STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| CHARLES E. BURKETT AND ASSOCIATES, INC., | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 92-3644RX |
| | ) | |
| DEPARTMENT OF TRANSPORTATION, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

FINAL ORDER

The final hearing in the above-styled matter was heard pursuant to notice by Stephen F. Dean, assigned Hearing Officer of the Division of Administrative Hearings, on July 15, 1992, in Daytona Beach, Florida.

APPEARANCES

FOR PETITIONER: Theodore E. Mack, Esquire
Cobb, Cole, and Bell
131 North Gadsden Street
Tallahassee, Florida 32301

FOR RESPONDENT: Pamela S. Leslie, Esquire
Pamela A. Arthur, Esquire
Office of the General Counsel
Department of Transportation
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUES

Whether the amendments to Rule 14-78-005,(7),(e),2, 8, and 9, Florida Administrative Code, promulgated by the Department of Transportation exceeded the authority delegated to the Department by the legislature. Specifically, the issue is whether the Department's rule requiring the minority owner of a disadvantaged business enterprise to possess expertise in critical areas of operation of the business is a reasonable and rationale implementation of the statute requiring that the business be owned and controlled by a socially and economically disadvantaged individual.

PRELIMINARY STATEMENT

The Petitioner, Charles E. Burkett and Associates, Inc. (hereafter Burkett), is an applicant for a Disadvantaged Business Enterprise (DBE) certificate to provide professional engineering services under contract to the Florida Department of Transportation (DOT). The DOT denied the Petitioner's application for DBE certification because it asserted that the disadvantaged owner did not control the day to day operations of the business because she lacked the expertise in critical areas of operation of the business. This

determination was based upon amendments to Rule 14-78-005,(7),(e),2, 8, and 9, Florida Administrative Code, adopted in June of 1991.

At the hearing, the Petitioner called no witnesses, The Respondent presented the testimony of one witness, Ms. Juanita Moore, Manager of the Department's Contracts Administration Office and former Manager of the Department's Minority Programs Office. Petitioner presented two exhibits into evidence, and Respondent presented three exhibits into evidence.

Following the hearing, both parties submitted proposed findings which were read and considered. Appendix A states which of the findings were adopted and which were rejected and why.

FINDINGS OF FACT

1. The Florida Department of Transportation is the state agency charged with the responsibility to develop and adopt criteria for a DBE program, and administer the DBE program.

2. Burkett is a Florida corporation whose sole stockholder is a white female American. She meets the criteria of a socially and economically disadvantaged individual. Burkett applied for certification as a DBE on July 12, 1991, and on October 1, 1991, the Department denied Burkett certification. Burkett submitted additional information and made changes in its internal organization to better conform to the Department's requirements; however, the Department has denied Burkett the designation based upon the owner's lack of expertise in the critical areas of the firm's operation, to wit; she does not possess education or experience in engineering.

3. The parties stipulate that Burkett is substantially effected by the rules being challenged, and possesses standing to bring this rule challenge.

4. In determining the qualifications of an applicant for DBE status, the Department utilizes Sections 334.044(2), 337.137, 339.05, and 339.0805, Florida Statutes; 49 CFR Part 23; the United States Department of Transportation administrative decisions; guidelines and training manuals from USDOT or the Federal Highway Administration (FHWA); and its own rules.

5. At the recommendation of a representative from FHWA, the Department amended the rules being challenged regarding qualifications for DBE certification to explicate the requirement for ownership control, as required by Section 339.0805(1),(c), supra, and 49 CFR Part 23.53, to include the concept of "expertise in critical areas of operation of the business" which is required by the USDOT.

6. The terms "expertise" and "critical areas of operation" are not defined in the Florida Statutes or DOT's rules. The DOT interprets "critical areas of operation" to mean the technical area in which the DBE certification is being sought. Management limited to the day-to-day normal business operations is not considered to be a "critical area of operation." The DOT's evaluation of "expertise" changes from business to business based upon the applicant's type of work. The department expects to see education and experience on the part of the disadvantaged owner in the technical area of operations of the business. The Department denied the Petitioner DBE certification because the disadvantaged owner did not possess engineering experience or education.

## CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties pursuant to Section 120.56, Florida Statutes. Based upon the facts presented and the stipulation of the parties, the Petitioner has standing to challenge the amendments to Rule 14-78-005,(7),(e),2, 8, and 9, Florida Administrative Code, promulgated by the Department of Transportation.

8. Section 339.0805(1),(c), Florida Statutes, provides:

> (c) The department shall certify a socially and economically disadvantaged business enterprise, which certification shall be valid for 12 months. The department's application for certification for a socially and economically disadvantaged business enterprise shall require sufficient information to determine eligibility as a small business concern owned and controlled by a socially and economically disadvantaged individual. A firm which does not fulfill all the department's criteria for certification shall not be considered a disadvantaged business enterprise. An applicant who is denied certification may not reapply within 6 months after issuance of the denial letter or the final order, whichever is later. The application and financial information required by this section are confidential and exempt from s. 119.07(1). This exemption from s. 119.07(1) is subject to the Open Government Sunset Review Act in accordance with s. 119.14. (Emphasis supplied.)

9. Section 334.044,(2), Florida Statutes, provides that the Department is authorized to adopted rules for the conduct of its business operations and the implementation of any provision of law for which the Department is responsible. Pursuant to that authority the Department enacted Rule 14-78-005,(7),(e),8., Florida Administrative Code, which provides:

> The minority owners shall have managerial and technical capability, knowledge, training, education or experience required to made decisions in the critical areas of operation. In determining the applicant's eligibility, the Department will review the prior employment and education backgrounds of the minority owners, the professional skills, training and/or licenses required for the given industry, the previous and existing managerial relationship between and among all owners, especially those who are familiarly related, and the timing and purpose of management changes.

10. The Department also promulgated Rule 14-78.005(7),(e),2., supra, which provides that the minority owner's knowledge of the particular business, background, involvement in the business on a day-to-day basis, expertise, involvement by the non-minority owners, employees or non-minority employees, other full or part-time employment by the minority applicant and the size of the applicant's business be considered. Rule 14-78.005, (7),(e),9., supra, provides that minority owners shall display independence and initiative in seeking, and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business; and in those instances in which the minority owners do not directly negotiate contracts, but claim to approve or reject bids and agreement, the minority owners shall demonstrate that they have the knowledge and expertise to independently make contractual decisions.

11. The Department cites in its brief Whitworth-Borta, Inc. v Jim Burnley, No. G87-176CAS, 1988 WL 242625 (W.D. Mich June 28, 1988), in which the court, faced with facts very similar to those presented and application of a rule very similar to the Respondent's rule, stated:

> The Court's review of the Department's decision is confined by a limited standard of review. In the face of the present challenge, the decision must be sustained unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.
>
> * * * * *
>
> At we noted in National Steel Corp. v. Gorsuch, 700 F.2d 314, 321 (6th Cir. 1983), it is not necessary that the agency's construction of the statute be the only permissible one. Rather, its construction "must be upheld unless that view is plainly unreasonable."
>
> * * * * *
>
> While this Court may well have reached a different conclusion had it reviewed the Whitworth-Borta application in the first instance, it cannot be said that the Department's decision is arbitrary, capricious or an abuse of discretion.
>
> Nor does the court believe the Department exceeded its authority by considering Mr. Whitworth's lack of engineering expertise in determining the extent of his business control. The term "control" is of necessity indefinite and flexible, enabling the Department to exercise reasonably broad discretion in assessing the facts and circumstances of each application.
>
> * * * * *

> In sum, it appears the department applied the MBE certification eligibility standards reasonably in concluding Whitworth-Borta had not carried its burden of proof that it is "controlled" by Mr. Whitworth.

12. The case above is cited at length because the facts were virtually identical to those in the instant case. Although in Whitworth-Borta, above, the challenge was to the application of the rule and not the rule; the Second District Court of Appeal recently stated in Dravo Basic Materials company, Inc. v State of Florida, Department of Transportation, 17 FLW D1673, regarding the standard for reviewing an agency's rule:

> When a rule is challenged before a hearing officer, it is the role of the officer to determine whether the rule is arbitrary or capricious. (Cites deleted.) This is usually a fact-intensive determination. A proposed rule is "arbitrary" only if it is "not supported by fact or logic." (Cite deleted.) The party challenging the rule must prove its invalidity by a preponderance of the evidence.

13. Similarly, the First District Court of Appeal stated in Florida League of Cities, Inc. v. Department of Environmental Regulation, Case No. 90-1733, Opinion filed July 25, 1991 concerning a rule of the Department of Environmental Regulation regarding minimum standards for disposal of domestic wastewater residuals:

> The challenger, among other things, is required to show that the requirements of the rule are inappropriate to the ends specified in the legislative act, or that the requirements proposed are not reasonably related to the purpose of the enabling legislation, or that the proposed rule is arbitrary and capricious. [Court cites Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759, and Marine Fisheries Comm'n v. Organized Fishermen of Fla., 503 So.2d 935, 938 (Fla. 1st DCA).]
>
> Significantly, the same factors used to test the validity of a statute on the ground that it constitutes a violation of the equal protection clause, in cases in which the rational basis standard is applicable, apply as well to rule challenges at the administrative trial level. (Agrico cited.) Accordingly, it is helpful to examine cases in which the constitutional validity of a statute has been challenged on the ground that it is a violation of the equal protection clause.

* * * * *

Consequently, to sustain the statute all that was required was a showing that it bore a reasonable relationship to a legitimate state interest. The burden was therefore placed on the challenger to prove that the statute was not supported on any reasonable basis or that it was arbitrary and unreasonable.

* * * * *

In McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), the United States Supreme Court observed that the equal protection clause is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective, "and that a state's discriminatory actions will not be set aside if any state of facts reasonably may be conceived to justify it." (Emphasis added by 1st DCA.) This standard has been termed the "some reasonable basis" standard.

* * * * *

. . . the rule is now clear that if no suspect or quasi-suspect classes are involved, and social or economic regulations are at issue, the proper test is the reasonable basis standard. United States R.R. Retirement Bod. v. Fritz, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980).

* * * * *

Consequently, as long as the classificatory scheme chosen by the legislature rationally advances a legitimate government objective, the courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld. (Cite deleted.) Florida courts have frequently applied this rule. See Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986); Markham v. Fogg, 458 So.2d 1122 (Fla. 1984); Loxahatchee River Envtl. Control Dist. v. School Bd. of Palm Beach County, 496 So.2d 930 (Fla. 4th DCA 1986), approved, 515 So.2d 217 (Fla. 1987). Moreover, it now appears that Florida courts have generally applied the rational basis standard to rule challenge proceedings. (Emphasis supplied and cites deleted.)

* * * * *

Turning to the proposed rule at issue, our standard of review at the appellate level is

> different from that at the hearing level, requiring us to determine whether the hearing officer's findings are supported by competent, substantial evidence. (Cite deleted.) It is nonetheless essential, in carrying out our review responsibilities, to decide whether the correct standard was applied at the rule challenge proceeding. We have no difficulty in deciding that the evidence submitted in support of the rule at bar was appropriate in form to the nature of the issues involved, (Cite deleted) and therefore met the highly deferential reasonable basis standard.

14. To summarize the instant facts, the Department of Transportation is designated to administer the DBE program relating to highway construction within the state. DOT is authorized to promulgate rules regarding all the programs which it administers. It has adopted the series of rules being challenged which implement the Florida statute requiring that the disadvantaged owner control the business seeking DBE certification by explicating "control," as used in the statute, to mean having the requisite knowledge, experience, and education to understand and participate in the technical operations of the business.

15. Although it appears that the term "control," as used in the Section 337.139 and 339.0805, Florida Statutes, relates to insuring that the applicant is really owned by a disadvantaged individual and not a non-disadvantaged individual hiding behind a wife or daughter to whom a majority share of the business has been transferred, the Department's rule extending "control" to include more than administrative/managerial functions is reasonable to implement the mandate to provide economic assistance to DBE's in harmony with the Department's interest that qualified businesses and individuals are attracted to engage in the technically oriented businesses related to building its roads, bridges and similar structures. Because a reasonable basis exists for the rule, the Petitioner did not carry its burden of proof to show that there was no rational basis for the rule requiring the disadvantaged owner to have expertise and technical capability, knowledge, training, education or experience to make decisions in critical areas of operation.

16. Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is,

ORDERED that Petitioner's challenge to the amendments to Rule 14-78-005,(7),(e),2, 8, and 9, Florida Administrative Code, be dismissed.

DONE AND ENTERED this 14th day of September, 1992, in Tallahassee, Leon County, Florida.

_____

STEPHEN F. DEAN, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 1992.

APPENDIX A

Both parties submitted proposed findings which were read and considered. The following proposals were adopted as indicated, or rejected for the reason stated:

Petitioner's Proposed Findings:

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| Para 1 | FO Para 3 |
| Para 2 | FO Para 1 |
| Para 3 | FO Para 5 |
| Para 4-9 | FO Para 4,5 |
| Para 10-12 | Irrelevant |
| Para 13-15 | FO Para 4,5 |
| Para 16-19 | FO Para 6 |
| Para 20 | Irrelevant |
| Para 21-24 | Conclusions of Law |

Respondent's Proposed Findings:

| | |
|---|---|
| Para 1 | FO Para 1 |
| Para 2 | FO Para 2 |
| Para 3 | FO Para 4 |
| Para 4 | Rejected as contrary to fact |
| Para 5,6 | Irrelevant |
| Para 7-11 | FO Para 5 |
| Para 12,13 | Irrelevant |
| Para 14 | FO Para 4 |
| Para 15 | FO Para 5,6 |

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A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

CHARLES E. BURKETT and ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Appellee.
_____/

NOT FINAL UNTIL THE TIME TO FILE REHEARING MOTION, AND IF FILED, DISPOSED OF.

CASE NO. 92-2482
93-686
DOAH CASE NO. 92-3644RX

Opinion filed May 13, 1994

Administrative Appeal from the Department of Transportation.

Theodore E. Mack, of Cobb Cole & Bell, Tallahassee, for Appellant.

Thornton J. Williams, General Counsel and Thomas F Capshew, Assistant General Counsel Tallahassee, for Appellee.

HARRIS, C. J.

The issue in this case is the validity of the rules of the Department of Transportation which have the effect of requiring that before a minority or woman owner may be certified as a Disadvantaged Business Enterprise in order to

compete for set aside contracts, such minority or woman owner must, in addition to merely being the owner, also have the technical capability, knowledge, training, education or experience required to make decisions in the critical areas of operation.

The rules implemented by the Department are consistent with and patterned after the rule promulgated pursuant to the Federal Surface Transportation and Uniform Relocation Act of 1987 (the Federal Act) to address the same problem of lack of minority and women participation in government construction contracts on the national level:

> (3) The minority or women owners shall also possess the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy and operations

49 C.F.R. s 23.53.

Where the empowering provision of a statute permits an agency to make rules and regulations necessary to carry out the provisions of the act [see section 337.139, Florida Statutes, (1991)], the validity of such rules and regulations will be sustained so long as they are reasonably related to the purposes of the legislation and are not arbitrary or capricious. General Telephone Co. of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984).

We find the rules of the Department to be neither arbitrary nor capricious and that they are reasonably related to the purpose of the legislation, which is to encourage minorities and women to actively participate in the construction services professions.

AFFIRMED.

DIAMANTIS, J. , concurs.

GRIFFIN, J. , concurs specially, with opinion.

GRIFFIN, J., concurring specially. 92-2482

This is the appeal of an order denying minority business enterprise ["MBE"] certification to the engineering firm, Charles E. Burkett and Associates, Inc., by the Department of Transportation. The firm has been owned 100 percent by a white female, Carol Burkett, since 1986, when her husband, the founder of the firm, died. While he lived, Carol Burkett's husband handled the "technical aspect" of the business -- the engineering and the marketing. She did everything else. After her husband's death, another engineer employed by the firm signed and sealed all engineering documents until her son became licensed as an engineer and he took over the technical aspects of the business. The reason for the denial of MBE certification was the requirement in DOT Rule 14-78.005(7)(e)-8 that minority owners must have: "Managerial and technical capability, knowledge, training, education or experience required to make decisions in the critical areas of operation." It is conceded that Carol Burkett has no engineering expertise. Appellant challenges the validity of that rule on

the ground that DOT has exceeded its legislatively granted authority by requiring expertise as an element of "control." See s 337.139 and 339.0805, Florida Statutes (1993). Appellant further challenges the application of the rule to the facts ot this case.

It is ironic that these MBE programs, ostensibly designed to remedy the effects of past discrimination, often are themselves vehicles of bias and discrimination. A prime example is the question of who is in "control" of a business where the majority owner is female. If a woman shares any ownership at all with a male or, if a male -- especially one related by blood or marriage -- is employed in the business in any capacity, there arises in the bosom of those who make the certification decision an unfair, yet unquenchable, presumption that she is, in fact, not in "control" of her own business. This same presumption or intuition (or whatever it is) is not applied -- or at least not applied with the same instinctual fervor -- to minority males who share ownership with a non-minority.

I am the cause of the delay in issuing the opinion in this case. Having exhausted the research and resources available to me for a broader understanding of this issue, I have finally concluded that there is probably no error in the appealed order. The requirement of "expertise" has been validated by federal case law, see, e.g., Car-Mar Const. Corp. v. Shinner, 777 F. Supp. 50 (D.D.C. 1991), and the DOT followed the federal dictate in adopting expertise as an essential element of "control." If this requirement of "expertise" is applied fairly and uniformly to both genders and all minorities seeking MBE certification, it may have the salutary effect of removing some of the latent bias that can exist in these governmentally run programs.

MANDATE
From
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

This cause having been brought to this Court by Appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the Opinion of this Court attached hereto and incorporated as part of this Order, and with the rules of procedure and laws of the State of Florida.

Witness the Honorable Charles M. Harris Chief Judge of the District Court of Appeal of the State of Florida, Fifth District, and the Seal of the said court at Daytona Beach, Florida on this day.

DATE: June 2, 1994

Fifth DCA Case No. 92-2482, 93-686 (SEAL)
County of Origin: Volusia
Trial Court Case No. DOAH 92-3644RX, DOAH 92-0896RX,
DOT 92-0679 (ADMINISTRATIVE)

_____
FRANK J. HABERSHAW, CLERK