

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

**In the Matter**

**- of -**

**the Application of G-Rock Safety, Inc.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 67141**

**RECOMMENDED ORDER**

**-by-**



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

This matter considers the written appeal by G-Rock Safety, Inc., (“G-Rock” 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 June 21, 2019, Ms. Mary Scordio, as President, applied on behalf of G-Rock for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 6, 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 § 144.2(b)(2);
  - (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 §144.2(b)(3);
  - (c) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
  - (d) Minority group members or 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, as required under 5 NYCRR §144.2(c)(2);
- (e) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2); and
- (f) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. G-Rock timely filed a Request to Appeal on May 4, 2022, along with a statement (APP Exhibit A/ DED Exhibit 3).
  4. A notice to proceed via written appeal was sent to G-Rock on October 5, 2022 (DED Exhibit 3).
  5. G-Rock filed its written appeal on December 5, 2022 (APP Exhibit B).
  6. The Division filed an Affidavit of Raymond Emanuel, Associate Director, dated August 21, 2023, and a brief of William Chen Esq., counsel for the Division, dated August 23, 2023.

#### **FINDINGS OF FACT**

7. G-Rock is engaged in the business of distribution of traffic control and job site perimeter safety equipment and supplies (DED Exhibit 1).
8. Ms. Mary Scordio is the President and has a 51% ownership interest. Her son, Mr. Rocco E. Scordio is the Vice President and has a 49% ownership interest. (DED Exhibit 1).
9. Ms. Scordio's husband, Mr. Rocco A. Scordio, is the owner of G-Rock Handcovers, Inc. (DED Exhibit 1).

10. Ms. Scordio and Mr. Rocco E. Scordio equally share all managerial operations of G-Rock, including estimating, preparing bids, supervising field operations and negotiating contracts. Mr. Rocco E. Scordio is also responsible for overseeing, maintaining and ordering inventory, sales, managing the warehouse, and making deliveries (DED Exhibit 1). Ms. Scordio's duties include accounts payable, accounts receivable, marketing, invoicing and sales (DED Exhibit 9). She lists her occupation on her 2019 tax return as computer operator (DED Exhibit 6).
11. G-Rock shares equipment, field employees and clients with G-Rock Handcovers, Inc. Mr. Rocco E. Scordio is employed by both entities as a driver .. Both companies are in the industrial safety industry (DED Exhibits 1, 7 and 8).
12. The 2019 and 2020 tax returns reflect that Mr. Rocco E. Scordio received a salary from G-Rock and Ms. Mary Scordio did not receive a salary (DED Exhibits 6, 7 and 8).
13. Applicant stated that G-Rock had no contracts entered into by the business (DED Exhibit 1), and instead produced invoices (DED Exhibit 12).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states in relevant part 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.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
  1. Money;
  2. Property;
  3. Equipment; or
  4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be 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)(3) states in relevant part 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 in relevant part 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.

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

Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

### **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 G-Rock 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 MWBE certification where, as here,

an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Ms. Scordio claims that she made a capital contribution to G-Rock and submitted a statement that alleges that Ms. Scordio transferred money from her personal savings to the business checking to cover start-up costs, such as business cards and the lease agreement. However, the application states that Rocco E. Scordio gifted \$5,000 to G-Rock in 2018 as a capital contribution and is devoid of any capital contribution by Ms. Scordio. (DED Exhibits 1 and 5).

On appeal, Ms. Scordio argues that the \$5,000 contribution was a gift from her husband, Mr. Rocco A. Scordio. Applicant argues that the application should have stated Rocco A. Scordio as having made the contribution, not Rocco E. Scordio. Ms. Scordio stated that the money came from a joint bank account owned by her and Rocco A. Scordio (APP Exhibit B). However, the application repeatedly stated that the contribution came from her son, Rocco E. Scordio (DED Exhibit 1). Also, the woman-owner must be able to show that the contribution came from assets belonging solely to the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 25, 2017 (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.

The Division's determination to deny the application on the basis that G-Rock failed to demonstrate that Ms. Scordio made capital contributions to G-Rock 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 2019 and 2020, Rocco E. Scordio received a salary from G-Rock and Mary Scordio did not receive a salary (DED Exhibits 6, 7 and 8). Ms. Scordio therefore does not share in the profits in proportion to her equity interest.

## 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. Scordio 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 business' industry. Her background is working as a computer operator. Her responsibilities include accounts payable, accounts receivable, marketing, invoicing and sales (DED Exhibits 9 and 10). These are administrative functions.

The critical function of the business is as a distributor of traffic control and job site perimeter safety equipment. Ms. Scordio and Mr. Rocco E. Scordio share equally the critical functions such as estimating, preparing bids, supervising field operations and negotiating contracts (DED Exhibit 1). Mr. Rocco E. Scordio's responsibilities include overseeing, maintaining and ordering inventory, sales, managing the warehouse, and making deliveries (DED Exhibits 9 and 11). On appeal, Ms. Scordio stated that as a startup, it was necessary to collaborate on all decisions. She argued that she oversaw a computer operations network and that she gained knowledge "of the safety distribution industry" by watching her husband operate G-Rock Handcovers. (APP Exhibit B). Ms. Scordio has not established that this experience and knowledge are part of the critical functions of the business.

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).

On appeal, Ms. Scordio states that all decisions are approved by her (APP Exhibit A/ DED Exhibit 3). This contradicts the statements she made in the application that she and Rocco E. Scordio equally made decisions pertaining to the managerial operations of the business (DED Exhibit 1). In addition, this statement does not clarify or explain the previously submitted documents. See *Scherzi Systems, supra*.

The Division's determination to deny the application on the basis that G-Rock failed to demonstrate that Ms. Scordio possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

### III. Control

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

Applicant was asked to produce contracts entered into by G-Rock. Applicant stated that there were no such contracts (DED Exhibit 1). Instead, applicant produced invoices (DED Exhibit 12). Therefore, applicant failed to demonstrate appropriate control of the business by the woman-owner as required by 5 NYCRR §144.2(d)(2). See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016 (substantial

evidence supported denial where no evidence was presented that the woman-owner signs contracts on behalf of the business).

#### IV. Independence

The Division further found that G-Rock is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3). G-Rock shares equipment, personnel and clients with G-Rock Handcovers, Inc., which is owned by Rocco A. Scordio. Rocco E. Scordio is employed by both entities as a driver. G-Rock Handcovers is also in the industrial safety industry and sells some products that G-Rock sells (DED Exhibit 1). On appeal, applicant claims that since its submission, it purchased its own equipment, but failed to provide any evidence to substantiate that claim (APP Exhibit B). Additionally, as this is new information that was not before the Division at the time of the application, it cannot be considered. See Scherzi Systems, LLC v. White, 197 A.D.3d 1466 (3d Dept 2021). Also, there is no claim that Rocco E. Scordio stopped working for both companies or that the companies stopped sharing clients.

The Division’s determination to deny the application on the basis that G-Rock failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

### **CONCLUSION**

G-Rock 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), 144.2(c)(2), 144.2(d)(2) and 144.2(e) 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 G-Rock's application for certification as a woman-owned business enterprise.

In the Matter of G-Rock Safety, Inc.  
DED File ID No. 67141  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Business Capitalization Narrative	Y	Y
DED 6	Mary Scordio 2019 Personal Joint Tax Return	Y	Y
DED 7	Rocco E. Scordio 2019 Personal Joint Tax Return	Y	Y
DED 8	Rocoo E. Scordio 2020 Personal Joint Tax Return	Y	Y
DED 9	Daily Responsibilities	Y	Y
DED 10	Mary Scordio Resume	Y	Y
DED 11	Rocco E. Scordio Resume	Y	Y
DED 12	Invoices	Y	Y