

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

**Seventy-fourth Session
February 22, 2007**

The Senate Committee on Commerce and Labor was called to order by Chair Randolph J. Townsend at 9:02 a.m. on Thursday, February 22, 2007, in Room 2135 of the Legislative Building, Carson City, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chair
Senator Warren B. Hardy II, Vice Chair
Senator Joseph J. Heck
Senator Michael A. Schneider
Senator Maggie Carlton

STAFF MEMBERS PRESENT:

Gloria Gaillard-Powell, Committee Secretary
Kelly S. Gregory, Committee Policy Analyst
Wil Keane, Committee Counsel
Scott Young, Committee Policy Analyst
Jeanine Wittenberg, Committee Secretary

OTHERS PRESENT:

Ronald P. Dreher, Nevada Peace Officers Research Association
Susan Fisher, Chiropractic Physicians' Board of Nevada
John F. Wiles, Division Counsel, Division of Industrial Relations, Department of
Business and Industry
Gary E. Milliken, Builders Insurance Company
Robert A. Ostrovsky, Employers Insurance
John E. Jeffrey, Southern Nevada Building and Construction Trades Council;
Nevada Trial Lawyers Association

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CHAIR TOWNSEND:

I will now open this work session to Senate Bill (S.B.) 3. We have been provided with a suggested amendment prepared by Mr. Keane ([Exhibit C](#)).

Mr. Keane, the explanation and definitions on page 2, subsection 3, is different language from the last mock-up. Is [Exhibit C](#) the original mock-up of the amendment?

SENATE BILL 3: Revises various provisions relating to the death benefits payable to surviving spouses of certain police officers and firefighters. (BDR 53-244)

WIL KEANE (Committee Counsel):

No. We've gone through a couple of different versions of this and this is the one that—included the concerns that—Mr. Dreher raised—with regard to whether or not—617 might end up somehow being inadvertently affected.

CHAIR TOWNSEND:

"Okay, so—the changes are primarily in sub 4?"

RONALD P. DREHER (Nevada Peace Officers Research Association):

"Yes.—Sub 4 was changed to add a new (a) and (b) and those are okay with us."

CHAIR TOWNSEND:

Subsection 4 now reads for the record, "the provisions of this section (a) do not apply to the surviving spouse of a deceased police officer or firefighter if the death of that officer or firefighter is made compensable only by chapter 617 of NRS; and (b) do not affect any compensation paid under 617 NRS." That makes reference specifically to heart and lung provisions?

MR. DREHER:

"Yes sir."

CHAIR TOWNSEND:

"Committee, questions? Mr. Keane, I think you wanted to clarify something. Is that correct?"

MR. KEANE:

Yes Mr. Chairman, thank you.—Mr. Young and I were talking and we talked with Senator Heck also.—There was a concern—in the—mock-up before you with regard to the language "from a hostile or violent act" which you can find on page 2, line 23, and the concern is that—by having it hostile or violent, something that was simply violent would be included and that was not—the intent.—Obviously things like a brick falling on someone's head would be a violent act but would not be intended to be covered. So it was our recommendation that we remove the words "or violent" and just have it be from a hostile act because what we were intending to cover here per—Mr. Dreher's request—was instances where an officer was on duty, not specifically responding to anything, but just on duty and was attacked.

CHAIR TOWNSEND:

"Mr. Dreher, are you prepared to say that you want to take out 'or violent act?'"

MR. DREHER:

Thank you Mr. Chairman, again, for the record, Ron Dreher. The intent of the "hostile or violent" was to incorporate all of the various types of accidents or the—encounters that an officer would—encounter in his or her daily duties. So if hostile, if by removing violent, we're including all of those other areas that would be incorporated under quote unquote violent, then obviously we don't have a problem with that. I just don't want to have it misinterpreted.

SENATOR HECK:

If I may, I think that at issue is that hostile includes violent, but violent does not necessarily include hostile. So the hostile is the

intent. You know there are many violent acts—or things that can be determined to be violent which really wouldn't be covered. So I think we thought that—and Mr. Young actually has a case cite on where that could be problematic and that is why we came up with just the idea of using the word hostile.

MR. DREHER:

"Mr. Chairman, for the record Ron Dreher again, then we wouldn't have any problem with that."

CHAIR TOWNSEND:

"Okay, so Mr. Young, what is the case cite that we'll be using?"

SCOTT YOUNG (Committee Policy Analyst):

Mr. Chairman, there was a case in 1983 called *American International Vacations v. Donald [sic] MacBride*.—In that case, and I am going to defer for any details to Mr. Keane, but in that case the Supreme Court discussed the term "violent" which is used in the definitional phrase of an accident in chapter 616A.—Mr. Keane can explain how the court interpreted "violent," but my understanding from what we were trying to accomplish in S.B. 7 [sic] is the term "violent" as it's presently used in chapter—616A through 616D would be broader than what was intended for the use of the term "violent" in S.B. 3.

CHAIR TOWNSEND:

"Okay. Mr. Keane."

MR. KEANE:

Thank you, Mr. Chairman. In that case—Mr. MacBride was working in an office and he was walking downstairs and his name was called out by a supervisor. He turned very suddenly and hurt his back as he turned. There was no fall, there was no impact and the court was looking at the phrase "sudden and violent" which is in the statute for coverage under workers' compensation.—For an injury—an injury needs to be "sudden and violent."—The court determined that based on

common usage of the terms, that a sudden turn that caused a back spasm—which needed treatment.—It was undeniable that his back had been hurt and he needed treatment that that was a "sudden and violent act."—It's our understanding that's not the sort of act they wanted to be included in "killed in the line of duty."

CHAIR TOWNSEND:

"Can you get me a copy of that case—?"

MR. KEANE:

"Absolutely ([Exhibit D](#))."

CHAIR TOWNSEND:

"Thank you Mr. Dreher. Committee, so we will remove 'or violent act,' which doesn't impact the amendment other than making clarification."

We will now move on to S.B. 19 and S.B. 23.

SENATE BILL 19: Revises provisions relating to licenses and certificates issued by the Chiropractic Physicians' Board of Nevada. (BDR 54-573)

SENATE BILL 23: Revises provisions governing fees charged by the Chiropractic Physicians' Board of Nevada. (BDR 54-621)

SENATOR CARLTON:

We addressed all of the concerns we thought the Committee had with these two bills and have combined them into one. The Committee has been provided with our recommended changes ([Exhibit E](#)).

SENATOR HECK:

In section 1, subsection 2, it appears there are now two pathways. If they do not do the things beginning on line 28 through line 38, they only have to do what is outlined beginning on line 40?

SENATOR CARLTON:

Correct.

CHAIR TOWNSEND:

For everyone who presents board and association bills, in the future we would prefer one bill. Please do not predetermine whether there should be fees in one bill and everything else in another. We will determine that.

SUSAN FISHER (Chiropractic Physicians' Board of Nevada):

I appreciate the help of Senator Carlton and Senator Heck on these bills. I would like to clarify that during the previous hearing on this bill I stated that the Legislative Counsel Bureau staff had advised us to submit two bills. It was actually the Office of the Governor who requested that we submit this in two separate bills.

SENATOR SCHNEIDER:

I understand we went to a biennial renewal so the renewal costs are doubled, which is not an increase in the fee. On page 6 of [Exhibit E](#), are any of the new fees going to be problematic for this combined bill? Was that discussed with the Office of the Governor? I would not want to see your bill fail because of those fees.

MS. FISHER:

I have discussed this with the Office of the Governor. They have indicated that, more than likely, with a letter from the Nevada Chiropractic Association (NCA) stating they support the fee of \$25, they are okay with the fees. The NCA has indicated to me that they will submit a letter of support. The \$25 fee would apply if the NCA hosts a continuing education seminar. They tend to host seminars as fund-raisers, but it also helps the Chiropractic Physicians' Board of Nevada (CPBN). More than likely, the CPBN would waive that fee entirely to help support them or any other nonprofit professional chiropractic association of this State or another state.

SENATOR CARLTON MOVED TO AMEND AND DO PASS S.B. 19.

SENATOR HECK SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR TOWNSEND:

We will now move to S.B. 54. We have a mock-up amendment ([Exhibit F](#)).

SENATE BILL 54: Revises provisions governing industrial insurance to create a presumption of intoxication or use of a controlled substance under certain circumstances. (BDR 53-803)

JOHN F. WILES (Division Counsel, Division of Industrial Relations, Department of Business and Industry):

I am curious about definitions. The new language would have the Division of Industrial Relations (DIR), Department of Business and Industry, develop standards for postaccident drug testing. It has occurred to me that the word "standards" may mean developing a procedure for drug testing. There may be another word that is more appropriate than "standards." I would like some guidance from the Committee.

CHAIR TOWNSEND:

Mr. Milliken, did you work on this amendment with Senator Lee?

GARY E. MILLIKEN (Builders Insurance Company):

Yes. I also worked with Kelly Gregory and had some discussions with Senator Heck.

CHAIR TOWNSEND:

Mr. Keane, do you understand the concern of Mr. Wiles regarding the use of the word "standards?" The basic problem in the original bill was it read "policy of the employer." That did not give us a true measurement or template for employees. Therefore, the administrator was going to create standards and a policy. We know what the intent of that is but the wording is not correct. Mr. Wiles, is that a fair assumption?

MR. WILES:

I just want to make sure we have it clear in the bill because it appears that there is a significant amount of interest in getting this correct. I would like to have the direction to the DIR as clear as possible so that we can refer to the statute if questions arise. For example, I believe Senator Heck referred to a *Code of Federal Regulations* (CFR) that maybe has a standard or something regarding this issue. It was relayed to me that this was too stringent. We are

looking for clear direction on what is the scope of our authority and what we are supposed to develop.

SENATOR HECK:

When we first heard the bill, I mentioned that we do not want to imply that there is any obligation upon any employer to actually have a postaccident drug-testing policy. That is not the mandate. I would like to see that if an employer has a postaccident workplace drug-testing policy, the DIR provides regulation on how it is to be done, because if the DIR develops a standard that is violated, what is the recourse?

MR. WILES:

Do you mean an Occupational Safety and Health Standard?

SENATOR HECK:

I mean a standard that will eventually be defined in the meaning of this bill.

MR. WILES:

We could conceivably fine someone for violating a regulation. If it is an intentional violation, it could even result in a benefit penalty in an extreme set of circumstances.

SENATOR HECK:

Do you mean a fine for a violation of the standard?

MR. WILES:

Yes. Does that mean we should have the drug-testing procedure in our regulation? Would our drug-testing procedure be what the employer would follow in the absence of their own drug-testing procedure? I am not clear on this.

SENATOR HECK:

My concern is there could be a development of patchwork postaccident drug-testing policies based on the whim of the employers. Some could be very restrictive for the employee and then there is Title 49 of CFR section 40 which lays out the federally mandated procedures for regulated drug testing. I am looking for a balance between what is in the CFR and not having a patchwork drug-testing standard. My main concern is that the employer and employee are both protected.

MR. WILES:

I apologize because this is subject matter with which the DIR and I are not familiar due to the nature of our current regulatory responsibilities. Are you talking about the timing of the testing? Are you asking if the test is not undertaken, should we have some sort of guidelines that caution us about the punishment of the employer?

SENATOR HECK:

The simplest thing would be to adopt Title 49 of CFR section 40 by reference. We do not want to get into punishment issues because even the CFR allows for different levels based upon whether the person is in a safety-sensitive position or things along those lines. I think we are looking for how the test needs to be performed, the timelines in which the test needs to be performed and a Medical Review Officer (MRO) needs to be involved

Most nonregulated drug-testing programs already mimic the CFR because it really is the only way they can be defensible.

MR. WILES:

I think I have a clearer picture now. Is this to apply in the absence of an employer's drug-testing policy, or is it supposed to be the bare minimum?

SENATOR HECK:

If an employer does not have a policy, they have no right to drug test an employee after an accident. So, if an employer has a policy, then this is the procedure that the employer must use consistently.

CHAIR TOWNSEND:

At least we now have two people who understand that. I need to make sure everyone in this room understands that if an employer does not have a policy, they are asking for trouble because then you cannot test someone.

SENATOR CARLTON:

At times, we go beyond policy to employment contracts because my employment drug-testing policies are a contractual matter. I am concerned that we are taking something, putting it into State law and then it will end up as part of my employment contract negotiations.

MR. WILES:

Yes. This would be a mandatory subject to bargaining negotiations.

Chair Townsend:

I did not hear it that way. Let me state it and you tell me if I am wrong. This just says if an employer has a policy, these are the standards that must be met. It does not say that an employer must have a policy. It does not mean you can or cannot negotiate one. It just says if you have one, the CFR or whatever the DIR adopts as regulation must be met. Is that correct?

SENATOR CARLTON:

You cannot negotiate an employment contract separate from State law.

CHAIR TOWNSEND:

No, it just means if an employer has a policy it should meet a standard.

SENATOR HECK:

For the record, I am a Certified MRO. I have developed and been involved in several workplace drug-testing programs. The issue of collective bargaining does not usually include how the testing is done. It is the idea of whether or not, as an employer, they have random workplace drug testing or postaccident drug testing. That is the issue that is covered in collective bargaining. It is not the procedure or format or the other details. It is the concept of whether or not you are subjected to drug testing.

SENATOR HARDY:

I do not disagree with Senator Carlton. We should look to see how the major employment contracts could be impacted. If we can adopt a policy without intentionally doing something that makes it difficult, then yes, but I think we need to be careful about letting a contract between private parties enter into our thought process as we develop State policy.

CHAIR TOWNSEND:

I do not disagree, and I do not think that is the intent. We are not trying to interrupt anyone's right to bargain or whether they do or do not have a drug-testing policy. It just says if you have one, there should be certain standards so that both sides know what they are. Otherwise, you end up litigating it, and I think that is the point of the CFR.

MR. MILLIKEN:

I agree with you on that. Remember, one of the reasons we brought this bill forward is that there is confusion over the person who refuses to take a drug test. That is something we need clarification on, but that can be accomplished with the guidelines you were talking to Mr. Wiles about.

CHAIR TOWNSEND:

What if you are stopped by a law enforcement officer while driving a vehicle and, for whatever reason, you are asked to submit to a sobriety test and you refuse, what happens?

MR. DREHER:

If you refuse to take a test once you are stopped and the test is offered, then by law you will lose your license for a certain period of time.

CHAIR TOWNSEND:

Is that prima facie evidence that you are guilty?

MR. DREHER:

That is correct.

SENATOR HECK:

It is not that you are guilty of driving under the influence, but it is part of the privilege of having a driver's license. It is not a presumption of guilt.

CHAIR TOWNSEND:

What we have in [Exhibit F](#), as questioned by Mr. Wiles, is now clearer in terms of what we were talking about, as opposed to what it said. Whether the Committee agrees if that affects collective bargaining or not, I would need a collective bargaining expert here.

Mr. Keane, we need to find an expert in the field of collective bargaining law.

MR. DREHER:

For the last 25 years, I have represented a number of associations and professional peace officers in collective bargaining throughout the State. We operate under *Nevada Revised Statute* (NRS) 288.150 and the mandatory topics of bargaining. Under what is being presented here, it would have a drastic impact on collective bargaining because, according to this, you would be saying

these are the standards that we are going to adopt. According to every bargaining negotiated settlement that I have been involved with, the NRS supersedes collective bargaining unless the collective bargaining supersedes or offers better benefits. The issues of drug testing and the like have been a heated subject in our world for a number of years and this would have an impact on collective bargaining.

CHAIR TOWNSEND:

Are you saying that every collective bargaining agreement in the State of Nevada has a different set of standards for drug testing?

MR. DREHER:

They could, and there are some that do not even mention drug testing. When you discuss drug testing in our world, it is a mandatory topic of bargaining and would be something we would negotiate, including how this particular bill would be administered. We do not want an inexperienced person performing a drug test. I have also been involved in those instances and it would be something we would want in writing and the collective bargaining agreement to assure both sides as to the rules. For example, we go through this all of the time in officer-involved shootings and there is a standard. Washoe County just instituted an officer-involved shooting policy where the mentioning of these types of tests is included. It is not automatic that you do a drug test when an officer is involved in a shooting. The investigator will go through and do a series of checks. A drug-recognition expert will come in and check the officer and see if there are any types of impairment on the officer. If so, then the officer would be asked to submit to a drug test.

SENATOR HARDY:

We certainly do not want every collective bargaining unit to have to go back and renegotiate. Is there standard language we could include that says when the collective bargaining agreements are renewed, this policy will be incorporated? Is that standard procedure or is it handled somewhere else under the collective bargaining laws? We do not want everyone to have to go back and renegotiate their collective bargaining agreements.

MR. DREHER:

Yes, that could be done. We did that in a previous bill covering NRS 289 for the professional peace officers. There is language in there that says "absent

collective bargaining" then this standard applies. I would think your legal department could do that.

SENATOR HARDY:

I do not want to say "absent collective bargaining." I want to say that when the collective bargaining agreement renews again, they have to adopt this minimum standard. I do not want to exempt them, but I also do not want them to have to open up and renegotiate.

SENATOR HECK:

I agree with Senator Hardy's comments. Perhaps the fix is that if you have a policy, not withstanding any provisions of a collective bargaining agreement, these are the procedures you will follow. By doing so, these will become the de facto standards and they will eventually trickle in to collective bargaining agreements if the person wants that to be a defensible standard that they accept.

CHAIR TOWNSEND:

I think that offers some reasonableness, although collective bargaining is different in the private sector than in the public sector. I cannot speak to the sponsor because he is not present, but maybe we should leave those contracts out of this for now and address those that have policies that are independent from collective bargaining. In the real world it is a very simple one, you have two parties sitting down trying to figure out what is in their best interests. I do not know how many collective bargaining agreements there are in this State and I do not know what percent of those have drug-testing policies.

ROBERT A. OSTROVSKY (Employers Insurance):

I feel responsible for this since I was the one who suggested that the DIR adopt regulation. I have a totally different view of the world than what other people here have suggested. I have negotiated private collective bargaining agreements for every major union on the Las Vegas Strip for 25 years. In my opinion, there are two issues here. The issue of whether or not a collective bargaining agreement contains any language referencing the employer's right to drug test is something frequently negotiated.

The purpose of the negotiation is to determine what disciplinary action the employer should take, up to and including termination, given whatever the drug-testing policy. I do not view that as having any impact on what you do in

NRS 616 or 617. I do not believe any labor contract in Nevada can remove the rights of an employer or injured worker from the provisions of these statutes. In my opinion, workers' compensation is stand-alone and rights cannot be negotiated away. There are some contracts that have negotiated further rights; for example, 100-percent payment of lost wages as opposed to the NRS 616C.475 of "66 2/3 percent." My interpretation of this is if an employer or insurer wants to use the provisions of NRS 616C.010 and wants to deny a claim for compensation based on a drug test, that drug test must meet whatever standard the DIR has in place. If it does not meet that standard, then the claim cannot be denied. The employer may still be able to terminate the employee. All this says is that if the employer is going to deny the workers' compensation claim, it must meet this standard.

I am just concentrating on when does an employer or insurer have the right to deny a claim because a person failed, or failed to take, a drug test. I was viewing things such as the drug test must be given within a certain number of hours of the injury. It must be offered to the individual, assuming they are competent to agree or disagree. If they are unconscious or otherwise incompetent because of an injury, then I do not think you can hold it against the employee because they did not take the test. Those are the types of issues that need to be worked on in the regulatory process. I view this bill as just a standard to accept or reject a claim.

JOHN E. JEFFREY (Southern Nevada Building and Construction Trades Council;
Nevada Trial Lawyers Association):

Danny Thompson was not able to make it today so I am also representing the Nevada State American Federation of Labor and Congress of Industrial Organizations. This amendment really does nothing that changes our objections to the original bill. There are many problems with drug and alcohol testing, especially in the workers' compensation statutes. The problem is when the Legislature put these provisions into statute, I believe it was kind of a reaction to "we don't want drugs on the job" which none of us do. A lot of people get caught up in this who are not impaired. That is a problem. I am sure this bill does nothing to correct any of the present problems and injustices with the law. This bill just throws a broader net over those problems and catches more people.

SENATOR HECK:

Mr. Jeffrey brings up an important point that was expressed the last time we heard this bill. This bill in no way, no matter what the drug-testing policy, is able to prove impairment at the time the test was performed. Unless sophisticated drug testing is performed, it is impossible to do and the cost would be prohibitive. I would like to remind the Committee that during the last Legislative Session, the Legislature did away with provisions that allowed private insurance companies to deny medical benefit claims if the person tested positive for drugs or alcohol. There seems to be a disconnect on what was done for private insurance companies and what we are looking at here.

SENATOR SCHNEIDER:

A lot of employers have regular random drug testing. Could they make drug testing a requirement after an injury as part of their company policy?

MR. JEFFREY:

Yes. I do not know of a contractor that does not drug test a prospective employee. They also have company policies that give them the right to random drug testing.

SENATOR SCHNEIDER:

Realistically, if there is an injured worker, the employer could drug test everyone on the job site right after the injury. That would be random drug testing and the employer would get what they want.

MR. JEFFREY:

We do not have a problem with pretesting. What has happened in the workers' compensation arena, especially in the drug-testing area, is that it has become a means to deny claims. This bill broadens that for them.

MR. MILLIKEN:

Going back to the original intent of the bill, we were only talking about those employees who refuse to submit to a drug test. That is the group of employees we were looking at.

SENATOR HECK:

If that is the group you were looking at, then all the employer needs to do in their drug-testing policy, which is subject to collective bargaining, is to state

that if an employee refuses to test, then it is grounds for dismissal or disciplinary action.

SENATOR HARDY:

When you go back and think about the original intent of the bill, this bill is about refusing to submit to drug testing.

CHAIR TOWNSEND:

I think the point here is that the employer should be saying if they did not negotiate that, they did not negotiate that. But on the nonnegotiating side, just simply say, if you do not take the test, then here is our policy and refusal is grounds for termination.

MR. MILLIKEN:

The gray area we are trying to straighten out is that, yes, the employee can be terminated for refusing a drug test, but all of the workers' compensation costs are still being paid for that employee injured on the job, even though they may be terminated for refusal to test.

CHAIR TOWNSEND:

Mr. Milliken, you have heard the concerns of this Committee. Please go back to the sponsor of this bill and see what he wants to do to accomplish the intent of the bill.

We will now move on to S.B. 100.

SENATE BILL 100: Requires an insurer or third-party administrator who pays workers' compensation to an employee or a dependent of an employee to deposit the compensation directly into the account of the employee or dependent under certain circumstances. (BDR 53-465)

SENATOR CARLTON:

The Committee has been provided with a mock-up amendment for this bill ([Exhibit G](#)). Kelly Gregory and I worked on this amendment based on the Committee's suggestions. We removed "temporary" because we took into consideration the time lag. We gave people until the beginning of next year to be able to implement this. I believe those were the two major concerns of this Committee.

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CHAIR TOWNSEND:

I believe Senator Carlton articulated correctly what [Exhibit G](#) accomplishes.

SENATOR HARDY MOVED TO AMEND AND DO PASS S.B. 100.

SENATOR HECK SECONDED THE MOTION.

SENATOR HARDY:

For those companies that are not up to date in doing this, I would like to reiterate that I think it is too bad we had to put this into statute.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR TOWNSEND:

I would like to discuss Senator Titus' bill on price gouging, S.B. 82.

SENATE BILL 82: Provides that price gouging during an emergency constitutes a deceptive trade practice. (BDR 52-31)

SENATOR HECK:

Senator Schneider and I met with the interested parties in subcommittee on this bill and I am providing the Committee with a copy of our report ([Exhibit H](#)). One last concern that was raised was the last provision in the bill which provided for a private right of action. We felt that if the other provisions listed previously were addressed, that would take care of the concern regarding that. Interested parties were directed to meet with the bill sponsor to see if some common ground could be reached.

SENATOR SCHNEIDER:

The Nevada Resort Association is concerned about room pricing. I requested that they bring us language they feel comfortable with.

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CHAIR TOWNSEND:

There being no further business before this Committee, the meeting is now adjourned at 10:05 a.m.

RESPECTFULLY SUBMITTED:

Jeanine Wittenberg,
Committee Secretary

APPROVED BY:

Senator Randolph J. Townsend, Chair

DATE: _____