

April 26, 2018

Reference Number 18-0170

Kristen Dilbone  
L.J. DeWeese Co., Inc.  
**REDACTED**  
Tipp City, OH

Dear Ms. Dilbone:

This is in response to your appeal of the decision of the Ohio Department of Transportation (ODOT) to deny DBE certification to your firm. The U.S. Department of Transportation (DOT) affirms ODOT's decision.

## **I. Procedural History**

The firm first applied to ODOT for DBE certification on July 19, 2016. Through a February 17, 2017, letter, ODOT denied the application. On February 28, 2018, the firm reapplied. ODOT conducted an on-site review of the firm on May 2, 2018. ODOT again denied the firm's application, through a letter of July 16, 2018. The firm appealed to the Department through a letter of September 7, 2018.

## **II. Burdens of Proof and Standard of Review**

### **(a) Burdens of Proof**

As provided in 49 CFR 26.61(b) of the rule, an applicant firm must, in most cases, 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.

However, a different burden of proof applies to ownership situations addressed by section 26.69(h) of the rule. This provision concerns ownership interests in a business that a non-disadvantaged individual has transferred to a disadvantaged individual without adequate consideration, while the non-disadvantaged individual remains involved in the firm. A similar provision concerning control, section 26.71(l), applies when a non-disadvantaged individual, whether or not a family member, who formerly owned and/or controlled a firm,

transfers ownership and/or control to a disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity.

Under both provisions, the firm must show by the more stringent “clear and convincing evidence” standard both that the transfer was made for purposes other than obtaining DBE certification and that the disadvantaged individual actually controls the company, notwithstanding the continued participation of the non-disadvantaged individual who made the gift or transfer.

In this case, it is undisputed that Ms. Dilbone’s parents, Carl and DeeAnn Hench, gifted ownership of a long-existing family firm over many years to Kristen and her brother, Jeremy Hench, with Kristen ultimately being given 51 percent of the stock. Carl Hench, a non-disadvantaged individual, remains with the firm as its Secretary. Consequently, with respect to both ownership and control, the applicant is required by sections 26.69(h) and 26.71(l) to demonstrate by the higher clear and convincing evidence standard both that she controls the firm and that the transfer of ownership and control was made for reasons other than obtaining DBE participation.

(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...”<sup>1</sup>

The Department does not make a *de novo* review of the matter...”<sup>2</sup> The Department affirms (a certifier’s) decision unless it determines, based on the entire administrative record, that (the certifier’s) decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”<sup>3</sup>

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. ODOT’s Rationale for Denial**

(a) Reason for transfer of majority ownership to Ms. Dilbone

ODOT’s denial letter points out through an image of the firm’s shareholder ledger that their parents had gifted Ms. Dilbone and Jeremy Hench with equal shares of the firm’s stock as of the beginning of 2015. By the end of 2015, each parent had gifted 15 additional shares to Ms. Dilbone, resulting in her holding 255 shares to Jeremy’s 225, enabling her to claim 51 percent ownership. From the fact that the firm then originally applied for DBE certification

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<sup>1</sup> 49 CFR 26.89(e).

<sup>2</sup> Id.

<sup>3</sup> 49 CFR 26.89(f)(1).

only several months later, in July 2016, ODOT inferred that the transfer of additional shares was intended to make the firm eligible for certification.<sup>4</sup>

(b) Control Issues

While not denying that both Kristen and Jeremy play significant roles in operating the firm, ODOT cites a variety of control-related issues as reasons for denying the application. One of these concerns by-law provisions, images of which ODOT includes in its denial letter. Article I states that a majority of the Board of Directors constitutes a quorum. Article II states that, at a directors' meeting, a majority vote of the directors is needed to dispense with or change the order or business. Article V states that by-laws may be amended, deleted, or added by an affirmative vote of a majority of all the directors.

According to the minutes of the December 27, 2017, shareholders' meeting, there are six directors: Carl and DeeAnn Hench; Jeremy Hench and his wife Heather Hench; and Kristen Dilbone her husband Kevin Dilbone. Three of the six are non-disadvantaged males. If the three men are not present at a meeting, there is not a quorum. Unless at least one of the three votes with the three women, the board cannot change the by-laws or make certain other decisions. ODOT concludes that this situation forces Kristen to rely on the cooperation or vote of a non-disadvantaged member to individual to make certain business decisions of the firm, compromising her ability to control the firm.

#### **IV. Arguments by Appellant**

With respect to ownership, the appeal states that the generational transfer of ownership in the family firm was made with guidance from a qualified attorney and accountant, and that the decision to make Ms. Dilbone the majority owner reflected not a desire to obtain certification but in recognition of the decades of hard work she had put into the firm.

Concerning the by-law provisions and their effect on control, the appeal states that there has never been a situation where a deadlock of disadvantaged and non-disadvantaged directors has been an issue. In any case, the firm contends, the by-laws could be easily amended to address the concern.

#### **V. Discussion**

The applicable burden of proof can be a key factor in the outcome of a decision. Evidence that may satisfy the lower "preponderance of the evidence" standard may fail to meet the higher "clear and convincing evidence" test.

The temporal proximity between the transfer of the 30 additional shares of stock to Ms. Dilbone from her parents and the firm's first application for DBE certification provides substantial evidence to support ODOT's conclusion that the firm did not meet the "clear and

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<sup>4</sup> According to the second page of the on-site interview report, Ms. Dilbone stated that her accountant first mentioned the DBE program to her when she became the majority owner. He thought they could qualify, so she started the process at that point. The date of this helpful suggestion is not stated in the record.

convincing evidence” standard with respect to demonstrating that the transfer was not made for purposes of obtaining DBE certification.

Likewise, the by-law provisions concerning directors constitute substantial evidence to support ODOT’s conclusions that Ms. Dilbone is subject to impermissible constraints on her discretion and powers.<sup>5</sup> Whether there has been a tie vote, or non-disadvantaged directors have blocked the board from transacting business, is not determinative. The provisions remain formal restrictions that limit the disadvantaged owner’s customary discretion. They amount to veto power because, for the board to take any action Ms. Dilbone supports, Ms. Dilbone must secure the cooperation or consent of at least one non-disadvantaged director. She does not control the board of directors under either standard of proof.

The firm is correct that these provisions could be changed in the future. At the time of the firm’s application and ODOT’s decision, however, they gave non-disadvantaged directors the power to block action the disadvantaged owner favors. See sections 26.73(b)(1), 26.89(f)(6).

The firm fails to rebut the presumptions of sections 26.69(h) (Ms. Dilbone’s insubstantial ownership) and 26.71(l) (her lack of control). The firm is therefore ineligible, as ODOT concluded, on ownership and control grounds.

## **VI. Conclusion**

For the reasons stated above, the Department affirms ODOT’s ineligibility determination as supported by substantial evidence and consistent with applicable certification rules.

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: Deborah M. Green

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<sup>5</sup> Section 26.71(c) states: A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).

