

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

In the Matter

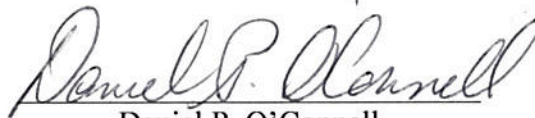
- of -

the Application of **Uniforms by Park Coats, Inc.**
for Recertification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 50952

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

June 26, 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 Uniforms by Park Coats, Inc. (Uniforms or applicant) for recertification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

By letter dated November 29, 2016 (*see* WBE Exh. 2), the Division determined that Uniforms does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied its recertification application. With a letter dated December 5, 2016, from Despina Haymando, Uniforms appealed from the Division's determination to deny its WBE application for recertification.

With a notice dated March 2, 2017, the Division scheduled the administrative appeal hearing for 1:30 p.m. on June 13, 2017 at the Division's offices located at 633 Third Avenue, New York, New York 10017. The March 2, 2017 notice also reiterated the Division's bases for the denial.

The hearing convened as scheduled. Despina Haymando represented Uniforms, and testified on behalf of applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division, and Raymond Emanuel, Associate Certification Analyst, testified for the Division.

The hearing was recorded. On June 15, 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 Division offered three exhibits identified as WBE Exhibits 1-3, inclusive. Uniforms did not offer any exhibits. All exhibits offered at that hearing were received into evidence. An exhibit chart is attached to this recommended order.

During the hearing (CD 24:07), I took official notice (*see* State Administrative Procedure Act [SAPA] § 306[4]) that in 2009 the Division certified Uniforms as a woman-owned business enterprise. Also, in 2013, the Division recertified Uniforms as a woman-owned business enterprise.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a 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 WBE 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, Uniforms bears the burden of proving that the Division's denial of the WBE application for recertification is not supported by substantial evidence (*see* SAPA § 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

With a letter dated November 29, 2016 (*see* WBE Exhibit 2), the Division denied the application filed by Uniforms for recertification as a woman-owned business enterprise. According to the November 29, 2016 correspondence, Uniforms does not meet the criterion outlined at 5 NYCRR 144.2(b)(2) because Despina Haymando does not exercise control over the business enterprise.

Uniforms by Park Coats, Inc.

In correspondence dated December 5, 2016, Despina Haymando stated that she provided the Division with copies of Uniforms' by-laws and stock certificates. Ms. Haymando said that the by-laws have not been updated since they were written, and that she has held 60% of the stock since 2001. Ms. Haymando acknowledged that her brother, Nikolas Haymandos,¹ is the company's president even though he is generally inactive with its operations due to health issues. Nevertheless, Ms. Haymando argued that she controls the company as the majority shareholder. Ms. Haymando reiterated her position during the hearing (CD 13:48, 14:15, 14:51, 24:30, 25:20, 25:58, 26:08).

FINDINGS OF FACT

1. Uniforms by Park Coats, Inc. (Uniforms), has business offices located at 790 Third Avenue, Brooklyn, New York 11232. Despina Haymando, and her brother, Nikolas Haymandos, formed the business enterprise in 1973. The siblings are the only shareholders and serve as the corporate officers. Since 1973, Nikolas Haymandos has been Uniforms' president. Despina Haymando currently serves as the vice-president and treasurer. (CD 08:10, 23:03, 23:38, 25:20, 26:36.)

¹ In Greek, the masculine form of a surname ends in "s" (CD 08:33).

2. Uniforms is a retail uniform supply service (*see* WBE Exh. 1).
3. In 2009, the Division certified Uniforms as a woman-owned business enterprise. In 2013, the Division subsequently recertified Uniforms as a woman-owned business enterprise.
4. On behalf of Uniforms, Despina Haymando filed a recertification application with the Division on January 3, 2016 (*see* WBE Exh. 1).
5. With a letter dated November 29, 2016, the Division denied Uniforms' application for recertification as a woman-owned business enterprise (*see* WBE Exh. 2).
6. As part of the January 2016 recertification application, Despina Haymando provided the Division with a copy of the By-Laws of Uniforms by Park Coats, Inc. These by-laws were in effect when Uniforms filed its initial application for WBE recertification in 2009. (*See* WBE Exh. 3; CD 21:59, 26:08.)²
7. Article IV of the by-laws outlines the duties and responsibilities of the president and vice-president. The president shall be the chief executive officer of the corporation, and "shall have the management of the business of the corporation" (WBE Exh. 3 at F). The vice-president shall have all the powers and functions of the president, during the absence or disability of the president. (*See* WBE Exh. 3; CD 5:28, 06:10, 06:42, 06:56.)
8. Article III of the by-laws provides for a board of directors who must be shareholders. The business of the corporation shall be managed by the board of directors. Currently, the board of directors for Uniforms consists of Despina Haymando and Nikolas Haymandos because they are the only shareholders. According to the by-laws, the vote of a majority of the directors present at the time of the vote shall be the act of the board. Each director present shall have one vote regardless of the number of shares that he or she may hold. (*See* WBE Exh. 3 at C-D; CD 10:25.)

DISCUSSION

This recommended order considers Uniforms' appeal from the Division's November 29, 2016 determination to deny its application for recertification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. With respect to exercising control over the business enterprise, the Division asserted that Uniforms did not demonstrate that the corporate by-laws permit Despina Haymando, as the woman-owner of the business enterprise, to make business decisions without restrictions as required by 5 NYCRR 144.2(b)(2). (*See* WBE Exh. 2.)

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

² The pages of the by-laws are designated with letters of the alphabet (A-J), rather than with numerals.

[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.

Uniforms' by-laws provide for a president, a secretary, a treasurer, as well as one or more vice-presidents. The board of directors consists of the shareholders, who in turn elect the corporate officers. (*See* WBE Exh. 3; CD 10:25.) Nikolas Haymondos is the president of Uniforms, and Despina Haymondo is the vice-president. (*See* WBE Exh. 1; CD 08:10, 23:03, 23:38, 26:36.)

The by-laws identify the duties and responsibilities for each corporate officer (CD 06:10). The president is the chief executive officer and has the authority to manage the business of the corporation (*see* WBE Exh. 3; CD 06:42). During the absence or disability of the president, the vice-president has all the powers and functions of the president (*see* WBE Exh. 3; CD 06:56).

The Division argued that when, as here, the corporate by-laws vest the authority to direct the business in individuals who are not women, the 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 Uniforms' by-laws demonstrate that Nikolas Haymondos, as the president of Uniforms, has the authority to manage the daily affairs of the business enterprise. (*See* WBE Exh. 1 and 3; CD 09:10.)

Uniforms argued, however, that Despina Haymondo, as a member of the board of directors, has ultimate control over the corporation because she is the majority shareholder (*i.e.*, 60%) (*see* WBE Exh. 1; CD 19:25, 24:30, 25:20). By being the majority shareholder, Uniforms argued that Ms. Haymondo 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 her views with respect to Uniforms' business operations. Consequently, Ms. Haymondo has absolute control over the activities of the business enterprise, according to Uniforms. Given her loyalty to her brother, Ms. Haymondo stated, however, that she would not remove him as the company's president (CD 13:48).

Contrary to Uniforms' argument, being the majority shareholder of Uniforms does not ensure that Ms. Haymondo controls the business enterprise. Rather, it demonstrates that she is the owner (*see* 5 NYCRR 144.2[a][5]), which is not at issue here. Moreover, the by-laws state that each director has one vote regardless of the number of shares that he or she may hold (*see* WBE Exh. 3). With only one vote, Ms. Haymondo could not call a meeting of the board of directors to replace her brother as the corporate president if Nikolas Haymondos chose to vote against his sister. The two siblings, as the only shareholders, are also the only board members (*see* WBE Exh. 3). Therefore, one board member's vote could cancel the other's out. (CD 09:40, 10:25, 23:38.)

The intent of the eligibility requirement at 5 NYCRR 144.2(b)(2) concerning the designation of the woman-owner as the decision maker 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 the woman-owner is in fact the decision maker of the business enterprise. Consequently, at the time that Uniforms filed its WBE application for recertification, Division staff correctly found that Despina Haymando was not the president of Uniforms. Therefore, staff appropriately determined that Ms. Haymando cannot make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Prior to the Division's November 29, 2017 denial letter, Uniforms had been certified as a woman-owned business enterprise since 2009 despite Nikolas Haymandos being its president since 1973 (CD 24:07, 26:36). The Division, however, is not bound to recertify Uniforms based on prior determinations. Based on the foregoing, Uniforms did not meet its burden. Uniforms may take the steps necessary to comply with the criteria outlined at 5 NYCRR 144.2. Subsequently, as provided by the regulations (*see* 5 NYCRR 144.5[b]), Uniforms may reapply for certification.

CONCLUSION

For the reasons outlined above, Uniforms failed to demonstrate that the corporate by-laws permit Despina Haymando, as the woman-owner of the business enterprise, to make 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 November 29, 2016 determination to deny Uniforms' application for recertification as a woman-owned business enterprise.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart

Matter of Uniforms by Park Coats, Inc.
WBE Case No. 50952

Hearing Date: June 13, 2017 (NYC - 1:30 PM)

WBE Exhibit No.	Description
1	WBE Recertification Application from Uniforms by Park Coats, Inc. Application No. 6400329 Started: 1/6/2016 Submitted: 1/29/2016
2	Division's Denial Letter Dated: November 29, 2017
3	By-Laws of Uniforms by Park Coats, Inc.

All exhibits are received into evidence.