

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

In the Matter

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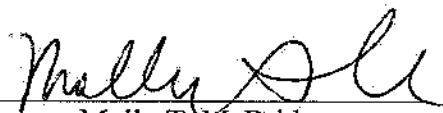
the Application of

Java Joe's Roasting Co., Inc.
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 61836

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge
February 14, 2023

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 ("DED") to deny Java Joe's Roasting Co., Inc. ("Java Joe's" or "applicant") women-owned business enterprise status be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") 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, by Java Joe's challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a women-owned business enterprise ("WBE").¹

Java Joe's application (Exhibit 1) was received on April 27, 2017. By letter dated January 16, 2018, the Division denied the application of Java Joe's for WBE certification (Exhibit 2).

Applicant filed a notice of written appeal in response to the Division's denial of its application for certification as a women-owned business enterprise (Exhibit 3). By letter dated May 10, 2018, applicant submitted its written appeal (Exhibit 9). DED submitted its response to the appeal on November 22, 2022 (Exhibit 10). Upon receipt of the file, the attached exhibit list was created. The exhibits listed constitute the entire record upon which this report is based.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied women-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation and control are applied on the basis of information supplied through the application process (*see* 5 NYCRR 144.2[a]). Among other showings, the applicant must demonstrate that the woman owner has made a capital contribution proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). Also, applicant must demonstrate the relevant business documents do not restrict the woman owner from making business decisions, as required by 5 NYCRR 144.2(b)(2).

¹ The minority and women-owned business enterprise (MWBE) regulations were amended in December 2020. Since the denial determination in this matter pre-dates the 2020 amendments, the Division evaluated the application for certification under the former regulations. Accordingly, unless expressly stated otherwise, all references to the MWBE regulations herein are to the former regulations

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a women-owned business enterprise (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 asserts that applicant failed to meet necessary criteria for certification. The Division asserts that applicant failed to demonstrate that the woman owner has made a capital contribution proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). Also, the Division asserts that the relevant business agreements do not permit the woman owner to make decisions without restrictions as required by 5 NYCRR §144.2(b)(2).

Position of the Applicant

Applicant asserts that it meets the criteria for certification and that the Division erred in not granting it status as a women-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Java Joe's was founded in July 2002 (Exhibit 1).
2. At the time that the company was founded, Kathy Pagnani contributed \$ [REDACTED] in inventory and owned 15% of the enterprise, David Pagnani (her husband) contributed \$ [REDACTED] and owned 45% of the enterprise, and Eric Cole contributed \$ [REDACTED] and owned 40% of the enterprise (Exhibit 1).
3. Java Joe's is a mid-sized coffee roaster specializing in producing freshly roasted premium coffee (Exhibit 1).

4. David Pagnani turned over his 45 shares in Java Joe's to the corporation on January 31, 2017. The corporation then transferred 60 shares to David Pagnani's wife, Kathy Pagnani, for no consideration. (Exhibit 1, 2.D., Exhibit 5)
5. Kathy Pagnani and Eric Cole share the following managerial operations responsibilities for Java Joe's: (1) financial decision-making; (2) negotiating bonding; (3) negotiating insurance; (4) marketing and sales; (5) hiring and firing; (6) supervising field operations; (7) managing and signing payroll; (8) negotiating contracts; (9) signing business accounts. (Exhibit 1, 4.A.) Kathy Pagnani, Eric Cole and David Pagnani share the following managerial operations responsibilities: (1) estimating; (2) preparing bids; (3) purchasing equipment and sales. (*Id*) The application does not identify any business managerial operations that are the sole responsibility of the woman owner.
6. The Application for certification identified Kathy Pagnani as President. (Exhibit 1, 2.A.) The applicant's Shareholder Agreement identified David Pagnani as President (Exhibit 5).
7. New York State Department of State's (NYS DOS) Directory of Corporations identified David Pagnani as President of the business at the time of the application. (DED Brief at 7)²
8. The Bylaws of Java Joe's states that the President "shall be the chief executive officer of the Corporation and shall have general charge of the business and affairs of the corporation." (Exhibit 5).
9. Minutes of a Special Meeting of Shareholders dated January 31, 2017, state David Pagnani "turned back into the Corporation" his 45 shares of stock and Kathy Pagnani was granted an ownership interest in Java Joe's totaling 60 shares.³

DISCUSSION

The woman owner did not make a capital contribution in proportion to her ownership interest.

DED denied the application on the basis that the woman owner did not make a capital contribution in proportion to her equity interest in the corporation. The eligibility criterion at issue requires that "the contribution of the minority group member(s) or women 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 144.2[a][1]).

As noted above, at the founding of the business in 2002, the women owner made a contribution of inventory valued at \$ [REDACTED] for her 15% ownership, while David contributed

² The NYS DOS Division of Corporations indicates that Kathy Pagnani is President of Java Joe's effective May 4, 2018, after the date of the application and denial of the application.

³ Minutes of Special Meeting of Shareholders of Java Joe's Roasting Company, Inc. dated January 31, 2017.

\$ [REDACTED] for his 45% ownership.⁴ On January 31, 2017 David Pagnani turned his 45 shares (majority ownership) over to the corporation and Kathy Pagnani was granted 60 shares (majority ownership). (Exhibit 5) Applicant has not claimed Kathy Pagnani paid any money or inventory to the corporation when she was given 60 shares of Java Joe's stock.

On appeal, Applicant argues that David Pagnani, majority owner, transferred all of his ownership to his wife Kathy to allow the company to "take advantage of current woman owned businesses and WBE programs in order to give the company an opportunity to grow and ensure the continued growth and operation of the company." (See App Brief). Applicant also noted the language in the Shareholder Agreement that provided for the husband and wife owners, David and Kathy, to "freely sell, transfer, assign, gift or bequeath any or all of his or her shares of the stock to other members of the Pagnani family". (See Shareholder Agreement, Section 3 Permitted Transfers between David P. Pagnani and Kathy Pagnani, dated August 27, 2002, Exhibit 5). The Division argues that while the gift transfer was permitted by the Shareholder Agreement, "it does not qualify as a capital contribution." (DED Brief at 5).

Applicant notes in its appeal that the application demonstrates there are four assumed name entities under the corporation that are operated by Kathy Pagnani, and these are the fundraising part of the business. Applicant contends, for the first time on appeal, that this demonstrates Kathy Pagnani has made a capital contribution by her management of the fundraising side of the business. (See App Brief at 7). Also, applicant argues for the first time on appeal that Ms. Pagnani possesses skills and expertise related to fundraising that Mr. Cole does not. To further support the position that a capital contribution was made by Kathy Pagnani, applicant argues she is the "focal point" of the fundraising program run by the business and is in direct control of the fundraising efforts which generated over 40% of the business revenue at the time of the application. (App Brief at 6-7). The Division notes that Ms. Pagnani serving in a different role than Mr. Cole was not stated in the application, nor has applicant adequately identified fundraising skills as a quantifiable asset. (DED Brief at 5). The Division argues that an applicant must satisfy the capital contribution requirement with more than an assertion of expertise in the business area. (*Id.*)

An examination of the resumes of Kathy Pagnani and Eric Cole, the application and supporting documents as well as the listed work experience of Kathy Pagnani and her male co-owner Mr. Cole show similar experience and skills. (Exhibit 8) Applicant has failed to demonstrate the woman owner has unique or superior skills or experience that translate to a capital contribution.

The Division addresses the Appellate Court decision in *Scherzi, LLC. White*, 197 A.D.3d 1466 (3d Dept. 2021). The Court held in *Scherzi* that the woman owner demonstrated at hearing she had both expertise and the relevant skills that the non-qualifying owner did not

⁴ The Shareholders Agreement also notes that the business was funded with \$ [REDACTED] cash at its founding with each shareholder contributing a percentage of the \$ [REDACTED] in proportion to his/her ownership interest. (See Exhibit 5)

that qualified as a capital contribution. As noted, no such showing was made herein and as such, *Sherzi* is not relevant.

The applicant has failed to demonstrate that the Division erred in denying the application due to the woman owner failing to make a capital contribution in proportion to her ownership interest.

Relevant business documents do not allow the women owner to make decisions without restrictions.

In deciding whether a women owner makes decisions without restrictions, the Division examines the relevant business documents, in this case the corporation's Bylaws and Shareholder Agreement (Exhibit 5) (5 NYCRR 144.2[b][2]). The Bylaws of the corporation identify the President of Java Joe's as the chief executive officer of the corporation and provide that that officer "shall have general charge of the business affairs of the corporation." (Exhibit 5) Therefore, the President of Java Joe's has the authority to make business decisions for the corporation. At the time of the application for women owned business enterprise status, the President of Java Joe's was identified as David Pagnani in the corporation's 2002 Shareholder Agreement as well as at the New York State Department of State, Division of Corporations. (DED Brief at 7). Applicant acknowledged that David Pagnani was identified as President of Java Joe's at the NYS DOS, Division of Corporations until after the denial of the application was issued. (App Brief at 9) The name of the President was changed to Kathy Pagnani at the NYS DOS Division of Corporations in May 2018. The Minutes of the January 2017 Special Meeting wherein majority ownership was transferred to Kathy Pagnani does not indicate that Kathy Pagnani was named President when she became majority shareholder. The only document that identifies Kathy Pagnani as President at the time of the application is the application itself. None of the corporate documents confirm that.

A review of the relevant corporate documents demonstrates that while the application states Kathy Pagnani was President at the time of the application, at the time of the application David Pagnani was President of Java Joe's. Therefore, at the time the application was filed, the business documents did not allow the woman owner unrestricted decision-making authority.

CONCLUSIONS

Java Joe's Roasting Co., Inc. has failed to meet the regulatory criterion as set forth in 5 NYCRR 144.2(a)(1) and 144.2(b)(2).

RECOMMENDATION

For the reasons stated herein, the Division's determination to deny Java Joe's Roasting Co., Inc.'s application for certification as a women-owned business enterprise should be affirmed.

Matter of JAVA JOE’S ROASTING CO., INC

DED File ID No. 61836

Exhibit List

Exh. #	Description
1	Application for certification
2	NYSDED denial letter
3	Applicant appeal letter
4	NYS Department of State registration of corporation
5	Corporate Bylaws and Shareholders Agreement
6	Minutes Special Meeting of Shareholders
7	Stock certificates and stock transfer table
8	Resumes Kathy Pagnani and Eric Cole
9	Applicant’s Brief in support of appeal
10	DED Brief in opposition to the appeal