



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

February 28, 2018

Reference Number 17-0157

Brad W. Hornsby, Attorney at Law
Bulloch Fly Hornsby & Evans
REDACTED
P.O. Box 398
Murfreesboro, TN 37133-0398

Re: Sonny's Contract Hauling, LLC Appeal of DBE Certification Denial

Dear Attorney Hornsby:

Sonny's Contract Hauling, LLC (SCH) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the August 9, 2017 certification denial of the firm as a Disadvantaged Business Enterprise (DBE) by the Tennessee Department of Transportation (TDOT).

SCH submitted a Uniform Certification Application (UCA) to TDOT on June 30, 2017; and the agency conducted an on-site interview with Ms. Jody Grimmatt, the firm's sole owner, on July 19, 2017. TDOT denied SCH's application based on the inability of Ms. Grimmatt, to satisfy ownership and control requirements of §§26.69(i) and 26.71(h) and (i) of the DBE program Regulation 49 C.F.R. Part 26 (the Regulation). SCH appealed TDOT's decision to the Department on April 25, 2017, and we requested the administrative record pursuant to §26.89(d). The Department concludes, based on a review of this record and your appeal, that substantial evidence supports TDOT's decision on the §26.69(i) grounds discussed below.¹ The Department does not uphold TDOT's decision regarding §26.71(h) and (i) for the reasons stated.

Decision: Ownership

SCH was established in August 2000. The entries on SCH's UCA (p.7) allotted for Ms. Grimmatt to list her initial investment to acquire her ownership interests in SCH are blank. TDOT noted in its on-site report that Ms. Grimmatt and her husband, Mr. Boyd Grimmatt, capitalized the firm with **REDACTED** from a joint account, but there is no documentation

¹ When a firm appeals a certification denial determination, the Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." §26.89(f)(1). The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

substantiating this transaction. (On-Site Report, p. 2). According to TDOT, the Grimmetts each held equal ownership interests (50% each) when the firm started; but after the first year, Ms. Grimmett took over the business. (Ibid). The record contains a letter from Ms. Grimmett to TDOT dated June 29, 2017, in which she describes her proof of ownership as follows:

Boyd Grimmett and I started the business in August 2000 from scratch. We purchased a used dump truck for **REDACTED**. I have checked with our bank to get a copy of the cancelled check and was told that they do not have documents past 13 years. Therefore, I do not have a copy. (Grimmett Letter, June 29, 2017)

The firm seeking certification bears the burden of demonstrating to the recipient (here, TDOT), by a preponderance of the evidence, that it meets the requirements of the Regulation concerning group membership or individual disadvantage, business size, ownership, and control. *See* §26.61(b). In assessing whether an individual meets the eligibility criteria concerning ownership, the recipient considers the entire record facts, viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. *See* §26.69(a).²

TDOT determined that SCH did not submit documentation of Mr. Grimmett renouncing his ownership interest in the marital assets used to fund the **REDACTED** contribution to the firm as required by §26.69(i), a provision that states:

You must apply the following rules in situations in which marital assets form a basis for ownership of a firm: (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm. (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification. §26.69(i).

There is no spousal renunciation described in §26.69(i)(1) on Mr. Grimmett's part. Absent any proof of Mr. Grimmett's renunciation and transfer of ownership interest in these assets to Ms. Grimmett *prior* to TDOT rendering a final certification decision, SCH has not proven, by a preponderance of the evidence, that a socially and economically disadvantaged individual owns

² §26.69(a): "In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices."

at least 51% the firm, as the Regulation requires.³ Substantial evidence in the record, as noted above, supports a conclusion of joint marital ownership, which under §26.69(i) means that neither spouse owns more than 50% of SCH. We affirm the denial of certification on the basis of §26.69(i).

Post-Denial Changes

You present for the first time on appeal Mr. Grimmatt's sworn affidavit wherein he renounces his ownership interests in SCH and transfer any interests he has to Ms. Grimmatt. The affidavit postdates TDOT's decision. While we appreciate that SCH is attempting to remedy the eligibility deficiencies that TDOT identified, it may not effectively do so on appeal and we may not consider it in reaching our conclusion. The Department's role on appeal is not to consider new evidence. *See* §26.89(e). Rather, it is to determine whether substantial evidence supported TDOT's decision at the time it was made. §26.89(f)(6) (Department bases its appeal decision on status and circumstances of firm as of the date of the certifier's decision). To the extent that the firm wishes to submit this document in the future, it must do so in a new certification application, which it may file after the applicable waiting period.

Decision: Control

The Department determines that TDOT has not fully developed its argument under §26.71(h) and (i) to support its certification denial decision. (See *infra*, in which the Department instructs TDOT to reconsider the record evidence in a broader context of the Regulation's control requirements.) We cannot affirm a decision based on underdeveloped reasons or ones unsupported by substantial evidence. *See generally* §§26.86(a), 26.89(f)(2) & 26.89(f)(4).

1. TDOT takes issue with Ms. Grimmatt not taking compensation since 2013 while others at the firm have received a salary. The agency mischaracterizes the purpose of the provision and states:

§26.71(i) specifically provides that the differences between the remuneration for a DBE applicant and other participants in the firm can be explained by the DBE applicant. However, in this case Ms. Grimmatt has not taken any salary from the company for several years. The regulation is intended to benefit the DBE applicant, not other participants within the firm. (Denial, p. 3)

Section 26.71(i)(1) instructs TDOT to *consider* a disparity in remuneration "in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by

³ TDOT did not cite the capital contribution requirement found in §26.69(e), although the agency did state there was no other documentation to show Ms. Grimmatt invested capital. TDOT's focus (because this provision was not cited) was on the marital renunciation, and as such we refrain from analyzing this potential issue. (§26.89(f)(5) precludes the Department from affirming on grounds not cited in the denial letter). We do flag the issue for TDOT's consideration in the event of a new certification application but note that it is reasonable, as Ms. Grimmatt, alleges, that the firm has not kept documentation of capital contributions that occurred over 16 years ago. If TDOT's core concern is that SCH did not provide a marital renunciation, then the firm providing one in a future application may suffice.

the firm.” Put simply, the provision articulates the boundaries of the certifier’s analysis of remuneration disparities in the context of determining control. The provision states:

[The certifier] may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, **the firm’s policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm.** You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner’s remuneration is lower than that of some other participants in the firm. (Emphasis Added)

The firm explained in its June 29, 2017 letter to TDOT that Ms. Grimmiett used all of SCH’s proceeds to invest into the business, thereby purchasing dump trucks, meeting payroll and mechanic fees, and other costs stemming from Mr. Grimmiett’s surgeries.

We reiterate this provision imposes no actual salary requirement that the firm must satisfy. A salary differential, to elicit a control concern, normally involves the non-disadvantaged participant earning *more* than the disadvantaged participant, then exploring the reasons why in the context of the entire record facts. Here, TDOT asked only one question during its on-site interview—i.e., how are stockholders, directors, and key personnel of the firm compensated. The response recorded was “no compensation.” TDOT appears to have made its conclusion solely on this basis along with evidence that employees earned wages, but did not consider Ms. Grimmiett’s explanations. This ignores the general requirement to examine the record as a whole as well as the specific allowance provided in §26.71(i) that “you may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner’s remuneration is lower than that of some other participants in the firm.” We do not uphold TDOT’s remuneration conclusion under §26.71(i).⁴

2. TDOT further deems the firm deficient for Ms. Grimmiett not possessing a commercial driver’s license (CDL) and therefore being unable “to drive one of her company’s trucks.” TDOT cites the license provision, §26.71(h) that in TDOT’s words “supports this determination.” This provision states:

If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the

⁴ The Department addressed the interplay between salary differential and control findings in a prior TDOT appeal that was upheld. (See *Lori Neal & Associates, Inc.* (U.S. DOT Appeal Reference Number 17–0067)).

socially and economically disadvantaged owners actually control the firm.
§26.71(h)

TDOT's denial determination contains no rationale other than the fact that Ms. Grimmer lacks a license. There is no indication that TDOT explored whether state or local law would require a person to have a CDL as a condition to owning and/or controlling a firm (as §26.71(h) states). If this is not the case, (and we doubt that it is), TDOT is permitted to take the absence of this license as one factor in its determination of whether Ms. Grimmer controls SCH. However, TDOT's analysis is incomplete on both points and as such, the Department cannot uphold the agency's determination on this ground.⁵

We affirm TDOT's determination of ineligibility on the basis of ownership, as supported by substantial evidence and not inconsistent with the Regulation's substantive or procedural provisions relating to certification. This determination is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights

cc: TDOT

⁵ For comparison, see *Jordan Leasing Company, LLC* (U.S. DOT Appeal Reference Number: 15-0004, Dec. 2015) wherein the Michigan Unified Certification Program found the non-disadvantaged owner of the firm and holder of its CDL, was heavily relied upon for his technical competence and to operate the firm. The Department affirmed the UCP using this fact as a consideration (not the sole reason) for finding of lack of control.