

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

In the Matter

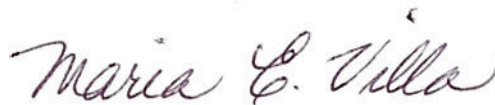
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the Application of **G & E Officeworld, Inc. d/b/a Fern Office Supplies**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 45582

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

January 22, 2019

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 G & E Officeworld, Inc. d/b/a Fern Office Supplies ("G&E" or "applicant") certification as a women-owned business enterprise ("WBE")¹ 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 G&E does not meet the eligibility criteria for certification as a WBE.

The Division denied G&E's application (Exhibit 1) for certification by letter dated July 11, 2017. Exhibit 2. The denial letter sets forth one ground under 5 NYCRR 144.2 for the denial. Applicant appealed from the denial by letter dated July 31, 2017 (Exhibit 3), and the Division advised applicant that the appeal hearing would be held on December 18, 2018. Exhibit 4.

The hearing took place as scheduled at 1:30 p.m. on December 18, 2018, at the Division's offices at 633 Third Avenue, New York, New York. Pearl Landau and her husband, Eli Landau, appeared on behalf of G&E, and Mr. Landau testified. Gretchen Robinson, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Abdul Bah, a senior certification analyst for the Division. On stipulation of the parties, all the exhibits offered were received into evidence, and a list of the exhibits 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 compact disc ("CD") was provided to this office on January 18, 2019, whereupon the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a WBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE 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 revealed in supplemental submissions or interviews that are conducted by Division analysts.

¹ 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, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for Atlantic 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

Position of the Division

The Division argues that applicant failed to establish that the women owner, Pearl Landau, shared in the risks and profits of the enterprise in proportion to her ownership interest (Exhibit 2, at 2 (citing 5 NYCRR 144.2(c)(2))). The Division's denial letter cited the following “relevant facts:”

- Ms. Pearl Landau owns fifty-one percent (51%) of the outstanding common stock of G & E Officeworld, Inc. (“G & E”) and Mr. Eli Landau owns forty-nine percent (49%) of the outstanding common stock of G & E.
- Mr. Landau received [REDACTED] dollar salary from G & E during its 2014 tax year.
- Ms. Landau did not receive a salary from G & E during its 2014 tax year.

Position of the Applicant

Applicant argues that Ms. Landau “shares all risks and profits with my husband, Eli receiving 49% and I receive 51%.” (Exhibit 3, at 1). Applicant went on to state that

about 10-12 years ago, per the advice of our business accountant I stopped receiving a salary from my business and had my husband Eli Landau take the full salary amount so when we collect joint Social security benefits we get almost double of what we would have gotten had we continued with both of us on payroll. Eli, had prior accumulation income from previous employments. The payroll check is deposited into our joint account that I have 100% access to.

Id.

FINDINGS OF FACT

1. G&E was established in 1990, and is a broker of office furniture and office supplies. Exhibit 1, at 2-3.

2. Pearl Landau is the president of G&E and owns 51% of G&E. Exhibit 1, at 3.
3. Eli Landau, Ms. Landau's husband, is the vice president and owns 49% of G&E. Exhibit 1, at 3.
4. In 2013, Eli Landau received a salary of [REDACTED] from the business. Pearl Landau did not receive a salary. Exhibit 5; HR at 11:05.
5. In 2014, Pearl Landau did not receive any salary from the business; Eli Landau received [REDACTED] in salary. Exhibits 6 and 10. In 2015, Eli Landau again received a salary of [REDACTED], while Pearl Landau did not receive a salary. Exhibits 7 and 8; HR at 15:00.
6. The 2016 quarterly tax return for the business indicated that Eli Landau received compensation during the second quarter; Pearl Landau did not receive a salary. Exhibit 9; HR at 26:00. The Schedule K-1 for 2016, attached to Form 4562, indicated that Eli Landau was paid [REDACTED]. Exhibit 11.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of G&E as a WBE pursuant to Executive Law Article 15-A. The Division cites one basis in support of upholding the denial, as discussed below.

Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2(c)(2)).

The information G&E provided in its application indicated that Pearl Landau did not receive a salary from the business, while her husband, Eli Landau, was paid. Eli Landau owns 49% of G & E; Pearl Landau owns 51%. Mr. Landau explained that, on the advice of their accountant, and in order to maximize the couples' Social Security benefits, the Landaus decided several years ago to compensate Mr. Landau from the business, but not Pearl. HR at 32:30; 34:45. As a result, because Mr. Landau's earnings had been historically higher, the couple stopped paying Pearl Landau from the business in 2004. HR at 36:21.

At the hearing, Mr. Landau testified credibly that he is semi-retired, and that the compensation has since been adjusted, with Mrs. Landau receiving a salary, while Mr. Landau does not receive compensation from the company. Applicant offered documentation regarding this point, but because the information was not before the Division at the time of the denial, that information could not be considered on appeal. As Division staff points out, based upon the information available at the time of the denial, the compensation received by Pearl Landau is not proportionate to her 51% ownership interest in G&E. Applicant did not dispute the facts presented by Division staff with respect to the respective compensation of Mr. and Mrs. Landau.

Applicant's arguments and testimony are not sufficient to demonstrate a lack of substantial evidence for the Division's denial determination. For example, applicant's tax returns show that Pearl Landau was paid nothing in 2013 and 2014, while her husband was paid [REDACTED] in 2013 and [REDACTED] in 2014 from the business during those years, even though Ms. Landau owns a majority share of the company. Exhibits 5, 7, and 8.

Applicant has failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Pearl Landau does not share in the risks and profits of G&E in proportion to her ownership interest, as required by 5 NYCRR 144.2(c)(2).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny G&E's application based upon whether the women owner shares in the risks and profits of G&E in proportion to her ownership interest in the enterprise (see 5 NYCRR 144.2(c)(2)).

Section 144.4(d) of 5 NYCRR provides that an applicant may not reapply for certification for two years from the date of the written notice denying certification, "provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant may reapply sooner." Because of the adjustment in compensation, applicant may wish to consider contacting Division staff to discuss reapplication before the two-year period has elapsed.

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny G&E certification as a women-owned business enterprise should be affirmed.

Matter of G & E Officeworld, Inc. d/b/a Fern Office Supplies
DED File ID No. 45582
Exhibit List

Exhibit No.	Description	Received
1	October 13, 2016 application	✓
2	July 11, 2017 denial letter	✓
3	July 31, 2017 letter from Pearl Landau	✓
4	November 23, 2018 letter scheduling hearing	✓
5	2013 Form 1120S Corporate Tax Return	✓
6	2014 Form 1040 Individual Tax Return	✓
7	2015 Form 1040 Individual Tax Return	✓
8	2015 Forms 940 and 941 (Employer's Annual Federal Unemployment Tax Return)	
9	2016 Form 941 (Employer's Quarterly Federal Tax Return)	✓
10	2014 Form 1120S Corporate Tax Return	✓
11	2016 Form 4562 Depreciation & Amortization Form, K-1s and 1125-E Form	✓