

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

In the Matter

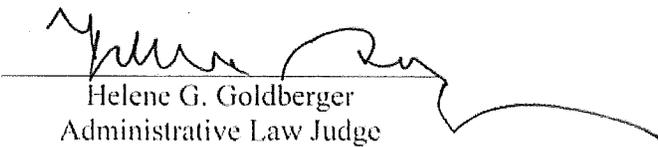
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the Application of **AIRFLOW AIR CONDITIONING,
REFRIGERATION & HEATING, INC.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61353

RECOMMENDED ORDER

- by -



Helene G. Goldberger
Administrative Law Judge

March 26, 2019

SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development (Department) to deny Airflow Air Conditioning, Refrigeration & Heating, Inc. (Airflow or applicant) certification as a woman owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

In a letter dated January 20, 2017, the Division determined that Airflow does not meet the eligibility requirements to be certified as a woman owned business enterprise and denied Airflow's application. *See*, WBE Exhibit 2. In this letter determination, the Division cited that Airflow failed to meet the eligibility requirements of Article 15-A of the New York State Executive Law and the rules and regulations promulgated thereunder because:

- Pursuant to 5 NYCRR § 144.2(a)(1), the contribution of women is not proportionate to their equity interest in the business enterprise;
- Pursuant to 5 NYCRR § 144.2(b)(1), the women owners do not make decisions pertaining to the operation of the business enterprise; and
- Pursuant to 5 NYCRR § 144.2(b)(1)(i), the woman owner of the business enterprise has not demonstrated adequate managerial experience or technical competence to operate the business enterprise.

By letter dated February 23, 2017, Candice Durkin, as the president of Airflow and its majority (51%) shareholder, appealed from the Division's determination to deny WBE certification (Appeal).¹ WBE Exhibit 3. Ms. Durkin agreed to file a written appeal in lieu of a hearing. Attached to Airflow's Appeal are Exhibits A-F. I have noted these on the attached exhibit chart but cannot consider Exhibits A or B as Ms. Durkin admits in the Appeal that these documents were not part of the company's submission to the Department with its application. *See*, Exhibit 3, pp. 1-2; §§ 144.4(e) and 144.5(a) of Title 5 of the New York Compilation of Codes, Rules and Regulations (5 NYCRR).

Thomas Regan, Esq., Associate Counsel, filed the Division's response dated March 5, 2019 (Response). With the Response, the Division included seven exhibits, which are identified in the attached exhibit chart. Among the exhibits included with the Response is a copy of Airflow's completed application for WBE certification (*see* WBE Exhibit 1 [Application No. 1854550, submitted December 8, 2016]), as well as other application materials related to the bases for the Division's January 20, 2017 determination.

¹As noted by counsel for the Department in his memorandum of law in response to Airflow's appeal, Ms. Durkin submitted two letters of appeal with identical arguments dated February 23 and May 26, 2017; the latter submission contained the attachments.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman owned business enterprise are established by regulation. *See*, 5 NYCRR § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts. *See*, 5 NYCRR 144.5(a).

STANDARD OF REVIEW

On this administrative appeal, Airflow, as applicant, bears the burden of proving that the Division's denial of its application for WBE 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

In the January 20, 2017 denial letter (WBE Exhibit 2), the Division determined that the application failed to meet the WBE certification criteria related to Candice Durkin's ownership as reflected by her capital contribution to the business enterprise. The Division asserted that the contribution of Ms. Durkin is not proportionate 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). According to the Division, Ms. Durkin possesses a 51% interest in the business enterprise, as compared to her husband John Durkin who possesses a 49% interest. Nevertheless, applicant failed to provide documentation that Ms. Durkin made a greater capital contribution to the business as compared to Mr. Durkin. *See*, WBE Memorandum of Law (MOL) at pp. 3-4. The Division's MOL notes that Airflow's application indicates that Ms. Durkin contributed ██████ in cash while Mr. Durkin contributed ██████ in equipment. *See*, MOL at p. 4; WBE Exhibit I, p. 3. Staff acknowledges Ms. Durkin's Response in which she admits that Mr. Durkin made a larger contribution. MOL, p. 4. With respect to the additional documentation submitted by Ms. Durkin, staff points out that Ms. Durkin admits these were not part of the application and should not be considered. MOL, p. 4.

In addition, the Division asserts that Airflow did not demonstrate that Ms. Durkin operated the company citing *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 890 (3d Dep't 1995) (the owner of the business does not make decisions pertaining to the operation of the enterprise if she "performs some functions and makes some decisions on her own; yet, significant operations are shared and still others are performed by [non-minority men] alone.") MOL, p. 4. Counsel argues that Ms. Durkin did not demonstrate any relevant training

or managerial experience in estimating or project management in the HVAC contracting industry and points to her resume with a concentration in back office functions. MOL, p. 5. Staff contrasts this with Mr. Durkin's resume and those of two field employees which indicate estimating and supervision of field employees as core responsibilities since 1987.² MOL, p.5. In addition, staff points to the relevant licenses that Mr. Durkin possesses including heating, oil, gas and special water. MOL, p. 5; WBE Exhibit 6.

Airflow

On appeal, Ms. Durkin asserts that although Mr. Durkin may have made a larger initial contribution to the company thirty years ago, she has made substantial contributions in "cash, experience and expertise" over the thirty-year period. Appeal, p. 1. Ms. Durkin explains that until 1993 she recorded no earnings as secretary of the Corporation, "instead funneling any monies due me back to the Corporation." Appeal, p. 1. And she points to a contribution of [REDACTED] between 1992 and 1993 to assist Airflow. *Id.* Ms. Durkin acknowledges that support for these statements was not included in the application and points to Airflow's Exhibits A and B annexed to the Appeal. Appeal, p. 2.

With respect to operational decisions, Ms. Durkin argues that since January 8, 2013, when her husband sustained health issues, she has been the individual with "ultimate decision making authority." Appeal, p. 2. Specifically, she claims as her areas of responsibility to be accounting, payroll, insurance and financial decisions; bid estimation; preparation, negotiation and making of bids; hiring and firing; equipment purchasing, management and repair; coordination of subcontractors and employees on specific jobs; management of all service and maintenance accounts and all aspects of marketing and sales. *Id.* Ms. Durkin argues that the fact that her husband has certain licenses and expertise does not negate her control over the day-to-day operation of the company.

Finally, as for managerial experience, Ms. Durkin argues that she is intimately involved in all aspects of the company's management including pricing and bidding (over which she has ultimate authority). Appeal, p. 2. She points to her thirty years of experience as co-owner of Airflow by which she developed expertise in the HVAC field and the company's continued success as evidence of her managerial expertise. *Id.* Ms. Durkin also points to her operation of the company's computer system – equipment with which she states Mr. Durkin has no experience. Appeal., p. 3.

FINDINGS OF FACT

I. General

1. Airflow Air Conditioning, Refrigeration & Heating, Inc. is located as 2015 Route 9W, Milton, NY. *See*, WBE Exhibit 1 at p. 1.

²In the MOL, Associate Counsel Regan writes "[b]y way of contrast, Mr. John Durkin's resume indicates estimating and supervision of field employees as core responsibilities *if her* duties since 1987." (emphasis added.) It appears that the italicized words constitute a typographical error.

2. Candice Durkin is president and owns 51% of Airflow. Her husband, John Durkin, owns 49% of Airflow. *See*, WBE Exhibit 1 at p. 3.
3. Candice Durkin applied to certify Airflow as a WBE on December 8, 2016 through the New York State Contract System. *See*, WBE Exhibit 1 at p.11.
4. Airflow is primarily engaged in heating, ventilation, air conditioning, sheet metal fabrication, humidification and refrigeration. *See*, WBE Exhibit 1 at p. 3.

Ownership

5. From July 10, 1987 until January 15, 2013, John Durkin was the president of Airflow. On January 15, 2013, the board of directors held a meeting at which Candice Durkin was elected president and Mr. Durkin, Candice's husband, gifted her one share of Airflow stock giving her the majority ownership in the company. WBE Exhibits 1, pp. 2, 3 and 7.
6. At the company's inception, Ms. Durkin contributed [REDACTED] in cash from personal savings towards office supplies and operation and Mr. Durkin gave [REDACTED] in equipment. *See*, WBE Exhibits 1, p. 3 and 5.

Control

7. Ms. Durkin is involved in all the core functions of the company including bid estimation. *See*, WBE Exhibit 1, p. 4.
8. For many of the business operations noted in the application such as estimating, hiring and firing, supervision of field operations, and purchasing equipment and sales, Ms. Durkin shares responsibility with Mr. Durkin and other in the company. *See*, WBE Exhibit 1, p. 4.

Managerial Experience

9. Ms. Durkin does not have a background in HVAC. She does not have education in this technical area. WBE Exhibit 4.
10. Ms. Durkin has experience in customer relations, accounting, payroll and human resources, marketing and general business management. WBE Exhibit 4.
11. Ms. Durkin has a degree in veterinary science technology and worked as a veterinary technician from 1981 – 1986. WBE Exhibit 4.
12. Ms. Durkin has worked at Airflow since 1987 taking responsibility for a variety of operational functions. WBE Exhibits 1, p. 4 and 4.

13. Mr. Durkin has experience in the HVAC industry since 1981 and has an educational background in HVAC technology. WBE Exhibit 4. He also has several industry-related licenses. WBE 6.

DISCUSSION

This recommended order considers Airflow's February 23, (and May 26) 2017 appeal including Attachments C-F and the response of the Division staff including Exhibits 1-7. The bases identified in the Division's January 20, 2017 denial letter (*see* WBE Exhibit 2) are addressed below.

I. Ownership and Contribution

With respect to the ownership criteria, Division staff asserted that applicant failed to provide documentation showing that Ms. Durkin's contributions were proportionate 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) and, thus, greater than the capital contributions of Mr. Durkin. *See*, WBE Exhibit 2. The Division's determination is supported by substantial evidence.

Ms. Durkin applied to the Division to certify Airflow as a WBE. *See*, 5 NYCRR 144.8(a)(5). The application does not support Ms. Durkin's claim that she has contributed greatly financially and in other ways to the company. Instead, the application indicates that she contributed only [REDACTED] at the commencement of the operation. *See*, WBE Exhibits 1, p. 3; 5. She did not provide any capital in exchange for the share in the company giving her majority ownership – instead, it was gifted to her. WBE Exhibits 1, p. 3 and 7, p. 2. In her appeal, as Exhibit A, Ms. Durkin submitted a copy of her May 2017 Social Security statement to support her claim that for many years she worked uncompensated for the company as her contribution to its operation. In addition, as Exhibit B, she provided copies of her checks paid to Airflow and a description of these payment for various amounts to substantiate her contributions. However, as noted above, because these documents were not submitted as part of the application, I cannot consider them. 5 NYCRR §§ 144.4(e); 144.5(a).

I note that neither article 15 of the Executive Law nor the implementing regulations at 5 NYCRR part 144 (Statewide Certification Program) place the Division under a legal obligation to research the nature of a woman owner's capital contributions, make inquiries with respect to the same, or complete the WBE application on her behalf.

Based on the administrative record, the Division reasonably concluded that Ms. Durkin did not demonstrate that she made a capital contribution to the business enterprise proportionate to her majority ownership interest.

II. Control

To be eligible for WBE certification, the Division's regulations state that "[d]ecisions pertaining to the operation of the business enterprise must be made by . . . women claiming

ownership of that business enterprise.” 5 NYCRR § 144.2(b)(1). In addition, women must demonstrate “control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.” 5 NYCRR § 144.2(b)(3). While Ms. Durkin argues that she has been the individual “with ultimate decision making authority as to its day-to-day affairs,” with respect to the business’s core functions set out in the application, for many, Ms. Durkin appears to share responsibility with Mr. Durkin and other staff members. WBE Exhibit 4. In Ms. Durkin’s Appeal, she emphasizes that “Mr. Durkin has no experience in the operation of our company computer system.” WBE Exhibit 3, p. 3. But this appears to be the only function and albeit an administrative one, in which she is solely in control.³ I found Airflow’s submissions – both its application and its Appeal – to be lacking in the substance necessary to demonstrate that Ms. Durkin was in control of the significant operations of Airflow. Accordingly, based on the record before me, I find that the Division reasonably concluded that Ms. Durkin failed to demonstrate control of the business.

III. Managerial Experience

The applicable regulatory criteria state that the woman owner “must have adequate managerial experience of technical competence in the business enterprise seeking certification [and] must demonstrate the working knowledge and ability needed to operate the business enterprise.” 5 NYCRR § 144.2(b)(1)(i). Ms. Durkin has a liberal arts degree and a degree in Veterinary Science Technology. WBE Exhibit 4. Prior to her joining Airflow, she worked as a veterinary technician. *Id.* In Airflow’s Appeal, Ms. Durkin states that she worked as a secretary for the company, at least for several years. WBE Exhibit 3, p. 1. Her resume indicates that her experience with Airflow is in customer relations, accounting, payroll and human resources, projects and service, marketing and general business management. WBE, Exhibit 4.

Contrasted with John Durkin who started with an education in HVAC and as an HFAC technician in 1981, Ms. Durkin appears to have administrative experience versus Mr. Durkin’s technological depth. WBE, Exhibit 4. This is further supported by Mr. Durkin’s possession of several licenses that are relevant to the business operation. WBE Exhibit 6. While Ms. Durkin explains in her Appeal that Mr. Durkin’s decline in health in 2013 prompted her to step in to lead the company, and that her experience in this role forges the basis for her management, there is no substantive proof of these assertions.

On this record, I conclude that the Division’s determination with regard to demonstration of adequate managerial experience or technical competence is supported by substantial evidence.

³ Ms. Durkin’s argument that the fact that the company has been doing so well financially is proof that as president she has shown “adequate managerial” experience is a circular one. WBE Exhibit 3, p. 2. Since there is no substantial evidence that she is in charge other than possessing the title of president, there is insufficient evidence to show that the income is due to her leadership.

CONCLUSION

1. With respect to the ownership criterion at 5 NYCRR § 144.2(a)(1), Airflow did not meet its burden to show that the Division's January 20, 2017 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the operation criterion at 5 NYCRR § 144.2(b)(1), Airflow did not meet its burden to show that the Division's January 20, 2017 determination to deny the application for WBE certification is not based on substantial evidence.
3. With respect to the managerial criterion at 5 NYCRR § 144.2(b)(1)(i), Airflow did not meet its burden to show that the Division's January 20, 2017 determination to deny the application for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Airflow's application for certification as a woman owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

Exhibit Chart
Matter of Airflow Air Conditioning, Refrigeration & Heating, Inc.
WBE File ID No. 61353

| WBE Exhibit No. | Description |
|-----------------|---|
| 1 | Airflow WBE certification application (Application No. 1854550, submitted December 8, 2016) |
| 2 | January 20, 2017 Denial Letter |
| 3 | Airflow's February 23, 2017 and May 26, 2017 Appeal Letter |
| 4 | Airflow Resumes |
| 5 | November 28, 2016 Letter of Candice Durkin to Division re: Ownership Information |
| 6 | Various Licenses Held by John Durkin |
| 7 | Minutes of Airflow Shareholder Meeting – January 8, 2013 |

| Airflow Exhibit No. | Description |
|---------------------|--|
| A | 2017 Social Security Statement of Candice Durkin – not accepted into Evidence |
| B | Copies of Checks by Candice Durkin to Airflow and Summary – not accepted into Evidence |
| C | Airflow Resumes (same as WBE Exhibit 4) – accepted |
| D | Airflow WBE certification application – same as WBE Exhibit 1- accepted |
| E | Airflow Bylaws – accepted |
| F | Airflow 2103 US Income Tax Return – accepted |