

**MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR**

**Seventy-third Session
February 17, 2005**

The Senate Committee on Commerce and Labor was called to order by Chair Randolph J. Townsend at 7:00 a.m. on Thursday, February 17, 2005, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chair
Senator Warren B. Hardy II, Vice Chair
Senator Sandra Tiffany
Senator Joe Heck
Senator Michael Schneider
Senator Maggie Carlton
Senator John Lee

GUEST LEGISLATORS PRESENT:

Senator Valerie Wiener, Clark County Senatorial District No. 3
Senator Maurice E. Washington, Washoe County Senatorial District No. 2

STAFF MEMBERS PRESENT:

Scott Young, Committee Policy Analyst
Kevin Powers, Committee Counsel
Shirley Parks, Committee Secretary

OTHERS PRESENT:

Steve McCauley, President, State Board of Athletic Trainers
Boyd Etter, Nevada Physical Therapy Association
Gilbert M. Cortez

Senate Committee on Commerce and Labor
February 17, 2005
Page 2

Michael Tanchek, Acting Labor Commissioner, Office of Labor Commissioner,
Department of Business and Industry
Paul J. Enos, Retail Association of Nevada
Christina Dugan, Las Vegas Chamber of Commerce
James F. Nadeau, Nevada Association of Realtors
Brad Spires, Nevada Association of Realtors
John P. Sande, III, Direct Buy, Incorporated
Frank Ball, Vice President, Franchise Relations, Direct Buy, Incorporated
Patricia Morse Jarman, Commissioner, Consumer Affairs Division, Department
of Business and Industry
Kathleen Delaney, Deputy Attorney General, Bureau of Consumer Protection,
Office of the Attorney General

CHAIR TOWNSEND:

We will hear Senate Bill (S.B.) 42. Bill sponsor, Senator Maurice Washington has asked that we take up the bill later. The second bill is S.B. 44. If the Committee is interested in this bill and decides it needs subcommittee work, then Senator Lee will Chair with Senator Hardy and me. Following this bill is S.B. 47 presented by Senator Valerie Wiener. If additional work is needed, Senator Carlton will work with Senator Wiener.

SENATE BILL 42: Makes various changes concerning compensation paid to employee or outside salesperson which is based solely on commission. (BDR 53-92)

SENATE BILL 44: Revises provisions regulating organizations for buying goods or services at discount. (BDR 52-763)

SENATE BILL 47: Revises provisions governing licensure of athletic trainers and requires study concerning regulation of personal trainers and other fitness instructors. (BDR 54-12)

SENATOR VALERIE WIENER (Clark County Senatorial District No. 3):

I am here to introduce S.B. 47, the athletic trainer licensure and personal trainer process. I want give you a brief history regarding the genesis of the bill before you today. In 1999, my second Legislative Session, I introduced S.B. No. 357 of the 70th Session. This was a highly discussed piece of legislation in the halls of the Legislature with dialogue from people supporting it and others not in support. With the assistance of Chair Townsend, an amendment was proposed

as a substitute piece of legislation for this bill. In the final hours the substitute amendment became a bill. The bill required a four-year period for athletic trainers to put together, for the Legislative Session, language for a licensure bill. This was accomplished with S.B. No. 27 of the 72nd Session. Included in the bill is a lengthy piece of legislation to establish a licensure process and a board. At the end of the bill there is a requirement that this particular board, once it is up and running, provide a mirror process to do the same for personal trainers. I was asked to request a bill draft to address the personal trainer component. I do want to propose an amendment, as well, based on the concern of some of the members of this Committee, to also address provisional licensure. I know there is sentiment on the Senate side and a caution towards provisional licensure. If it becomes a problem, I will offer to delete language considering this issue. I have asked Steve McCauley to appear and answer any questions you may have. He can explain much better than I, as he has been involved in the process from the beginning.

STEVE MCCAULEY (President, State Board of Athletic Trainers):

I have been involved in the process of legislation for the regulation of athletic trainers since 1999. There has been a tremendous learning curve for me with respect to contacting State governmental agencies, educating them as to who we are and continuing our education as to what we need to do.

Our board has received invaluable guidance from our Deputy Attorney General, Keith Marcher, whose patience and mentoring has played a great role in the board's accomplishments to this point. I am proud to tell you today, over 80 percent of the registered certified athletic trainers in our State have completed their applications and await only their FBI report to obtain the first-ever license to practice athletic training in the State.

Last fall, I discovered, our board was faced with a choice. This choice concerned section 55 of S.B. No. 27 of the 72nd Session, whether to satisfy the requirements poorly or wait and do it correctly with the thought and study they deserve. Being involved in this process from the beginning, I understand the importance of consumer protection legislation that would come from the bill. Fitness professionals deserve a better effort and so do the people of our State. I made a decision in the fall of 2004 to contact the Legislative Counsel Bureau (LCB) and report to them that the board would not be able to complete the work set forth in section 55 of S.B. No. 27 of the 72nd Session. The LCB suggested

that we work with Senator Wiener to sponsor a bill and S.B. 47, before you today. It mirrors section 55 of S.B. No. 27 of the 72nd Session with the addition of an interim progress report to be submitted to the Legislative Commission. I am requesting an extension of the timeline to effectively carry out the tasks and the intent of the bill. I am seeking your support for the inclusion of the physical therapy profession in this process.

CHAIR TOWNSEND:

Are there questions for Mr. McCauley?

SENATOR CARLTON:

Establishing a board is a huge undertaking. There are some things lacking here. The reports that are due would tell us how well your board is doing. We need to know where your budget sits, if you have been through an audit and how many licensees you actually have. There are numerous questions needing answers. As busy a person as you are, I need to point out one conflict of which I am sure you are totally unaware. You are the president of the association and you are the president of the board. You cannot wear these two hats. It is not in the purview of the public interest. The association is there to represent their members. The board is there to represent the public. You have, in essence, conflicted yourself on a number of issues. I appreciate your efforts to try to do what is right, but you have put yourself in an awkward position. We will need to sit down and discuss how to best handle these problems. There is more information this Committee will need in order to understand this bill. We will need to determine if this board will be able to accomplish what it has set out to do.

MR. McCAULEY:

The conflict was obvious to me when the process started. Keith Marcher discussed it with me. He decided it was not a conflict, thinking I could do both. I was fully prepared to resign the presidency of the State association, but based on our conversation I continued to do both.

CHAIR TOWNSEND:

We are not picking on you. This is not the point. We admire your intensity. There are some things we need to do to help Mr. McCauley. Perhaps Mr. Marcher needs to know the Committee perspective on boards and 20 years of experience based on public policy. We will need to clear up Mr. McCauley's

position. There are other extremely competent people, qualified to be of help in this area.

SENATOR TIFFANY:

I would like to hear Mr. Powers' opinion on this issue. In the private sector there are presidents and CEOs in companies holding the same position. There are other boards where this is policy. Do we need a legal opinion?

CHAIR TOWNSEND:

The long-standing history here is that a person cannot hold both titles. We have taken a public-policy position that it is inappropriate. There are no boards where this would exist.

MR. McCAULEY:

I am fully prepared to resign the office of presidency of the State association and turn it over to someone else.

CHAIR TOWNSEND:

Senator Carlton is correct, the board is there to protect the public and the association is there for the interest of the licensee and its members. We try to keep the two separate.

MR. McCAULEY:

I would like to address the further questions with regard to developing the reports. Those reports are available and the audit has been completed and returned. I am not aware to whom I would contact with a project report and reporting the budget.

SENATOR CARLTON:

There are boards still needing reminders of reports that are due. We are mainly trying to get all boards to act the same with their reporting cycles so that we can monitor their progress even during the interim.

MR. McCAULEY:

I am willing to do whatever the State requires.

Senate Committee on Commerce and Labor
February 17, 2005
Page 6

CHAIR TOWNSEND:

The Audit Division of LCB will provide examples of past audits that will be helpful to you. Mr. McCauley, do you have anyone else here or in southern Nevada who would add to this discussion?

MR. MCCAULEY:

I have the S.B. 47 amended language I referred to earlier.

BOYD ETTER (Nevada Physical Therapy Association):

We worked with Senator Wiener, Steve McCauley and Senator Carlton very closely on language dealing with our issues on S.B. 47. We have not looked at all the new amendment language, as yet, but we would like to work with them again.

CHAIR TOWNSEND:

The task you have set before you is substantial. Our job, as a staff and with the subcommittee, is to help you define your board. We have to face reality; obviously some boards do not make it. We submit for the record testimony from Kevin Buckley, Deputy Director of Government Relations, International Health, Racquet and Sportsclub Association (IHRSA), dated February 16, 2005 ([Exhibit C](#)). Are there any further questions regarding this bill? We will close the hearing on S.B. 47. Senator Carlton, Senator Tiffany and Senator Heck will be in charge of this bill in subcommittee. Please report back when you have completed your work. Senator Washington will now speak to S.B. 42.

SENATOR MAURICE E. WASHINGTON (Washoe County Senatorial District No. 2):

We will address S.B. 42 which addresses how outside commission salespeople are compensated, providing a contractual agreement between the two. This bill would give power to the Labor Commissioner to intercede for a fair amount of compensation and impose fines and penalties as is deemed necessary, especially if the salesperson is required to attend sales meetings. The bill is self explanatory. Gilbert M. Cortez, a salesperson who has a concern regarding sales commissions will speak to this issue.

CHAIR TOWNSEND:

Are there questions for Senator Washington?

Gilbert M. Cortez:

I will read excerpts from my written testimony ([Exhibit D](#)). I have been in commission sales for 50 years. In those years I have lost jobs because I have stood up and fought for my rights. Many times I have had costs subtracted from my sales commissions. Called penciling, the owner of the dealership reviews the sale and adds his costs and losses against the sale leaving my final check with much less. There are no contracts or signed agreements. When promises are made, there is nothing to back up your claim.

CHAIR TOWNSEND:

In your experience, has any of this behavior been because of your employment by a new-car, franchise dealer in Nevada?

MR. CORTEZ:

Yes they have. I have worked 80 to 90 hours a week without pay. They have required that you be there. They require that you be there for meetings. Mobile home dealers do not pay you for your training or the time you spend on their meetings.

CHAIR TOWNSEND:

Did we hear you say someone required you to work 80 to 90 hours a week?

MR. CORTEZ:

It is that you have to be there in order to make a sale. There is a schedule provided with times for you to be there. Regarding the mobile home sale concern I have written about, I promised a customer certain amenities, such as an appliance listed in the inventory of the mobile home. Later I was billed for the same appliance. I tried to recover my loss, but I could not prove my case. I lost the lawsuit to the company. There is no contract, no signed agreement and no guarantee with these companies.

CHAIR TOWNSEND:

Are there questions for Mr. Cortez? I want to get back to S.B. 42 and the standards it outlines. It addresses your concern in section 2. It speaks specifically of the commissioned person. Based solely on commission, you will receive a written agreement. The intent is to outline all the conditions to which you have jointly agreed. If there is some problem with the agreement, this is when the Labor Commissioner would be allowed to enter into the disagreement, provide a hearing and in some manner bring resolution to it. I am not sure of the

procedures in the mobile home dealerships, real estate industry or other commissioned sales dealers. Standards of practice with gross sales and other agreed-upon deductions are extremely detailed in the auto sales industry.

SENATOR LEE:

Commission sales have built-in incentives for the go-getters, someone who really wants to build a business with renewals, referrals and marketing. These people are usually independent contractors and there are dates they have to give up in order to be available for training, and attend sales meetings to be successful. These folks can own their own business within a larger corporation. These companies are not contracted to compensate you for attending these meetings. Section 3 of this bill encompasses a broad range of sales. It is a real deal killer. Paying minimum wage is going to take away the opportunity for the hustler, the hard worker, to make a good income. My wife is in real estate sales. She is called in from time to time with State regulations that need to be exposed to the agents. This is one way agents are taught properly. There are too many different sales agencies besides automobile and mobile home dealers that would be affected by this bill. Is it your intent to bring in all commissioned salespeople?

SENATOR WASHINGTON:

I understand there are some concerns with section 3 of this bill. I agree it covers a broad range of salespeople. It should be more narrowly defined. Mr. Cortez has a legitimate complaint as well. He may have some misgiving and misunderstanding about his employer's treatment. I will let others testify to this bill's merits.

SENATOR LEE:

There is merit in some of this bill. It has a far-reaching effect.

CHAIR TOWNSEND:

Are there any other questions? There are two tragedies here. First, one faced by Mr. Cortez and second, is the company who created the problems for you puts a negative broad-brush against all those companies that do things correctly. There are disagreements, but contracts can be outlined up front to provide a fair and equitable opportunity to review the document and take any complaint to the general manager or the owner without question. Good employers want to do the right things because they know good employees make a difference to their business.

SENATOR WASHINGTON:

It is the Committee's prerogative to process this bill if it is workable. I would like to add a request of the Committee to send a letter to the Labor Commissioner stressing the concerns of Mr. Cortez and how salespeople like him might receive a just compensation for work they have done.

CHAIR TOWNSEND:

Bringing in the Labor Commissioner and giving him some of the issues this Committee faces is a good idea, and then to have him share with us what he is hearing would be helpful. A *Nevada Revised Statutes* (NRS) Title 53 subcommittee is appropriate. I chair this subcommittee along with Senator Carlton and Senator Heck. Is there anyone else to testify on S.B. 42?

MICHAEL TANCHEK (Acting Labor Commissioner, Office of Labor Commissioner, Department of Business and Industry):

We have looked into this issue and we were in contact with Senator Washington's office. We have looked at S.B. 42. Our position is neutral on this bill. One suggestion I did make has to do with the language in section 2. We passed new regulations during summer 2004. One of the regulations deals with commission sales. Specifically, in those instances where there is no written sales agreement or written commission agreement between the employer and the salesperson, this commission will look at a course of action to deal with the parties involved and the amount of compensation.

CHAIR TOWNSEND:

Commissioner Tanchek, when it is convenient for you, please come and meet with this Committee. We would like to see you personally, get to know you better and go through a few things of interest to the Committee. We would like to discuss your budget and hear from you about the kinds of trends you are seeing.

MR. TANCHEK:

I will be more than happy to do this.

PAUL J. ENOS (Retail Association of Nevada):

We oppose S.B. 42. Section 3 requires payment to commission salespeople for attending the sales meetings or training. These are negotiable issues usually part of a contract. I am willing to work with the sponsor and the subcommittee on this and other language concerns within the bill.

Senate Committee on Commerce and Labor
February 17, 2005
Page 10

CHAIR TOWNSEND:

Do you have other language you would like to offer? As a reminder, there is an amendment format for those who are willing to work with this Committee on language and amendments. We have an amendment process.

CHRISTINA DUGAN (Las Vegas Chamber of Commerce)

We have the same concerns with section 3 as the Retail Association. We believe training seminars and sales meetings are beneficial to sales staff. They learn about their product or gain an understanding of the marketplace. Certainly we would encourage any salesperson to attend these meetings as this could mean future sales. Smaller employers would find paying minimum wage a burden.

CHAIR TOWNSEND:

Are there any questions of Ms. Dugan?

SENATOR CARLTON:

In the types of business of which you spoke, if you did not attend those meetings, would you lose your job? Is there a hammer involved if you do not attend?

Ms. DUGAN:

I could not speak to that, not being the employer. I know there are some mandatory meetings dealing with safety issues.

SENATOR CARLTON:

It can make a difference in how this is perceived, whether a meeting is optional or mandatory.

JAMES F. NADEAU (Nevada Association of Realtors):

With me today is Brad Spires, Vice Chair of the Legislative Committee, Nevada Association of Realtors.

BRAD SPIRES (Nevada Association of Realtors):

I am a broker acting as a broker salesperson in Gardnerville. The concern we have really revolves around section 3 of S.B. 42. We currently have systems where a realtor has a contract with the employing broker. Outlined in the contract is the compensation procedure. If, in fact, there is any legislation for payment of a certain wage for hours worked, I think it could jeopardize the

independent-contractor status and even some ramifications as far as the federal tax codes. If payment is made by employer to employee, then we are looking at additional payments of tax benefits and other fees that do not exist now. We are comfortable with the procedure we have as broker and salesperson, the contracts we do and the governing division that is in place. We will work with your subcommittee to do whatever we can to see that section 3 will not affect us.

CHAIR TOWNSEND:
Are there any questions of these gentlemen?

SENATOR SCHNEIDER:
I know the National Association of Realtors have worked long and hard at the federal level to establish the independent-contractor status. The larger real estate firms do a good job protecting this status. I worked for a while with a mobile home dealer. The more involved I became the less comfortable I felt with all the things they were doing in their business. This mobile home dealer operated really fast and loose. It was like a combination boiler room and used-car sales all in one. This may be something to look at during this session.

CHAIR TOWNSEND:
Is there anyone with questions here or in southern Nevada? We will close the hearing on S.B. 42. We will open the hearing on S.B. 44.

JOHN P. SANDE, III (Direct Buy, Incorporated):
Direct Buy, Incorporated, is a discount business for furniture, rugs, televisions and larger similar items. A client buys a membership and as a result of the membership receives a discount for purchasing directly. In existing law if you are in this type of business, you must post a \$50,000 bond and set up a custodial trust account with a financial institution approved by the State of Nevada. Once this occurs, the trustee can only withdraw 25 percent of the buyer's payments under the contract from the trust account, or every six months, whichever is less. This makes it uneconomical for certain organizations to come and do business in Nevada.

We propose to change the law for certain entities that have existed for over 10 years and have at least 25 franchises. You still have the requirements for franchisees to post a \$50,000 bond, but you would also have the parent organization, in this case Direct Buy, that would have to post a \$250,000 bond

with the State. If all these circumstances were met, Direct Buy could basically act as trustee, taking the buyer's payments and pay out 50 percent of those payments for the first quarter of the contract or six months, whichever is less and 50 percent during the second quarter of the contract. There is another feature patterned after California law. During the course of the contract, if a location moves more than 20 miles away from the buyer's residence, then the contract is still in existence as long as the organization can continue to provide at-home ordering services and delivering services without penalties. These are regulated by the State of Nevada.

CHAIR TOWNSEND:

Mr. Ball, please tell us how Direct Buy works. How do your franchises work? What is the role of the consumer? We need examples.

FRANK BALL (Vice President, Franchise Relations, Direct Buy, Incorporated)

We have 100 franchised discount-buying organizations in the United States and Canada. We are in support of S.B. 44. Our organization sells memberships and the buyers purchase items essentially at cost. We do not mark up the merchandise. We have relationships with 942 manufacturers and authorized suppliers. The only source of operating income and profit comes through selling memberships. A person who buys a membership can go to our brick and mortar store which has about 800 catalogues and order any item at a considerable savings. We sell furniture, kitchen cabinetry, which by the way has a tremendous price markup, and other large items at a much lower cost. Our company has operated the business as the franchisor for 33 years. We sell a territory to a franchisee buyer who opens a brick and mortar store in this area and they sell memberships and deal directly with them. What we give to the buyer is the franchise system and all the relationships with these manufacturers and suppliers.

CHAIR TOWNSEND:

Are there any questions of Mr. Sande or Mr. Ball?

MR. SANDE:

I do have clean-up amendments ([Exhibit E](#)) that I brought with me. Mr. Young has them.

CHAIR TOWNSEND:

The Committee has been given copies of the amendments.

MR. SANDE:

The first amendment for S.B. 44 changes the meaning of franchise because the Federal Trade Commission (FTC) is in the process of revising franchise regulations and the existing rule may be replaced soon. The second change proposed would amend section 6, subsection 2, paragraph (a) subparagraph (2). Mr. Ball met with Patricia Morse Jarman and some of her staff as well as the Deputy Attorney General yesterday, and explained Direct Buy and these changes.

CHAIR TOWNSEND:

Ms. Morse Jarman and some of her staff are in southern Nevada watching this meeting through videoconference.

PATRICIA MORSE JARMAN (Commissioner, Consumer Affairs Division, Department of Business and Industry):

We have concerns directly related to the consumer protection aspect in terms of disclosure. It needs to be made clear that these catalogue items are custom orders allowing only a limited opportunity for refunds. These memberships are very expensive. Another concern is with the bonding requirements. We also have a problem with the definition of a franchise, and certain restrictions imposed. We want to work with the LCB to firm up the language.

KATHLEEN DELANEY (Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General):

Yesterday, we had a good meeting with Mr. Ball. We were able to clarify many issues. There are a few, possibly six, revisions that we would propose using the appropriate format when it is received. We do not perceive any conflict with Mr. Ball or his organization with these revisions. We want to make some amendments addressing the disclosures we think are necessary in the membership contract. We are not in opposition to this bill and we feel confident we will be able to work out some minor changes that will satisfy everyone.

SENATOR TIFFANY:

Did I hear you say an independent party is to act as a trustee, but a parent company could also become that trustee?

MS. MORSE JARMAN:

Yes, the Deputy Attorney General has told us this is a common practice. This is not a problem.

CHAIR TOWNSEND:

I have a question for both you and Mr. Ball. You know the components of your organization. Putting aside the types of sales, is the membership agreement somewhat like Sam's Club or Costco? What is the consumer's perception?

MR. BALL:

Our organization is completely different. They stock items for low cost. They depend on making a profit from high volume, not membership fees.

CHAIR TOWNSEND:

In the future it will be important to explain your franchise business model for all concerned. Questions by consumers need to be clearly resolved.

SENATOR HECK:

I have a question regarding the proposed language in section 6. When the business location moves greater than 20 miles away, the individual will not have the ability to cancel the membership. Is this option clearly specified in the contract they sign?

MR. BALL:

Absolutely, it is part of the contract. In yesterday's meeting we discussed this issue and we pledged to work on suitable language to include this item of disclosure in the contract.

SENATOR TIFFANY:

I am trying to envision your type of business. Is it a catalogue business with samples? Is most of it done on the Internet?

MR. BALL:

In recent years we have tried to keep up with technology. Each brick and mortar facility would house approximately 700 to 800 catalogues with samples of all the fabrics, woods, leathers, floor coverings, etc. The bulk of business is with the catalogue orders. We have just completed a Web site out of Arizona. It is a virtual showroom. It is a new presentation and carries photos of all our merchandise along with the information needed to place an order. Future growth is expected through the Web site.

Senate Committee on Commerce and Labor
February 17, 2005
Page 15

SENATOR TIFFANY:

Right now, it would seem that all the business is out of the warehouse. You are not mainly Internet-based so far. Is there a location in Nevada as yet?

Mr. Ball:

No, not really. The showrooms are bringing in the most business. We have not found a location in Nevada, but obviously Las Vegas is attractive. We would consider Reno and Carson City as possible markets as well.

CHAIR TOWNSEND:

Where are your corporate headquarters Mr. Ball? Location here would be beneficial for your company.

MR. BALL:

The corporate headquarters are in Melville, Indiana.

CHAIR TOWNSEND:

There being no further business, this closes the hearing on S.B. 44. The meeting is adjourned at 8:28 a.m..

RESPECTFULLY SUBMITTED:

Shirley Parks,
Committee Secretary

APPROVED BY:

Senator Randolph J. Townsend, Chair

DATE: _____