

**DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES
STATE OF WASHINGTON**

In re:

ANDGAR CORPORATION

OAH Docket No. 11-2020-LI-10548

NO. 2022-019-APP

DIRECTOR'S ORDER

Joel Sacks, Director of the Washington State Department of Labor and Industries, having considered the order of the Washington State Apprenticeship and Training Council (Council) decided on January 18, 2022, the appeal submitted by Andgar Corporation, briefing submitted by the parties, and the record created by the Council, issues this Director's Order.

The parties to the matter are Andgar Corporation (Sponsor), the Apprenticeship Program of the Department of Labor and Industries (Department), and the Objectors (collectively Southeastern Washington/Northeastern Oregon Sheet Metal Workers Apprenticeship Committee; Northeastern Washington/Northern Idaho Sheet Metal Apprenticeship Committee; and Western Washington Sheet Metal JATC). The issue in this case is whether the Sponsor's Request for Approval of Proposed Standards for Sheet Metal Worker should be granted.

The Director makes the following Findings of Fact, Conclusions of Law, and final Order.

I. FINDINGS OF FACT

1. The Sponsor is located in Ferndale, Washington, which is in Whatcom County. It is primarily in the sheet metal business. The Sponsor's Washington State Unified Business Identifier (UBI) number is 600-100-192.

2. In 2018, the Sponsor created four subsidiaries. Each subsidiary has a different business focus and its own UBI number. Two of those subsidiaries, Andgar Architectural Metals LLC (UBI number 604-254-874) and Andgar Mechanical LLC (UBI number 604-255-353), are relevant to this case.
3. The Sponsor handles most of the administrative responsibilities for its subsidiaries. The Sponsor's human resources and payroll departments serve the subsidiaries. The Sponsor and its subsidiaries are considered one benefit unit for health insurance purposes, and an "aggregate large employer" under the Affordable Care Act. The Sponsor files its federal tax returns as one business entity; the Internal Revenue Service disregards the subsidiaries. The subsidiaries do not have their own website.
4. The Sponsor also administers the safety program for the subsidiaries. The Sponsor and its subsidiaries collectively report safety data to the Department.
5. Hiring decisions are made by the subsidiaries, with significant input from the Sponsor's Human Resources Manager. Employees are hired to work for the Sponsor or a particular subsidiary, although employees may be loaned or transferred between entities through a formal process involving a loaned employee agreement or a transfer agreement. When an entity loans an employee, the Sponsor does an accounting of labor costs to ensure that the entity that uses the employee ultimately pays for his or her work. Every employee signs loaned employee agreements when they are hired; apprentices in the proposed program will do the same.
6. The Sponsor began developing a Request for Approval of Proposed Standards for Sheet Metal Worker.
7. Under the Sponsor's proposed plan, it proposed relying on the two LLCs to employ its apprentices and train them in the various work process of its standards. It will not itself employ the apprentices or provide on-the-job training.
8. In March or April 2020, Tom Bajema, Training and Development Coordinator with the Sponsor, began working with Gary Peterson, Apprenticeship Consultant with the Department, to develop proposed apprenticeship standards.

9. In August 2020, the Sponsor submitted its Request for Approval of Proposed Standards to the Department, along with its associated Related/Supplemental Instruction (RSI) Plan. The Department conducted a technical review of the Sponsor's proposed standards.
10. The Request for Approval of Proposed Standards identified the program as individual nonjoint, even though the apprenticeship committee is comprised entirely of employees from Andgar Architectural Metals, LLC and Andgar Mechanical, LLC, and apprentices will work at those subsidiaries.
11. On August 19, 2020, Peterson emailed Bajema regarding his concern that the proposed apprenticeship program involved three separate Andgar companies with three separate UBI numbers when it was proposed as an individual program.
12. On August 27, 2020, the Sponsor submitted revised proposed standards and RSI to the Department, once again as an individual nonjoint program with Andgar Corporation as the sponsor.
13. Peterson issued a "decline to sign" memorandum to the Apprenticeship Program Manager because the Sponsor sought an apprenticeship program that has Apprenticeship Committee members from two other companies and WAC 296-05-009(1)(b) provides that for only one employer for an individual.
14. On September 9, 2020, the Sponsor submitted revised standards in response to the technical review team's recommendations. The revisions clarified the attendance policy and made minor edits to the document's typography and organization. But the Sponsor declined to make any modifications to the structure of the program to address the Department's concern regarding involvement of multiple corporate entities in an individual program.
15. On September 17, 2020, the Department concluded its technical review of the Sponsor's program, and issued a memorandum to the Council regarding its findings. The technical review team signed off on all aspects of the proposed program other than its individual structure. The memorandum to the Council stated that the Sponsor's program "[d]oes not meet criteria established by Chapter 49.04 RCW and Chapter 296-05 WAC. Standards and Committee

structure as proposed appear to represent multiple companies. Program appears to be ‘Group Non-Joint’ (multiple UBI Numbers) Chapter 296-05-009.” Obj. Ex. Z.

16. On September 25, 2020, the three Objectors timely filed objections to the Sponsor’s proposed program. The Objectors are all sponsors of sheet metal apprenticeship programs in Washington State.

17. On November 9, 2021, the Council referred the objections to the Office of Administrative Hearings for adjudication.

18. The Office of Administrative Hearings served the Initial Order on May 18, 2021. The Initial Order found that the proposed apprenticeship program of Andgar Corporation for Sheet Metal Worker should be disapproved.

19. On June 4, 2021, the Sponsor timely contested the Initial Order with the Council.

20. The majority of the Council voted to disapprove the proposed Sheet Metal Worker standards. Council members Ed Kommers, April Sims, Brett Wideman, Shelley Wilson, and Kenna May voted to disapprove the standards. Council member David D’Hondt voted to approve.

21. On January 18, 2022, the Council issued its Findings of Facts, Conclusions of Law, and Decision and Order.

22. On February 17, 2022, the Sponsor timely filed a petition of administrative review to the Director.

II. CONCLUSIONS OF LAW

1. The Director has jurisdiction over the subject matter and the parties to this action, under RCW 49.04, RCW 34.05, and WAC 296-05.

2. The Council is authorized to approve apprenticeship programs. RCW 49.04.010. When new apprenticeship program standards are proposed, the Council considers whether to approve the standards. WAC 296-05-011. The Director reviews appeals from decisions of the Council, with a de novo decision. RCW 49.04.065; RCW 34.05.464.

3. Apprenticeship laws are designed to encourage apprenticeship programs but only do so in a way that protects the learning process of apprentices.
4. Apprenticeship standards contain “specific provisions for operation and administration of the apprenticeship program and all terms and conditions for the qualifications, recruitment, selection, employment, and training of apprentices.” WAC 296-05-003 (Standards). To be eligible for registration, apprenticeship program standards must conform to WAC 296-05. RCW 49.04.050.
5. Apprenticeship programs may have different structures. Of relevance here, the Council may approve “individual nonjoint” and “group nonjoint” programs. WAC 296-05-011(l)(b)(iii)-(iv). An “individual nonjoint” program is defined as “[a] program sponsored and administered by an individual employer with no labor organization.” WAC 296-05-011(l)(b)(iv). A “group nonjoint” program is “[a] program sponsored only by an employer association and administered only by the employer association.” Apprenticeship committees are likewise characterized as either “individual” or “group.” WAC 296-05-009(l)(a)-(b). An individual committee represents “an individual employer,” whereas a group committee represents “more than one employer or employer association.” *Id.*
6. Group programs must offer apprenticeship and training opportunities on an equal basis to all eligible apprentices and employers. WAC 296-05-009(5). An individual program (sponsored and administered by a single employer) is not subject to this requirement and may limit apprenticeship and training opportunities to its own employees. *See id.*
7. “Employer” is defined as “[a]ny person or organization with a valid Washington state unified business identifier (UBI) number employing an apprentice.” WAC 296-05.003.
8. Statutory construction rules apply to administrative rules just as they do to statutes. *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Under plain language analysis, the tribunal determines a rule’s meaning from its terms “to give effect to its underlying policy and intent.” *Id.* at 56.

9. Assuming that there would be an employed apprentice as planned, each of the subsidiaries have their own UBI number so they each are an individual employer under the plain language definition of WAC 296-05-003. This means there are at least two employers, and not an “individual nonjoint” program but instead a “group nonjoint” program.

10. In this case, the Sponsor seeks approval for an individual program when its corporate structure dictates that a group program is necessary. The Sponsor, Andgar Corporation, is a parent company with four subsidiaries, two of which (Andgar Mechanical LLC and Andgar Architectural Metals LLC) will be intimately involved in its apprenticeship program. Although closely related, each of the companies involved in the Sponsor's program is a separate legal entity with its own individual UBI number. Each company has its own employees and makes the final decision on whom to hire. A loan agreement or transfer is required for an employee associated with one entity to work for another, further supporting the conclusion that the three entities are distinct from one another and do not operate as a single company with respect to their relationship to the employees. While all three companies operate under the Andgar Corporation umbrella, they are separate and distinct legal entities. There are no doubt legal advantages for this approach otherwise the Sponsor would not have arranged for it.

11. Under the Sponsor's proposed plan, as found above, it will rely on the separate entities to employ its apprentices and train them in the various work process of its standards. It will not itself employ the apprentices or provide on-the-job training. Because this arrangement necessitates a group structure, the Director must disapprove the proposed standards.

12. Similarly, the Sponsor's apprenticeship committee does not represent “an individual employer” within the meaning of WAC 296-05-009(1)(b). Instead, the committee represents “more than one employer.” Committee members include representatives from Andgar Mechanical LLC and Andgar Architectural Metals LLC. In fact, the Sponsor itself has no committee representative. For this reason as well, the Sponsor's proposed apprenticeship program for Sheet Metal Worker is a group program erroneously proposed as an individual program.

13. Andgar Architectural Metals LLC and Andgar Mechanical LLC. have separate workforces, scopes of work, different management, and different hiring processes. Neither employer is considered a training agent because the program is structured as an individual program which does not have training agents. Likewise, neither employer is required to sign either of the Department's training agent forms. Nor are the employers subject to discipline by the Council in their role as employers providing on-the-job training to apprentices in an individual program. As a result, allowing an individual employer to use multiple employers to provide on-the-job training to apprentice would have a negative impact on the Department's oversight of the apprenticeship program. *See* Objector's Suppl. Br. 3. As explained by Gary Peterson, an Apprenticeship Consultant 3 with the Department, "I wouldn't know who would be responsible if there was a later problem with an apprenticeship program. . . . I don't know from the Department's perspective, who would be ultimately responsible of these three entities: the Andgar Mechanical, Andgar Architectural Metal, or Andgar Corporation. I don't know who would be responsible." Tr. 466.

14. The public policy underlying the regulatory scheme is that the level of control and oversight of a parent corporation over a subsidiary corporation varies between corporations. In some corporate structures, there is little distinction between the parent and a subsidiary. In these situations, the subsidiary exists primarily for financial or regulatory reasons but in reality, is the same corporation as the parent with the same governance. In other corporate structures, subsidiaries are truly separate entities with their own governance, officers, goals, finances, and little oversight by the parent. Additionally, permitting a parent corporation to qualify, as an individual program when the parent corporation does not intend to employ any of the apprentices but instead will have multiple subsidiary corporations employ the apprentices is ripe for abuse. It is unknown how much control or oversight a parent corporation has over a subsidiary. If there is little oversight, then there is a risk that apprentices working for a subsidiary might be worked out of ratio or worked outside of the work processes. Likewise, if a parent is the only organization that the Department has on record and the subsidiaries are not recorded as

employers of the apprentices, then this hinders the Department's ability to investigate and/or audit the program and its compliance with the standards. There will also not be transparency about the program. Finally, allowing a corporation with multiple subsidiaries to employ apprentices to register as an individual program allows the corporation to avoid requirement that it offer the program to other employers. A group apprenticeship program "must offer apprenticeship and training opportunities on an equal basis to all eligible apprentices and employers." WAC 296-05-009(5). There is no similar obligation for individual programs. The Department has an obligation to treat similar programs in a similar manner. Allowing a program with multiple employers to avoid the requirement to offer the program to other employers would be unfair and inconsistent.

15. It is important to ensure that only qualified individual programs exist in order to safeguard important rights. Under Washington State law, apprenticeship programs may be organized several ways and each has its benefits and requirements. Individual apprenticeship programs, such as the one that the Sponsor claims to be, has much more flexibility in its hiring processes for apprentices. *See* WAC 296-05-009(5). "An apprenticeship committee must offer apprenticeship and training opportunities on an equal basis to all eligible apprentices and employers, unless the committee represents individual or plant programs." WAC 296-05-009(5). If a sponsor is able to form an individual apprenticeship program, they are able to be exclusionary in their selection of apprentices. In other words, they would be allowed to limit the pool of apprentice candidates to employees within their own company. As a result, qualified individuals across the state could be excluded. This poses a substantial risk that candidates of color or women could be excluded if they are not already within the sponsor's pool of employees.

16. The Sponsor argues that the parent company and the subsidiaries should be viewed as one employer. It points to laws like the Internal Revenue Code, the Affordable Care Act, and the Industrial Insurance Act where this may be the case. But laws about parent corporations and subsidiaries vary from one context to another. Employment laws under the Minimum Wage Act

and the Fair Labor Standards Act apply the joint-employer doctrine that treats multiple-related corporate entities as joint-employers, not one individual employer. *See, E.g., Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014); *Carrillo v. Schneider Logistics, Inc.*, 501 F. App'x 713, 715 (9th Cir. 2012). Under these cases, the law recognizes the individual company as an employer that may be jointly liable for wages with another employer. So for the purpose of employment they are all individual entities that may in addition be jointly liable with another company.

17. The Sponsor cites to statutes about aerospace employers, RCW 49.04.220(3) and (6)(a), because they reference the business and occupational tax chapter 82.02 RCW that discusses parents and subsidiaries. But the reference to this tax code is only to establish who is an aerospace engineer in terms of what tax rate they have, not to incorporate all the other provisions of chapter 82.02 RCW.

18. The Sponsor cites to the United States Department of Labor definition of employer as “any person or organization employing an apprentice whether or not such person or organization is a party to an Apprenticeship Agreement with the apprentice.” 29 C.F.R. § 29.2. But this definition is not helpful for two reasons. First, the Sponsor doesn't employ the prospective apprentices only the LLCs do. Second, even if this isn't the case, the definition only establishes that the Sponsor might be an employer, but under the definition, a subsidiary would also be an employer. The Sponsor Andgar does not and cannot dispute that those subsidiaries are employing workers. The question here is not whether the Sponsor Andgar Corporation is an employer, but whether the subsidiaries are employers. The Sponsor does not contest they plan to employ apprentices or that they have UNI numbers. So the Sponsor has failed to propose standards consistent with the apprenticeship rules and statutes.

19. The Sponsor seeks to submit new evidence about (1) DUX Apprenticeship & Fabrication Training Apprenticeship Program Standards approved on 10/15/2020; (2) Request for Approval of Proposed Standards and supporting documents for DUX Apprenticeship & Fabrication Training submitted on 8/13/2020; and (3) documents purportedly from the State of Washington

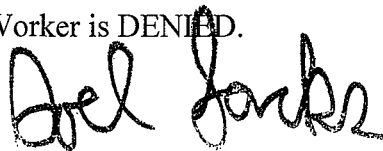
Corporation and Charities Filing System for DUX Supply Company and Piper Mechanical, Inc. The Director declines to take either judicial or official notice of these documents, assuming these doctrines apply, which is not decided. The documents have little relevance here. First, these documents are insufficient to judge the foundation or relevancy of this evidence as there would need to have been evidence offered in order to compare one set of standards and a program's structure beyond paper documents. Second, although federal case law has recognized a duty of consistency where a pattern of previous decisions could be relevant in determining whether there is a new and unknown position being taken by an agency, Washington law looks to plain language to determine how a regulation applies. In any event, an isolated decision does not implicate the federal doctrine if it even applies in Washington especially where there is no indication that anyone raised the issue of the program's structure as an individual program in the offered documents, and there was no full adjudicative proceeding like the one conducted here. While the approval may have been in error in the first case, it is hardly arbitrary and capricious to adhere to the law in the present matter. Finally, the Director has final authority regarding the approval of standards, and there is no evidence that the Director has issued a decision about a program's structure. RCW 49.04.065; RCW 34.05.464. The Director is not bound by errors committed by the Council.

20. Because there is not an individual program here, the Request for Approval of Proposed Standards for Sheet Metal Worker must be denied. Because this issue is dispositive the remaining arguments about whether the proposed standards were reasonably consistent with existing apprenticeship programs for the Sheet Metal Worker occupation, as well as other issues raised by the Objectors that the Council did not address, need not be reached..

21. The Sponsor's proposed apprenticeship standards for Sheet Metal Worker do not meet the requirements of RCW 49.04 and WAC 296-05.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, Sponsor's Request for Approval of Proposed Standards for Sheet Metal Worker is DENIED.



JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail.
RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by emailing it to directorappeal@lni.wa.gov or by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which the Director will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.04.065(3) provides, "Orders that are not appealed within the time period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in RCW 34.05, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Deck, declare under penalty of perjury under the laws of the State of Washington that the Director's order was sent via email and U.S. Mail, postage pre-paid, on the 8 day of November, 2022 to the following:

Andgar Corporation
Tom Bajema, Workforce Training Manager
PO Box 2708
Ferndale, WA 98248

Joshua D. Brittingham
Davis Grimm Payne and Marra
701 Fifth Ave., Ste. 4850
Seattle, WA 98104
jBrittingham@davisgrimmpayne.com
bgreen@davisgrimmpayne.com

Western Washington Sheet Metal JATC
Eric Peterson
11831 Beverly Park Road B-1
Everett, WA 98204

Kristina Detwiler
Robblee Detwiler & Black
2101 Fourth Ave., Ste. 1000
Seattle, WA 98121
kdetwiler@unionattorneysnw.com
acarr@unionattorneysnw.com

Southeastern Wash./Northeastern Ore.
Sheet Metal Workers Apprenticeship Comm.
1718 W. Sylvester St.
Pasco, WA 99301

Northeastern Wash./Northern Idaho
Sheet Metal Apprenticeship Comm.
7209 E. Trent Ave. Ste. 2
Spokane, WA 99212

Eric Lawless, AAG
Labor & Industries Division
Office of the Attorney General
PO Box 40121
Olympia, WA 98504-0121
Eric.Lawless@atg.wa.gov
lniolyeservice@atg.wa.gov

Department of Labor and Industries
Apprenticeship Section
P.O. Box 44530
Olympia, WA 98504-4530

DATED this 8 day of November at Tumwater, Washington.



LISA DECK