

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**207 GENESEE STREET**  
**UTICA, NEW YORK 13501**

**In the Matter**

**- of -**

**the Application of E. Gartland & Associates, LLC**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 5748446**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**September 7, 2023**

This matter considers the written appeal by E. Gartland & Associates, LLC, (“EGA” or “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 (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On October 10, 2021, Ms. Elizabeth Gartland, as Member, applied on behalf of EGA for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 28, 2022, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former § 144.2(a)(1).
  - (b) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR former §144.2(c)(2);
  - (c) Minority group members or women relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1); and

- (d) Minority group members or women relied upon for certification do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1).
3. EGA timely filed a notice of appeal with accompanying statement on March 8, 2022 (APP Exhibit 1).
  4. A notice to proceed by written appeal was sent to EGA on October 4, 2022 (DED Exhibit 3).
  5. The Division filed an Affidavit of Raymond Emanuel, Director of Certification, dated May 15, 2023, and a brief of Michael Livolsi Esq., counsel for the Division, dated June 6, 2023.

**FINDINGS OF FACT**

6. EGA is engaged in the sales and distribution of HVAC related products. (DED Exhibit 1).
7. Ms. Elizabeth Gartland is a Member and has a 51% ownership interest. Mr. Edward Gartland is a Member and has a 49% ownership interest (DED Exhibit 1).
8. Ms. Gartland and Mr. Gartland each made a capital contribution of \$ [REDACTED] (DED Exhibit 10). Ms. Gartland stated that the primary source of her equity contribution was expertise. The claimed areas of expertise include customer and vendor contact, answering emails, purchase orders, invoicing, bill paying, inventory, tax compliance, shipping and receiving (DED Exhibits 1 and 8).
9. The 2020 EGA Form 1125-E reflects that Mr. Gartland received \$ [REDACTED], and Ms. Gartland received \$ [REDACTED] (DED Exhibit 4). The W-2 Forms from that year reflect that Mr. Gartland earned \$ [REDACTED] and Ms. Gartland earned \$ [REDACTED] (DED Exhibit 5).
10. Mr. Gartland is EGA's President, a position he has held since 2009. He represents multiple products in dedicated territory to HVAC-R contractors, wholesalers, OEMs and Industrials. Prior to his position as President of EGA, he was a territory manager for Racon

Refrigerants from 1986 to 1991, an account executive for Honeywell from 1992 to 2003, a technology manager at Honeywell from 2003 to 2006, and a Director of refrigerants and carbon management for Verisae from 2006 to 2009 (DED Exhibits 6 and 8).

11. Ms. Gartland's resume indicates that from 2008 until the present she is responsible for purchasing, invoices, record keeping, shipping, tracking and telephone support for leak detection products (DED Exhibit 7). Prior to becoming co-owner of EGA, she was a registered nurse from 1997 to 2005 (DED Exhibits 7, 8 and 9)

### **APPLICABLE LAW**

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

5 NYCRR former §144.2(c)(2) states as follows:

...The minority group member or woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former §144.2(b)(1) states in relevant part as follows:

- (1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:
  - (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
  - (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division's interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

5 NYCRR §144.2(b)(2) states as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

5 NYCRR §144.2(b)(3) states as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(c) states as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
  - (i) The products or services the business enterprise provides to clients; and
  - (ii) The means by which the business enterprise obtains contracts or orders.

### **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 EGA for certification as a WBE 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 Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable

mind may accept as adequate to support a conclusion or ultimate fact.” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. See Scherzi Systems, LLC v. White, 197 A.D.3d 1466 (3d Dept 2021).

## **DISCUSSION**

### I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner’s contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The application states that Ms. Gartland and Mr. Gartland each made a capital contribution of \$500 (DED Exhibit 1). Ms. Gartland stated that the primary source of her equity contribution was expertise. The claimed areas of expertise include customer and vendor contact, answering emails, purchase orders, invoicing, bill paying, inventory, tax compliance, shipping and receiving (DED Exhibits 1 and 8).

When expertise is the claimed form of contribution, the applicant must provide evidence in the application of the valuation of the expertise and must establish that the expertise contributed was proportional in value to the equity interest. *Matter of Darr Construction Equipment Corporation*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7,

2022. Expertise must be uncompensated, specialized and directly applicable to one or more critical aspects of the operation of the business enterprise and a reasonable assessment of the fair market value of the expertise must be clearly documented. 5 NYCRR §144.2(b)(2)(i).

No proof was submitted to show that the expertise was uncompensated, specialized and directly applicable to the operation of the business, and no account of the fair market value of the expertise was documented.

The Division's determination to deny the application on the basis that EGA failed to demonstrate that Ms. Gartland made contributions to EGA in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

5 NYCRR §144.2(b)(3) 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.

The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

The tax documents submitted with the application show that in 2020, as per Form 1125-E, Mr. Gartland received \$ [REDACTED], while Ms. Gartland received \$ [REDACTED]. Mr. Gartland's W-2 reflects that he received \$ [REDACTED], while Ms. Gartland's W-2 reflects that she received \$ [REDACTED] (DED Exhibits 4 and 5). Ms. Gartland, as majority shareholder, received substantially less than Mr. Gartland, a minority shareholder.

The Division's determination to deny the application on the basis that EGA failed to

demonstrate that Ms. Gartland shares in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

## II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Gartland does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the HVAC industry (DED Exhibits 1 and 7). The critical functions of the business are sales and distribution of HVAC related products (DED Exhibit 1). Ms. Gartland has no training, education or experience in the industry. Her resume also reveals that she has no prior experience in the HVAC industry and was a registered nurse from 1997 to 2005 (DED Exhibits 7, 8 and 9). She does not have the training or experience in the industry necessary to supervise the work of the employees.

5 NYCRR §144.2(c)(2) states that “... women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”.



The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).

EGA’s products and services include the sales and distribution of HVAC related products (DED Exhibit 1). Mr. Gartland is EGA’s President, a position he has held since 2009. He represents multiple products in dedicated territory to HVAC-R contractors, wholesalers, OEMs and Industrials. Prior to his position as President of EGA, he was a territory manager for Racon Refrigerants from 1986 to 1991, an account executive for Honeywell from 1992 to 2003, a technology manager at Honeywell from 2003 to 2006, and a Director of refrigerants and carbon management for Verisae from 2006 to 2009 (DED Exhibits 6 and 8).

Ms. Gartland’s duties include customer and vendor contact, answering emails, purchase orders, invoicing, bill paying, inventory, shipping and receiving (DED Exhibits 7 and 9). She was previously a registered nurse from 1997 to 2005 (DED Exhibit 7). Ms. Gartland does not exercise independent operational control over the core functions of the business.

### **CONCLUSION**

EGA did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), 144.2(b)(3), 144.2(c)(1) and 144.2(c)(2) 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 EGA’s application for certification as a woman-owned business enterprise.

In the Matter of E. Gartland & Associates, LLC  
 DED File ID No. 5748446  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Business Tax Documents 2020	Y	Y
DED 5	Personal Tax Documents 2020	Y	Y
DED 6	Resume of Mr. Gartland	Y	Y
DED 7	Resume of Ms. Gartland	Y	Y
DED 8	Narrative response regarding ownership and contribution	Y	Y
DED 9	Narrative response 4A	Y	Y
DED 10	Operating Agreement	Y	Y
APP 1	Request to Appeal with attachment	Y	Y