

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

**In the Matter**

**- of -**

**the Application of Ernest R. Kimball, Inc. D.B.A. Kimball Trucking  
for Recertification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 50842**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad  
Administrative Law Judge  
June 6, 2023**

This matter considers the written appeal by Ernest R. Kimball, Inc. D.B.A. Kimball Trucking (“Kimball Trucking”, 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 recertification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. Sharon Kimball Zimmerman, as the President, applied on behalf of Kimball Trucking for recertification as a WBE on December 28, 2017 (DED Exhibit 1).
2. In a letter dated January 9, 2020, the Division denied Kimball Trucking’s application (DED Exhibit 2).
3. Kimball Trucking timely filed a notice of appeal on January 20, 2020 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Kimball Trucking on February 3, 2020 (DED Exhibit 3).
5. Applicant submitted its written appeal by letter dated February 26, 2020 (APP Exhibit 2).
6. The Division responded by filing an Affidavit of Raymond Emanuel dated February 16, 2023 and a brief submitted by Jamone Turner, Esq., counsel for the Division, dated February 22, 2023.

### **FINDINGS OF FACT**

1. Kimball Trucking is a trucking company that provides excavating, trucking and hauling services, based in Webster, New York (DED Exhibit 1).

2. Kimball Trucking was established in 1989 by Charles R. Kimball. He was the sole shareholder of the business until December 30, 2005, when he transferred by gift 51% ownership to Sharon Zimmerman (DED Exhibits 5 and 6).
3. In 2010, Mr. Kimball's remaining shares were transferred to Mark Soucy (30%) and Eugene Kimball (19%) (DED Exhibit 6).
4. Sharon Zimmerman is the President and 51% owner of Kimball Trucking. Mark Soucy is the Senior Vice President and 30% owner and Eugene Kimball is the Vice President and 19% owner (DED Exhibit 6).
5. Ms. Zimmerman's duties include legal, financial, banking, insurance, managing the office, making major purchase decisions, and other administrative duties. (DED Exhibit 7).
6. Mr. Soucy dispatches and schedules trucks at job sites, is a Class A truck driver, truck mechanic and equipment operator (DED Exhibit 7).
7. Eugene Kimball is in charge of customer relations and is a Class A truck driver and truck mechanic (DED Exhibit 7).
8. Kimball Trucking's 2005 Bylaws provide that "the number of directors shall not be less than three" and that "The Board of Directors shall have the control and general management of the affairs and business of the Corporation" (DED Exhibit 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(b)(1) states as follows:

Decisions pertaining to the operations of the business enterprise must be made by... women claiming ownership of that business enterprise. The following will be considered in this regard:

- (i) ...women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
- (ii) ...women must demonstrate the working knowledge and ability needed to operate the business enterprise...

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

Articles of incorporation, corporate bylaws... or other agreements must permit ... women who claim ownership of the business enterprise to make those decisions without restrictions.

### **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 Kimball Trucking for recertification 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” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

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 or explain previously submitted materials will be considered, however new evidence will not be considered. *See Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

### **DISCUSSION**

#### I. Prior Certification

Applicant states that it has been continuously certified as a woman-owned business enterprise since 2008 and that the operation and management of the business has not changed since 2008 (APP Exhibit 2).

The Division acknowledges that Kimball Trucking was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify Kimball Trucking based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Kimball Trucking had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the December 28, 2017 application and supporting materials and cannot rely on the past determinations of the Division.

## II. Ownership

The Division interprets 5 NYCRR former §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. 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, e.g., *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order dated October 31, 2016, Final Order 16-55 dated November 1, 2016.

The Division argues that applicant failed to demonstrate that Sharon Zimmerman made contributions to Kimball Trucking in proportion to her ownership interest in the business as required under 5 NYCRR former § 144.2(a)(1). Specifically, the Division states it is undisputed

that Ms. Zimmerman was gifted her ownership interest in Kimball Trucking from her father, Ernest R. Kimball (DED Exhibit 5).

Applicant submitted no other documents to demonstrate that Ms. Zimmerman made any contributions in the form of money, property, equipment, or expertise to the business. Ms. Zimmerman did not quantify or in any way demonstrate that she contributed any expertise to the core functions of Kimball Trucking when she received 51% of its shares from her father in 2005.

The Division's determination to deny the application on the basis that Kimball Trucking failed to demonstrate that Ms. Zimmerman made contributions to Kimball Trucking in proportion to her ownership interest, as required under 5 NYCRR former §144.2(a)(1) is supported by substantial evidence.

### III. Operation

To determine who makes decisions pertaining to an enterprise's operations, the Division first identifies the core revenue generating functions of the enterprise, and then assesses who within the enterprise is primarily responsible for performing those functions and who has the expertise and knowledge necessary to perform and oversee those functions.

The Division states that Kimball Trucking is a dump truck service moving earth materials and asphalt. (DED Exhibit 1). Ms. Zimmerman's resume indicates that she performs the administrative work for the applicant business, including legal, financial, banking, insurance and credit issues, hiring and managing the office (DED Exhibit 7). Mr. Soucy's resume states that he dispatches and schedules trucks at job sites, is a Class A truck driver, truck mechanic and equipment operator (DED Exhibit 7). Mr. Kimball's resume states that he is in charge of customer relations and is a Class A truck driver and truck mechanic (DED Exhibit 7).

Mr. Soucy and Mr. Kimball are responsible for performing the core revenue generating functions of Kimball Trucking and have the expertise and knowledge necessary to perform those

functions. Ms. Zimmerman has no direct dump truck experience and is responsible for the administrative aspects of the business (DED Exhibit 6).

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Sharon Zimmerman does not (i) make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former § 144.2(b)(1); (ii) have adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(i); and (iii) have the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(ii).

#### IV. Control

The Division cites Article II, Section 1 of the Company's Bylaws that state "The number of directors shall not be less than three" and Article II, Section 4 that states "The Board of Directors shall have the control and general management of the affairs and business of the Corporation" (DED Exhibit 9).

Ms. Zimmerman argues that she has "the controlling portion of this business with 51% of stock so even combined Mark Soucy and Eugene Kimball cannot outvote me" (APP Exhibit 2). This claim is insufficient to overcome the company Bylaws which dictate that the Board of Directors has the ultimate authority to make business decisions. 5 NYCRR former §144.2(b)(2) requires that the corporate bylaws... or other agreements must permit ... women who claim ownership of the business enterprise to make those decisions without restrictions.

Ms. Zimmerman does not have the authority to exercise independent operational control over the core functions of Kimball Trucking. See *In the Matter of Whispering Pines Development Corp.* (DED file no. 61332) (June 5, 2019).

The Division's determination to deny the application on the basis that Kimball Trucking failed to demonstrate that Sharon Zimmerman was permitted to make decisions without restrictions, as required by 5 NYCRR former §144.2(b)(2) is supported by substantial evidence.

### **CONCLUSION**

Kimball Trucking did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR former §144.2(a)(1), 5 NYCRR former §144.2(b)(1), 5 NYCRR former §144.2(b)(1)(i), 5 NYCRR former §144.2(b)(1)(ii) and 5 NYCRR former §144.2(b)(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 Kimball Trucking's application for recertification as a woman-owned business enterprise.



In the Matter of Ernest R. Kimball, Inc. D.B.A. Kimball Trucking  
 DED File ID No. 50842  
 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Recertification –12/28/2017
DED 2	Denial Letter – 1/9/2020
DED 3	Notice to Proceed via Written Appeal – 2/3/2020
DED 4	Minutes of Meeting of Board of Directors – 12/30/2005
DED 5	Stock Certificates
DED 6	Stock Transfer Ledger
DED 7	Resumes of Sharon Zimmerman, Mark Soucy and Eugene Kimball
DED 8	Copies of Employee drivers' licenses
DED 9	Corporate Bylaws
APP 1	Applicant's Notice of Appeal – 1/20/2020
APP 2	Applicant's Appeal Letter – 2/26/2020