

December 14, 2018

Reference Number 18-0044

Martha J. Showman
Ray Showman, Jr. Excavating
REDACTED
P.O. Box 646
Waterford.PA 16441

Dear Ms. Showman:

Ray Showman, Jr. Excavating (“the firm”) has appealed the decision of the Pennsylvania Unified Certification Program (PA UCP) denying its application for DBE certification. After fully considering the administrative record of the case provided to us by the PA UCP under the standards provided in 49 CFR Part 26 (“the regulation” or “Part 26”), the Department of Transportation is reversing the decision with respect to ownership issues and the control issue concerning whether 51 percent owner Martha Showman’s role was limited to administrative matters. We are also reversing the PA UCP decision on the issue of whether the firm is controlled collectively by the Showman family, rather than by Ms. Showman as an individual. Consequently, we are directing Allegheny County and the PA UCP to certify the firm.

I. Procedural Background

The firm first applied to Allegheny County in 2016. Allegheny County denied the application in a March 23, 2016, letter, on the ground that by-law provisions required shareholders representing two-thirds of the votes all shareholders are entitled to cast were necessary for a quorum and to take other actions, and that a majority of the Directors must be in agreement before any action is considered actionable. This conflicted, the decision said, with the provisions of section 26.71(c) of the regulation, which provides that there can be no restrictions through by-law provisions or other formal or informal devices “that prevent socially and disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.”

Since Ms. Showman then owned 51 percent of the firm’s stock, she was not in a position to meet the two-thirds requirement of the by-laws, because the cooperation of her husband, Ray Showman, Jr., who then owned 39 percent of the stock, would be necessary to create a quorum or take other actions. The letter noted that Allegheny County had offered Ms. Showman an opportunity to amend the restrictive language, but she did not do so.

The firm again applied for certification on November 15, 2016. In the interim, in an effort to remedy the problem identified in the March 2016 denial letter, Mr. Showman had gifted an additional 16 percent of the firm’s stock to Ms. Showman, resulting in her having 67 percent of the stock in her name. The provisions of the by-laws themselves appear not to have been changed, however. There was an on-site interview on April 28, 2017, by certification analyst De Doyle, who recommended denial of the application through a memorandum dated May 9, 2017, and an associated Executive Summary and report.

On May 12, 2017, Allegheny County once again denied the firm's application. The primary basis for this denial was that the firm appeared to be a family-owned and operated business and that it was difficult to determine that Ms. Showman, as distinct from the family as a whole, controlled the business. Ms. Showman's functions, the letter continued, appeared to be administrative in nature. She is not, the letter said, involved with work site supervision, bid take offs, or other industry functions crucial to the firm's success. A separate ground for the denial, going to Ms. Showman's ownership in the firm, was that the initial contribution to form the firm in the 1980s was a loan signed by Mr. Showman to purchase a piece of equipment.

In a June 9, 2017 letter, Ms. Showman appealed the denial decision to PA UCP, asserting that she was now a 67 percent owner of the firm – fixing the problem cited as a basis for the 2016 denial – and disputed that her functions were merely “administrative.” She included a long list of the functions she performs and explained the delegations she had made to other participants in the firm, saying that she remained very involved in overseeing all aspects of the business. Ms. Showman appeared at an appeal hearing before the PA UCP on September 21, 2017.

The PA UCP, in a September 25, 2017 letter, upheld Allegheny County's denial. With respect to ownership, the letter cited the 1980s equipment purchase loan, which was signed by Mr. Showman. With respect to control, the letter agreed with Allegheny County's conclusions with respect to Ms. Showman having an administrative role and that the firm appeared to be a family-run business.

On December 21, 2017, Ms. Showman appealed the PA UCP decision to the Department, beginning the Department's consideration of the issues involved.

II. Burden of Proof and Standard of Review

(a) Burden of Proof

As provided in section 26.61(b) of the rule, an applicant firm must demonstrate, by a preponderance of the evidence that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control. This means that the applicant must show that it is more likely than not that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets eligibility criteria.

(b) Standard of review for certification appeals

On receipt of an applicant's appeal from a denial of certification, the Department makes its decision “based on the entire administrative record as supplemented by the appeal... The Department does not make a *de novo* review of the matter...”¹ The Department affirms (a certifier's) decision unless it determines, based on the entire administrative

¹ 49 CFR 26.89(e)

record, that (the certifier's) decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."²

This language means that the Department does not act as though it were the original decision maker in the case or substitute its judgment for that of the certifier. If the certifier's decision – including a finding that an applicant failed to meet its burden of proof – is supported by substantial evidence, then the Department will affirm the certifier's decision.

III. Ownership Issues

(a) The original equipment issue

Citing section 26.69(i)(1) of the regulation, the May 12, 2017, denial letter from Allegheny County faulted Ms. Showman's assertion of ownership in the firm because "the initial contribution for the firm was a piece of equipment purchased on loan in 1984 with the final payment made 09/01/1988 signed by Ray Showman Jr. on 08/23/1984. Martha Showman is not listed on the loan document provided with the certification application." The PA UCP September 25, 2017, letter reiterated the point, saying "Significantly, the initial contribution for your firm originated with a piece of equipment purchased on loan in 1984, and the final payment was made in 1988 by Mr. Showman. The record indicates that your name does not appear on the loan document...."

The Allegheny County and PA UCP analyses of this issue did not take section 26.73(b)(1) of the regulation into account. That provision tells certifiers to

evaluate the eligibility of the firm based on present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership and control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.

The Department intended this provision, informally known as the "no original sin" rule, specifically to prevent disadvantaged owners from being denied certification on the basis of long-past actions having little if any contemporary relevance. The provision is longstanding, having first been proposed in the Department's December 9, 1992 proposed rule³, re-proposed in the Department's May 30, 1997, supplemental notice of proposed rulemaking⁴, and adopted in the Department's final rule of February 2, 1999⁵. In the final rule's preamble, the Department said

We believe there is no rational or legal basis for denying certification to the firm on the basis of what it was in the past. Is it a small business presently owned and controlled by socially and economically disadvantaged individuals? If so, it would

² 49 CFR 26.89(f)(1)

³ 57 FR 58288. The genesis of this provision, then, is almost as old as the firm's first bulldozer.

⁴ 62 FR 29548 at 29572 and 29601-02

⁵ 64 FR 5096 at 5210-21 and 5139.

be contrary to the statute, and to the intent of the program, to deny certification because at some time – perhaps years – in the past, it was not owned and controlled by such individuals.⁶

This provision precludes certifiers from denying certification because of a transaction, however interpreted, now long in a firm's past, like the paperwork relating to a loan secured 34 years ago.

(b) The stock transfer

In July 2016, Mr. Showman transferred 160 shares of stock in the company to Ms. Showman. All parties agree that this was a gift without consideration. It had the effect of putting 67 percent of the stock of the firm in Ms. Showman's name. As Ms. Showman stated in her June 9, 2017 letter to Allegheny County, this action was intended to remedy the defect found in the County's 2016 rejection of her firm's application, as she now believed had the two-thirds majority to take action on behalf of the firm under the provisions of its by-laws.

Under section 26.69(h)(1)(i), when a disadvantaged individual receives a gift of an interest in a business, without consideration, from a non-disadvantaged individual who is involved in the same firm, the disadvantaged individual is rebuttably presumed not to hold this interest for purposes of the part 26 ownership calculation. Per section 26.69(h)(2)(i), to overcome this presumption the disadvantaged individual must show, by clear and convincing evidence, that the gift was made for reasons other than obtaining DBE certification.

Since Ms. Showman states that the gift of 16 percent of the firm's stock to her was made explicitly to remedy a problem that led to its denial in 2016, she cannot show that the gift was made for purposes other than obtaining DBE certification. Consequently, with respect to ownership under section 26.69, that 16 percent does not count. For 26.69 purposes, she is a 51 percent owner of the firm, not a 67 percent owner. But 51 percent is enough. Ms. Showman is properly regarded as owning the firm for DBE certification purposes.

IV. Control Issues

(a) Are Ms. Showman's duties merely "administrative?"

The final sentence of section 26.71(g) of the rule provides that "Generally, expertise limited to office management, or bookkeeping functions unrelated to the principal activities of the firm is insufficient to demonstrate control." This language has existed in its present form since the Department's February 2, 1999, final rule⁷, having been subject to public comment in the Department's May 30, 1997, SNPRM⁸. In the preamble to the latter document, the Department commented that the language concerned "generic" business administration experience.⁹ The final rule adopted the language without change or further preamble discussion.

⁶ Id. at 5121

⁷ 64 FR 5138

⁸ 62 FR 29548 at 29568-69 and 29601

⁹ Id. at 29569

Related to this provision, the PA UCP letter of September 25, 2017, says, in conclusory fashion, that Ms. Showman's work is "administrative in nature," while saying that the requisite managerial and technical competence reside in her husband and son. The underlying May 12, 2017, letter from Allegheny County says that Ms. Showman "manages the office and oversees the administrative functions of the firm." Her functions, the letter further asserts, "appear to be administrative in nature," and do not involve "work site supervision, bid take offs, and other industry related functions crucial to the firm's success." These words are taken almost verbatim from an Executive Summary that accompanies De Doyle's May 9, 2017, memorandum and report concerning the on-site interview.

Allegheny County's March 23, 2016, denial letter took a noticeably more positive view of Ms. Showman's role with the firm. With respect to control matters, this letter noted that

Over the past 31 years of operation the business has grown and Ms. Showman has taken on more responsibilities as its President. She appears to be currently engaged in number of critical aspects of the business involving review and submission of bids, hiring of personnel, decisions on equipment purchases and general expenditures. Ms. Showman is a guarantor of all loans and lines of credit along with her husband and executed contracts on behalf of the company as chief officer or president.

Ms. Showman's tasks or her role vis-à-vis that of her husband and children in operating the firm were not cited as reasons for the denial, which rested solely on the restrictive provisions of the by-laws.

Moreover, Ms. Showman's submissions the record paint a detailed and specific picture of the scope of her duties with the firm,¹⁰ providing an extensive, and uncontroverted, list of her duties related to the critical functions of the business. An undated set of talking points suggests that Ms. Showman presented a similar list to the September 21, 2017, informal PA UCP hearing. The PA UCP letter does not engage with these presentations in detail. Nor does it recognize that these duties are, on their face, not "generic" functions "unrelated to the principal activities of the firm" but rather activities that pertain to matters crucial to the successful operation of the business, without which it would not be viable, no less than operating a piece of construction equipment in the field.

It is also important to take into account a preceding sentence in section 26.71(g), which provides that "The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees." That the 51 percent owner of a firm does not, for example, drive a bulldozer or personally act as a field supervisor for those who do, should not be taken to mean that she cannot be regarded as controlling the firm, if she has "the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations,

¹⁰ See Ms. Showman's June 9, 2017 letter to Allegheny County and PA UCP at p. 3-4 and December 21, 2017, letter to the Department at p. 2-3 and 13-14

management, and policymaking.¹¹ The nature and scope of Ms. Showman’s duties, as described in the record, provides substantial evidence that she has the ability to do so. Consequently, there is not substantial evidence supporting PA UCP’s conclusion that Ms. Showman should be regarded as not controlling the firm under the final sentence of section 26.71(g).

(b) The “family-operated business” issue

The most significant ground on which Allegheny County and PA UCP denied certification to the firm is that they were unable to determine that Ms. Showman, as the disadvantaged owner, controlled the firm in her own right, as distinct from the Showman family as a whole. In particular, the PA UCP letter “deemed it significant that you and your non-disadvantaged son, Jason Borne (sic)¹²...make all business decisions together including setting policy, directing marketing, and managing the day to day operations of the firm.”¹³

Language from several provisions of section 26.71 are involved with this issue, and their background is useful to understand the issue in this case. PA UCP cites paragraph (k)(2), which provides that

If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

This stricture should be read in tandem with paragraph (k)(1), which provides that

A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

¹¹ 49 CFR 26.71(g). Engaging in field operations is not a *sine qua non* of controlling a construction company. As noted in the preamble to the ancestor of this provision in the Department’s December 1992 NPRM (57 FR 58307), “an individual is not required to have hands-on, direct control of or expertise in every aspect of a firm’s affairs.”

¹² It is not clear where the mistaken last name assigned to Jason Showman came from. Perhaps the matter should be titled “The Borne Mis-identity,” in accidental homage to Jason Bourne, the protagonist in the well-known action movie franchise.

¹³ September 25, 2017, PA UCP letter at 3

Paragraph (k)(1) sounds basically the same note as paragraph (e), which provides that

Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

These provisions addressing family members exist in the broader context of the rule's language concerning delegation of authority, expressed in paragraph (f):

The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

Paragraphs (e) and (f) had their origins in the December 9, 1992, NPRM¹⁴. As the preamble to that NPRM said

The proposal codifies the Department's interpretation...that an individual is not required to have hands-on, direct control of or expertise in every aspect of a firm's affairs. The disadvantaged owners may delegate various areas of management or daily operations to employees, regardless of whether these persons are disadvantaged individuals themselves...Especially as organizations grow and become more complex, many important functions will be delegated¹⁵.

The preamble to the May 30, 1997, NPRM elaborated on this point:

The Department has interpreted its regulation, since the mid-1980s, as permitting the delegation of functions by disadvantaged owners. A certification appeal and ensuing litigation in the 1980s established that disadvantaged owners can delegate functions to non-disadvantaged participants, as long as they retain actual control over the firm. This interpretation also states that disadvantaged owners are not required to have experience or expertise superior to that of other participants in the firm, but must have the ability to intelligently and critically evaluate information provided by others and make their own decisions based on that information....Once a firm grows beyond the one-person shop stage, delegation is essential. It is fanciful to imagine that one or a few owners can or

¹⁴ 57 FR 58307

¹⁵ 57 FR 58292-93

*should do...everything a firm does. As long as owners can take back the authority they have delegated, retain hiring and firing authority, and continue to “run the show” for the company, they control it, notwithstanding delegation of some authority and functions.*¹⁶

This proposed concept was carried over into the February 2, 1999, final rule without substantive change.¹⁷

The “family firm” provisions of current Part 26 also have their roots in the 1992 and 1997 proposals. The 1992 NPRM preamble said that there would no *per se* rule prohibiting the involvement of family members in a firm.¹⁸ Consequently, the proposed rule text said that “the fact that a member of the family” of a disadvantaged owner “participates...as a manager, employee, owner (or) board member does not, in itself, indicate that the owner fails to control the firm.”¹⁹

This language carried over to the 1997 SNPRM, the preamble noting that for DBE purposes, there are only two kinds of people: disadvantaged individuals and others. There is no rationale for treating non-disadvantaged family members from other non-disadvantaged individuals.²⁰ However, in response to comments on the 1992 proposal, the 1997 SNPRM added a provision that “where the recipient cannot discern whether the disadvantaged owners themselves, as distinct from the family unit as a whole, control the firm, the applicant has not demonstrated control.”²¹ This proposal became the basis for the present 26.71(k)(2). In the preamble to the February 2, 1999, final rule, the Department explained the provision as follows:

*Family-owned programs have long been a concern in the program. The SNPRM provided explicitly that if the threads of control in a family-run business cannot be disentangled, such that the recipient can specifically find that a woman or other disadvantaged individual independently controls the business, the recipient may not certify the firm. A business that is controlled by the family as a group, as distinct from controlled individually by disadvantaged individuals, is not eligible...Non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. It is not fair and does not achieve any reasonable program objective to say that an unrelated white male may perform functions in a DBE while the owner’s brother may never do so.*²²

Reading these provisions together, it is clear that disadvantaged owners can delegate functions, including important functions, to non-disadvantaged participants, as long as the disadvantaged owners maintain ultimate control of the business and can “run the

¹⁶ 57 FR 29568. See also proposed regulatory text at 57 FR 29600-01

¹⁷ 64 FR 5138

¹⁸ 57 FR 58293

¹⁹ 57 FR 58307

²⁰ 62 FR 29569

²¹ Id.

²² 64 FR 5120

show.” Subject to such delegations, non-disadvantaged individuals can participate, even in important ways, to the operation of the firm, as long as they are subject to direction and hiring and firing by the disadvantaged owners.

Non-disadvantaged family members are treated no differently from other non-disadvantaged participants in this respect. The issue of the family-run business, in this context, is simply a special case of a more general principle. If a disadvantaged owner’s delegations of functions to non-disadvantaged participants go so far as to make governance of a corporation a collective responsibility, rather than ultimately the individual responsibility of the owner, then the disadvantaged individual owner has not demonstrated control. This is equally true whether the other members of the collective are family members or not.

The task for certifiers – not an easy one –is to carefully and thoroughly scrutinize the record and then make a sound judgment about the issue of control by the disadvantaged owner vs. control by a collective. The September 25, 2017, PA UCP letter states that during the September 21 hearing, Ms. Showman acknowledged that critical operations of the firm “were performed by a group of family members.”²³ Moreover, the letter states, the record shows that such duties as bidding, contract administration, day-to-day operations and management, are delegated “evenly” to other family members. In reference to the standard of section 26.71(k)(2), the letter said that Ms. Showman and her son, Jason, “make all business decisions together include setting policy, directing marketing, and managing day-to-day operations of the firm.”

The statement that such duties as bidding, contract administration, day-to-day operations and management, are delegated “evenly” to other family members was picked up from the May 12, 2017, Allegheny County letter, which also concluded that “it appears the firm is a family owned and operated business. It is difficult to determine that Martha Showman is distinct from the family as a whole in regards to the control of the firm.” Elaborating on this point, the letter says that Ms. Showman’s husband and son “manage the operations, supervise the job sites, manage the site employees, and know the industry to assist the estimators with bid take-offs, site layouts, and client services regarding the job sites. A family member controls every aspect of the firm. However, it would be difficult to determine that one individual controls the firm.”

These conclusions derived directly from De Doyle’s May 9, 2017, memorandum and associated documents, so it is useful to examine in some detail the materials on which these documents relied. The October 2016 application form has a grid for the various identified functions performed by each participant in the company.

With respect to setting policy, Martha Showman is listed as “Always,” with Ray Showman as “Frequently.” The same is true of bidding and estimating. Martha is listed as “Always” for marketing and sales; no one else is listed in that category. For supervising field operations, Ray is listed as “Always,” Jason as “Frequently,” and

²³ There is no transcript or minutes of the hearing to enable the Department to determine whether this characterization is accurate.

Martha as “Seldom.” For attending bid openings, Sarah Betcher is listed as “Frequently” and Martha as “Seldom.” For office management, Martha is listed as “Always” and Sarah is listed as “Frequently.” For hiring and firing, Martha is listed as “Always,” while Ray is listed as “Always” for field staff and “Seldom” for management staff. Jason is also listed as “Seldom” for hiring and firing field staff. For “designates profits spending or investment” and “obligates business by contract/credit,” Martha is listed as “Always;” no one else is listed in those categories. For purchases of equipment, Martha and Ray are both listed as “Always.” For “signs business checks,” Martha is listed as “Always;” no one else is listed in this category.

From these statements by the applicant firm, it appears that Ray and Jason are delegated the predominant role in supervising field operations. With respect to two categories – hiring of field staff and purchases of equipment – Ray and Martha both are “always” involved. In the other categories, Martha is listed as having the predominant or sole role. It should be noted that, while these checklist categories do not provide a breakdown of the amount of time or degree of authority exercised by each participant, they do not on their face support a conclusion that control tasks are “evenly” distributed among the participants.

The on-site interview report makes several references that bear on the control roles of the participants. Many of these references are drawn from a tape made of the interview. In Item 4 of the report, Ms. Showman is quoted as saying, with respect to the original formation of the corporation, “I just became the President because I do all the office work and I do all the signing and have always done all the signing for the contracts. President/Secretary. Ray was Treasurer... Vice-President/Treasurer. We just made it that way. He was out in the field and I am in here.”

In Item 6, the report relates that “The estimators assist in looking for contracts to bid.” It is also stated that “During a meeting once a week, Martha, Ray, Jason, and the estimators²⁴ decide which projects will be on the firm’s bid list.” In Item 7, Ms. Showman is quoted as saying that Jason is “taking over going out and running the jobs and checking with the guys.” She is also quoted as saying “Last year he (Jason) took over as operations.”

With respect to the bidding process, the Item 16 of the report summarizes the interview by saying

Deciding which projects is collective during the weekly meetings. The estimators and/or Jason attend the pre-bid meetings. The two estimators do the calculations for the required materials... The final proposal is reviewed by Martha Showman. Depending on the type of the bid requirements, the bid is submitted either by the estimators or Martha Showman. Martha signs mailed or hand delivered proposals. The estimators submit electronic bids with their electronic signature.

²⁴ Martha Showman, Ray Showman, Jason Showman, Sarah Showman, and Sarah Betcher are family members. Other people mentioned are employees who are not family members.

Item 17 follows the post-award process:

Martha Showman signs the contract provided by the contractor, directs Sarah to order the certificate of insurance, the estimators produce the submittal packages. Directs Heather to do the scheduling. Chad marks the job sites (Surveyor). The estimators or site foremen order material. Jason and/or Gary Black supervise the jobs. The estimators complete the as-built drawings and the off staff do the warranty paperwork for closing the project.

With respect to delegation of responsibilities, Item 18 states that “Tom and Marshall create estimates. Chad performs take-offs and calculations inside and marks the sites. Jason supervises the site, the foremen perform the work onsite. They have a mechanic and welder to keep the equipment maintained.” Item 20 relates that “Martha delegates more work but she reviews EVERYTHING” (upper case in original).

In Item 28, a checklist indicates that Ms. Showman does not read structural drawings or create estimates but does have the ability to determine whether an estimator’s numbers are competitive, question the decisions of an estimator or anyone else, recognize technical problems sometimes, and evaluate and solve technical problems. In Items 29 and 30, Ms. Showman is reported as being able to revoke delegated authority and hire/fire persons to whom authority is delegated.

The information in this report clearly shows that participants in the firm other than Ms. Showman, including family members, play a variety of roles in the firm’s affairs, some of them important, notably field supervision, though this information also supports Ms. Showman’s assertions of overall control of the enterprise.

The “*Explain recommendation*” line of the report says simply “Denial,” not further explaining how the examiner got from the information in the application and report to that conclusion.

On p. 4-5 of her June 9, 2017, appeal letter to PA UCP, Ms. Showman describes in detail the delegated responsibilities of her various family members and employees and her supervisory and oversight roles with respect to each of them. She reiterates many of these matters in her talking points for the September 21, 2017 hearing, also mentioning that she did have occasion to fire a family member.

The September 25, 2017 PA UCP letter does not specifically address or respond to the material in Ms. Showman’s June 9, 2017, appeal or September 21, 2017, hearing presentation.²⁵ Rather, the letter repeats, in slightly different words, the conclusions of the May 25, 2017, Allegheny County letter and the May 9, 2017, memorandum and

²⁵ It is difficult to imagine how PA UCP staff could have fully taken the hearing information into account and written and approved the letter in the very brief interval between the hearing and issuance date of the letter, raising a concern that a decision may have been reached, and the letter may even have been drafted, before the hearing.

associated documents without engaging with most of the arguments raised in Ms. Showman's appeal.

The Department understands that, under 26.71(k)(2), if a certifier cannot determine whether a disadvantaged individual controls a firm in her own right, as distinct from a family controlling the firm as a collective, the firm is properly judged to have failed to meet control requirements. But in a certification appeal, the Department must judge whether the certifier's difficulty in making this determination was based on substantial evidence, as distinct from a subjective impression. To the contrary of the PA UCP decision, the information on the application and the on-site interview report support the applicant's contention that, while some functions are delegated, Ms. Showman retains overall control of the enterprise.

V. Completeness of the Record

In her appeal letters to PA UCP and the Department, Ms. Showman states that there was a tape made of the on-site interview. PA UCP says nothing about the existence of this tape, although Item 4 the on-site review report references a quotation from Ms. Showman at 5:25 of the audio. Ms. Showman asserts that she requested a copy of this tape but was denied access on the ground that it was for internal use only. The PA UCP does not dispute Ms. Showman's contention on this point. By declining to provide the tape or a transcript of it, Allegheny County and the PA UCP failed to comply with section 26.86(a) of the rule, which mandates that "All documents and other information on which the denial is based must be made available to the applicant, on request" (emphasis added).

Ms. Showman is justified in arguing that her inability to access the tape of the on-site interview hampered her ability to appeal the denial of her firm's application. Absent being to hear or read precisely what she said, it would be more difficult for her to place statements by the certifier in context or point out where she believed the certifier may have misstated or misunderstood what she said. This also applies to the on-site report and associated documents, which do not appear to have been provided to Ms. Showman, but which were crucial in forming the decisions of Allegheny County and the PA UCP.

Taping an on-site interview is not required or recommended by the Department's rules or guidance. If an interview is taped, however, it, and/or a verbatim transcript, are inescapably a part of the administrative record of the case. As such, it must be provided to the Department as part of the material submitted in connection with a certification appeal. It was not. Hence, the administrative record is incomplete in this important respect, contrary to the requirement of section 26.89(d) of the regulation, which requires a certifying agency to provide the Department a "complete administrative record...including a hearing transcript..." We also note that the record as submitted also fails to include tape, transcript, or even notes or a summary of the September 21, 2017, appeal hearing.

VI. Conclusions

As noted in section III above, neither the original equipment purchase nor gift of stock grounds for denying the firm's eligibility on the basis of ownership are consistent with the Department's rules on these matters. As noted in section IV (a) above, the control ground for denial related to Ms. Showman allegedly performing merely administrative tasks is not supported by substantial evidence. On these three issues, the Department is reversing the PA UCP decision.

With respect to the "family-controlled company" issue discussed in section IV (b) above, the record shows that non-disadvantaged family members Ray and Jason Showman admittedly play important roles in the company, particularly with respect to field operations. At the same time, the application, on-site reports, and submissions by the firm provide substantial evidence for a predominant role for Ms. Showman.

The incompleteness of the administrative record, Ms. Showman's consequent inability to respond fully to the May 12, 2017, denial by Allegheny County; the apparent inconsistency between statements in the September 25, 2017, letter and the May 23, 2016 letter; and the absence of specific PA UCP's responses to Ms. Showman's June 9, 2017, letter and hearing presentation with respect to the her role vis-à-vis that of other participants in the firm; make it impossible for the Department to conclude that there is substantial evidence supporting PA UCP's conclusions on the issue as well.

Consequently, the Department is reversing the PA UCP decision on this matter. Therefore, the Department instructs Allegheny County and the PA UCP to certify the firm at this time.

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: Kathleen Padilla, Ruth Byrd-Smith