflect that apprentices retain disciplinary appeal rights to the Council.<sup>2</sup> In response to the Court of Appeals ruling, the Council directed

---

<sup>1</sup> Western Washington Operating Engineers Apprenticeship Committee, et al. v. Washington State Apprenticeship and Training Council, 130 Wn. App. 510, 123 P.3d 533 (2005).

<sup>2</sup> "We reverse and remand for a formal adjudicatory hearing on the Committee composition designated in the standards. We also vacate the ALJ's and the Council's findings that CITC's apprenticeship standards were (1) reasonably consistent with other related programs for hands-on training; and (2) adequately articulated an apprentice's

the parties to participate in an adjudicatory proceeding to address all three issues.<sup>3</sup>

B. Council's Adjudicative Proceeding

On February 16, 2006, the Council held a special adjudicatory proceeding under the direction of Council Chair Melinda Nichols to address the three issues on remand. (R. 14). Prior to the adjudicatory proceeding, Appellants did not submit any written reasons as to why--or even whether--they "contested" CITC's proposed committee. Indeed, even at the hearing, Appellants presented no witnesses or evidence regarding the unsuitability of proposed committee members. (R. 62).

In order to comply with the Court of Appeals remand, CITC presented testimony by Halene Sigmund, vice-president of apprenticeship for CITC, regarding the identity of, and the selection process for, proposed employer and employee representatives on its apprenticeship committee. (R. 16). With regard to the committee selection process, Sigmund testified that the employer and employee representatives were chosen from

---

disciplinary appeal rights. These issues must be addressed on remand." 130 Wn. App. at 527.

<sup>3</sup> An adjudicatory proceeding was first required in the apprenticeship context by the Washington Supreme Court in Seattle Building and Construction Trades Council, et al. v. The Apprenticeship and Training Council, 129 Wn.2d 787, 920 P.2d 581 (1996). There, the Court ruled that state approval of an apprenticeship program constituted a "license" subject to RCW 34.05.422 (1)(b) of the Washington Administrative Procedures Act. Under that statute: "[A]pplications for licenses that are contested by a person having standing to contest under the law...shall be conducted as adjudicative proceedings." (Emphasis supplied).

volunteers responding to CITC solicitations sent to training agents working within CITC's operators' program. (R. 62). Of the three management representatives who volunteered and were proposed by CITC, all were participating in the CITC Operators apprenticeship program as training agents and were therefore familiar with the program. (R. 63). Indeed, one proposed management representative, Rod Majors, was an instructor in the program. (Id.) Of the three nonmanagement representatives who volunteered and were proposed by CITC, all were employed by employers participating in the program. (Id.) One volunteer, Bruce Solt, was a recent graduate of the program and another, Al Myers, was an instructor. (Id.)

The three proposed nonmanagement members attested in writing, that "I am fully capable of performing the work processes as outlined in the CITC Heavy Equipment Operator standards at journey level and I am fully aware of the importance of my role on the CITC operators committee." (Id.) Only nonmanagement member Bruce Solt was not required to provide such an attestation since he was a recent graduate of the program. (Id.) All were provided a written "job description" of their

duties on the committee<sup>4</sup> and required to attest in writing to their willingness to comply with these duties. (Id.)

In order to make sure all proposed committee members understood their responsibilities, Sigmund telephoned each and spoke with them for less than an hour. (R. 63). Sigmund also held a meeting to provide them with the CITC standards, the governing apprenticeship statutes and regulations. (Id.) The only no shows at the meeting were proposed management representatives Rod Majors (an instructor in the program) and Tim Whiteis (a training agent for the program) and nonmanagement representative Al Myers (also an instructor in the program). (Id.) In response to this evidence regarding the proposed committee, Appellants presented no witnesses or evidence but relied, instead, on the sufficiency of the evidence presented by CITC.

With regard to the second and third issues identified by this Court for remand, CITC provided testimony by Ms. Sigmund that CITC would amend its standards to reflect both that related supplemental instruction

---

<sup>4</sup> “Meet a minimum of 3 times a year (4 additional meetings will be exclusively for interviewing applicants); Monitor work and wage progressions of each apprentice quarterly; Review apprentice files quarterly; Review grades, absences on an as needed basis; Complete job-site observations once a year; Monitor compliance by employer and apprentice; Review complaints or grievances by the apprentice or employer.”

would include 60 to 80% hands-on training<sup>5</sup> and that the disciplinary procedure for apprentices would be subject to review by the Council.<sup>6</sup>

After the February 16, 2006 adjudicatory hearing, briefs were submitted. At the April 20, 2006, quarterly meeting of the Apprenticeship Council where final agency action was to take place, CITC representatives were present to respond to questions about the revised operator standards. (R. 62). The Council did not schedule oral argument nor advise the parties that this would constitute submittal of additional evidence or legal argument. Instead, representatives of both CITC and Appellants merely responded to questions from Council members. (Id.)

On May 3, 2006, the Council issued its determinations on all three issues. (R. 14-18). The Council approved the committee as proposed. With regard to the proposed nonmanagement representatives, the Council determined that “[t]here is no indication that these individuals are other than employees, and the sponsor provided information which confirms that all of the representatives selected - - both management and non-management - - come from the group served by the apprenticeship

---

<sup>5</sup> The amended standards provide that “[r]elated/supplemental instructions shall consist of between 60 and 80% practical training (skill training or seat-time).” (R. 62). Contrary to the assertion of Appellants, this language is reflected in the existing standards.

<sup>6</sup> The amended standards provide that “[a]ll decisions of the Apprenticeship Committee shall be final subject to the apprentice’s right to file an appeal of the Apprenticeship Committee’s decision as provided in WAC 296-05-009.” (R. 62). In the instant Petition for Judicial Review, Appellants are not challenging CITC’s amended standards regarding disciplinary procedure.

committee (contractors utilizing construction equipment operators).” (R. 18). The Apprenticeship Council also determined that the committee representatives had been given or would be given “adequate information regarding the program and apprenticeship in general to function effectively as apprenticeship committee members.” (Id.) The Apprenticeship Council also noted that it had previously approved a proposed committee “based on volunteer participation from appropriate contractors with journey level experience.” (Id.) Nowhere did the Council rely upon any of the unsworn responses to questions which had been asked at its prior quarterly meeting.

With regard to the hands-on training issue as well as the disciplinary appeals right issue, the Council noted that CITC had amended both in order to comply with the regulations and to achieve reasonable consistency with existing program standards in the same trade. (R. 17). As a result, the proposed committee was approved and the proposed amendments were found to sufficiently address the concerns of the Court of Appeals and the standards were approved.

C. Trial Court Review

Appellants filed a timely petition for review under the Washington Administrative Procedures Act. (R 4-18). Appellants limited their petition to two issues: (1) the Council’s approval of the proposed CITC

committee and (2) the Council's approval of the CITC's proposed amendment of the standards to satisfy the Court's requirement that the "hands-on" component of RSI achieve the 60 to 80% level. Appellants concede that CITC's proposed amendment of the standards to address the right of apprentice appeal, satisfied this Court's directive.<sup>7</sup>

On January 26, 2007, a hearing was held before Judge Gary Tabor of the Thurston County Superior Court. (R. 87). Judge Tabor ruled that the Appellants bore the burden proving that the Council's rulings on the issues of committee selection and composition as well as hands-on training were not supported by substantial evidence. (R. 92-93). With regard to the selection process approved by the Council, Judge Tabor ruled as follows:

. . . [W]hat is a correct process? There's not a specific instruction in the law that says it's got to be done this way. I don't find the problems that were suggested by counsel in sending a letter out to ask employees to volunteer and sending that letter to employers. I don't find that that's the employer selecting the person.

(R. 94).

---

<sup>7</sup> In Appellants' brief, counsel admits that "since CITC adequately articulated an apprentice's disciplinary appeal rights in its revised proposal standards, that issue no longer is before the Court." Appellants' Brief at p. 4, footnote 1.

Moreover, Judge Tabor pointed out that Appellants presented no evidence that any of the proposed employee representatives were “yes men selected by the employer.” (Id.)

With regard to Appellants’ claim that three proposed committee members lacked sufficient apprenticeship knowledge undergoing regulations, Judge Tabor disagreed and held there was substantial evidence that “these persons were people with suitable knowledge.” (R. 95).

Regarding the Council’s reliance on precedence, Judge Tabor ruled that Appellants’ failure to demonstrate that the Council’s characterization of that precedent was incorrect or that it did not occur, was fatal to their argument. (R. 96).

Finally, with regard to Appellant’s APA attack on the sufficiency of CITC’s proposed amendment on hand-on training, Judge Tabor ruled that “what the Court of Appeals decision said is, there should have been a particular articulation, if you will, of the amount of hand-on time, and so there was.” (R. 96). Judge Tabor also noted Appellants’ inconsistent “shift” from their prior insistence regarding apprentice appeal rights that the actual provisions of the apprenticeship standards trump whatever actually occurs. (Id.)

D. Appeal

Appellants filed this appeal. (R. 101-119). With regard to the Apprenticeship Council's approval of the proposed committee, Appellants argue that the findings are not supported by "substantial evidence on the record as a whole" and that the Council improperly relied upon non-record evidence by referring to their precedential 2000 ruling on selection of an apprenticeship committee. (Appellants' Brief at pp. 12-19.) Second, Appellants allege that the Council should not have accepted CITC's proposed amendment of the standards regarding "hands-on" training absent additional evidence that they were already achieving the target number now contained in the standards. (Appellants' Brief at pp. 20-23.) For the reasons set forth below, the appeal should be dismissed in its entirety.

**III. ARGUMENT**

A. Appellants Have the Burden of Demonstrating the Invalidity of the Council's Action.

Under Washington's Administrative Procedure Act ("APA"), judicial review of the actions of an agency is carefully circumscribed - - especially when the review involves matters within the agency's discretion and expertise. The burden of demonstrating the invalidity of the agency action is clearly upon the party asserting the invalidity. RCW 34.05.570(a). Relief is only available if the person seeking the judicial

relief has been “substantially prejudiced by the action complained of.” RCW 34.05.570(d). Courts may grant relief only if the agency erroneously interprets the law or if the agency’s decision is “arbitrary or capricious.” RCW 34.05.570(3)(c), (i); Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep’t of Ecology, 146 Wn.2d 778, 51 P.3d 744 (2002).

When reviewing an agency’s interpretation of a state statute or regulation, courts will review the statute or regulation’s plain language in order to determine legislative intent. State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). The agency’s interpretation of its regulations are subject to deferral unless they are “not plausible or are contrary to legislative intent.” Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus., 122 Wn. App. 402, 409, 97 P.3d 17 (2004), review granted, 154 Wn.2d 1001, 113 P.3d 481 (2005). With regard to findings of fact, Appellants have the burden of establishing that the findings are “not supported by evidence that is substantial when viewed in light of the whole record before the Court.” RCW 34.05.570(3)(e). The APA expressly limits the reviewing court to “assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature placed in the agency.” RCW 34.05.574.

The situation, as here, of union organizations challenging agency approval of a competing apprenticeship program has been previously addressed by the courts. In Daugherty v. U.S., 86 L.R.R.M. 3075 (D.S.D. Tex. 1974), competing union sheet metal apprenticeship programs challenged the United States Secretary of Labor's approval of a non-union apprenticeship training program. In upholding the Secretary's ruling, the federal district court underscored the importance of deferring to the agency charged with implementing the National Apprenticeship Act, 29 U.S.C. § 50:

The Court is of the opinion that the broad, loose statutory language of the National Apprenticeship Act compels the conclusion that the Act grants an extremely wide discretion to the Secretary to determine what labor standards shall be "necessary to protect the welfare of apprentices." 28 U.S.C. § 50. From the information which has been provided the Court on apprenticeship programs and the construction industry in general it is clear to the Court that the decision on registering an apprenticeship program requires a substantial amount of judgment and expertise, and may turn on many technical facts. These are matters which Congress has left to the discretion of the Department of Labor and matters in which the Court should not interfere and substitute what would amount to a de novo decision on its part.

Id.

This appeal goes to the heart of the Council's expertise and authority and asks the court to substitute its own methodology for selection of apprenticeship committee members. As a result, the Court

must give substantial weight to the Council's interpretation of the RCW and WAC provisions, most of which provide only broad directives governing creation and implementation of apprenticeship training programs.

Further, Appellants' request for judicial micromanagement is especially unwarranted since it is Appellants' burden under Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council, 129 Wn.2d 787, 920 P.2d 581 (1996), to contest those portions of the apprenticeship "license" they feel are inadequate under RCW 34.05.422(1)(b).<sup>8</sup> This is especially the case based on this Court's express remand to provide Appellants the opportunity to contest the proposed committee.

Appellants claim without citation that CITC somehow had the burden to anticipate and present evidence regarding each of Appellants' unstated objections by calling each and every proposed committee member so they could be cross-examined on their selection and knowledge of apprenticeship. This burden is clearly unsupported under the Seattle Building Trades decision and this Court's prior ruling ("The right to object to a sponsor's committee composition arises when the

---

<sup>8</sup> "Existing programs have an interest in contesting what they believe to be inadequate standards in order to prevent entry of new, substandard programs into the market . . ." Seattle Bldg., 129 Wn.2d at 796.

Council receives a sponsor's proposed standards."'). Western Washington Operating Engineers Apprenticeship Committee, 130 Wn. App. at 522 (emphasis added).

CITC presented prima facie evidence regarding the identity of the proposed committee members as well as evidence regarding their selection and knowledge. Once that occurred the burden shifted to Appellants to present evidence to "contest" the proposed committee members as inadequate under state law or regulations. State v. McAllister, 31 Wn. App. 554, 557, 644 P.2d 677 (1981). As discussed below, Appellants rely instead on unsubstantiated innuendo and alleged high thresholds with no legal basis.

B. Since Substantial Evidence in the Records Supports the Correctness of the Council's Approval of the CITC Committee, the Appeal Should Be Dismissed.

Appellants ask the Court to second-guess the Council's approval of CITC's committee on three grounds: (1) CITC's selection process "could have" resulted in hand-picked employer patsies as nonmanagement representatives (Appellants' Brief at pp. 14-16); (2) evidence that the proposed representatives already participate in the CITC program and received or would receive copies of the standards, the governing WACs and the governing RCWs, is insufficient to support the Council findings that the members are "knowledgeable in the process of apprenticeship

and/or the application of chapter 49.04 and these rules” (Id. at pp 16-18); and (3) the Council’s reliance on prior Council minutes confirming Council approval of a similar committee selection process is improper since neither party submitted the precedent into evidence at the hearing. (Id. at pp. 18-20.) None of the arguments should result in overturning the Council approval.

1. CITC Established that it Adhered to a Consistent and Logical Procedure for Selecting Committee Members in Compliance with RCW 49.04.040.

Under RCW 49.04.040, apprentice committees are to consist of an equal number of employer and employee representatives. In the event the program is union, the union representatives choose the employee representatives; in the event the program—as here—is non-union, the committee members “may be chosen...[i]n a manner which selects representatives of management and nonmanagement served by the apprenticeship committee.” RCW 49.04.040(2).<sup>9</sup> The eligible pool must therefore come from those “served by the apprenticeship committee”—in this case the training agents. There are no additional statutes, regulations

---

<sup>9</sup> Based on the regulation the employee representatives could be supervisory employees as long as they are “nonmanagement.” This designation is consistent throughout the regulations. See for example, WAC 296-05-313 (1) (“Apprenticeship committees must be composed of an equal number of management and nonmanagement representatives.” (Emphasis supplied)).

or even Department memos prescribing the "manner" for selection of committee members.

Here, the unrefuted evidence is that committee members were solicited from the pool of "management and nonmanagement served by the apprenticeship committee." (R. 62). The fact that the written solicitation of interest was provided to employers who, in turn, provided it to their employees, does not undermine their "representative" status, especially where, as here, the volunteering nonmanagement representatives were twice required in writing to attest to their willingness to serve and the importance of their role, (R. 63), were telephoned by CITC representative Sigmund to underscore their responsibilities and answer questions and attended a meeting to discuss their role. (Id.) The only nonmanagement representative to not attend the meeting was Al Myers, who was already an instructor in the program.

Appellants suggest that popular elections should have been held to truly underscore the "representational" status of the nonmanagement members and to foreclose the possibility of employers hand-picking pro-management committee members. (Appellants' Brief at p. 14.) However, nowhere in the statutes or regulations is an election required or even

suggested.<sup>10</sup> For union apprenticeship programs it is the union who hand-picks the employee representatives. RCW 49.04.040(1). Are they the paradigm of objectivity to ensure “representational” status? The members of the Apprenticeship Council who, by law, are employer and employee “representatives,” are not even subject to a popular vote but are appointed by the Director of Labor and Industries. RCW 49.04.010. Appellants ask the Court to consider evidence which they themselves did not provide and which does not exist: that nonmanagement representatives Dotson, Solt and Myers, may have been “volunteered” by nefarious employers intent on neutering nonmanagement opposition on the CITC committee. (Appellants’ Brief at p. 15.) However, suspicion and innuendo does not amount to record evidence which can be considered by this Court to overturn the actions of the Apprenticeship Council. See Franklin County Sheriff’s Office v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982). As the trial court correctly held, Appellants presented no evidence that the

---

<sup>10</sup> Even if a popular election is required, CITC provided such an election on February 16, 2007 for participating employees to designate employee representatives. The election occurred after the trial court hearing and ruling and the WSATC was advised of the election in a letter dated March 12, 2007. Appellants’ contention that CITC was required to hold an election is therefore moot. See Snohomish County v. State, 69 Wn. App. 655, 660, 850 P.2d 546 (1993) (“A case is technically moot if the court cannot provide the basic relief originally sought, or can no longer provide effective relief.”); Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 631, 860 P.2d 390 (1993) (“When an appeal is moot, it should be dismissed.”). To the extent the Court of Appeals wishes to view evidence related to the February 2007 election, CITC shall submit such evidence to the Court by way of a motion to review additional evidence on review under Rule of Appellate Procedure (RAP) 9.11.

proposed nonmanagement representatives were “yes men selected by the employer.” (R. 94.)

2. Substantial Evidence Supports the Fact that CITC’s Proposed Apprenticeship Committee Members Possessed the Requisite Knowledge of Apprenticeship.

WAC 296-05-313(4) requires that committee members must be “knowledgeable in the process of apprenticeship and/or the application of chapter 49.04 RCW and these rules.” Thus, the committee member must possess knowledge of either “the process of apprenticeship” or application of the Washington Apprenticeship Act. At the hearing, Appellants provided no evidence of an industry test or requisite threshold by which it can now claim that three committee members are not “knowledgeable of the process of apprenticeship.” The three committee members singled out by Appellants (management members Whiteis, Bogardus and nonmanagement member Dotson) are all employed by CITC Operator training agents and all responded to CITC’s request for potential committee members. (R. 62-63). All were briefed via telephone about their responsibilities. (Id.) Dotson was provided a job description which mirrors the duties set forth in WAC 296-05-303 and attested in writing that he would comply with the duties. (Id.) All three, with the exception of Whiteis, attended a meeting with CITC representative Sigmund where they were provided a copy of the CITC standards as well as copies of

apprenticeship laws and regulations for the state of Washington. (Id.) According to CITC representative Sigmund, she intends to meet Whiteis with the documents rather than send them to him since “I would prefer to meet directly with them.” (Id.) Clearly this constitutes “substantial evidence” to support the Council’s findings of sufficient knowledge of the apprenticeship process.

3. There is no Evidence that the Council Relied Upon Non-Record Evidence or Unsworn Testimony.

Finally, Appellants take issue with the Council’s reliance on prior precedent approving the committee selection process used by CITC<sup>11</sup> and Appellants attempt to characterize it as improper reliance on non-record evidence in violation of the APA. This is a distortion of the record. First, courts and agencies can and must rely on precedent to guide their decisions. Courts have imposed a “duty of consistency” which prohibits agencies from “treat[ing] similar situations in dissimilar ways.” Vergeyle v. Employment Security, 28 Wn. App. 399, 404, 623 P.2d 736 (1981). Further, RCW 34.05.570(3)(h) requires the Council to rule with consistency unless a rational basis for an inconsistency is demonstrated by an explanation of the facts and its reasoning. Nothing in the APA

---

<sup>11</sup> “Further, the Council has previously approved management representation 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.” (R. 18).

precludes the Council's action and, indeed, RCW 34.05.452(5) allows an agency to take notice of any "judicially cognizable facts." The minutes of a prior Apprenticeship Council meeting surely constitute such a "fact." Simply because neither party cited the minutes nor put them into evidence does not preclude the Apprenticeship Council from referring to and justifying its current action as consistent with prior action in a similar setting.

Second, in the event Appellants felt that the 2000 Apprenticeship Council minutes did not reflect prior Council approval of the same committee selection process as this case, they had the opportunity to either file a motion for reconsideration, RCW 34.05.470, or submit the "correct" minutes to this Court. RCW 34.05.562. As the trial court pointed out, Appellants' failure to take either action speaks volumes about the correctness of the Council's characterization of its precedent. (R. 96).

Finally, nowhere did the Council indicate it was relying upon non-record evidence or unsworn testimony submitted by either party. At its April 20, 2006 meeting, Council representatives did ask questions of both parties, even though no additional argument had been scheduled after close of the February 16, 2006 hearing. However, their Order does not reflect the consideration of any of the responses or argument made at the later meeting. (R. 14-18). Appellants attempt to link a single affirmative

response to a Council member's leading and general question at the April 20, 2006 Apprenticeship Council meeting<sup>12</sup> to the specific finding of the Council regarding the minutes of a July, 2000 Council meeting. However, the link cannot be established and, more importantly, cannot be used to preclude the Apprenticeship Council from relying on its own precedent.

As a result, Appellants' arguments on both the selection criteria and the competency of the committee are without support and the Council's approval of the committee should be affirmed.

C. Substantial Evidence Supports the Council's Determination that Amendment of the Standards Regarding Hands-On Training Was Sufficient.

In response to the Court of Appeals' request for further information in the standards regarding "hands-on training" and disciplinary appeals, CITC amended its standards. Ironically, Appellants concede that CITC's amendment of the program's disciplinary standards was appropriate<sup>13</sup> but maintain that similar amendment of the related

---

<sup>12</sup> "Nichols: Historically for your other approved programs, was this a process that was utilized in order to select committee members?"

Sigmund: Yes." (R. 246).

<sup>13</sup> As this Court is aware, Appellants vigorously pursued their position that, no matter what was practically occurring with regard to apprentice disciplinary proceedings, the standards had to expressly reflect the absence of finality in those proceedings. This Court agreed and CITC, without objection from Appellants, modified the standards which Appellants concede addressed the Court's concern since "CITC adequately articulated an apprentice's disciplinary appeal rights in its revised standards. . . ." Petitioners' Brief at p. 4, footnote 1. However, with regard to "hands-on" training, Appellants now argue the converse of this position by claiming that amendment of the express terms of the

supplemental instruction is improper absent additional data to demonstrate that CITC is currently achieving the expressed goal set forth in the amended standards. The inconsistency of Appellants' argument demonstrates its spuriousness.

Appellants' claim that the amendment is insufficient constitutes a thinly veiled attempt to challenge the implementation of the RSI standards themselves. The only matter properly before this Court is whether CITC's program, on its face, aims to achieve the same skill level as existing programs. In addition to the amendment directly addressing this Court's concern, CITC provided substantial evidence in the form of testimony by CITC Vice President of Education Dave Perrin that achievement of the stated "hands-on" training goal is attainable. (R. 74). He testified that after the first Council approval of the Operator standards, instructors were advising him that additional "hands on" training was necessary anyway. (Id.) By adding the recommended "hands on" training, the mandated goal would be achieved. (Id.)

Again, it is significant to show how Appellants' attack of CITC's standards is a moving target, the position of which changes according to Appellants' latest strategy to prevent CITC's standards from seeing the

---

standards is insufficient and that the Council can only rely on what is actually occurring. The position is neither consistent nor supportable.

light of day. In its first appeal to this Court, Appellants managed to convince the Court that Mr. Perrin was the *only* credible witness regarding “hand on” training (despite contrary record testimony relied upon by the administrative law judge from a competing training director using the same course materials) and that his “guess” constituted a “mandate” to instructors. Now, however, Mr. Perrin’s testimony is, according to Appellants, a self-serving fabrication and his promised mandate *which is set forth in writing in the standards* is an empty one.

In sum, both the Council and CITC have complied with the Court of Appeals November 22, 2005 ruling that the Council require, and CITC provide, sufficient evidence that CITC’s amended RSI standards are reasonably consistent with standards of competing programs. At the April 20, 2006 adjudicative proceedings, Appellants were given the opportunity, but failed, to present witnesses and evidence regarding CITC’s RSI program. Because CITC has followed all proper procedures and provided ample evidence in support of the sufficiency of its standards, Appellants seek to invalidate CITC’s as-of-yet implementation of its standards. Appellants’ argument fails, because as the Council astutely concluded:

[u]ntil the program standards are approved in the manner in which the program is operated, 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 Objectors in their post-hearing brief. The

standards are consistent with existing program standards. Compliance with the standards as approved is a matter for future review.

(R. 274).

The standards have been amended and the Council can now monitor those standards to ensure that CITC acts accordingly. The Council's acceptance of the proposed amendment should be affirmed.

#### **IV. CONCLUSION**

For the foregoing reasons, CITC respectfully requests that the Trial Court's affirmance of the Council's decision be affirmed.

RESPECTFULLY SUBMITTED this 16th day of July, 2007.

WILLIAMS, KASTNER & GIBBS PLLC

By   
Judd H. Lees, WSBA #10673

Attorneys for Interested Party Construction  
Industry Training Council of Washington

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 16<sup>th</sup> day of July, 2007, I caused a true and correct copy of the foregoing document, "BRIEF OF INTERESTED PARTY CONSTRUCTION INDUSTRY TRAINING COUNCIL OF WASHINGTON," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

Counsel for Appellants:

Richard Robblee  
Rinehart & Robblee  
1620 Metropolitan Park Bldg  
1100 Olive Way  
Seattle, WA 98101

Counsel for Respondents:

Judith C.W. Morton  
Assistant Attorney General  
Labor & Industries Division  
4224 6th Avenue SE, Bldg.1  
Olympia, WA 98504-0121

Leslie Johnson  
Assistant Attorney General  
900 Fourth Avenue, Suite 2000  
Seattle, WA 98164-1012

DATED this 16<sup>th</sup> day of July, 2007.

  
\_\_\_\_\_  
Lyndsay C. Taylor

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUL 16 PM 2:50  
STATE OF WASHINGTON  
DEPUTY