

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

In the Matter

- of -

the Application of **Gordon & Zoerb Electrical Contractors, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61219

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

April 30, 2020

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 Gordon & Zoerb Electrical Contractors, Inc. ("G&Z" or "applicant") certification as a women-owned business enterprise ("WBE") 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&Z does not meet the eligibility criteria for certification as a WBE.

The Division denied G&Z's application for WBE certification (DED Exhibit B) by letter dated January 6, 2017. DED Exhibit A. As discussed below, the letter sets forth three grounds under Section 144.2 of 5 NYCRR for the denial, based upon applicant's failure to demonstrate that the women owner owns and operates G&Z for certification purposes. In an e-mail dated April 12, 2017, John D. Celani, Esq., counsel for applicant, requested an extension of time to file a written appeal, and the extension was granted by Chief Administrative Law Judge James McClymonds. By letter dated May 9, 2017, applicant submitted its appeal. The appeal included a memorandum of law (the "Appeal") and attached exhibits.

The Division responded to applicant's appeal in submissions dated February 18, 2020, including a memorandum of law ("DED Memorandum") and the affidavit of Raymond Emanuel, Director of Certification Operations for the Division (the "Emanuel Affidavit"), with attached exhibits. The exhibits offered by applicant and Division staff were marked and received into evidence. A chart of those exhibits is attached.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see Section 144.2 of 5 NYCRR). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, and control of the business enterprise are evaluated based upon 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, on information revealed in supplemental submissions, and, if appropriate, on interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of G&Z's application for WBE certification 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

Division

The Division asserted that applicant failed to meet three requirements for certification as a woman-owned business, pursuant to Section 144.2 of 5 NYCRR. First, the Division argued that the contribution of the woman owner, Karen Basher, was not proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (see Section 144.2(a)(1) of 5 NYCRR). The denial letter listed the following “relevant facts” with respect to the applicant’s failure to satisfy this requirement:

- Ms. Karen Basher owns ninety percent of the outstanding common stock of Gordon & Zoerb Electrical Contractors, Inc. (“G&Z”), and Mr. Andrew Sciandra owns ten percent of the outstanding common stock of G&Z.
- The applicant represents that Ms. Basher and Mr. Sciandra have made contributions of expertise to G&Z, each valued at \$0.
- Documents submitted with the application for the purpose of demonstrating Ms. Basher’s contributions to G&Z reflect certain payments to shareholders by G&Z in conjunction with the redemption of stock by such shareholders.
- The application does not include any documentation of personal contributions by Ms. Basher to G&Z.

Exhibit DED A, at 2.

Second, the Division asserted that Karen Basher, the woman owner, did not make decisions pertaining to G&Z’s operation, as required by Section 144.2(b)(1). In this regard, the Division cited the following “relevant facts” in the denial letter:

- G&Z is primarily engaged in providing electrical contracting services, including power, fire alarm, communication and data wiring.
- Male individuals, including Mr. Sciandra, are primarily responsible for managing core functions of the business enterprise, including estimating and supervising field operations.

Exhibit DED A, at 3.

The Division went on to contend that the woman owner of the business enterprise had not demonstrated adequate managerial experience or technical competence to operate G&Z (see Section 144.2(b)(1)(i)). Specifically, in its denial letter, the Division noted that:

- Ms. Basher has not demonstrated any relevant training or credentials relevant to electrical contracting.
- Ms. Basher's professional experience prior to becoming the President and majority shareholder of G&Z was in managing administrative, financial, and human resources functions at G&Z.
- Mr. Sciandra is a licensed master electrician.
- Mr. Sciandra has over twenty-five years of managerial experience with G&Z, taking on progressively greater responsibility for managing projects and the provision of services in the field.

Id.

The Division noted that when G&Z filed its application, “[i]t did so within six months after Ms. Karen Basher, a long-time administrative employee who played no part in the actual performance of any of the company’s electrical contracting work” became the majority owner of the business, despite the fact that she had paid \$0 for her interest in the company. DED Memorandum, at 1-2.

Applicant

On its appeal, applicant contended that Karen Basher, the woman owner, directs all aspects of the company’s operations, and has the power to hire and fire all of the company’s employees. Moreover, according to applicant, “[s]he has provided contributions in the form of money, expertise and 38 years of her life devoted to this Company.” Appeal, at 2. Applicant went on to assert that those contributions are proportionate to her equity interest in G&Z, that she makes decisions pertaining to G&Z’s operations, and that “she has more than adequate managerial and technical competence” to operate G&Z. Appeal, at 2-3.

FINDINGS OF FACT

1. Gordon & Zoerb Electrical Contracting, Inc. is a commercial/industrial contractor, specializing in power, fire alarm communication and data wiring. G&Z is located at 420 South Harris Hill Road, Buffalo, New York. DED Exhibit B, at 1; 3.

2. The business was initially formed by Howard Zoerb as Zoerb & Company, Inc. DED Exhibit C. Karen Basher started with the company in 1978 “as a receptionist, performing day to day functions of answering phones, filing and typing.” DED Exhibit E. In 1980, Charles Gordon and his wife, Jean Gordon, purchased the business. DED Exhibit C. Charles Gordon owned seventy shares of the company’s 100 shares of stock, and his wife owned the remaining 30 shares. DED Exhibit C.

3. In 1998, Ms. Basher became a shareholder in G&Z, purchasing a fifteen percent ownership (15%) from Charles and Jean Gordon. App. Exhibit C. Charles and Jean Gordon assigned ninety percent of the 100% shares that they owned back to G&Z, and sold the remaining ten shares back to three of the company’s employees. DED Exhibit F. The terms of

this transaction were memorialized in a June 4, 1998 Stock Purchase and Redemption Agreement (the “1998 Agreement”).¹ DED Exhibit G.

4. Pursuant to the 1998 Agreement, Charles and Jean Gordon were to be paid [REDACTED] over a ten-year term, by G&Z (not the individual shareholders) for the ninety shares of stock that G&Z was assigned. The 1998 Agreement refers to the [REDACTED] payment as the “Redemption Price.” DED Exhibit G.

5. Ms. Basher paid [REDACTED], or [REDACTED] per share, for 1.5 shares. At the same time, Ronald Klavoon purchased 1.5 shares for the same amount, and Anthony Girone purchased the majority interest (7 shares, for [REDACTED]). DED Exhibit G. The 1998 Agreement refers to Mr. Girone, Mr. Klavoon, and Ms. Basher as the “Purchasers,” and the amount they paid to purchase their shares as the “Purchase Price.” Id.

6. The remaining shares in the 1998 ownership transfer were redeemed by G&Z for [REDACTED], payable by promissory note. DED Exhibit G. In the 1998 Agreement, Charles Gordon agreed to lend G&Z [REDACTED] to pay off G&Z’s indebtedness to M&T Bank, as well as loans from the Purchasers to G&Z. According to the 1998 Agreement, the loans (including [REDACTED] from Ms. Basher) were to be “reclassified as additional contributions to capital of the Corporation.” Id., Sections 6.6 and 6.7. Applicant did not provide any underlying documentation with respect to the loans referenced in the 1998 Agreement.

7. Although Ms. Basher became a 15% owner, her responsibilities continued to be administrative in nature, and did not include managing the field division, which was done by her two partners. DED Exhibit E.

8. On January 1, 2015, Ms. Basher became the ninety percent shareholder, pursuant to a December 31, 2014 stock redemption agreement (the “2014 Redemption Agreement”). DED Exhibit H. As part of the 2014 Redemption Agreement, Anthony Girone redeemed all seven of the shares that he then held, representing a 70% interest in G&Z, by assigning those shares back to G&Z for [REDACTED]. DED Exhibit H. G&Z paid Mr. Girone [REDACTED], and pursuant to an April 1, 2015 promissory note (the “Promissory Note”) G&Z agreed to pay the [REDACTED] balance, plus [REDACTED] interest per annum, over a ten-year period. DED Exhibit H, at Sections 1.1-1.3; Promissory Note. The checks to Mr. Girone were drawn on G&Z’s account, not Ms. Basher’s personal account. Applicant Exhibit G. According to applicant, Ronald Klavoon redeemed his shares pursuant to a similar redemption agreement.²

9. In connection with the Promissory Note, Ms. Basher signed an April 1, 2015 limited personal guaranty agreement (the “Guaranty Agreement”), limited to 27% of the outstanding balance of the indebtedness at one point in time. DED Exhibit H, Guaranty Agreement. Andrew Sciandra entered into a similar guaranty agreement, limited to 3% of the outstanding indebtedness at one point in time. DED Exhibit H.

¹ Only the first three pages of the 1998 Agreement were provided with the application and the Appeal.

² The information provided by applicant with respect to Mr. Klavoon’s agreement was not reflected in any documentation provided by applicant in the application or the Appeal.

10. Also on April 1, 2015, Ms. Basher and Mr. Sciandra entered into a shareholders' agreement (the "2015 Agreement"), reflecting Ms. Basher's ownership of 9 shares of G&Z's common stock, and Mr. Sciandra's ownership of the remaining one share. DED Exhibit I.

11. Ms. Basher is the president and treasurer. App. Exhibit K. Mr. Sciandra is the vice-president, secretary, and project manager. *Id.* On or about September 15, 2015, G&Z applied for certification as a WBE. Emanuel Affidavit, ¶ 12.

12. G&Z's application for certification as a WBE identified "\$0 EXPERTISE" as the contributions of Karen Basher and Andrew Sciandra. DED Exhibit B, at 3.

13. In 2012, Ms. Basher was paid [REDACTED], Mr. Girone was paid [REDACTED], and Mr. Klavoon was paid [REDACTED]. DED Exhibit J. In 2013, she was paid [REDACTED], while Mr. Girone's compensation was [REDACTED], and Mr. Klavoon was paid [REDACTED]. *Id.*

14. Ms. Basher is not a licensed electrician, and has had no formal training in electrical work or other related construction trades. DED Exhibit E. Her resume indicates that in 1980, when she became a minority shareholder, her responsibilities included "all administration, including human resources and financial decisions, while my two partners handled the field division." DED Exhibit E. When Ms. Basher became the majority shareholder, she continued to "monitor the daily operations overseeing the bidding process, field, office and finances." DED Exhibit E. Andrew Sciandra, a 10% owner of G&Z, is a licensed master electrician, and has worked as an electrician since 1987. DED Exhibit N. Anthony Girone is a licensed master electrician. DED Exhibit L.

15. G&Z's application for certification as a WBE states that Ms. Basher is solely responsible for financial decisions; negotiating bonding and insurance; and managing and signing payroll. DED Exhibit B, at 4-5. Ms. Basher is also the sole signatory on business accounts. DED Exhibit B, at 5. She shares responsibility for marketing and sales, hiring and firing employees, supervising field operations, purchasing equipment and sales, and negotiating contracts with other male employees. DED Exhibit B, at 5. Other employees, primarily male employees, are solely responsible for estimating and preparing bids. DED Exhibit B, at 4.

DISCUSSION

This report considers applicant's appeal from the Division's determination, pursuant to Executive Law Article 15-A, to deny certification to G&Z as a women-owned business enterprise.³ Section 144.1(a)(1) of 5 NYCRR requires an applicant to demonstrate that the contribution of the woman owner is proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. The first basis for the denial of G&Z's application for certification cites to this regulatory provision. DED Exhibit A, at 1.

³ 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* Section 140.1(tt) of 5 NYCRR (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"))).

Applicant argued that “Ms. Basher purchased her interest in the Company by paying for it with cash and converting debt that the Applicant owed to her personally to a capital contribution.” Appeal, at 10. Specifically, applicant asserted that she contributed money to G&Z “by virtue of converting debt that the Company would have otherwise had to pay to her to a capital contribution.” *Id.* According to applicant, the payments for the stock redemption in 1998 “consisted of funds that would otherwise have been distributed pro rata to the shareholders, including Ms. Basher.” Appeal, at 4. Applicant argued that Ms. Basher forbore receiving her 15% interest in [REDACTED] of dividends that would otherwise have been distributed, and that such forbearance amounted to [REDACTED] of contributed funds.

In response, the Division argued that despite Ms. Basher’s acquisition of a 15% interest in 1998, and any capital contributions allegedly made at that time, applicant failed to establish that Ms. Basher made any further contribution in exchange for the much greater additional equity (90%) that she acquired in 2015, specifically that it was undisputed that Ms. Basher “made no further contribution, of any nature, kind or description for this substantial increase in equity.” DED Memorandum, at 9. Moreover, the Division pointed out that Ms. Basher had not provided any documentation regarding the loans referenced in the 1998 Agreement, and noted that under the terms of the 2014 Redemption Agreement, the payments to Mr. Girone were paid, or would be payable, by G&Z, not Ms. Basher. Applicant included copies of the checks to Mr. Girone, all of which were drawn on G&Z’s account, not Ms. Basher’s personal funds. Applicant Exhibit G. The Division concluded that Ms. Basher made no personal contribution of any kind for her majority interest, which “expanded to ninety percent (90%) only because of a stock redemption that was paid for by the company and not by her.” Emanuel Affidavit, ¶ 19. The Division’s arguments are persuasive, and the amounts applicant argues were contributed in 1998 do not establish that she made a contribution proportionate to her 90% equity interest acquired in 2015.

In addition, applicant took the position that Ms. Basher “also contributed her expertise in the form of providing underpaid and unpaid services resulting in a huge increase in Company value while she has been an owner.” Appeal, at 11. Applicant characterized Ms. Basher as “grossly underpaid for her immensely broad duties,” and contended that her contributions “increased the value of the Applicant from [REDACTED] in 1998 to [REDACTED] in 2015.” *Id.* The Division countered that the corporation’s income tax returns for the years 2012, 2013 and 2014 (the years immediately preceding Ms. Basher becoming G&Z’s majority shareholder), showed that Ms. Basher received compensation comparable to or greater than G&Z’s other two shareholders. DED Exhibit J (showing that in 2012, Ms. Basher was paid [REDACTED], Mr. Girone was paid [REDACTED], and Mr. Klavoon was paid [REDACTED]; in 2013, she was paid [REDACTED], while Mr. Girone’s compensation was [REDACTED], and Mr. Klavoon was paid [REDACTED]). These facts do not support applicant’s argument that Ms. Basher was underpaid, or unpaid, and in this regard applicant offered only the increase in value from 1998 to 2015, without any valuation of Ms. Basher’s contribution to that increase, or a showing that the increase was attributable to her efforts.

Applicant went on to assert that Ms. Basher also contributed money to the business “by virtue of the manner in which she came to own ninety percent of the Applicant.” Appeal, at 11. Applicant pointed out that both the 1998 and 2015 transactions included, at least in part, stock

redemptions, and that as a result “current shareholders are bought out by the Company, rather than directly by the shareholders, using money that would otherwise be distributed as dividends to the remaining shareholders.” *Id.* In response, the Division maintained that she did not lose future shareholder distributions, “the existence of which are by the very nature of such payments wholly speculative and dependent upon future, unpredictable business conditions.” DED Memorandum, at 10. The Division reiterated that it was indisputable that Ms. Basher made no personal contribution of any kind for her increase in equity from 15% to 90%.

Finally, applicant argued that Ms. Basher contributed money to G&Z by virtue of her personal guaranty of company debt. Under the terms of the stock redemption, Ms. Basher personally guaranteed 27% of the promissory note held by Mr. Girone and payable by G&Z. Applicant took the position that “Ms. Basher put ████████ of her personal funds at risk in the event the Company failed (or should it fail in the future) while paying down its debt to the former shareholder.” Appeal, at 12. In response, the Division argued that applicant had not shown that Ms. Basher was called upon to render payment on the guaranty, “or that any funds supplied by Ms. Basher were used to make even a single payment to any redeeming shareholder.” Emanuel Affidavit, ¶ 21. The Division went on to point out that even if Ms. Basher had been called upon to make a payment pursuant to the personal guaranty, she would only have been responsible for a small portion (27%) of what would have been owing, “thereby enabling her to retain the entirety of her increased equity . . . for only a fraction (i.e., 27%) of the redemption price, in plain derogation of the requirement, set forth in 5 NYCRR § 144(2)(a)(1), that the woman’s contribution be ‘proportionate’ to the equity received.” Emanuel Affidavit, ¶ 22. Applicant’s assertions are speculative, and insufficient to meet G&Z’s burden to show that the Division’s denial was not based on substantial evidence. The Division emphasized the importance of Section 144.2(a)(1), and “the rationale behind the legislative insistence that the contribution that is made by the woman owner in exchange for a company’s equity be real and provably made by her, in proportion to the value received. A less exacting standard . . . would enable a woman to assume the status as a ‘majority’ owner without expending or contributing anything for her increased and expanded equity interest,” while prior majority owners remained the de facto owners. Emanuel Affidavit, ¶ 24.

Applicant’s reliance on Matter of Kelly Contracting, Inc., DED File No. 58554 (Recommended Order, Aug. 5, 2016, reversed by Final Order, Aug. 17, 2016), is misplaced. As the Division notes, the applicant in that case invested \$80,000 in cash in the business enterprise when she became the majority shareholder, with proceeds from a line of credit secured by the residence she owned jointly with her husband. In addition, she purchased 51% of the common stock owned by her husband, after obtaining a valuation from an attorney, for \$4,355.40. The payment was made from an account held solely in her name. In this case, applicant has not shown that she made any payment from her personal assets for the increase in equity. The Division’s denial based upon Section 144.2(a)(1) of 5 NYCRR was based upon substantial evidence.

Section 144.2(b)(1) of 5 NYCRR requires that an applicant demonstrate that decisions pertaining to the operations of the business enterprise are made by the woman claiming ownership of the business. The Division’s denial letter cited to this provision as one of the grounds for the denial of G&Z’s application. On its Appeal, applicant maintained that Ms. Basher, as president and treasurer, “makes all final operational decisions for the Company, and

oversees the highest level of operations for the Company.” Appeal, at 12. While acknowledging that male employees, such as Andrew Sciandra, are responsible for estimating and supervising field operations, applicant argued that the Division failed to consider that “Ms. Basher makes operational decisions too, not just the males who work for the Company,” and went on to assert that the Division relied upon reasoning that is prohibited by controlling case law. Appeal, at 13. Applicant contended that the law does not require Ms. Basher to do everything herself, nor is there a requirement that she hold an electrician’s license in order to qualify for certification.

In response, the Division pointed out that applicant had not “shown that Ms. Basher has had any training as an electrician and/or that she has even the slightest knowledge of the technical and/or practical aspects of that trade.” DED Memorandum of Law, at 17-18. The Division maintained that Ms. Basher’s work for G&Z had been only of an administrative nature, and that there was no indication in the application, or in anything proffered by applicant on appeal, “that she ever participated in, let alone supervised, even a single electrician service related job.” Emanuel Affidavit, ¶ 31. The Division went on to assert that “it is beyond dispute that every professional undertaking in which Gordon and Zoerb has been involved was, at least since 1998, conducted and supervised either by Anthony Girone and/or Andrew Sciandra, both of whom worked [for G & Z], right through the time that the application for WBE certification was filed.” Emanuel Affidavit, ¶ 31.

The Division noted that Ms. Basher “joined the company not as a trade apprentice but rather as a receptionist, performing, in her words, ‘day to day functions of answering phones, filing and typing,’ and eventually took on such duties as ‘daily bookkeeping operation’ and ‘office manager.’” Emanuel Affidavit, ¶ 27; DED Exhibit E. The Division also noted that even when Ms. Basher became a minority shareholder in 1998, her responsibilities included “all administration, including human resources” while her two male partners handled the field division. *Id.* This arrangement did not change after she became a majority shareholder.

Applicant cited to Matter of Creative Connection LLC, DED File No. 60169 (Recommended Order, Dec. 8, 2016, reversed by Final Order, Jan. 4, 2017), but as the Division pointed out, the appeal and decision in that case focused on the requirement in Section 144.2(b)(1)(iii) of 5 NYCRR that a woman owner devote time on an ongoing basis to the enterprise, rather than management of the core functions of the business. Moreover, the facts in Creative Connection are distinguishable. In that proceeding, the woman owner of the business that provided educational and related services to disadvantaged students had over twenty-five years of teaching experience, as well as graduate and undergraduate degrees in education. Here, it is undisputed that Ms. Basher is not a licensed electrician, and that core business functions are performed by other, male employees. Applicant also relied upon Matter of KTR Trucking, LLC, DED File No. 59790 (Recommended Order, Oct. 26, 2016; modified, and as modified, affirmed by Final Order, Oct. 28, 2016), but in that case, unlike this one, the Division offered no evidence as to whether the woman owner made decisions pertaining to the operation of the business.

Matter of Ignelzi Interiors, Inc. v. New York City Dept. of Small Business Services, 31 Misc.3d 642, 918 N.Y.S.2d 299 (Sup. Ct. N.Y. Co. 2011), cited by applicant, dealt with whether the minority owner of fifty-one shares of the business was empowered to make

decisions, rather than the non-minority shareholder. There was no issue in that case as to whether the applicant had the requisite experience and technical competence, or working knowledge or ability to operate the business. The same is true with respect to Matter of Era Steel Construction Corp. v. Egan, 145 A.D.2d 795 (3rd Dept. 1988), which did not involve a determination whether the applicant met the standards set forth in Section 144.2(b)(1) of 5 NYCRR, but instead focused on a denial of certification based upon the certifying agency's assessment of "industry practice." The Court found that the agency's assessment lacked a foundation in the record.

In light of the record and the decisions cited by the parties, the Division correctly concluded that Ms. Basher did not exercise independent operational control over G&Z's core functions (see Matter of J.C. Smith v. New York State Dept. of Economic Development, 163 A.D.3d 1517, 1520 (4th Dept. 2018) (holding that "it is not irrational or unreasonable for the Division to require that a 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 also Matter of Occupational Safety & Environmental Assocs, Inc. v. New York State Dept. of Economic Development, 161 A.D.3d 1582, 1583 (4th Dept. 2018) (denying certification where the wife did not have the working knowledge and expertise to have independent operational control of the business; rather, it was the husband who had the education and expertise, and was the principal consultant for the business, and therefore decisions pertaining to operation were not made by the woman claiming ownership)).

The Division also cited to Matter of Panko Electrical and Maintenance Corp. v. Zapata, 172 A.D.3d 1682 (3rd Dept. 2019), in which the court rejected the petitioner's contention that the woman owner, who bore primary responsibility for the petitioner's financial and administrative affairs, and decided what jobs to bid, approved final estimates, and personally reviewed and executed contracts, nonetheless did not exercise the degree of operational control required by Section 144.2(b)(1). The Court noted that the woman owner in that case could not read blueprints, and tasked others with handling the technical details in preparing estimates. Moreover, she did not supervise any field operations, and seldom visited work sites. See also Matter of Outer-County Construction Corp., DED File No. 54385 (Recommended Order, Apr. 20, 2018; affirmed by Final Order, July 10, 2018) (woman owner's job duties and responsibilities focused on financial and human resource management, contracts and daily operations, scheduling, monitoring cash flow, marketing and branding; concluding that woman owner did not make decisions pertaining to the company's core functions: estimating and supervising field operations); Matter of MLJ Painting Corp., DED File No. 61601 (Recommended Order May 2, 2019; affirmed by Final Order, May 2, 2019 (certification properly denied where woman owner's activities related primarily to managing human resources, payroll, scheduling jobs, hiring and firing employees, and ordering material, rather than exercising control over the core functions of the business enterprise). In light of the record, and controlling case law, the Division's denial on this ground is supported by substantial evidence.

The Division relied upon a third ground in its denial of G&Z's application, specifically, that Ms. Basher did not have adequate managerial experience or technical competence in the business enterprise seeking certification, as required pursuant to Section 144.2(b)(1)(i) of 5 NYCRR. Applicant contended that an applicant may acquire the required managerial or

technical experience on the job, and that the woman owner was not required to have an electrician's license as a condition of certification. Applicant argued that Ms. Basher demonstrated relevant training and credentials through decades of on-the-job training and experience. According to applicant, Ms. Basher's 38 years with G&Z were "more than adequate for certification under the regulations." Appeal, at 17.

Applicant noted that Ms. Basher started working for the company out of high school and asserted that "[s]he is trained in and has served in every position in the Company that does not require an electrician's license." Appeal, at 17. According to applicant, Ms. Basher "chooses what jobs to bid, oversees the estimates performed, negotiates the contracts, and personally approves each and every job contract for the Company." Id.

In response, the Division pointed out that "it is undisputed that Ms. Basher . . . has no technical training or experience as an electrician and/or in any other construction trade." Emanuel Affidavit, ¶ 31. The Division maintained that since 1998, every professional undertaking was conducted and supervised by either Anthony Girone and/or Andrew Sciandra. Id. According to the Division, when Ms. Basher assumed the status of majority shareholder, "the company's core services continued to be performed and supervised not only by long standing employee Andrew Sciandra, a licensed electrician, but also by Anthony Girone, the former majority owner who remained . . . employed by the enterprise and actively engaged in its affairs." Id., ¶ 32.

In support of its argument, applicant cited to Matter of KTR Trucking, LLC, DED File No. 59790 (Recommended Order, Oct. 26, 2016; modified, and as modified, affirmed by Final Order, Oct. 28, 2016). Matter of KTR is distinguishable. First, the Director affirmed the administrative law judge's determination that the woman owner had not demonstrated adequate managerial experience or technical competence. Although on appeal applicant in that proceeding provided additional documentation detailing the woman owner's experience in the trucking industry, and showing that she was responsible for all operations other than actually driving the trucks (for example, safety training, repairing and maintaining the trucks, and interacting with contractors), that documentation was not before the Division at the time of the denial, and thus could not be considered on appeal. Moreover, KTR had two employees: the woman owner, whose health status disqualified her from obtaining a license to drive a truck, and the licensed truck driver.

In this case, the applicant has made no such showing. Rather, the record demonstrates that the male employees of G&Z, and not Ms. Basher, provide the managerial experience and technical knowledge with respect to G&Z's core, income generating functions. DED Exhibit B, at pp. 4-5 (indicating that male employees are solely responsible for estimating and preparing bids, and that Ms. Basher shares responsibility with male employees for other functions including marketing, hiring and firing, supervising field operations, purchasing equipment, and negotiating contracts). See Matter of Northeast Stud Welding Corp., 211 A.D.2d 889 (3rd Dept. 1995), (determining that an application for certification as a women-owned business was properly denied; reasoning that, although the woman applicant performed some functions, and made some decisions on her own, significant operations were shared and still others were performed solely by her husband. The Court noted that, while not dispositive, the woman owner had no training or expertise in welding, which was the construction service

provided by the business, and concluded that she lacked the technical ability to evaluate her husband's work, "be it stud welding, training others to do so or supervising field operations." Id., at 891 (citations omitted)); Matter of Upstate Electrical, LLC, DED File No. 61808 (Recommended Order, June 11, 2018; affirmed by Final Order, Aug. 30, 2018) (affirming the Division's conclusion that the functions of the business were performed by male employees, and that the woman owner had no training or expertise in electrical contracting to qualify her to supervise their work).

Applicant also relied upon Matter of Diversified Indus. of WNY, DED File No. 48637 (Recommended Order, Sept. 7, 2016; affirmed by Final Order, Oct. 20, 2016). This decision is also factually distinguishable. In that proceeding, the applicant was comprised of only the two female shareholders, and the Recommended Order stated that the Division failed to establish who, if not the two women owners, provided the managerial experience, technical competence, working knowledge or ability to operate the business. Recommended Order, at 4. In addition, the applicant in that case demonstrated that she possessed relevant licensure. In this case, employees of G&Z other than Ms. Basher are primarily or exclusively responsible for providing technical knowledge and managerial experience with respect to the core, revenue generating functions of the business, and are licensed electricians. Similarly, applicant's reliance upon Matter of Coverco, Inc., DED File No. 54730 (Recommended Order, January 23, 2017; affirmed by Final Order, Jan. 20, 2017) is misplaced. In Coverco, the woman owner had been the applicant's president for more than five years, and had been the former president and owner of another company. As the Division noted, "not only is there no indication that Ms. Basher had ever run another business, but it is not disputed that Mr. Girone had been in charge of Gordon and Zoerb through December 31, 2014, a mere six months before the Appellant applied for WBE certification status." DED Memorandum of Law, at 25. The Division pointed out that Ms. Basher did not demonstrate that she had any substantive responsibility for the actual work G&Z performed; rather, her two partners were responsible for the company's "field division." Emanuel Affidavit, ¶ 32; DED Exhibit E.

It was not unreasonable for the Division to conclude, based upon the application materials, that Ms. Basher's management and supervisory activities consisted of administrative, back office functions, rather than estimating, preparing bids, or performing electrical work. The Division's denial of G&Z's application for certification as a woman-owned business for failure to satisfy this criterion was based upon substantial evidence.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division's determination to deny G&Z's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny G&Z's application for certification as a woman-owned business enterprise should be affirmed.

Matter of Gordon & Zoerb Electrical Contractors, Inc.
DED File ID No. 61219
Exhibit List

Exhibit	Description	Received?
App. A	Documents filed with application	✓
App. B	Resume: Karen Jo Basher (duplicate of DED E)	✓
App. C	Stock Purchase and Redemption Agreement	✓
App. D	September 17, 2015 application	✓
App. E	W-2s: Karen Basher	✓
App. F	Stock Redemption Agreement, Promissory Note, Limited Personal Guarantees, copy of Signed Stock Power	✓
App. G	Photocopies of checks	✓
App. H	April 1, 2015 Shareholder Agreement	✓
App. I	March 17, 2016 narrative	✓
App. J	Work Orders/Purchase Orders	✓
App. K	Organizational Chart	✓
App. L	January 6, 2017 denial letter	✓
DED A	January 6, 2017 denial letter	✓
DED B	September 17, 2015 application	✓
DED C	Responses to questions by certification analyst	✓
DED D	Stock transfer ledger and certificates	✓
DED E	Resume: Karen Jo Basher	✓
DED F	Assignment separate from certificate	✓
DED G	June 4, 1998 Stock Purchase and Redemption Agreement	✓
DED H	Stock Redemption Agreement, Promissory Note, Limited Personal Guarantees, copy of Signed Stock Power	✓
DED I	April 1, 2015 Shareholder Agreement	✓
DED J	2012 U.S. Corporate Tax Return	✓
DED K	April 1, 2015 Limited Personal Guaranty Agreement	✓
DED L	Master Electrician License: Anthony Girone (exp. 12/31/2015)	✓
DED M	2015 U.S. Corporate Income Tax Return	✓
DED N	Resume and License: Andrew Sciandra	✓