International Union of Operating Engineers

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

2850

July 6, 2010

Regulatory Unit Counsel
Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649

Re: 16A-7101- Comments

Dear Sir or Madam:

The International Union of Operating Engineers ("IUOE"), IUOE Local 542, and IUOE Local 66 jointly submit these comments in response to regulations promulgated by the State Board of Crane Operators to implement the Crane Operator Licensure Act (the "Act"). 40 Pa.B. 3041 (June 5, 2010).

The IUOE is a labor organization that represents approximately 400,000 members, with about three-quarters of its membership employed as heavy equipment operators in the construction industry. As the union with jurisdiction over the operation of cranes and derricks, the IUOE represents operators of cranes and derricks in Pennsylvania and throughout the country. IUOE Local 542 and IUOE Local 66 are the affiliates of the International Union that represent workers in the construction industry in the State of Pennsylvania.

I. THE BOARD SHOULD AWAIT GUIDANCE FROM OSHA

To ensure consistency with OSHA crane standards, the Board should await guidance from OSHA before issuance of its final rules. OSHA has announced that in July 2010 it will issue its final rule on its amendments to 29 C.F.R. Part 1926, which upgrade the standards for protection of employees from hazards associated with hoisting equipment when used to perform construction activities. 73 *Fed.Reg.* 59714 (October 9, 2008).[1]

The IUOE understands that the effective date of Sections 501, 503, 702, and 706 of the Act is 24 months from October 9, 2008, or October 9, 2010, and the Board has a relatively short deadline if it wishes to promulgate rules to implement the Act before the effective date of these sections. However, the Board should await definitive guidance from OSHA in light of the facts that: 1) publication of OSHA's final rule is imminent; and 2) the Board's proposed rules

[1] The website of the United States Department of Labor states that OSHA is "moving aggressively to meet its projected date of July 2010 for publishing the final rule." http://www.dol.gov/regulations/factsheets/osha-fs-cranes.htm In April 2010, OSHA submitted the final rule to the Office of Management and Budget (OMB), and the OMB's website also lists July 2010 as the projected date for issuance of the final rule. http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200910&RIN=1218-AC01

are fundamentally at odds with OSHA's proposed regulation 29 C.F.R. § 1926.1427 on key issues, such as the need for accreditation of testing organizations by more than one nationally recognized accrediting agency and national portability of certifications issued by accredited testing organizations. The following are some of the key issues on which OSHA guidance will be instructive:

- Whether certification from a testing organization that has been accredited by **one** nationally recognized accrediting agency as defined in OSHA's proposed rule 1926.1401 is sufficient to satisfy "Option 1: Certification by an accredited crane/derrick operator testing organization" (29 C.F.R. § 1926.1427(b));
- Whether OSHA will revise its definition of "nationally recognized accrediting agency" in proposed rule 1926.1401 based on testimony and comments submitted by interested parties;
- Whether state and local crane certification laws must allow for national portability of certifications issued by an accredited testing organization from employer to employer and from state to state;
- Whether OSHA will adopt the IUOE's recommendation that OSHA require applicants for certification provide documentation to the accredited testing organization of at least 1,000 hours of crane related on-the-job experience and/or training;
- Whether OSHA's final rule will defer to the expertise of nationally recognized accrediting agencies for determinations that a firewall exists between training and testing; and
- Whether OSHA will retain the proposed four-year phase-in period for certification/qualification requirements or adopt the IUOE's recommendation that the phase-in period be shortened to two years.

The Board itself repeatedly recognizes in the preamble to its proposed regulations the importance of OSHA guidance and acknowledges that OSHA's revised regulations are likely to take effect "before or soon after" the effective date of the Board's regulations[2]:

> In addition to considering the intent of the General Assembly, the Board has also taken into consideration existing and anticipated changes to ASME volumes and OSHA regulations. The Board did not think that it would be wise to promulgate the regulations solely upon current or existing standards or regulations when it was aware of changes that are likely to take effect before, or soon after, the effective date of its regulations. Therefore, this proposed rulemaking, when it is appropriate, accounts for what the regulatory environment will be in June 2010, as well as the current state of the law.

[2] Preamble, "The Commonwealth Joins the National Trend."

As discussed below, the Board's recognition of the importance of OSHA guidance conflicts with its decision to disregard the requirements in OSHA's proposed regulations in issuing its own proposed rules. In any event, the Board should not assume that OSHA's final rules concerning certification of crane operators will be essentially the same as OSHA's proposed rules since the vast majority of the voluminous comments and testimony during the rulemaking was directed at changes to the proposed crane certification regulations.

II. THE PENNSYLVANIA ACT AND OSHA'S PROPOSED RULE REQUIRE ACCREDITATION BY ONE NATIONALLY RECOGNIZED ACCREDITING AGENCY

A. The Pennsylvania Act

The Crane Operator Licensure Act clearly provides that a testing organization must obtain approval from either the NCCA **or** the ANSI, and that accreditation from both testing organizations is not required (emphasis added):

> "Certification" Certification from the National Commission for the Certification of Crane Operators or another organization found by the State Board of Crane Operators (NCCCO) to offer an equivalent testing and certification program meeting the applicable requirements of the American Society of Mechanical Engineers ASME B30.5 as relating to mobile cranes, ASME B30.3 or the requirements of ASME B30.4 as relating to tower cranes and the accreditation requirements of the National Commission for Certifying Agencies **or** the American National Standards Institute.

In contravention of the plain statutory language, the Board's proposed rule 6.53(a) mandates that a testing organization be accredited by at least **two** nationally recognized accrediting agencies in providing that a testing organization's application will be automatically disqualified if the applicant is not accredited by ANSI and NCCA. The Board lacks authority to issue a rule that is contrary to the Act's clear mandate. *See Insurance Federation of Pennsylvania, Inc. v. Foster*, 138 Pa.Cmwlth. 229, 240, 587 A.2d 865 (1991) ("when interpreting a statute, an administrative agency commits an abuse of discretion when the agency's interpretation conflicts with the clear and plain meaning of that statute or regulation.")

The Board's rationale for reading an "and" instead of an "or" between "National Commission for Certifying Agencies or the American National Standards Institute" is not justified since there is no conflicting language in the Act that would preclude an interpretation of "National Commission for Certifying Agencies or the American National Standards Institute" as it is plainly written. In requiring both ANSI and NCCA accreditation, the Board states that a testing organization is not "equivalent" to the NCCCO if it does not have accreditation from both since the Act's use of "equivalence" indicates the "General Assembly's

intent that the Board limit its approval to those other organizations that are point-by-point identical to NCCCO in relevant criteria, except for the fact of a separate corporate existence and control." Preamble, § 6.51. This reading of equivalence is contrary to two canons of statutory construction: 1) where language is clear and unambiguous, the letter of the statute controls; and 2) a statute must be read to give effect to all its provisions.[3] 1 Pa.C.S. § 1921.

B. OSHA's Proposed Rule

Unlike proposed rule 6.51, the Pennsylvania statute itself is consistent with OSHA's proposed rule 1926.1427(b)(1)(i), which states that a testing organization must be "accredited by **a** nationally recognized accrediting agency based on that agency's determination that industry recognized criteria for written testing materials, practical examinations, test administration, grading, facilities/equipment and personnel have been met." Emphasis added. OSHA's final rule will confirm whether accreditation by one accrediting agency is sufficient and will also confirm whether OSHA continues to consider accreditation by only the NCCA to be sufficient.

OSHA's proposed rule 1926.1401 defines "national recognized accrediting agency" as "an organization that, due to its independence and expertise, is widely recognized as competent to accredit testing organizations." OSHA states in the preamble that "under this definition, **new** accrediting organizations would meet this definition upon establishing a national reputation based on independence, use of widely recognized criteria, and demonstrated competence in applying those criteria." 73 *Fed.Reg.* at 59811 (emphasis added). In discussing **existing** nationally recognized accrediting agencies, OSHA states that "the National Commission for Certifying Agencies (NCCA), the accreditation body of the National Organization for Competency Assurance (NOCA), has accredited testing organizations in a wide variety of fields, including those that provide crane operator certification."[4] *Id.* OSHA noted that in 2003 ANSI "began accrediting" personnel certification entities. *Id.*

OSHA clearly does not share the Board's view that NCCA's "standards are minimal" (Preamble, § 6.53) since OSHA views NCCA as widely recognized as competent to accredit testing organizations. The IUOE believes, therefore, that it would be prudent for the Board to await issuance of OSHA's final rule before taking a final position of the competence of NCCA in the field of personnel certification.

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[3] With regard to statutory construction, Pennsylvania law provides (1 Pa.C.S. § 1921):

a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

[4] The NOCA is now the Institute for Credentialing Excellence (ICE).

III. OSHA's PROPOSED RULE CONTEMPLATES PORTABILITY OF CERTIFICATIONS ISSUED BY PRIVATE TESTING ORGANIZATIONS FROM STATE TO STATE

While the Board claims that it is taking OSHA's proposed rules into account in issuing its proposed regulations, the Board is not only fundamentally at odds with OSHA on the number of accreditations that a testing organization must obtain, but it is also in conflict with OSHA on the issue of portability of certifications issued by private testing organizations.

OSHA's proposed rules clearly provide that certifications issued by **an** accredited testing organization are **portable** from employer to employer and from state to state. Proposed rule 1926.1427(b)(2) states that certifications issued under "Option 1: Certification by an accredited crane/derrick operator testing organization," are portable. Like OSHA, other states do not require that a testing organization be accredited by more than one nationally recognized accrediting agency and all states recognize accreditation by the NCCA. *See e.g.*, California provides, in relevant part, that a "certifying entity is any organization whose certification program is accredited by **either** the National Commission for Certifying Agencies (NCCA) **or** the American National Standards Institute (ANSI)."[5] 8 CCR 5006.1 (emphasis added). Likewise, Minnesota law requires that an operator receive a "valid crane operator certificate" from "**a** nationally recognized and accredited certification program." MINN. STAT. § 182.6525, subd. 1. Washington law provides that an operator must possess as "a valid crane operator certificate, for the type of crane to be operated, issued by a crane operator testing organization accredited by a nationally recognized accrediting agency." WAC 296-155-53300 (emphasis added). Nevada law provides that (NRS § 618.880 (emphasis added)):

> (c) An applicant for certification as a crane operator must hold a certificate which:
>
> (1) Is issued by an organization whose program of certification for crane operators:
>
> I. Is accredited by the National Commission for Certifying Agencies **or** an equivalent accrediting body approved by the Division; or

[5] *See also*, Utah regulation (R156-55a-504), which provides that:

> In accordance with Subsection 58-55-504(2)(a) one of the following certifications is required to operate a crane on commercial construction projects:
>
> (1) a certification issued by the National Commission for the Certification of Crane Operators; or
> (2) a certification issued by the Operating Engineers Certification Program formerly known as the Southern California and Hoisting Certification Program.

II. Meets other criteria established by the Division;

If the Board adopts a requirement that it will grant licensure only to those candidates who have obtained a certification issued by a testing organization accredited by ANSI **and** NCCA, it will limit portability of certifications issued by testing organizations that have obtained only one accreditation. There are crane operators throughout the country who have certifications from testing organization operating in states which recognize certifications issued by testing organizations that have been accredited by only one nationally recognized accrediting agency.

The IUOE anticipates that OSHA will confirm that certifications issued by private testing organizations will be portable from employer to employer and from state to state. Indeed, while parties (including the IUOE) participating in the OSHA rulemaking have requested that OSHA permit states that administer their own tests to continue to require that applicants for licensure pass the state-administered tests, no party has requested that OSHA modify the proposed rule to require that a testing organization receive accreditation from more than one nationally recognized accrediting agency in order to be portable from employer to employer or from state to state.

IV. LIKE OSHA, THE BOARD SHOULD DEFER TO THE EXPERTISE OF NATIONAL RECOGNIZED ACCREDITING AGENCIES ON WHETHER TRAINING AND TESTING ARE INDEPENDENT FUNCTIONS

The IUOE commends the Board for its efforts to ensure that there is independence between the testing organizations that it approves and the entities that train and/or test applicants for certification. The IUOE agrees that true third party testing is indispensable to achieve significant advances in safety, and that third party verification does not exist when there is no firewall between training and testing.

Like OSHA, the Board has recognized that the "combination" of training and education functions "constitutes a conflict of interest." Preamble, § 6.52. However, unlike OSHA, which delegates to the nationally recognized accrediting agencies the function of determining whether there is independence between the testing and training, the Board includes as part of its approval process a determination of whether there is independence between the two functions and the testing organization is independent from affiliated entities. For the reasons explained herein, the IUOE recommends that the Board defer to the accrediting agencies – NCCA and ANSI – on these issues since it is within their area of expertise.

Personnel certification is a highly specialized field and regulatory agencies, including OSHA, have not devoted the requisite in-house resources[6] to perform the functions of accrediting agencies or to substitute their judgment for that of the psychometricians and other specialists in this field. The assessment of the validity and reliability of testing is the essence of personnel certification. An indispensable part of that process is a determination of whether there is the necessary independence between testing and training to protect the integrity of the testing.

The IUOE recommends that before making a judgment about the accreditation process and the ability of the accrediting agencies to determine whether a firewall between testing and training exists, the Board should invite the NCCA and ANSI to provide testimony on the process of personnel certification.

A. OSHA Has Recognized the Expertise of Accrediting Agencies in Determining Independence Between Testing and Training

In the context of the crane rulemaking, OSHA researched the connection between accreditation and ensuring that there is independence between testing and training and determined that nationally recognized accrediting agencies are competent to determine that such independence exists. 73 *Fed.Reg.* at 59816. In this regard, the preamble states that OSHA understands that a determination that a firewall exists between testing and training is part of the accreditation process and that an entity seeking accreditation may not offer training unless the entity can demonstrate to the accrediting agency that the training is independent of both evaluation and certification. *Id.* To achieve the goals of preserving confidentiality and impartiality in the testing process, proposed rule 1926.1427(g) relies upon accrediting agencies to apply accrediting standards. Proposed rule 1926.1427(g) provides that:

> Under this section, a testing entity is permitted to provide training as well as testing services as long as the criteria of the applicable accrediting agency (in the option selected) for an organization providing both services are met.

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[6] The Board has demonstrated in its comments on the NCCCO's program that Board does not have the resources to conduct a level of review that is equivalent to the investigations conducted by accredited agencies. The preamble states that "Notably, NCCCO is only a certifying organization. It does not train or educate people to be crane operators." Preamble, § 6.52. While it is true that the NCCCO itself does not train and educate crane operators, its agents – the certified practical examiners – do, in fact, train and educate crane operators. The NCCCO administers practical tests through certified practical examiners who must be a certified crane operator and must complete the NCCCO's accreditation. The practical examiners are typically instructors at the training program hosting the exam or employees of the employer hosting the exam. In his or her capacity as an agent of the NCCCO, the practical examiners record a candidate's performance on the practical examination, including the operational errors that may result in the deduction of points.

B. The NCCA and ANSI Have Already Determined That Accredited Testing Organizations Have Autonomy in Making Certification Decisions and That Testing and Training Are Independent Functions

Both International Organization for Standardization ("ISO") 17024 and NCCA's Standard for the Accreditation of Certification Programs require that the certifying entity have "autonomy in decision making over essential certification activities" and that there be no "conflicts of interest between certification and education functions." (NCCA Standard 2). With regard to conflicts of interest, Standard 2 states that "the certification agency must not also be responsible for accreditation of educational or training programs or courses of study leading to the certification."

The NCCA's Commentary to Standard 2 addresses all the concerns expressed by the Board in the preamble (Preamble, §§ 6.52 and 6.53), including "skewing the testing process to gain higher pass rates," the "formation of a shell organization to perform certification," and affiliation among organizations or common ownership. With regard to autonomy, the Commentary to Standard 2 states:

> Certification programs may satisfy the requirements for autonomy of the governing body or governing committee in a number of ways. Incorporation of the certifying agency as an independent unit usually ensures autonomy. The bylaws of a parent organization may be constructed so that certification program governance and decision-making are defined as the responsibility of a specific unit of the organization with complete authority over all essential certification decisions. A governing committee may be given such authority in the policies and procedures and organization chart of a corporation.

With regard to independence between testing and training, the Commentary to Standard 2 states:

> In addition to not *accrediting* programs leading to the initial certification, the certification organization must not require that candidates complete that organization's program for certification eligibility. If a certification organization provides an educational program (including but not limited to primary education, exam preparation courses, study guides), the organization must not state or imply that: 1) this program is the only available route to certification; or 2) that the purchase or completion of this program is required for initial certification.

C. The Board Should Defer to These Autonomy and Independence Determinations

The proposed regulations impose a number of requirements to ensure that applicants disclose affiliations between entities responsible for training and those responsible for testing and to ensure that the Board takes such affiliations into account when deciding whether to approve testing organizations.

Section 6.52(5) to (7) requires the disclosure of the following information:

> (5) The names and addresses of any parent or subsidiary entities of the applicant.
> (6) The names and addresses of each entity that is affiliated with the applicant for purposes of this section, "entity which is affiliated with the applicant" means an entity having common or interlocking ownership with the applicant, or with a parent of subsidiary of the applicant.
> (7) Whether the applicant or any of the entities identified in paragraph (5) or (6) offer a program of training or education in crane operation.

With regard to review of the disclosed information, proposed rule 6.53(b) states that the "Board may deny an application for approval as a certifying organization" based on a "finding by the Board that the applicant is not independent of an entity that offers a program of education or training in crane operation."[7]

The Board provides examples of potential grounds for rejection of an application. One such example is "an applicant that had an exclusive contractual relationship to test and certify candidates from a separate organization that trains and educates crane operators may rise to the level of a conflict of interest that violates the need for independence." Preamble, § 6.53. The Board appears to believe an "exclusive contractual relationship" that would require a training organization to deny its trainees a choice in the selection of a testing entity from which to seek certification might cause the testing organization to "manipulate or game the system" or seek to gain a "marketing advantage" by advertising that "graduates or its program or course of study have a higher pass rate." Preamble, § 6.52.

The Board does not appear to be concerned about the opposite situation: where a testing organization limits the pool of candidates whom it will test based upon membership or employment. The IUOE agrees that a **limitation** on the pool of candidates would not create a potential for a conflict of interest since the testing organization would not advertise its testing services to the general public

[7] The IUOE recommends that the Board refer petitions for termination of approval based on lack of independence between training and testing to the accrediting agency or agencies which issued the original accreditations. *See* proposed rules 6.56(a)(3)(iv)-(vi).

to gain additional candidates for testing, or otherwise seek to gain a market advantage to maximize the number of crane operators whom it tests.

Unlike the Board, an accrediting agency would have the capacity to undertake a factual investigation to determine whether the exclusive contractual relationship does, in fact, give rise to a conflict of interest. The Board should not seek to duplicate a function performed by accrediting agencies that have greater expertise, experience, and resources in evaluating autonomy in making certification decisions and independence between training and testing.

V. OSHA WILL CLARIFY WHETHER IT WILL ADOPT THE IUOE's RECOMMENDATION THAT APPLICANTS FOR CERTIFICATION MUST SATISFY MINIMUM EXPERIENCE REQUIREMENTS

If the Board awaits guidance from OSHA, it will learn whether OSHA has adopted the IUOE's recommendation that candidates for testing for certification provide documentation to the accredited testing organization of at least 1,000 hours of crane related on-the-job experience and/or training. The IUOE's recommendation was based on developments in states with crane certification laws.

The IUOE explained in its testimony to OSHA that third party testing/verification should serve as a quality control on training programs for crane operators. However, employers who implement training programs that teach to the test or send their employees to crash courses so that their crane operators can pass written and practical tests are flouting the intent of the certification regulation. A valid and reliable examination tests the minimum skills that an operator must possess to be a qualified crane operator. A test must be both valid and reliable to obtain certification by a nationally recognized accrediting agency. A valid and reliable test examines a random sampling of the information that an individual should know in order to perform the function that is the subject of the test. Training mills that teach to the test diminish the random sampling factor by allowing the trainee to learn only the information that is needed to pass the test. In so doing, training mills make the test a less reliable measure of the knowledge that the operator possesses. A minimum experience requirement will aid in counteracting the effect that training mills that teach to the test have on the testing/certification process.

The IUOE endorses the approach of the states, which recognize that earning a passing grade on a practical test may not be a sufficient credential to ensure that the operator can safely operate a crane under all the circumstances that may be presented at a construction site. Here is a sampling of the states that have minimum experience requirements:

1. Nevada's crane certification law was recently amended to adopt a minimum experience standard that is based on the Operating Engineers Certification Program's standard (NRS § 618.880(c)):

618.880(c)(3) Requires a minimum of 1,000 hours of crane-related experience or training during the 5-year period immediately preceding the issuance of a mobile crane operator certification;

(4) Requires a minimum of 1,000 hours of crane-related experience or training, of which a minimum of 500 hours is specific to tower crane operation, during the 5-year period immediately preceding the issuance of a tower crane operator certification;

2. *New York* (12 *New York Code, Rules & Regulations* § 23-8.5(f))

Experience required. An applicant for a certificate of competence must be at least 21 years of age and must have had practical experience in the operation of cranes for at least three years and, in addition, have a practical knowledge of crane maintenance.

3. *Connecticut (Conn. Agencies Regs.* § 29-223-3a(a)(2))

Each applicant shall have at least two years of experience in the operation of a crane.

4. *New Jersey* (*New Jersey Administrative Code* § 12:121-4.2(b))

The Department shall issue an Apprentice/Trainee Crane Operator Permit to each applicant who satisfies the requirements listed below. The applicant for an Apprentice/Trainee Crane Operator Permit shall: be at least 18 years of age at the time of the application; submit a notarized attestation that he or she has less than 1,000 hours of crane-related experience; and submit an Apprentice/Trainee Crane Operator Permit Application completed in accordance with the provisions of N.J.A.C. 12:121-4.3(a), (b)1, 2, 4 and 5, and (c) through (g).

VI. OSHA's FINAL RULE WILL CLARIFY WHETHER IT HAS ADOPTED THE IUOE's RECOMMENDATION THAT THE FOUR-YEAR PHASE-IN PERIOD BE SHORTENED TO TWO YEARS

In the proposed rule, the Board makes reference to OSHA's four-year phase-in period set forth in 1927.1427(k)(1). *See e.g.*, "Another factor that the Board considered is the effect of OSHA's negotiated rulemaking. When the negotiated rulemaking is expected to take effect in 2014, it may have the effect of

excluding this class of licensees from working in the construction industry." Preamble, § 6.23.

The IUOE recommended that OSHA shorten the phase-in period for the crane certification standard from four years to two years from the effective date of the final rule. The IUOE took the position before OSHA that the four-year phase-in period for crane certification recommended by the C-DAC report is no longer appropriate. In view of OSHA's prolonged delay in the issuance of a proposed rule, the adoption of that recommendation would result in at least a **ten-year** phase-in period from the time the recommendation was made if OSHA issues the final rule in 2010. The IUOE maintained that since the key reason (the market needed time to respond to an increased demand for certification services) for C-DAC's recommendation no longer exists (73 *Fed. Reg.* at 59819), OSHA should revise 1927.1427(k)(1) to read that "As of the effective date of this subpart, until **two** years after the effective date of this subpart, the following requirements apply."

OSHA's final rules will clarify whether the IUOE has successfully persuaded OSHA to shorten the four-year phase-in period.

The IUOE appreciates the opportunity to comment on the Board's proposed regulations. The IUOE intends to supplement these comments once OSHA issues its final rule.

Respectfully submitted,

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