

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NY 12245

In the Matter

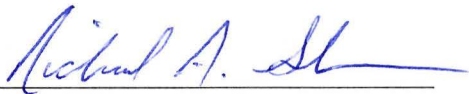
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the Application of **KPN Management Corporation**
DBA Express Employment Professionals
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58681

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

October 20, 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 to deny KPN Management Corporation DBA Express Employment Professionals ("KPN Management" 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 KPN Management does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by KPN Management for WBE certification by letter dated April 23, 2020 (exhibit 2). The letter set forth two grounds under former 5 NYCRR 144.2¹ for the denial. Applicant filed an appeal notice (exhibit 3) by letter dated May 21, 2020. By notice of hearing dated July 7, 2023 (exhibit 4), the Division advised applicant that the appeal hearing would be held virtually on August 3, 2023, using the Webex videoconferencing platform. I held a pre-hearing conference with the parties on July 12, 2023 during which I established a schedule for the exchange of exhibits and witness lists and briefly discussed the hearing procedure (*see* email to the parties dated July 13, 2023).

I convened the virtual hearing at approximately 10:00 a.m. on August 3, 2023. Edward Crossmore, Esq., appeared on behalf of applicant and called two witnesses: Kathryn Nivison, President and owner, KPN Management; and Harvey Homsey, Vice President, Franchise Systems, Express Services, Inc. William Chen, Esq., represented the Division and called one witness: Kimberly Motekew, Senior Certification Analyst. The virtual hearing was recorded via Webex and will be cited herein by reference to the time that the relevant testimony began (for example, a citation to testimony that begins at or about ten minutes and thirty seconds into the hearing would appear as "recording at 10:30").

As agreed to by the parties, exhibits and witness lists were exchanged prior to the day of the hearing. Six exhibits were submitted by the Division and none were submitted by applicant. The parties stipulated to the receipt of all six exhibits into the hearing record (recording at 9:45) (*see* exhibit list appended to this report).

¹ The regulations pertaining to minority and women business enterprise certification were amended, effective December 2, 2020. Because the Division denied the application prior to that date, the former MWBE regulations apply to my evaluation of the criteria cited for the denial.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a WBE are established by regulation (*see* former 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.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for KPN Management 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 cites two grounds for the denial of KPN Management's WBE application. Specifically, the Division notes that applicant is a franchisee of Express Services, Inc. ("ESI") and argues that applicant failed to (i) establish that applicant's franchise agreement permits the woman owner, Kathryn Nivison, to make decisions without restrictions (exhibit 2 at 2-3 [citing former 5 NYCRR 144.2(b)(2)]); and (ii) establish that KPN Management is an independent business enterprise (exhibit 2 at 3 [citing former 5 NYCRR 144.2(a)(2), (c)(2)]).

Position of Applicant

Applicant argues that KPN "has maintained WBE status since 2014 and no changes, alterations, or adjustments to the corporate structure or ownership [have] occurred" (exhibit 3). Applicant further argues that "[d]espite any regulations by its franchisor, Ms. Nivison maintains regular control over her independent enterprise" (*id.*).

FINDINGS OF FACT

1. KPN Management is a corporation, established in 2013, and is a "full-service staffing company providing employees to other companies for temporary, evaluation-to-hire, and direct hire placements" (exhibit 1 at 1-2 [items 1.C, 1.R, 1.S], 4 [item 5.A]).

2. The woman owner, Kathryn Nivison, is the sole owner of the business enterprise, and has been since its inception (exhibit 1 at 2 [item 1.O], 3 [items 3.A, 3.C]).

3. The woman owner, Kathryn Nivison, is the President and sole member of the Board of Directors of the business enterprise, and has been since its inception (exhibit 5 at 50; recording at 13:40; 17:40).

4. KPN Management is a franchisee and operates under a franchise agreement with ESI dated April 30, 2013, and an amendment thereto, dated August 31, 2013 (exhibit 5 at 1²; exhibit 6 at 1).

5. ESI provides a manual ("ESI manual") to its franchisees that is used in the operation of the franchise. The ESI manual includes, but is not limited to, the Expressway Manual, the Franchisee Handbook Manual, and the Procedures Manual (exhibit 5 § XIII.A.1).

6. Pursuant to the franchise agreement, applicant has agreed to operate the business enterprise "in strict compliance with the systems, procedures, methods, policies and requirements prescribed" in the ESI manual (exhibit 5 § XIII.B.1).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of KPN Management as a WBE pursuant to Executive Law Article 15-A. As discussed below, the Division cites two grounds in support of upholding the denial.

Business Agreements

The applicable regulatory criterion states that the business enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (former 5 NYCRR 144.2[b][2]).

Applicant acknowledges that the business enterprise is subject to a franchise agreement, but asserts that "Ms. Nivison maintains regular control over her independent enterprise" (exhibit 3). Applicant argues that the franchise agreement "is nothing more than a standard arrangement" for "protecting the brand" of the franchisor, ESI (recording at 3:35) and that the franchisor, ESI, "does not interfere, [and is not] involved in the day-to-day operations" of KPN Management (recording at 4:35). Applicant also notes that this is a recertification and that there have been no

² Exhibit 5 includes two pages numbered "1." The first of these two pages states that the agreement was made on April 30, 2013, the second states that the agreement was made on April 23, 2013. I rely upon the first page numbered "1" because it appears that it was intended to supersede the second page "1" (*see id.* ["AMENDED 04-30-13" and the initials "KN" appear at the top right corner of the first page numbered "1"]).

changes in the franchise agreement or applicant's business operations since the prior certification (recording at 5:10).

Ms. Nivison testified that the franchise agreement did not restrict her decision making with regard to the operations of the business enterprise. For example, Ms. Nivison testified that (i) she could not think of any restrictions ESI placed on her ability to choose clients for her business (recording at 27:50); (ii) there were "[n]o restrictions at all" on her decision to open a second office (*id.* at 29:20); (iii) ESI "has not had any input," and does not have approval authority, regarding her hiring decisions (*id.* at 32:00); and (iv) she does not need approval from ESI to advertise her business (*id.* at 35:50).

When asked whether ESI had interfered with any of her business decisions, Ms. Nivison testified, "[n]one that I can think of" (*id.* at 38:30). She further testified that she had not referred to the ESI manual or to the franchise agreement in making any business decision over the past 30 days (*id.* at 1:30:30), nor could she recall having done so over the past year (*id.* at 1:31:40).

Mr. Homsey testified that the franchise agreement is intended to protect the ESI brand, ensure brand recognition, and create consistency across franchisee territories (recording at 1:40:45). He further testified that the ESI manual provides "a guide" for how to operate a franchise under the ESI system (*id.* at 1:36:30). He acknowledged, however, that the franchise agreement requires strict compliance with the ESI manual (*id.* at 1:38:50).

The Division argues that the denial determination is supported by substantial evidence (recording at 2:56:40), and asserts that the testimonies of Ms. Nivison and Mr. Homsey demonstrate that there are multiple restrictions on how KPN Management operates (*id.* at 2:57:20). Ms. Nivison acknowledged that the franchise agreement requires all franchisees to operate in "strict compliance" with the requirements prescribed in the ESI manual (recording at 57:30; *see* exhibit 5 § XIII.B.1) and that ESI may terminate the franchise agreement if applicant fails to comply with any of the provisions of the agreement (tr at 58:50; *see* exhibit 5 § XV.B.3).

Among other things, the franchise agreement (i) requires applicant to use the Express Employment Professionals name and marks and precludes applicant from using other trade names or marks (recording at 1:01:30, 1:02:30, 1:03:40; exhibit 5 § I.C.7); (ii) precludes applicant from providing any services other than those authorized under the agreement (recording at 1:14:40; exhibit 5 § V.B.1); (iii) provides that all clients serviced by KPN Management will be the clients of ESI (recording at 1:07:30; exhibit 5 § II.C.3); (iv) limits applicant's operation to a territory established by ESI (recording at 1:07:00; exhibit 5 § II); (v) requires applicant to obtain ESI's approval prior to moving offices (recording at 1:18:40; exhibit 5 § V.D); (vi) requires applicant to implement ESI programs within applicant's assigned territory (recording at 1:20:30; exhibit 5 § V.G); (vii) requires applicant to submit all contracts to ESI for approval, except for ESI standard time cards and service agreements (recording at 1:24:10; exhibit 5 § V.P); (viii) prohibits applicant from establishing a website for the business without ESI approval (recording at 1:27:50; exhibit 5 § X.F); (ix) requires applicant to obtain ESI approval prior to transferring or selling the business enterprise (recording at 1:28:15; exhibit 5 § XIV.C); and (x) requires applicant to obtain ESI approval before engaging in career placement services under the franchise agreement (recording at 2:17:00; exhibit 5 § VIII.A).

The Division's denial determination is supported by substantial evidence. As described above, the franchise agreement places a multitude of restrictions on the woman owner's decision making in relation to the enterprise's business operations. Accordingly, by its express terms, the franchise agreement does not "permit . . . women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (former 5 NYCRR 144.2[b][2]).

Applicant failed to meet its burden to demonstrate that the record before the Division at the time of the denial did not contain substantial evidence to support the Division's determination to deny the application under the criteria set forth in former 5 NYCRR 144.2(b)(2).

Independence

The applicable regulatory criterion states that the applicant "must be an independent business enterprise" (former 5 NYCRR 144.2(c)(2); *see also* former 5 NYCRR 144.2(a)(2) [stating that "the business enterprise must demonstrate that it is an independent, continuing entity"]).

The Division argues that the parameters placed upon KPN Management by the franchise agreement demonstrate that the business enterprise is not independent (recording at 2:59:30). ESD analyst Motekew testified that "if it was not for the franchisor, the applicant business would not be able to [provide] the scope of services" for which certification is being sought (recording at 2:39:00). She further testified that "[t]he fact there is an additional entity, separate from the applicant business, that is required to be a part of the business entity – that is what creates an independence issue" (*id.* at 2:43:50).

Applicant argues that the denial determination in this matter has the effect of excluding "any franchise operation" from being certified (recording at 3:02:15). Applicant asserts that "at the federal level there is specifically a rule that provides that a franchise or licensing agreement does not automatically disqualify a business" (*id.* at 3:03:30). Applicant argues that New York State should not have "a blanket rule preventing women business enterprises [that] are franchisees from being qualified as a WBE" (*id.* at 3:06:50).

The Division does not assert that being a franchisee is an automatic basis for disqualification. Rather, as was made clear in the testimony, it is the number and extent of the restrictions set forth under the specific franchise agreement at issue in this proceeding that led the Division to deny the application on independence grounds (*see supra* at 4; recording at 57:25 – 1:28:30, 2:39:00, 2:59:30; exhibit 5). In addition to the restrictions discussed previously, I note that (i) applicant is required to use the computer systems and software specified by ESI (recording at 1:27:30; exhibit 5 § X.A); (ii) temporary employees placed by applicant with a client are paid through ESI's payroll (recording at 34:50, 2:05:40; exhibit 5 § VII.A); (iii) payments made by clients for the services provided by applicant are collected by ESI (recording at 2:05:50 exhibit 5 § VII.B); and (iv) ESI handles bookkeeping and client billing for applicant (recording at 2:06:45; exhibit 5 §§ IV.F, VII.B).

The question of whether every franchisee, regardless of the specific terms of their particular franchise agreement, is barred from being certified as a women-owned business

enterprise is not properly before me. Rather, on the basis of the franchise agreement at issue here, and the many restrictions on applicant's operations contained therein, I conclude that there is substantial evidence in the record to support the Division's determination that applicant is not an independent business enterprise.

Applicant 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 KPN Management is not an independent business enterprise, as required by former 5 NYCRR 144.2(a)(2) and 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 KPN Management's application on the bases that (i) the woman owner, Kathryn Nivison, is not permitted by the franchise agreement to make decisions pertaining to business operations without restrictions (*see* former 5 NYCRR 144.2[b][2]), and (ii) KPN is not an independent business enterprise (*see* former 5 NYCRR 144.2[a][2], [c][2]).

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny KPN Management Corporation DBA Express Employment Professionals certification as a women-owned business enterprise should be affirmed.

**Matter of KPN Management Corporation
DBA Express Employment Professionals
DED File ID No. 58681**

Exhibit List

Exhibit	Description
1	KPN Management WBE Application, signed July 28, 2017
2	Division WBE Denial Letter to KPN Management, dated April 23, 2020
3	KPN Management Appeal Notice, dated May 21, 2020
4	Notice of Hearing, dated July 7, 2023
5	ESI Franchise Agreement with KPN Management, dated April 30, 2013
6	Amendment to ESI Franchise Agreement, dated August 31, 2013