

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

In the Matter

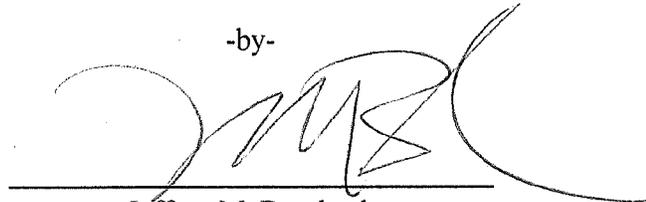
-of-

the Application of Business Environments, LLC.  
For Certification as a Minority/ Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51495

RECOMMENDED ORDER

-by-

A handwritten signature in black ink, appearing to read 'JMB', is written over a horizontal line. The signature is stylized and cursive.

Jeffrey M. Bernbach  
Administrative Law Judge

November 28, 2018

## 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 Business Environments, LLC. ("Business Environments" or "applicant"), certification as a minority/ women-owned business enterprise ("MWBE")<sup>1</sup> be affirmed for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by applicant, 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that Business Environment does not meet the eligibility criteria for certification as a MWBE.

The Division denied the application (Exhibit D 1) filed by Business Environments for MWBE certification by letter dated July 19, 2017 (Exhibit D2). The letter sets forth a single ground under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal dated August 2, 2017. The Division advised applicant that the hearing on this matter would be held on September 27, 2018 (letter from the Division to applicant, dated September 10, 2018).

I convened the hearing at approximately 1:00p.m. on September 27, 2018, at the Division's offices located at 633 Third Avenue, New York, NY. Kyra Faison-Gardner and McKenzie Gardner, along with applicant's attorney Craig R. Weiss, appeared, and Ms. Faison-Gardner provided testimony on behalf of Business Environments. Mr. Weiss cross examined the Division's witness and made opening and closing statements on behalf of the applicant. Mariel Cohen, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Glen Butler, a senior certification analyst for the Division. A list of exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on a compact disc ("CD") was provided to the undersigned on or about October 29, 2018, whereupon, the hearing record was closed.

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<sup>1</sup> The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]. The term minority owned business enterprise is one that is, among other things, at least 51% owned by one or more United States citizens or permanent resident aliens who are minority group members (See 5 NYCRR 140.1(a)(a).

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a MWBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied MWBE status, the ownership, operation, control, and independence of the business enterprise are assessed 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 itself, and on information provided in supplemental submissions or interviews that are conducted by Division analysts.

## **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proving that the Division's denial of MWBE certification for Business Environments is not supported by substantial evidence (see State Administrative Procedure Act Section 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**

### Position of the Division

The Division cites a single basis for denial of Business Environments' application; that applicant does not make decisions pertaining to operation of the business enterprise (5 NYCRR section 144.2(b)(1)).

### Position of Applicant

Applicant essentially argues that she routinely makes decisions pertaining to the operation of the business enterprise. Ms. Faison-Gardner also relies on the fact that Business Environments was previously certified by the NYS Department of Economic Development( as well as by other governmental entities at various times) as a minority/women owned business enterprise on July 16, 2008, and the instant application is merely one for continuation of such certification.

## **FINDINGS OF FACT**

1. Business Environments is primarily engaged in the sale and installation of office furniture, flooring and carpeting.

2. John Gardner, a white male, is President and 49% owner of Business Environments and manages significant operations of the business related to the sale and installation of office furniture, flooring and carpeting.
3. Kyra Faison-Gardner, a black woman, is CEO and 51% owner of Business Environments and is primarily responsible for managing human resources, financial matters and marketing for the business.
4. John Gardner and Kyra Faison-Gardner are husband and wife.
5. John Gardner was previously employed by Allsteel, Inc., a manufacturer of contract furniture and principle client of Business Environments. In or about 2005, Allsteel decided to open its own distributorship for its furniture products and assigned John Gardner to operate it. In or about 2007, Allsteel sold the distributorship to Business Environment, LLC, which was owned by John Gardner and Ms. Faison-Gardner; and Mr. Gardner continued to be in charge of sales and installation of Business Environments' products, which were essentially the same as those sold by the Allsteel distributorship.

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Business Environments as a minority/ woman owned business enterprise pursuant to Executive Law Article 15-A.

At the outset, before addressing the Division's criteria, it is important to note that the layman's concept of the fundamentals of business ownership is not what controls the determination whether an applicant has satisfied the criteria set forth in the NYCRR. For example, it is not disputed that Kyra Faison-Gardner is a minority and female and the owner of 51% of the business. However, to insure that the mission of the Division is successful—that of assisting small and frequently start-up businesses, which are owned by minorities and women, to succeed despite discrimination they may experience—certain particular criteria are applied, including that discussed below as the bases for determining whether to grant certification. By the very nature of family-owned businesses, which often operate with a less formal structure than non-family owned businesses, it can sometimes be more difficult for them to obtain certification than non-family owned businesses.

Minority/women do not make decisions pertaining to the operation of the business enterprise. 5 NYCRR section 144.2(b)(1).

Thus, while Kyra Faison-Gardner certainly makes business decisions relating to the operation of the business enterprise, these do not go to the core business of selling and installing

furniture which is essentially the responsibility of John Gardner, and which are the types of functions contemplated by 5 NYCRR section 144.2(b)(1) as necessary for certification.

## CONCLUSION

Applicant has not met the burden of demonstrating that the record lacks substantial evidence to support the Division's determination to deny Business Enterprises' application on the basis stated. Instructive on this point is the recent decision of the New York State Court of Appeals in Matter of Haug v. State Univ. of N.Y. at Potsdam, 2018 N.Y. Slip Op., 06964 (October 18, 2018).

In this Article 78 proceeding, the Court of Appeals, in addressing the concept of substantial evidence in the context of a judicial appeal from an administrative hearing at which evidence was taken, observed as follows:

- The administrative decision makers' findings are to be accorded deference;
- Courts have no right to review the facts as to the weight of the evidence to be given them;
- The substantiated evidence standard is a minimal standard and requires only that a given inference is reasonable and plausible, not necessarily the most probable; and
- There can be substantial evidence on both sides of an issue or to support various conclusions.

All of the foregoing serving to reinforce to an unsuccessful applicant, the inherent difficulty they face in seeking to reverse a determination based upon the substantial evidence standard.

## RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Business Environments, LLC. certification as a minority/ woman owned business enterprise should be affirmed.

Matter of Business Environment, LLC.

DED File ID No. 51495

**Exhibit List**

Exhibit #	
JT1	Operating Agreement For Business Environments, LLC.
J2	Empire State Development Certification
A1	Certifications and Affidavits of Eric Reiter and Mitchel Sharp
D1	Application
D2	Denial Letter