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Oregon State Legislature
Joint Committee On Ways and Means
Sub Committee On Human Services
900 Court Street NE
Salem, OR 97301

February 5, 2016

Re: Oregon Commission for the Blind Funding Request of January 22,
2016

Dear Co-Chairs Bates and Nathanson and Subcommittee Members,

I am an attorney representing Blind Employment Services of Tomorrow (BEST), an Oregon non-profit organization that advocates for employment opportunities for blind and visually impaired people. I also represent individuals in matters concerning the Oregon Commission for the Blind (OCB) in various forums.

The funding request put to the Joint Committee on Ways and Means recently by OCB is troubling for many reasons. First and foremost, it is based on a false premise. The rationale given by OCB for

these funds is given in its letter (attached for reference) of January 22, 2016:

In January of 2016, the Oregon Attorney General's office issued an opinion advising the Commission that **licensed blind managers do not have the authority to sub-contract the vending locations they have been assigned, and that sub-contracting of vending locations violates ORS 346.520(1).**

Emphasis added. The advisory opinion (Opinion Request OP-2016-1, attached for reference) does not support this interpretation. The opinion is fairly straightforward, and its conclusion is concise. It reads:

Based on the text and context, we conclude that to “operate” vending machines for purposes of ORS 346.520(1), **the blind individual licensed by the Commission to operate the vending machines either must personally carry out the day-to-day vending machine work or control, direct and supervise those who do.** A licensed blind vendor who does not control, direct and supervise the work of a subcontractor who services the machines does not “operate” the vending machines within the meaning of ORS 346.520(1).

Emphasis added. OCB's interpretation either misreads the thrust of the opinion, or deliberately misleads. A reasonable interpretation of the opinion is that subcontracting **is** allowed under ORS 346.520(1), as long as the licensed blind vendor controls, directs, and supervises the work of the subcontractor.

This type of subcontracting has been in practice in Oregon since at least 2001, when the current Business Enterprise Program (BEP) Rules were adopted. Something else worth noting is that many licensed blind managers have employees, which is a standard practice, and allowed by OCB. What is true under ORS 346.520(1) about control, etc., of subcontractors by managers is equally true for employees. Yet OCB does not suggest that this advisory opinion suddenly prohibits managers from having employees, and it does not draw any distinction between employees and subcontractors to justify its interpretation. Subcontracting is utilized by licensed blind managers all over the country, and is not prohibited by the Randolph-Sheppard Act (20 U.S.C. § 107 et seq), which is the enabling legislation for agencies like OCB to administer the program as State Licensing Agencies (SLA). To my knowledge, this issue has never been litigated in Oregon. This is likely because like having employees, the practice of subcontracting is a useful and profitable one for all involved parties, and there has never been any reason to challenge its legality. There is no pending litigation or other challenge to the practice of subcontracting pushing the agency to prohibit it. Several BEP participants have weighed in with the agency since they became aware of this

move by OCB, assuring the agency that they do, indeed, control, direct, and supervise their subcontractors, as any successful business person must. By attempting to take this step, OCB is engaging in ad-hoc rule making to strip independent business people of one of their most fundamental tools driving good service, efficiency and profitability.

Why then did the agency construe this opinion in such a way, and try to use it as a blunt instrument against licensed blind managers? The agency should solicit input on current subcontracting and employment practices from experienced managers and then through information and training try to make sure that they do adequately control, direct and supervise their subcontractors and employees. Instead OCB acts as if this is a crisis that demands immediate drastic changes to the program. It is always difficult to know what is in the heart and mind of another human being, but it appears that the staff at OCB resent the time and trouble the program costs them, and are anxious to turn it into something they can exercise greater control over. The licensed blind managers are entrepreneurs, and often press the agency to be more pro-active in expanding the program, by, for example, asserting the priority for vending sites in state facilities as the Randolph-Sheppard Act allows, and as is

standard practice in many states. The agency has failed miserably at this, and in the past three, the total number of managers has actually decreased, from 17 to 16. It is not at all clear from OCB's funding request how this latest plan is expected to generate 17 new employment opportunities by next year. It's not as if a critical shortage of vending machines in Oregon is constraining the program. If OCB would secure more sites for vending, that would create employment opportunities. Vending machines can be found to fill any new sites without the state taking on inventory that must be purchased, transported, maintained, repaired and eventually replaced. If OCB was referring not to employment opportunities for the blind, but for employees who would be hired by OCB to handle logistics for the purchased vending machines, then these are not new jobs, just displacement of existing jobs that are being done by non-state employees.

Licensed Blind Managers also make OCB staff uncomfortable when they insist that Oregon laws and administrative rules be followed. Requests that the agency account for lapses and illegal maneuvers are routinely subject to long delay in responding, and stonewalling instead of providing responses and remedies. As an example, recently a manager asked the agency to address

his complaint that the Business Enterprise Consumer Committee (BECC) of the BEP, composed of elected licensed blind managers, was not following its by-laws affecting his right to representation by the Committee. His complaint was made to Eric Morris, the BEP director who regularly presides over BECC business meetings. Mr. Morris waited 81 days before replying that complaints against the BECC were out of the scope of his authority, and there could be no administrative complaint or review process. This interpretation was seconded by Executive Director Johnson. The manager was directed to go to the BECC for resolution. There is no administrative review or hearing process exclusive to the BECC, so to secure his rights this vendor must apparently wield his powers of persuasion to convince the elected committee to follow its bylaws, which it has so far refused to do. Good luck with that. His only recourse beyond that would be federal arbitration or a lawsuit, with concomitant expenses and delay.

Refusing to address straightforward questions of rules interpretation and complaints about program implementation and forcing constituents into protracted, costly dispute resolution is standard operating procedure at OCB. Instead of following the laws and regulations governing the BEP, OCB often

flouts them, and counts on delay, expense and eventual frustration of the wronged parties to resolve the inevitable complaints and challenges to it. Indeed, the present proposal and budget request, which is a sea change in policy and administration of the program was developed without the input of the BECC, which by is required by rule. By habitually operating outside the rules and then forcing people to pursue litigation rather than having a functional dispute resolution process, OCB spends a great deal of its resources on litigation opposing the constituency it it supposed to serve. This creates budgetary problems, which have been pointed up by more than one audit of the agency by both state and independent auditors, and Attorney General expenditures constitute a “significant issue and/or concern” in OCB’s 2015-2017 Financial Status Report.

The various problems of the OCB are too complex and numerous to go into here. As regards the BEP, the agency is badly off-track. By this request, they appear to be trying to turn what could be a very dynamic and empowering program enabling blind and visually impaired business people to turn their skills into a thriving, independent livelihood into a paternalistic, top-down cookie cutter program so that they can dole out routes and

machines to compliant, grateful individuals. Even stranger is OCB's apparent conception that they can supplant all of the value-added services that subcontractors supply to licensed blind managers such as product selection, warehousing, transportation and other advantages simply by buying a lot of vending machines. OCB has demonstrated no facility for business operations, and should it undertake this proposed course of action the results are likely to be disastrous for the program.

OCB's interpretation of the informal opinion is extreme and erroneous, as pointed out above. It should also be noted that this opinion carries no precedential weight, and that the question has not been decided in any legal proceeding. If OCB should somehow implement this plan it will interfere with existing business relationships, violate contracts, and disrupt vending facility operations. In other words, it is nearly certain to lead to legal challenges from licensed blind managers, subcontractors and other affected entities. The outcome of such litigation cannot be predicted with certainty, but what is certain is that it will be long and expensive, and in my opinion a loser for OCB. Nobody wants that. This proposal is disruptive, poorly conceived, and is an attempted end run around applicable Oregon rules and

laws. Any request for funding it is at best premature, and at worst an attempted illegal use of state resources to diminish and degrade a valuable program that empowers blind and visually disabled Oregonians.

Thank you for your consideration in this important manner. If the subcommittee would like further information, please contact me. Personal testimony from licensed blind managers will be readily available, should the subcommittee or full committee so desire.

Best regards,

Cary L. Allen

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