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April 4th, 2016

Chair Alissa Keny-Guyer
House Committee on Human Services and Housing
Re: Hearing on HB 3253

Chair Keny-Guyer and Committee members,

I urge you to support HB 3253 and its proposed amendments, and to work with stakeholders to improve oversight and implementation of the Randolph-Sheppard Act (RSA) by the Oregon Commission for the Blind in developing this bill. Please accept this testimony on this important bill. I have represented clients in various matters involving the Business Enterprise Program (BEP) administered under the enabling RSA and corresponding state laws before the Commission in the past several years, and would like to offer my perspective.

The RSA is a powerful tool for blind people in achieving employment and independence by running their own businesses in public buildings. Clarifications and improvements are needed in Oregon's mini RSA in order to facilitate access to the program for more individuals who are blind and to increase the effectiveness and democratic governance of the program.

Contracting and Teaming Partners

Until fairly recently, individual Licensed Managers who are blind in the BEP were allowed, and even encouraged in some cases to contract

some services to private companies. Managers vary in visual acuity, the size and scope of their vending facilities and routes, needs for merchandise and services, and other considerations, and are in the best position to evaluate their own capabilities, needs, and path to profitability. Some have chosen to subcontract and have satisfactory arrangements with their business partners of long standing that help them control inventory, stay on top of changing markets, maintain equipment and machinery, and provide storage and other services that allow the managers to leverage their own efforts toward maximum efficiency and profitability. Other managers do not want or need such services and run their own successful operations by themselves or with the help of employees.

The Commission solicited an Attorney General Opinion on subcontracting, which was issued on January 25, 2016.¹ The crux of the Opinion states that in order to “operate” vending facilities within the meaning of ORS 346.520(1), the manager must either personally carry out the work or “control, direct and supervise” the work of a subcontractor. The parsing of the meaning of the word “operate” in the statute as explained in the Opinion led the Commission to conclude that subcontracting is prohibited. The view of Managers who employ subcontractors is that they very much do control, direct and supervise them. It is worth noting that the language in the statute would apply to employees of Managers as well as to subcontractors, but the Commission has not taken the position that Managers may not have employees.

Because of the very different interpretations of this Opinion by the Commission and Managers, conflict has ensued. If the Commission continues down this road, litigation is sure to follow, with its attendant drain on resources for both sides. The RSA allows for subcontracting, and many state mini RSAs allow it, sometimes with restrictions or limited to certain circumstances. It is my opinion that the state mini Act should not be more restrictive than the enabling legislation. Just the

¹ Opinion Request OP-2016-1.

opposite, opportunities for creative structuring of the law should be eagerly sought by the legislature and the agency with the goal of increasing employment for the blind, who at present suffer 70% unemployment.

Since the interpretation of legislation is at the heart of the dispute on subcontracting, a legislative fix, rather than rulemaking through litigation or otherwise is the most economical path. I urge the Committee to work with stakeholders to make sure that HB 3253 clarifies that subcontracting is an option that managers are able to choose or reject, based on their sound business judgment, subject to the oversight and assistance of the Commission. Once the confusion attached to the legality of subcontracting has been removed, the Commission can work with the Blind Enterprise Consumer Committee in the collaborative process the RSA and the BEP Rules mandate for decisions affecting the operation of the program to make any changes deemed necessary to the way subcontracting is handled.

Alternative Dispute Resolution

HB 3253 and its amendments propose an arbitration panel for resolution of complaints by Managers against actions by the Commission concerning the BEP. This would be a positive step. As it now stands, the hearing process conducted by the Commission on complaints lacks formal elements to ensure thorough explication of the issues. Representation by counsel is also prohibited, putting complainants at a disadvantage. The next stage, a formal hearing through the state Office of Administrative Hearings also tends to be less than adequate because it is often decided on Summary Determination, and Administrative Law Judges typically lack the training or the inclination to properly consider the federal statutes that are nearly always part of the pleadings. Thus, complainants are often unable to effectively make their case until the appeal stage. This is a most inefficient administration of justice, and frustrating and unfair to complainants.

An arbitration panel hearing earlier in the process would conserve agency and Manager resources and avoid the often years-long process of resolving these disputes. I ask the Committee to support this provision of HB 3253.

Operating Agreements

A detailed process for transfer and promotion of Managers in the BEP is contained in the BEP Rules. However, the Commission thinks it has found a loophole in the Rules whereby it may remove a manager from a facility without cause or process, arbitrarily. The Commission last year terminated one Manager's right to his assigned facility by refusing to renew an Operating Agreement. Operating Agreements are written as one-year contracts between the Commission and Managers. They are routinely renewed, unless the Manager is out of compliance with the Rules.

The transfer and promotion scheme for Managers is the heart of the program, and should be governed by rules that are well understood and followed by the Commission and Managers. HB 3253 and its proposed amendments make Operating Agreements terminable only for cause, eliminating the loophole whereby the Commission attempts to remove Managers from their assigned facilities capriciously. Please support this provision in the bill.

Other Provisions

Overall, there are many improvements to the law offered in this bill. First, this bill makes some needed changes to the law that brings it into closer compliance with the RSA. This is desirable, in that it will tend to eliminate conflicts with that enabling federal legislation, and simplify conflict resolution. HB 3253 also makes the agency more accountable to the citizens of Oregon by annual reporting on its administration of this important program. Another positive aspect of this proposed law is an emphasis on healthy food and beverage choices for employees and guests in our public buildings. Finally, this bill offers

increased participation and more democratic decision making by the people the RSA was enacted for, blind people striving to reach their maximum vocational potential. I hope the Committee will give thorough consideration to this progressive, important legislation. I am happy to answer any questions the Committee may have or act as a resource if that would be helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cary Allen', with a stylized flourish at the end.

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