

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

In the Matter

- of -

the Application of Brandt Equipment, LLC,
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 63915

RECOMMENDED ORDER

- by -

/s/

Daniel P. O'Connell
Administrative Law Judge

April 28, 2020

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 Brandt Equipment, LLC, doing business as Brandt Industries (Brandt or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal by Brandt, pursuant to New York State Executive Law article 15-A and title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division that the business enterprise does not meet the eligibility criteria for certification as a WBE.

Esther Reich serves as the President for the business enterprise and submitted a fast track application¹ on behalf of Brandt for certification as a WBE on May 4, 2018 (*see* WBE Exhibit 1). The Division denied Brandt's application by letter dated March 22, 2019 (*see* WBE Exhibit 2). The March 22, 2019 denial letter set forth four grounds for the denial.

With a letter received on April 24, 2019 (*see* WBE Exhibit 3), Ms. Reich responded, on behalf of Brandt, to the Division's March 22, 2019 denial letter, and requested a hearing. The Division issued a Notice of Appeal Hearing dated January 29, 2020, which scheduled the hearing for February 11, 2020, at 1:30 p.m. at the Division's offices located at 633 Third Avenue, New York, New York 10017 (*see* WBE Exhibit 4).

The hearing convened as scheduled on February 11, 2020. Ms. Reich appeared at the hearing on behalf of Brandt and testified. Simon Wynn, Esq., Senior Counsel, and Fawziyyah W. Slavov, Esq., Associate Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Carllita Bell, Senior Certification Analyst, testified for the Division.

An audio recording of the administrative adjudicatory hearing was made, and two CDs were prepared. During the hearing, the parties offered 11 exhibits, and they were received into evidence (*see* CD 2 at 33:25-35:55, 36:53-37:18). An exhibit chart is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise. Staff reviews

¹ *See* 5 NYCRR 144.8.

the business enterprise as it existed at the time the application was filed based on representations in the application as well as information filed in supplemental submissions. (*See* 5 NYCRR 144.4[e] and 144.5[a].)

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Brandt for certification as a WBE 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 Division staff'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

Division Staff

In the March 22, 2019 denial letter, Division staff stated that Brandt failed to meet four of the criteria for WBE certification set forth in 5 NYCRR 144.2 concerning Ms. Reich's ownership and operation of the business enterprise. First, staff concluded that Ms. Reich, as the woman-owner, did not demonstrate that her contributions were proportionate to her equity interest in the business enterprise, as required by 5 NYCRR 144.2(a)(1). Second, staff held that Brandt did not demonstrate that Ms. Reich shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). Third, staff held further that Brandt did not show that the woman-owner makes decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1). Finally, staff determined that Ms. Reich, as the woman-owner, does not devote time to the business enterprise on an ongoing basis, as required by 5 NYCRR 144.2(b)(1)(iii). (*See* WBE Exh. 2; *see also* CD 2 at 37:50-40:50.)

Brandt Equipment, LLC

In her letter received on April 24, 2019, Ms. Reich asserted, on behalf of the business enterprise, that she is the only owner, and has put her heart and soul into Brandt Equipment. According to Ms. Reich, her husband, Abraham, transferred his shares of the business enterprise to her in 2013. Ms. Reich explained that because the business enterprise is a limited liability corporation, she does not receive a W-2 form, but does take distributions. To demonstrate that she has received distributions from the business enterprise, Ms. Reich enclosed copies of two statements dated March 20 and 21, 2019, with her April 2019 correspondence. As part of her opening statement, Ms. Reich reiterated these points. (*See* WBE Exh. 2; *see also* CD 1 at 04:06-09:11.)

FINDINGS OF FACT

1. On May 4, 2018, Ms. Reich filed a fast track application with the Division seeking certification for Brandt Equipment, LLC, as a woman-owned business enterprise (*see* WBE Exhibit 1; CD 2 at 12:05).
2. Brandt is a medical equipment wholesaler manufacturer and supplier of a range of medical products used to operate healthcare facilities. Among other things, Brandt offers medical stools, lamps, safes, and stands. (*See* WBE Exh. 1, § 4; CD 1 at 25:55-26:20; CD 2 at 22:30-23:00.)
3. By letter dated March 22, 2019, the Division denied Brandt's application for WBE certification (*see* WBE Exhibit 2).
4. With a letter received on April 24, 2019, Ms. Reich responded to the Division's March 22, 2019 denial letter, and requested a hearing on behalf of Brandt (*see* WBE Exhibit 3).

I. Ownership

5. In December 2008, Esther Reich and her husband, Abraham Reich, purchased Brandt Equipment, LLC, from Neil Brandt. At that time, the members of the limited liability company were Esther and Abraham Reich. The funds used to purchase the business enterprise came from an account jointly owned by the Reichs. (*See* WBE Exh. 1 at § 2.C, and WBE Exh. 8; *see also* CD 1 at 16:19-16:34, 21:00-21:49; CD 2 at 01:42, 13:20-13:50, 14:15-15:25.)
6. At an organizational meeting held on December 31, 2012, Abraham Reich transferred all of his membership units of Brandt to Esther Reich. Ms. Reich did not pay Mr. Reich any compensation for his membership units. (*See* WBE Exh. 9; CD 1 at 16:35-16:40, 21:55-22:50; CD 2 at 12:33-12:50, 13:50, 15:40-17:00.)
7. Brandt's NYS Tax documents for 2016 and 2017 did not identify Ms. Reich as receiving any compensation from the business enterprise (*see* WBE Exhs. 6 and 10).
8. Brandt's application materials do not show that Ms. Reich received any compensation or distributions from the business enterprise (CD 1 at 24:26-24:48, 35:24; CD 2 at 18:08).

II. Operations

9. According to her résumé, Ms. Reich has a Bachelor of Arts degree in accounting and finance, and is a certified public account. In addition, Ms. Reich has a Master in Education, and has a certificate from the New York State Department of Education in school psychology. (*See* WBE Exh. 5.)
10. At Brandt, Ms. Reich is responsible for budgeting, cost-control, payroll, as well as accounts receivable and accounts payable. In addition, Ms. Reich analyzes sales,

manages the sales team, researches new products, and is responsible for marketing. Ms. Reich attends conferences on behalf of Brandt. (See WBE Exh. 5; CD 1 at 18:55-19:10; CD 2 at 24:20-25:50.)

11. Ms. Reich has a full-time position with [REDACTED]. As a school psychologist, Ms. Reich works daily from 8 a.m. to 3 p.m. for 185 days per year. Ms. Reich then devotes about 4 hours per day to the business enterprise. In addition, when school is not in session, Ms. Reich devotes more time to the business enterprise. (See WBE Exh. 1 at 5 of 6, Response 6, and WBE Exh. 11; CD 1 at 28:15-29:08, 30:10-31:22, 38:30-40:16; CD 2 at 20:52-21:30.)

DISCUSSION

This recommended order considers Brandt's appeal from the Division's March 22, 2019 determination (*see* WBE Exhibit 2) to deny the certification of Brandt as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in 5 NYCRR 144.2, the Division identified four bases for the denial with respect to the ownership and operation of the business enterprise (CD 1 at 03:35). Specifically, the Division contended that:

1. the woman-owner's contributions are not proportionate to her equity interest in the business enterprise, as required by 5 NYCRR 144.2(a)(1);
2. Ms. Reich does not share in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2);
3. the woman-owner does not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1); and
4. Ms. Reich, as the woman-owner, does not devote time to the business enterprise on an ongoing basis, as required by 5 NYCRR 144.2(b)(1)(iii).

Each basis is addressed below.

I. Ownership

The Division interprets 5 NYCRR 144.2(a)(1) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner and consistently denies applications for WBE certification where an applicant fails to substantiate the source of the capital contribution by the woman-owner or where, as here, the contribution is derived from assets provided by, or jointly held with, an ineligible individual.² Even where the

² The Recommended Orders and Final Orders are available at the New York State Department of Economic Development website at: www.esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-appeal-hearings. *See e.g. Matter of OTONE Mechanical Construction, Inc.*, Recommended Order dated April 25, 2017 at 6-7 (proceeds from jointly held marital property did not constitute a capital contribution solely by the woman-owner), Final Order 17-28 dated May 2, 2017; *Matter of Hertel Steel Inc.*, Recommended Order dated February 10, 2017 at 3-5 (business not eligible for WBE certification where the money to purchase the business was from a jointly owned bank account),

business enterprise has been inherited or gifted, the Division requires an applicant to demonstrate that the woman-owner's contribution is proportionate to her equity interest in the business enterprise.³

Here, Brandt's application includes a statement that the funds used to purchase the business enterprise came from an account jointly owned by Esther and Abraham Reich (*see* WBE Exh. 1 at 5 of 6, Response 2; CD 1 at 16:19-16:34, 21:00-21:49). In response to a document request from Division staff dated January 2, 2019, concerning the review of Brandt's application for WBE certification, Ms. Reich provided a copy of the December 1, 2008 - January 1, 2009 bank statement for the account jointly owned by Esther and Abraham Reich, that identifies the check used to purchase the business enterprise in December 2008 (*see* WBE Exh. 8; CD 2 at 14:15-15:25). Moreover, Ms. Reich credibly testified at the hearing that after the transfer of Abraham Reich's membership shares to her during the December 31, 2012 organizational meeting, Ms. Reich did not pay Mr. Reich any compensation for his membership units (CD 1 at 16:35-16:40, 21:55-22:50; CD 2 at 15:40-17:00; *see also* WBE Exh. 9.) Consistent with the referenced administrative decisions, I conclude, therefore, that the Division's determination that Brandt did not meet the eligibility criteria outlined at 5 NYCRR 144.2(a)(1) is based on substantial evidence. I recommend that the Director conclude the same.

Section 144.2(c)(2) of 5 NYCRR requires that the woman-owner must enjoy the customary incidents of ownership, and must share in the risks and profits in proportion to her ownership interest in the business enterprise. This provision ensures that the woman owner receives the benefits that accrue to a business as a result of State contracting preferences from a WBE certification, and that persons who are not members of a protected class do not receive a disproportionate share of such benefits. The Division has consistently held that the woman-owner must realize the majority of profits from the business enterprise to satisfy this criterion.⁴

In response to a document request from Division staff dated January 2, 2019, concerning the review of Brandt's application for WBE certification, Ms. Reich provided copies of her personal income tax returns and those of Brandt for 2017 including W-2s (*see* WBE Exh. 11). In addition, Ms. Reich provided copies of Form NYS-45 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for the first and fourth quarters of 2016 and 2017 (*see* WBE Exhs. 6 and 10; CD 2 at 17:10-18:00). The supporting materials provided by Ms. Reich for Brandt's application for WBE certification did not include documentation concerning the distributions made to Ms. Reich for 2016 and 2017 (CD 1 at 25:33, 35:24; CD 2

Final Order 17-12 dated March 10, 2017; *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 at 4-6 (proceeds of a home equity line of credit on jointly held marital property did not qualify as capital contribution of the woman-owner), Final Order 17-21 dated March 27, 2017.

³ (*See e.g. Matter of Beam Mack Sales & Services, Inc.*, Recommended Order dated October 31, 2016 at 9, Final Order 16-55 dated November 1, 2016; *Matter of Friend Commercial Contracting Corp.*, Recommended Order dated May 11, 2016 at 9, Final Order 16-15 dated May 16, 2016.

⁴ *See e.g. Matter of National Recovery Solutions, LLC*, Recommended Order dated May 25, 2017 at 6-7 (business not eligible for certification where the woman-owner and majority shareholder received the same compensation as her husband), Final Order 17-31 dated June 5, 2017; *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 at 5-6 (business not eligible for WBE certification where the woman-owner's husband received significantly more compensation she did), Final Order 17-21 dated March 27, 2017.

at 18:08). Upon review of the application materials, Division staff determined that Ms. Reich did not show that she received any compensation or distributions from Brandt.⁵

In her April 24, 2019 response to the Division's March 22, 2019 denial letter, Ms. Reich explained that members of a limited liability corporation do not receive W-2 forms. However, Ms. Reich explained further that she does take distributions from Brandt. To demonstrate her receipt of distributions, Ms. Reich enclosed copies of statements from Brandt dated March 20 and 21, 2019, for payments of [REDACTED] per statement. (See WBE Exh. 3; CD 1 at 17:05-17:31, 24:26-24:48; CD 2 at 01:54-02:20.)

For the following reasons, the statements enclosed with Ms. Reich's April 24, 2019 response cannot be considered here. First, Brandt's March 20 and 21, 2019, statements were not part of the application materials reviewed by Division staff prior to the denial determination. Second, the application materials include tax returns for 2016 and 2017. As a result, it is not possible to compare the wages paid to Brandt's employees in 2016 and 2017 with the any distributions that Ms. Reich may have received during the same period.

Ms. Reich offered WBE Exhibit 7 at the hearing, which is a copy of a statement dated April 16, 2018, from the Bank of Hope (Fort Lee, New Jersey). Referring to WBE Exhibit 7, Ms. Reich testified that she is responsible for payments on a loan totaling [REDACTED]. Ms. Reich argued that her payments toward this loan demonstrate that she shares in the risks in proportion to her ownership interest in the business enterprise. Mr. Reich acknowledged, however, that WBE Exhibit 7 was not part of the application materials reviewed by Division staff prior to staff's determination. (See WBE Exh. 7; CD 1 at 11:55, 12:59-13:26, 15:08-15:21; CD 2 at 02:40-3:24, 03:50-05:15.) Because the scope of the review in this proceeding is limited to the application and supporting materials at the time the Division issued its determination, any new information offered during the hearing cannot be considered (see 5 NYCRR 144.4[e] and 144.5[a]). With a future application, Division staff would evaluate the merits of this additional information as it relates to applicant's compliance with this eligibility criterion.

In *Matter of C.W. 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 Brandt's application for WBE certification, was substantial evidence to support the Division's consideration of whether a woman-owned business meets the eligibility criterion at 5 NYCRR 144.2(c)(2). I conclude that staff's determination that Brandt did not demonstrate that the woman-owner shared in the risks and profits of the business enterprise in proportion to her ownership interest was based on substantial evidence, and recommend that the Director conclude the same.

II. Operations

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise be made by the woman-owner. In evaluating compliance with this eligibility criterion, Division staff reviewed Section 4 of the application to identify the significant business operations. Significant business operations or core functions generate revenue for the

⁵ As discussed below, Ms. Reich did receive compensation from [REDACTED] as a school psychologist (see WBE Exh. 11).

business enterprise and are unique to the industry compared to those administrative functions, which are common to most businesses. (CD 2 at 22:30-23:00.)

Section 4.A of Brandt's application states that the mission of the business enterprise is to "manufacture" innovative, useful, and dependable medical equipment. Section 4.B describes the enterprise's business operations or core functions as "manufacture/supplier." The application identifies two North American Industry Classification System (NAICS) numbers relevant to Brandt. The primary NAICS number is 33911 (Medical Equipment and Supplies Manufacturing), and the secondary NAICS number is 423210 (Furniture [except drafting tables, hospital beds, medical furniture] Merchant Wholesalers. (See WBE Exh. 1 at 3 of 6; CD 2 at 23:05-23:21.)

Based on this information, Division staff concluded that Brandt's significant business operation or core function is to manufacture medical furniture (CD 2 at 23:30-24:15). However, upon review of Brandt's responses to Division staff's January 2, 2019, information request, which included Ms. Reich's résumé, staff concluded that Ms. Reich does not participate in the core business operations. Rather, Ms. Reich primarily oversees financial and administrative matters. (See WBE Exhs. 1 and 5; CD 1 at 16:40-17:00, 26:20, 26:51-28:10; CD 2 at 24:20-25:50.)

The Division has consistently held that minority and woman-owners must perform significant business operations in order to comply with the eligibility criterion at 5 NYCRR 144.2(b)(1).⁶ Therefore, I conclude that the Division's determination with respect to Brandt's compliance with this eligibility criterion is based on substantial evidence.

During the hearing, Ms. Reich credibly testified that growing up, her family owned a business that assembled furniture called LaVita Industries, and that she learned how to assemble furniture when she worked for the business. At Brandt, Ms. Reich said that she has employees who assemble the furniture before delivery. (CD 1 at 10:20-11:15-19:50-20:06.)

However, Ms. Reich's prior work experiences were not part of Brandt's WBE application materials reviewed by Division staff. For example, Ms. Reich's résumé does not include the name of the family business, her period of employment, and her duties and responsibilities. In the event that Brandt reapplies for certification, and Ms. Reich includes this experience, Division staff would evaluate this information as part of its compliance determination. Given the limited scope of this administrative appeal hearing, however, Ms. Reich's testimony about this topic cannot be considered now.

Finally, the Division determined that Ms. Reich does not devote time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR 144.2(b)(1)(iii). The basis for the Division's determination is that Ms. Reich is employed full-time by [REDACTED] as a school psychologist (see WBE Exhs. 5 and 11; CD 2 at 18:50-20:52). Ms. Reich acknowledged that she is employed full-time by [REDACTED] at the hearing. However, Ms. Reich said that her school-related responsibilities end at 3:00 p.m., which allows her to devote 4 hours to Brandt daily, as well as when school is not in

⁶ See *Matter of Watson Farms, LLC*, Recommended Order dated July 19, 2018 at 11 and n. 6, Final Order 18-49 dated January 30, 2019.

session on holidays and during the summer. (CD 1 at 28:23-29:25, 30:10-31:22, 38:30-40:16). Ms. Reich stated in closing arguments that she plans to retire from her current position with [REDACTED] in two years, and would devote more time to Brandt (CD 2 at 42:05-42:20).

Accordingly, I conclude that the application and supporting materials before the Division at the time it made its determination did not demonstrate that Ms. Reich devotes time on an ongoing basis to the daily operation of Brandt as required by 5 NYCRR 144.2(b)(1)(iii).⁷ Brandt failed to meet its burden to demonstrate that the Division's denial was not based upon substantial evidence. Accordingly, the Division's denial should be affirmed.

CONCLUSION

For the reasons outlined above, applicant has failed to meet its burden to demonstrate that the Division's determination to deny Brandt's application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR 144.2(a)(1), 144.2(c)(2), 144.2(b)(1), and 144.2(b)(1)(iii) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny Brandt's application for certification as a woman-owned business enterprise.

Attachments: Exhibit Chart

⁷ See *Matter of Watson Farms, LLC*, Recommended Order dated July 19, 2018 at 12-13, Final Order 18-49 dated January 30, 2019.

Division of Minority and Women's Business Development

Exhibit Chart
Matter of Brandt Equipment, LLC
NYS DED File No. 63915

Hearing Date: February 11, 2020

WBE Exhibit No.	DED Exhibit Letter	Description
1		Fast Track M/WME Certification Application filed by Brandt Equipment, LLC (App. No. 5751470 [6 pages]), submitted on May 4, 2018.
2		Division's March 22, 2019 denial letter.
3		Undated letter received on April 24, 2019 from Ms. Reich responding to the Division's March 22, 2019 denial letter, and requesting a hearing.
4		Division's Notice of Appeal Hearing dated January 29, 2020.
5	H	Esther Reich – Résumé
6	F	NYS-45 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Returns First and Fourth Quarters of 2016 and 2017
7	J	Bank of Hope Bank Statement 4461 Bronx Boulevard, LLC April 16, 2018
8	D	Check No. [REDACTED] Citigold Bank Statement Avrumi Reich and Esther Reich December 1-January 1, 2009
9	E	Brandt Equipment, LLC Organizational Meeting Minutes December 31, 2012

10	F	NYS-45 Quarterly Combined Withholding 4th Quarter 2017 <i>See Exhibit 6 above</i>
11	G	W-2 Wage and Tax Statement Esther Reich Tax Year 2014, 2015, 2016, and 2017

All exhibits received into evidence (CD 2 at 33:25-35:55, 36:53-37:18).