

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

In the Matter

- of -

the Application of **KEICHER METAL ARTS, INC.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 56273

RECOMMENDED ORDER

- by -

/s/

Helene G. Goldberger
Administrative Law Judge

March 25, 2021

SUMMARY

The determination of the Division of Minority and Women's Business Development of the New York State Department of Economic Development (Division or DED) to deny Keicher Metal Arts, Inc. (Keicher or applicant) recertification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

In a letter dated April 5, 2019 the Division determined that Keicher does not meet the eligibility requirements to be recertified as a woman-owned business enterprise and denied Keicher's application. *See*, DED Exhibit (Ex.) 2. The grounds for the Division's denial are:

- Pursuant to § 144.2(b)(1) of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), women do not make decisions pertaining to the business enterprise;
- Pursuant to §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii) of 5 NYCRR, the woman relied upon for certification, does not possess the working knowledge and ability needed to operate the business enterprise;
- Pursuant to 5 NYCRR § 144.2(b)(2), relevant business agreements do not permit the woman owner to make decisions without restrictions.

By letter dated April 12, 2019, Margaret Keicher, Vice-President of Keicher Metal Arts Inc. wrote to Cathy Powers of the MWBE Appeal Unit requesting guidance with respect to appealing the Division's April 5th determination. DED Ex. 10. By Notice of Written Appeal dated April 24, 2019, Ms. Powers notified Ms. Keicher that the company's appeal was due by June 24, 2019. Keicher submitted the applicant's timely appeal to the Division. With the appeal, Ms. Keicher submitted a copy of the company's Bylaws (Appendix A); the resumes of Margaret R. Keicher and Michael E. Keicher (Appendix B); a Transaction Detail by Account from 2007 (Appendix C) and a Waiver Notice of A Special Meeting of the Board of Directors of Keicher dated June 6, 2019 to create a new office of Chief Executive Officer. I am unable to consider Appendices C and D because they were not included as part of the documentation submitted with the application and thus, was not before the Division staff when it made its review. *See*, 5 NYCRR § 144.4(e).

Fawziyyah W. Slavov, Esq., Counsel for New York State Division of Economic Development, filed the Division's brief in response dated March 2, 2021 (DED Br.). With the response, the Division also submitted the affidavit of Raymond Emanuel, the Certification Director of the Division, dated February 25, 2021. Attached to Mr. Emanuel's affidavit are ten exhibits, which are identified in the attached exhibit chart. Among the exhibits included with the Response is a copy of Keicher's completed application for WBE recertification (*see* DED Ex. 1 [Application No.8153613 , submitted April 1, 2016]), as well as other application materials related to the bases for the Division's April 5, 2019 determination.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation. *See*, 5 NYCRR § 144.2. To determine whether an applicant should be granted WBE status or recertified with WBE status, the Division assesses the ownership, operation, and control of the business enterprise based on 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, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts. *See*, 5 NYCRR 144.5(a).

STANDARD OF REVIEW

On this administrative appeal, Keicher, as applicant, bears the burden of proving that the Division's denial of its 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

The Division

In the April 5, 2019 denial letter (DED Exhibit 2), the Division determined that the application failed to meet the WBE certification criteria related to Margaret Keicher's role in the company based upon its determination that *women do not make decisions pertaining to the operation of the business enterprise* pursuant to 5 NYCRR § 144.2(b)(1); *women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise* pursuant to 5 NYCRR §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii); and *relevant business agreements do not permit the woman owner to make decisions without restrictions* pursuant to 5 NYCRR § 144.2(b)(2).

The Division found in its review of the 2016 application that Ms. Keicher managed primarily administrative and financial duties at Keicher including payroll and taxes, correspondence, IT functions, billing, tracking of equipment maintenance, answering phones, insurance and human resources. Emanuel Affidavit (Aff.) ¶¶ 15-16; DED Exs. 5-6; Appendix B. DED staff contrasted this description with that contained in the resume and narrative of Mr. Keicher that cited his responsibilities as designer, fabricator installer, shop foreman, layout man and having direct interaction with general contractors, buildings owners, architects and sub-contractors among other roles. Emanuel Aff. ¶¶ 17-18; DED Exs. 6, 7 and Appendix B. In addition, DED staff point to Mr. Keicher's decades of experience in the metal arts. Emanuel Aff. ¶ 18; DED Ex. 6 and Appendix B.

With respect to the control aspects of the Division's determination, DED staff notes that Mr. Keicher is president of the company and Keicher's Bylaws designate him the chair with respect to board meetings. Emanuel Aff. ¶ 20; DED Ex. 3, Appendix A. Finally, based on its review of the entire application and what staff determined was Ms. Keicher's lack of expertise in the core functions of the company, staff determined that she lacked the ability and the ability based on corporate dictates to control the enterprise. Emanuel Aff., ¶ 21.

With respect to the two records submitted with Keicher's appeal – the fiscal information from 2007 and the Board of Directors determination of June 17, 2019 to create a new office of Chief Executive Officer with Ms. Keicher appointed to that role - (Appendices C and D), staff maintains that because that information was not part of the documentation before staff at the time of the application, it cannot be considered. DED Br., pp. 11-12

Keicher

In the company's appeal, Ms. Keicher argues that Article 15-A of the Executive Law only requires that the woman in control of the WBE only has to own at least 51% of the company and that the law does not require the woman to be the named president. Appeal Letter (App.), p. 2. And, with respect to the Bylaws, Ms. Keicher notes that they do not identify Mr. Keicher as the highest ranking individual in the company but rather they designate the Chairperson to preside over all the Board of Director meetings. *Id.*

With respect to her role at the company, Ms. Keicher affirmed that she does all the administrative and office management but also stressed that she seeks new job opportunities, estimates and submits bids, interacts with general contractors, architects and building owners, negotiates contracts, establishes and tracks all projects, ensures product quality, attends project meetings, is sales distributor for the plaques and works in the shop as needed. Appeal Letter. p. 3. Ms. Keicher maintained that while she may not be familiar with every aspect of fabrication, she ensures that she has experienced quality employees to fulfill the work specifications and ensures that jobs are done according to requirements and on time. Additionally, she identified equipment that she has operated when needed. *Id.* Ms. Keicher further explained that as the company owner, she makes the decisions regarding hiring more people, purchasing additional equipment and determining the ways to improve the company's processes. *Id.*

In further explaining her role, Ms. Keicher does not dispute Mr. Keicher's activities noted by DED staff but emphasizes that the Division failed to note was that she too interacts with the general contractors, building owners, architects, and sub-contractors. Appeal Letter, p. 4. Ms. Keicher also states that she estimates jobs, purchases equipment, does problem determination and resolution, "among many other things." *Id.*

Ms. Keicher explains her role in transforming it into a new shop and office and her establishment of all the office software including both administrative functions, AutoCad and BluePrinting Drafting. *Id.* Ms. Keicher provides her background as having grown up in a metal restoration business and states that her husband Michael only learned the business when he came to work for her father. Appeal Letter, p. 5.

With respect to control, Ms. Keicher reiterates her 51% majority share and the company's decision to designate her as CEO as the June 2019 meeting. *Id.* She concludes the appeal letter by stating that Keicher Metal Arts was granted WBE status in 2013 and nothing has changed to warrant denial. Appeal Letter, p. 6.

FINDINGS OF FACT

1. Keicher Metal Arts, Inc. is located at 93 Route 84, Cairo, New York. DED Ex. 1 at 1.E.
2. At the time of the application review, Margaret R. Keicher served as Vice-President, Secretary and Treasurer and owned 51% of the company. DED Ex. 1, 3.A.; DED Ex. 3; App. A. Michael Keicher was President and Chairman with ownership of 49% of the company. DED Ex. 1, 3.A.; DED Ex. 3; Appendix A.
3. Keicher applied for recertification as a WBE on April 1, 2016. *See*, DEC Ex. 1.
4. Keicher is engaged in custom ornamental metal fabrication and installation. *See*, DED Ex. 1 at 5.C and Emanuel Aff., ¶ 13.
5. The company was established in or around 2007. App. A.
6. Ms. Keicher's family owned O'Donnell Metal Maintenance and Mr. Keicher came to work for the company where he learned the business of metal restoration. Appeal Letter, p. 5.
7. Ms. Keicher established all the systems in the new office that Keicher Metal Arts established including both administrative software systems as well as substantive ones like AutoCad and BluePrint Drafting. Appeal Letter, p. 4. Ms. Keicher's responsibilities at the company include all the administrative, financial, human resources aspects as well as interaction with prospective clients, contractors, architects, building managers and owners. DED Ex. 5, App. B. In addition, she negotiates contracts, does sales and estimates, job estimating and bid submissions, scheduling, purchasing and inventory control, attends project meetings and ensures quality control. *Id.*, DED Ex. 6.
8. Mr. Keicher performs design, estimating, fabrication and serves as AutoCad Draftsman, shop foreman, artists, sculptor, pattern and mold maker, lost wax caster and installer. DED Exs. 4, 7; App. B.
9. The Keicher Metal Arts, Inc. Bylaws provide that each board member shall have one vote irrespective of the number of shares. App. A, DED Ex. 3, Section 7. Section 5 of the Bylaws provides that the Chairperson of the Board, if any and if present, shall preside at all meetings of the Board of Directors. App. A, DED, Ex. 3.

DISCUSSION

This recommended order considers Keicher's April June 18, 2019 appeal including Exhibits A-B and the response of the Division staff including Exhibits 1-10. I am not relying upon Keicher's Exhibits C and D as these records were not before the Division at the time of the application. The bases identified in the Division's April 5, 2019 denial letter (*see* DED Exhibit 2) are addressed below.

I. Operation

Section 144.2(b)(1) of 5 NYCRR requires that "[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise."

Sections 144.2(b)(1)(i) and 144.2(b)(1)(ii) require that the woman relied upon for certification demonstrate adequate managerial or technical competence to operate the business enterprise and has demonstrated the working knowledge and ability needed to operate the business enterprise.

Ms. Keicher's resume, narrative and her appeal letter describe her many duties with the company. While Division staff focus on her many administrative duties, they omit to address her other duties in the company that appear to mirror those of her husband Michael. Those are specifically interactions with general contractors, architects, building owners, involvement with contract negotiations, attendance at project meetings, quality control and hands-on work as needed in the shop. Appeal letter, p. 3; DED Exs. 5, 6. It is clear that her role at the firm goes beyond back room functions and that she has played a key role in setting up the firm when it moved to its current premises and in continued oversight.

Accordingly, it would appear that Ms. Keicher does exercise independent control of the company in its many aspects. As she notes, the fact that she delegates responsibilities with respect to fabrication does not automatically mean that the company relinquishes eligibility for certification. *See, Matter of J.C. Smith, Inc. v. New York State Dept. of Economic Dev.*, 163 A.D.3d 1517, 1520 (4th Dept. 2018) citing Executive Law § 310[15]; 5 NYCRR § 144.2(b)(1).

DED staff maintain that Ms. Keicher does not have the expertise to run the company and distinguish her husband's many years in metal work. Emanuel Aff. §§ 18-19. However, based on Ms. Keicher's resume, narrative and her appeal letter, it appears that she literally grew up in the industry, built the current structure of it from its onset, and has had 18 years of experience both in working for Michael Keicher d/b/a Keicher Metal Arts and Keicher Metal Arts, Inc. Appendix B; DED Ex. 5.

The difficulty however with the company's eligibility rests with its corporate structure. Ms. Keicher owns the majority of shares of the company however the Bylaws provide that voting is done not by shares but rather one director – one vote. Thus, Ms. Keicher has no more legal control over the enterprise than her husband. And, the company's appeal does not provide any information to indicate that Ms. Keicher exercises ultimate control. The appeal includes a 2019

Board of Directors determination to designate Ms. Keicher as CEO, but I cannot consider this record as it was not part of the original application. Appendix D.

Accordingly, Keicher failed to demonstrate in its application and/or in its appeal enough information to rebut the staff's conclusions to the contrary that Ms. Keicher was in control of the significant operations of the applicant. And, based on the record before me, I find that the Division reasonably concluded that Ms. Keicher failed to demonstrate operational control of the business.

II. Control

The applicable regulatory criteria state that the “[a]rticles of incorporation, corporate bylaws, partnerships agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make those decisions without restrictions.” 5 NYCRR § 144.2(b)(2). The staff focused on the designation by the applicant of Mr. Keicher as Chairperson and President as determinative of his control of the company. However, as noted by Ms. Keicher in the appeal, the Bylaws only provide that the Chairperson presides over meeting of the board. App. A, Section 5; DED Ex. 3. However, the Bylaws do not give Ms. Keicher control of the company. Rather, because each director is given one vote, she has no controlling decision-making authority. App. A, DED Ex. 3, Section 7.

While the Board of Directors determined to make a new office – Chief Executive Officer – and to designate Margaret Keicher to that role with specific authority as the “highest-ranking member of this company . . .”, this action took place in June 2019 (Appendix D) and thus, this record was not part of the application for recertification and cannot be considered here. 5 NYCRR § 144.4(e).

With respect to Keicher's reference to past certifications of the company, the State is rarely estopped from addressing errors in order to carry out its statutory mandates. *See, Matter of Empire Air Specialties v. New York State Dept. of Economic Dev.*, 2016 NY Slip Op. 816909 (U) (7/29/16 Sup. Ct. Albany County). The WBE status is granted for three years pursuant to Executive Law § 314(5) and the Division is charged with reviewing every application whether for certification or recertification on its merits and is not bound by prior determinations. *See, Matter of the Application of Coverco, Inc.*, Recommended Order (ALJ O'Connell, 1/27/17), Final Order 17-06 (1/30/17); 159 A.D.3d 1538 (4th Dep't 2018) (court confirmed agency's determination and dismissed Article 78 petition challenging it).

Based upon the record before me, I conclude that the Division reasonably found that the company's governing documents precluded Ms. Keicher from control of the enterprise.

CONCLUSION

1. With respect to the operation criterion at 5 NYCRR § 144.2(b)(1), 144.2(b)(1)(i) and 144.2(b)(1)(ii), Keicher did not meet its burden to show that the Division's April 5, 2019 determination to deny the application for WBE recertification is not based on substantial evidence.

2. With respect to the control criteria at 5 NYCRR §§ 144.2(b)(2), Keicher did not meet its burden to show that the Division's April 5, 2019 determination to deny the application for WBE recertification is not based on substantial evidence.

RECOMMENDATION

While I departed from the Division's findings with respect to Ms. Keicher's expertise and authority within the company, the Division's determination to deny Keicher's application for recertification as a woman owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

Exhibit Chart
Matter of Keicher Corporation
WBE File ID No. 56273

EXHIBIT NO.	DESCRIPTION
DED-1	Application for Certification dated April 1, 2016
DED-2	Denial Letter dated April 5, 2019
DED-3	Bylaws - 2007
DED-4	Resume of Michael Keicher
DED-5	Resume of Margaret Keicher
DED-6	Narrative of Margaret Keicher's responsibilities – June 5, 2018
DED-7	Narrative of Michael Keicher's responsibilities June 5, 2018
DED-8	Certified Mail – Green Card Receipt
DED-9	Minutes of Special Meeting of Board of Directors dated June 17, 2019
DED-10	Letter dated April 12, 2019 from Margaret Keicher to Cathy Powers re: appeal
APP-A	By Laws
APP-B	Resumes of Margaret R. Keicher & Michael E. Keicher
APP-C	Keicher Metal Arts, Inc. 2007 Transaction Detail
APP-D	Notice of Special Meeting of Board of Directors – June 6, 2019 and Minutes – June 17, 2019 ¹

¹ The ALJ does not consider Appendices C and D as part of this record.