

November 12, 2019

Reference Number 19-0100

Eugene Hale
G&C Equipment Corporation
879 W. 190th St., Suite 500
Gardena, CA 90248

Dear Mr. Hale:

G&C Equipment Corporation (G&C) appeals the California Unified Certification Program's decertification of the firm as a Disadvantaged Business Enterprise (DBE). CUCP originally decertified G&C in June 2018; G&C appealed; and on February 25, 2019 we remanded for CUCP to reconsider existing evidence in light of our instructions and produce a new Notice of Decision (NOD). On March 21, 2019 CUCP issued that NOD, and G&C appealed. We affirm the decertification as supported by substantial evidence and consistent with applicable rules.

Our February 2019 decision considered the matter of your 2017 personal net worth (PNW) with reference to specific assets and specific liabilities. Our concern was that both parties applied state community property rules too broadly, even to the specially enumerated "requirements" of section 26.67(a)(2)(iii). With benefit of hindsight we see that our own focus in the remand letter was wider than necessary to resolve the appeal.

We take a narrower approach here, in the interests of clarity and sufficiency, in deciding the substantive issue. We begin with the core fact that we stated in the remand. At year end 2017 you reported "net worth that is [REDACTED] under the Regulation's [REDACTED]. Accordingly, a greater dollar value of net additions (supported by appropriate evidence) renders [you] non-disadvantaged and the firm ineligible."

We incorporate by reference the line-item values you reported at December 31, 2017 and the information you provided, including total gross asset value and exclusions, concerning your calculations. Based on our discussion of the operative provisions, CUCP made substantial upward adjustments to reported values. The only reported and adjusted values we address here are those concerning your retirement accounts.¹ Determining whether substantial evidence supports CUCP's adjustment of the reportable retirement account value is outcome

¹ You split the gross value of your retirement assets 50/50 as between you and your spouse, allocated half to her, and reported the other [REDACTED] --with adjustments, roughly [REDACTED] --on your PNW statement. That is the asset value you used in calculating your below-cap PNW.

determinative. Stated another way, our task is to determine whether CUCP proved that G&C is ineligible, based on evidence demonstrating your PNW is, more likely than not, over the limit. The numbers are large enough, standing alone, to determine whether you have excess net worth.²

The parties agree that the retirement accounts were worth ██████████ in December 2017. In its NOD, CUCP adjusted your 50% reporting to 100%, according to our instructions about proper application of section 26.67 rules. The NOD put you on notice of CUCP's adjustment, the reason for it, and the evidence in support (e.g., your account statements). That was all the remand required with respect to retirement accounts. We specifically asked for explanations and/or new computations consistent with our instructions, based on the evidence CUCP had and which you had already had the opportunity to challenge. We did not require CUCP to start from scratch, and we decline your request that we do so now.³

CUCP's gross upward adjustment of the value of retirement assets is ██████████.⁴ It would take an effective tax rate of nearly 75%, for your net inclusion to place you under the PNW cap, and evidence in the record demonstrates unequivocally that neither your effective tax rate nor top marginal rate is that high. By your own reporting, you compute the reduction for taxes and penalties on the deemed distribution of retirement assets to be 54% of account value,⁵ a number not supported by substantial evidence.

² Section 26.87 requires CUCP to demonstrate that the firm is more likely than not ineligible. It does not require CUCP to determine the value of every possible asset, liability, imputation, or allocation with exactitude. We can and do ignore all of CUCP's other adjustments and (for present purposes only) give you the benefit of all of your original reporting, except as pertinent to your retirement accounts. We do this to simply our decision and clarify its limited scope. In effect, we assume for the sake of argument (and only to resolve this appeal) that the bulk of your reporting is correct. We expressly do not opine on whether any or all of that reporting (other than relating to retirement assets), the underlying application the DBE regulations, or related community property assumptions or assertions are in fact correct.

³ A soup-to-nuts re-examination is unnecessary and a poor use of resources. CUCP had what it needed to make its case. The adjustment in question is easy enough to understand: CUCP rejected your removal of half the account value from gross reportable assets. You have the opportunity in this appeal to challenge the calculations and the rationale and evidence supporting them. And you did. That is all sections 26.87 and 26.89 require. To the extent you argue error, we disagree and in any event find neither fundamental unfairness nor substantial prejudice within the meaning of section 26.89(f)(3). You were able to mount the most effective appeal the facts would allow. Those facts tending not to support G&C's position does not make it incumbent on CUCP to develop new ones in the interest of "completeness."

You would challenge CUCP's exclusion of 20% of gross value for taxes due on the deemed account distribution despite your 2016 tax return demonstrating that your effective tax is 19%. We find CUCP's position supported by substantial evidence, but that finding is not essential to the result. Even if we applied the 54% exclusion you assert, the net includible amount that results from reporting your retirement accounts at full value is over \$████████ more than enough to render you non-disadvantaged. *See also* footnote 5, below.

⁴ As we explained in our remand decision, citing the rule language and the Department's decisions and guidance, retirement accounts normally pertain to the named *individual*, and that individual must report 100% of the value of her retirement assets (less 100% of applicable tax on a theoretical distribution) in computing PNW, when she is, as the evidence indicates you are, the sole account holder. That is the section 26.67(a)(2)(iii)(D) rule.

⁵ This calculation gives you full benefit of the questionable \$████████ exclusion you took from the ██████████ in retirement assets you reported. In fact, it is CUCP's determination, that your effective tax rate is closer to 20%, that is supported by substantial evidence. Your 2016 Form 1040, the latest return available at the time of your PNW

G&C is correct that the certifier has the burden of proof. CUCP carries its burden in making a prima facie case for ineligibility on the basis that the agreed account value is [REDACTED], the accounts are titled exclusively to you, and section 26.67(a)(2)(iii)(D) “requires” full inclusion on your PNW statement.⁶ That is the essence of CUCP’s rationale and its evidence. We conclude that CUCP’s rationale and its processes are consistent with applicable Part 26 rules. The evidence is highly relevant, substantial, direct, and uncontroverted: you concede that the asset’s value is [REDACTED] and that you included only 50% (before reducing for tax) of it. CUCP proved its case, that GNC is more likely than not ineligible.

G&C is ineligible because your PNW exceeds the section 26.67(a) cap. We affirm the decertification under section 26.89(f)(1).

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

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: CUCP

report, shows an effective tax rate of 19%. We agree with CUCP that effective tax rate, not marginal tax rate, better serves the Department’s purpose in construing the exclusion narrowly. We retract our remand assertion to the extent it suggests otherwise.

⁶ G&C’s burden is to persuade us that CUCP was wrong in concluding that your retirement assets are not includable at 100%. GNC’s response that the retirement accounts “may be” community property, and CUCP has the burden of developing more evidence, investigating that maybe, and making a definitive determination with respect to every asset and liability, is a non-rebuttal. It is an unpersuasive, unsupported attempt to raise the bar for CUCP. There is no enhanced burden that CUCP make its more than sufficient ineligibility case even stronger when CUCP has met its section 26.87 burden. Further, we explained on remand why California family law does not trump the Department’s specially tailored DBE rules, particularly not those the regulation unequivocally identifies as “requirements” of this federal program.