

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

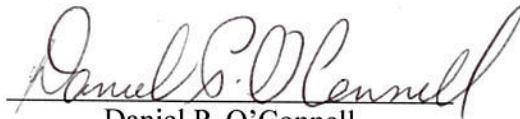
- of -

the Application of **Casters, Wheels and Industrial Handling, Inc.**
for Certification as a Minority and Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60912

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script, reading "Daniel P. O'Connell". The signature is written in black ink and is positioned above the printed name and title.

Daniel P. O'Connell
Administrative Law Judge

March 3, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny the application filed by Casters, Wheels and Industrial Handling, Inc. (CWIH or applicant) for certification as a minority and woman-owned business enterprise (MWBE) be affirmed for the reasons set forth below.

PROCEEDINGS

In denial letters dated August 31, 2016 (*see* MWBE Exh. 4), the Division determined that CWIH does not meet the eligibility requirements to be certified as a minority and woman-owned business enterprise, and denied CWIH's application (*see* MWBE Exh. 3). With a letter dated September 28, 2016, from Lissa Wong-Mayberger, CWIH appealed from the Division's determination to deny MWBE certification.

In a Notice of Appeal Hearing dated January 4, 2017, the Division scheduled the appeal hearing for 10:00 a.m. on February 21, 2017 at the Division's offices located at 633 Third Avenue, New York, New York 10017. The January 4, 2017 notice also reiterated the Division's bases for the denial.

The hearing convened as scheduled. Paul R. Williams, Esq., (Schubach, Williams & Pavone, LLP) represented CWIH, and Lissa Wong-Mayberger testified on behalf of applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division, and Matthew LeFebvre, Senior Certification Analyst, testified on its behalf.

The hearing was recorded. On February 27, 2017, the Office of Hearings and Mediation Services (OHMS) of the New York State Department of Environmental Conservation received a copy of the audio compact disk (CD), whereupon the record of the hearing closed.

In addition to the testimony of the witnesses identified above, the parties offered seven exhibits identified as MWBE Exhibits 1-7, inclusive. All exhibits offered at that hearing were received into evidence (CD 1:15:26). An exhibit chart is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a minority and woman-owned business enterprise are outlined in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted MWBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise on the basis of information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. (*See* 5 NYCRR 144.5[5].)

STANDARD OF REVIEW

On this administrative appeal, CWIH bears the burden of proving that the Division's denial of the application for MWBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

The Division

The Division denied the application filed by CWIH for certification as a minority and woman-owned business enterprise in letters dated August 31, 2016, which are collectively identified in the hearing record as MWBE Exhibit 4. According to the August 31, 2016 correspondence, CWIH did not meet the ownership criteria outlined at 5 NYCRR 144.2(a)(1), and 5 NYCRR 144.2(c)(2). With respect to exercising control over the business enterprise, the Division alleged further that CWIH did not comply with the requirement at 5 NYCRR 144.2(b)(2). (*See* MWBE Exh. 4; CD 45:50-49:50, 1:21:29-1:24:23.)

Casters, Wheels and Industrial Handling, Inc.

In a letter from Ms. Wong-Mayberger dated September 28, 2016, CWIH appealed from the Division's August 31, 2016 determination to deny MWBE certification. Ms. Wong-Mayberger argued that the denial was in error. With reference to the application materials, Ms. Wong-Mayberger said that she made a capital contribution to the business enterprise. In addition to a contribution of money, Ms. Wong-Mayberger argued that she also contributed expertise based on her prior experiences gained from working at CWIH's predecessor companies before she acquired them and consolidated them into one corporation.

Ms. Wong-Mayberger contended that she shares in the risks and profits in proportion to her ownership interest in the business enterprise. Ms. Wong-Mayberger said that profits from the company are typically paid out in the form of dividends. If CWIH had profits, then Ms. Wong-Mayberger said that she would have received dividends in proportion to her ownership interest in the company. According to Ms. Wong-Mayberger, the company has not paid dividends, but reinvests any earnings back into the company.

With respect to control, Ms. Wong-Mayberger said that her title has always been chief executive officer. As the majority shareholder (51%), Ms. Wong-Mayberger contended that she controls the Board of Directors, which retains ultimate control over the business enterprise. Ms. Wong-Mayberger asserted that the Division's review of CWIH's application for MWBE certification is procedurally defective because Division staff did not conduct a site visit. (*See also* CD 04:12-11:37, 1:15:26-1:21:05.)

FINDINGS OF FACT

I. General

1. Casters, Wheels and Industrial Handling, Inc. (CWIH), has business offices and a warehouse located at 8 Engineers Lane, Farmingdale, New York 11735. CWIH also operates a storefront at 364 West 36th Street, New York, New York 10018. Among other things, CWIH sells the following items: (1) casters and wheels for all applications; (2) hand trucks for deliveries; (3) bins, boxes, and shelving; (4) warehouse equipment; and (5) drum handling equipment. (*See* MWBE Exh. 3; CD 13:31, 13:52, 22:28.)
2. Ms. Wong-Mayberger began working for CWIH's predecessor companies¹ in June 1985. From June 1985 to July 1994, Ms. Wong-Mayberger worked the bookkeeper and office manager for CWIH's predecessor companies. (*See* MWBE Exh. 6, CD14:20.)
3. In July 1994, Ms. Wong-Mayberger purchased CWIH's predecessor companies and formed Casters, Wheels and Industrial Handling, Inc. (*see* MWBE Exhs. 1, 3, 5, and 6; CD 15:05, 16:35.)
4. On behalf of CWIH, Lissa Wong-Mayberger filed an application for certification as both a minority-owned and woman-owned business enterprise (MWBE) with the Division on June 20, 2014 (*see* MWBE Exh. 3, CD 36:46).
5. In letters dated August 31, 2016, the Division denied CWIH's application for certification as a minority and woman-owned business enterprise (*see* MWBE Exh. 4).

II. Ownership

6. In July 1994, Lissa Wong-Mayberger and John Mayberger each contributed ██████████ toward the purchase of CWIH (*see* MWBE Exhs. 3 [§ 2.C], and 5; CD 16:06, 52:57-55:11.)
7. With its federal income tax return for 2014 (June 1, 2014 to May 31, 2015), CWIH provided Form 1125-E, which identifies two corporate officers and the compensation each received. John P. Mayberger is the president of Casters, and his reported compensation was ██████████. Lissa Wong-Mayberger is the chief executive officer of Casters, and her reported compensation was ██████████. (*See* MWBE Exh. 2; CD 16:45, 43:02, 57:30-58:38.)
8. On schedule L of the 2014 tax return, the unappropriated retained earnings on June 1, 2014 were ██████████, and on May 31, 2015, the unappropriated retained earnings were

¹ Prior to 1994, Casters, Wheels and Industrial Handling, Inc., was operated as two separate companies. The name of the first was Casters and Wheels for Industry, Inc., and the second company was known as Industrial Handling Company, Inc. (CD 14:20).

I. Ownership

With respect to the contribution required by 5 NYCRR 144.2(a)(1), Division staff observed that in section 2.C of the application, CWIH identified two people who made capital contributions in July 1994 to the business enterprise. The first contribution was made by Lissa Wong-Mayberger, who contributed [REDACTED]. The second was from John Mayberger, who also contributed [REDACTED]. As requested by Division staff, CWIH provided additional documentation concerning the sources of capitalization. (See MWBE Exhs. 3 and 5; CD 54:01-55:11.)

With respect to the required contribution from Ms. Wong-Mayberger to the business enterprise, staff testified that the focus of the analysis was on a capital contribution. Referring to the application and supporting documents, staff observed that the capital contribution from John Mayberger was the same as that made by Lissa Wong-Mayberger even though Ms. Wong-Mayberger is CWIH's majority shareholder. (See MWBE Exhs. 3 and 5, CD 52:57-55:11.) As a result, Staff reasonably concluded, that CWIH failed to show that Ms. Wong-Mayberger made a capital contribution in proportion to her equity interest in the business enterprise as required by 5 NYCRR 144.2(a)(1).

The Division acknowledged that the eligibility criterion identifies other acceptable types of contributions including expertise (see 5 NYCRR 144.2[a][1]). Staff explained, however, that the value of Ms. Wong-Mayberger's nine years of work experience at CWIH's predecessors could not be quantified and, therefore, was not considered. (See MWBE Exh. 6; CD 55:11-56:22, 1:07:35-1:09:32.)

Nevertheless, CWIH argued that Ms. Wong-Mayberger's nine years of work experience at CWIH's predecessor companies should be considered a contribution of expertise to the business enterprise. Though its value could not be quantified, CWIH contended that Ms. Wong-Mayberger's prior work experiences had some associated value. (CD 09:52, 1:16:18, 1:17:16.) The Division, however, contended there is a distinction between the terms, experience and expertise. (CD 47:24 – 48:21.)

The distinction identified by the Division between the terms, experience and expertise, is significant. Contrary to CWIH's argument, the experiences that Ms. Wong-Mayberger gained from working at CWIH's predecessor companies before her ownership are not a form of expertise that Ms. Wong-Mayberger may then contribute to the company to satisfy the applicable ownership criterion. Rather, the work experiences gained may serve to demonstrate whether Ms. Wong-Mayberger controls business operations, as required by 5 NYCRR 144.2(b)(1).² Therefore, regardless whether the value of Ms. Wong-Mayberger's work experiences could be quantified, I conclude that any experiences that may be gained from employment cannot be considered expertise contributed to the business enterprise.

Given these circumstances, the only other type of contribution presented by CWIH in its application for MWBE certification that was before Division staff was a capital contribution. Because the contributions made by John Mayberger and Lissa Wong-Mayberger were the same (*i.e.*, [REDACTED] each), I conclude that CWIH failed to show that Ms. Wong-Mayberger made a

² CWIH's compliance with the eligibility criteria outlined at 5 NYCRR 144.2(b)(1) are not at issue here (CD 03:34).

capital contribution in proportion to her equity interest in the business enterprise as required by 5 NYCRR 144.2(a)(1). Accordingly, I conclude further that Division staff's determination with respect to this eligibility criterion was based on substantial evidence, and recommend that the Director conclude the same.

An additional ownership criterion at issue in this matter is whether CWIH showed that Lissa Wong-Mayberger enjoys the customary incidents of ownership, and shares in the risks and profits in proportion to her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). With its federal income tax return for 2014, CWIH provided Form 1125-E, which identifies two corporate officers and the compensation that each received. In 2014, John P. Mayberger and Lissa Wong-Mayberger each received [REDACTED] in compensation. (See MWBE Exh. 2; CD 43:02, 57:30-58:38.)

For 2014, CWIH noted that its retained earnings were [REDACTED] (see MWBE Exh. 2 [Schedule L, Line 25] at 5, CD 41:47). CWIH argued that, as the majority shareholder, Ms. Wong-Mayberger would have benefited from any distribution of these retained earnings in the form of dividends (CD 06:23-07:12, 1:18:35).

During the hearing, however, Ms. Wong-Mayberger testified that for the past seven or eight years, it has been the company's policy *not* to distribute any earnings as dividends to the shareholders, but to retain them. Ms. Wong-Mayberger testified further [REDACTED] (CD 25:53-26:28.) Based on [REDACTED], CWIH's argument about a potential benefit that Ms. Wong-Mayberger might receive if CWIH were to distribute dividends to shareholders, is speculative and, therefore, without merit.

In *Matter of CW Brown, Inc. v Canton* (216 AD2d 841, 843 [3d Dept 1995]), the court held that staff's review of tax returns, such as those considered during the review of CWIH's application for MWBE certification, was substantial evidence to support the Division's consideration of whether a minority and woman-owned business meets the eligibility criterion at 5 NYCRR 144.2(c)(2). In 2014, the compensation received by Mr. Mayberger and Ms. Wong-Mayberger was the same. Given the similarity in the compensation that each received, I conclude that the Division's determination that CWIH does not comply with the eligibility criterion at 5 NYCRR 144.2(c)(2) is based on substantial evidence. I recommend that the Director conclude the same.

Ms. Wong-Mayberger testified further that at a shareholders' meeting, the shareholders agreed to limit their respective salaries to a particular level, in part, because of [REDACTED] (CD 27:08). Documentation of this meeting and subsequent meetings, as well as any related resolutions adopted at these meetings was not before Division staff prior to the August 31, 2016 determination. However, with respect to a future application for MWBE certification (see 5 NYCRR 144.5[b]), documentation of such meetings and any related resolutions may have merit in demonstrating compliance with the eligibility criterion at 5 NYCRR 144.2(c)(2).

II. Control

The issue on appeal is whether CWIH demonstrated compliance with the requirement at 5 NYCRR 144.2(b)(2), which states, in full, that:

[a]rticles of incorporation, *corporate bylaws*, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions (emphasis added).

CWIH's by-laws provide for a president, a secretary, and a treasurer as well as one or more vice-presidents. The Board of Directors consists of the shareholders, who in turn elects these corporate officers. (*See* MWBE Exh. 1 [§ 6.1] and 7 [Certificate of Directors' Action]; CD 33:39, 59:30.) According to the application, John Mayberger is the president of CWIH. Lissa Wong-Mayberger is the chief executive officer. Kevin McPartland is the vice-president for sales. (*See* MWBE Exh. 3; CD 16:45, 17:36, 1:04:23.)

The by-laws identify the duties and responsibilities for each corporate officer. The president is the principal executive officer and has the authority to supervise and control all business and affairs of the corporation. (*See* MWBE Exh. 1 [§ 6.5]; CD 59:30, 1:01:28.) The by-laws neither identify a chief executive officer, nor describe the duties and responsibilities that would be associated with such a position (*see* MWBE Exh. 1).

The Division argued that when, as here, the corporate by-laws vest the authority to direct the business in individuals who are not either minority or women, the minority woman-owner is not in control of the business enterprise. Based on the information presented with the application and supporting materials, Division staff concluded that CWIH's by-laws demonstrate that John Mayberger, as the president of CWIH, has the authority to manage the daily affairs of the business enterprise. (*See* MWBE Exh. 1 and 7; CD 49:50, 1:24:23.)

CWIH argued, however, that Lissa Wong-Mayberger, as a member of the Board of Directors, has ultimate control over the corporation because she holds the majority (*i.e.*, 51%) of the voting shares (*see* MWBE Exhs. 3 [§ 2.A], and 7 [Certificate of Directors' Action]; CD 16:35, 25:20). By holding the majority of voting shares, CWIH argued that Lissa Wong-Mayberger has the authority to call a meeting of the Board of Directors, and at such a meeting replace the corporate officers with people who would share Ms. Wong-Mayberger's views with respect to CWIH's business operations. Consequently, Ms. Wong-Mayberger has absolute control over the activities of the business enterprise, according to CWIH. CWIH concluded that it complies with the eligibility requirement outlined at 5 NYCRR 144.2(b)(2). (CD 10:40, 1:21:05.)

The intent of the eligibility requirement at 5 NYCRR 144.2(b)(2) concerning the designation of minority and woman-owners as the decision makers in the corporate documents of the business enterprise is to formalize functional designations. Formalized designations, as reflected in the corporation's by-laws, ensure that minority and woman-owners are in fact, the

decision makers of the business enterprise. Consequently, at the time that CWIH filed its application for MWBE certification, Division staff correctly found that Lissa Wong-Mayberger was not the president of CWIH. Therefore, staff appropriately determined that Ms. Wong-Mayberger could not make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). This conclusion is consistent with the court's determination in *CW Brown (supra* at 843).

With reference to section 4.A of the application, CWIH noted that Ms. Wong-Mayberger is the responsible individual for all managerial operations at the company. Based on these responses in the application, CWIH argued that Ms. Wong-Mayberger controls the daily operations at the company. As noted by the Division (CD 1:24:23), the responses in section 4.A of the application relate to the eligibility criteria at 5 NYCRR 144.2(b)(1), which are not at issue here (CD 03:34).

CONCLUSIONS

1. CWIH did not show that Lissa Wong-Mayberger made any contribution in proportion to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise, as required by 5 NYCRR 144.2(a)(1).
2. CWIH did not demonstrate that Lissa Wong-Mayberger enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).
3. CWIH failed to demonstrate that Lissa Wong-Mayberger, as the minority and woman-owner, is listed on corporate documents and relevant business agreements which, thereby, permits her to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's August 31, 2016 determination to deny CWIH's application for certification as a minority and woman-owned business enterprise.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart

**Matter of Casters, Wheels and Industrial Handling, Inc.
MWBE Case No. 60912**

Hearing Date: February 21, 2017 (10:00 AM)

WBE Exhibit No.	Description
1	By-Laws of Casters, Wheels and Industrial Handling, Inc.
2	IRS Form 1120 US Corporation Income Tax Return Casters, Wheels and Industrial Handling, Inc. June 1, 2014 to May 31, 2015
3	Certification Application Casters, Wheels and Industrial Handling, Inc. Started: 6/20/2014 Submitted: 10/19/2015 9 pages
4	Correspondence dated August 31, 2016 from the Division denying minority and woman-owned business enterprise certification to Casters, Wheels and Industrial Handling, Inc.
5	Letter dated September 14, 2015 from Lissa (Wong) Mayberger from Casters, Wheels and Industrial Handling, Inc. to the Division
6	Résumé of Lissa Wong Mayberger
7	Minutes of the Meeting of Shareholders of Casters, Wheels and Industrial Handling, Inc. dated February 12, 2002. Certificate of Directors' Action

All exhibits received into evidence (CD 1:15:26).