

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

In the Matter

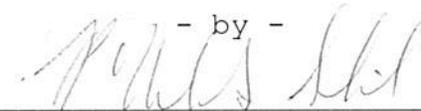
- of -

the Application of
David J. Hummel Enterprises, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60649

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

March 12, 2018

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 the application of David J. Hummel Enterprises, Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") 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 ("5 NYCRR") Parts 140-144, by David J. Hummel Enterprises, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

David J. Hummel Enterprises, Inc.'s application was submitted on January 22, 2016 (Exh. DED1).

The application was denied by letter dated October 18, 2016, from Bette Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Debora Hummel's ownership and operation of the applicant.

In a two-page letter dated November 14, 2016, the applicant appealed from the denial.

By letter dated January 9, 2017, the Division notified the applicant that its written appeal should be received on or before March 6, 2017.

In a five-page letter dated April 10, 2017, applicant submitted its written appeal. Enclosed with the appeal were 28 exhibits, described in the attached exhibit chart as A1-A28.

In an eight-page memorandum dated February 21, 2018, the Division responded to the applicant's appeal. Enclosed with the

response were nine exhibits, described in the attached exhibit chart as DED1-DED9.

On February 22, 2018, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

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.

STANDARD OF REVIEW

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

Position of the Division

In its denial letter, the Division asserts that the application failed to meet three separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Debora Hummel's capital contributions are 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).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Debora Hummel, shares in the risks and profits in proportion with her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

Third, the Division found that the woman owner relied upon for certification, Debora Hummel, does not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

Position of the Applicant

David J. Hummel Enterprises, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. David J. Hummel Enterprises, Inc. has a business address of 729 Wilton Gansevoort Road, Gansevoort, New York (Exh. DED1 at 1). The application states that the business consists of the sale of commercial cooking equipment (mixers, ovens, ranges, hoods and ventilation), warewashing, refrigeration and freezers (reach-in and walk-in), small wares, table top items, beverage and bar supplies, food prep, storage and transport items, sanitation and maintenance supplies, and holding and warming equipment. It also provides 24/7 on-call service including warranty, repair, removals, installation and planned maintenance programs as well as full design and project management services from conception to completion, including: preliminary design, mechanical and electrical drawings, cut sheets, detailed budget, construction documents, contractor submittals, procurement and installation, and final inspection of the site, installation and equipment. The firm also provides delivery and installation of equipment to restaurants, schools, and business facilities as well as offering training and certification courses in ServSafe on food handling, preparation, cooking, storage, and disposal. Exh. DED1 at 4.

2. David J. Hummel Enterprises, Inc. was established on April 21, 1997 and at the time of the application, Debora Hummel owned 51% of the firm and served as its president and treasurer while her husband, David, owned 49% of the firm and served as its vice president, secretary and treasurer (Exh. DED1 at 3).

3. The application states that Mr. and Ms. Hummel each contributed ██████ to the firm at its inception (Exh. DED1 at 3). An explanation provided with the application materials states that this money came from a joint bank account and was used for basic start-up costs. Other application materials indicate that over the years, profits have been invested back into the company, but the dates and amounts of these additional contributions are not specified (Exh. DED3).

4. In 2015, the total wages and distributions received by Mr. Hummel were ██████ while Ms. Hummel received ██████ (Exh. DED4 at 10-12). In 2014, Mr. Hummel received a total of ██████ and his wife received ██████ (Exh. DED5 at 1-3). In 2013, Mr. Hummel received a total of ██████ and his wife received \$102,758 (Exh. DED6 at 1-3).

5. At the firm, Ms. Hummel's primary responsibilities are administrative, including accounting, purchasing, sales/marketing, and human relations. Mr. Hummel's primary responsibilities are in servicing and installation of equipment. He possesses a strong knowledge of the technical and mechanical aspects of the business and works primarily on site with the field workers. He oversees daily operations, and schedules all field work for both the service and installation departments of the firm (Exh. DED9).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth three bases related to Ms. Hummel's ownership and operation of David J. Hummel Enterprises, Inc. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Debora Hummel's capital contributions were 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). The relevant facts cited in the denial letter are: (1) the application states that Ms. Hummel owns 51% of the firm and her husband owns the remainder; (2) they each made a [REDACTED] contribution to the firm, but there was no supporting documentation to prove this; and (3) the application materials do not establish that she made any contribution to the firm.

On the appeal, Ms. Hummel states that she has made contributions to the business in proportion to her ownership interest in the form of money, property, equipment, and expertise. Nevertheless, none of these contributions are identified on the application. First, with respect to her contribution of money, she claims to have contributed a total of [REDACTED] in cash to the business ([REDACTED] in December 2015 and [REDACTED] in March 2017) while her husband contributed [REDACTED] in December 2015. As proof of these contributions she provides copies of cancelled checks and other bank documents (Exh. A2). Second, with respect to her contribution of property, she states that she and her husband jointly own the property that the firm rents to use as an office, showroom, and warehouse (Exh. A9), but does not explain how this rental agreement shows a contribution of property. Third, with respect to her contribution of equipment, she states that she owns 51% of all the equipment the firm owns, but does not explain how this is a contribution of equipment to the firm. Fourth, with respect to her contribution of expertise, she states she manages all sales in the salesroom, works with customers selling all types of equipment, oversees the financial/accounting department, makes hiring and firing decisions, and manages marketing. As proof of this expertise contribution she provides copies of signed company checks (Exh. A3), signed bank reconciliation statements (Exh. A4), signed payments to vendors (Exh. A6), and signed letter offers of employment (Exh. A5).

In its response, the Division refers to the application and the narrative explanation regarding contributions which both state that Mr. and Ms. Hummel each contributed ██████ to the firm (Exh. DED1 at 4, DED3). The Division argues that because Ms. Hummel did not claim to have made a greater contribution (reflecting her 51% ownership), the firm cannot qualify as a WBE. The Division also notes that the claim of a ██████ contribution is at odds with information in the firm's 2015 tax forms which show additional paid-in capital of ██████ (Exh. DED4 at 6, line 23) which is unexplained in the application materials. With respect to Ms. Hummel's claimed contributions in 2015, the Division notes that these monies were not treated as additional paid-in capital on the firm's 2015 tax return (Exh. DED4 at 6, line 22).

Because Ms. Hummel's claimed contributions identified in the appeal are not listed in the application and were not quantified in the accompanying materials, these claims were not before the Division at the time of its denial, and therefore, are not relevant to this appeal. Based on the evidence in the record, the applicant has failed to demonstrate that the woman owner Debora Hummel's capital contributions are 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). The Division's denial was based on substantial evidence.

The Division also found that the applicant failed to demonstrate that the woman owner, Debora Hummel, shares in the risks and profits in proportion with her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The relevant fact cited in the denial letter is that for each tax year for which information was provided in the application, Mr. Hummel received greater wage compensation than his wife.

On the appeal, Ms. Hummel states that she shares in the risks in proportion to her ownership interest, including leases, lines of credit, loans, insurance claims, and lawsuits. As proof of the risk she has assumed, she includes a document showing her as a guarantor of a ██████ line of credit (Exh. A7), the signed lease (Exh. A9), and signed credit applications (Exh. A8). With respect to the benefits she and her husband

receive from the corporation, Ms. Hummel states that she takes a proportionate share of the company's profits, but chooses to pay her husband more than herself and insists that salary compensation is a separate issue from overall risk and company profit.

In its response, the Division states the firm is ineligible to be certified as a WBE because Mr. Hummel receives greater wage compensation than does his wife. The Division notes that the total wages and distributions received in 2015 by Mr. Hummel were [REDACTED] while his wife received [REDACTED] (Exh DED4 at 10-12). In 2014 Mr. Hummel received a total of [REDACTED] while his wife received [REDACTED] (Exh. DED5 at 1-3). In 2013, Mr. Hummel received a total of [REDACTED] while his wife received [REDACTED] (Exh. DED6 at 1-3). The Division concludes that because Mr. Hummel receives more benefit from the corporation, the firm is not eligible to be certified as a WBE.

Based on the evidence in the record, specifically the larger benefit Mr. Hummel received from the firm, applicant failed to demonstrate that the woman owner, Debora Hummel, shares in the risks and profits in proportion with her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's denial was based on substantial evidence.

Operation

In its denial letter, the Division found that the woman owner relied upon for certification, Debora Hummel, does not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The relevant facts cited in the denial letter are: (1) the firm is primarily engaged in the sale and servicing of refrigerators and other kitchen equipment; (2) Ms. Hummel has no training or managerial experience in the servicing or installation of refrigerators; and (3) her husband has over forty years of relevant industry experience.

On the appeal, Ms. Hummel states that the Division mischaracterizes the nature of the firm's business as being primarily engaged in the sale and servicing of refrigerators and other kitchen equipment. Rather, she argues that it is a full-

service dealership engaged in a broad range of services from the sale of small wares to all types of commercial equipment including full scale projects. Citing the description of the business in the application (see finding of fact #1), she argues that no single person possesses all the skills needed to run all aspects of the company and that she hires employees to manage the various departments of the firm. She states that she oversees the operation and management of the entire company. While her husband works with the project department, he has little involvement with showroom sales, marketing, purchasing, accounting or human relations and has no experience in design work or architectural drawings. Her husband's role is limited to his technical knowledge of refrigeration and walk-ins.

In addition, Ms. Hummel challenges the Division's claim that she has no training or managerial experience in the servicing and installation of refrigerators and states she has twenty years of such experience and meets weekly with the managers of each department at the firm (Exh. A10). She also argues that the firm has five major divisions (service, projects, showroom sales, accounting/human relations, and purchasing) so the servicing and installation of refrigerators is an extremely limited aspect of the overall business. Because of this, the technical skill to service and install refrigeration units is not necessary to manage the company. She concludes that her years of experience in the industry should be considered relevant to her qualifications to operate the business.

In its response, the Division argues that Mr. Hummel possesses decades of experience in the industry that Ms. Hummel lacks. She primarily manages the firm's financial matters, marketing and the day-to-day operations of the firm's showroom, but relies on her husband's electrical skills, product knowledge and construction management experience. The Division bases its argument on the Hummels' resumes. Hers shows decades of managing financial and marketing matters, as well as overseeing the firm's showroom (Exh. DED7), while his shows prior experience in performing electrical and design work in the refrigeration equipment industry and his work with the firm designing projects, supervising field work, and servicing equipment (Exh. DED8). The information in the resumes is

confirmed by a narrative description of the owners' roles at the firm (Exh. DED9). The Division concludes that the record contains no evidence that Ms. Hummel has ever designed a project, overseen field work, or that she has the ability to do so. Because of these facts, the firm is ineligible to be certified as a WBE. Rather, the Division concludes, the firm should more properly be considered a family business.

While it is impossible based on the record on appeal to discern the proportion of revenue the firm derives from its sales operations in comparison with that from its service and installation operations, it was reasonable to conclude that servicing and installation are significant aspects of the firm's business. The narratives of the Hummels' duties at the firm (Exh. DED9) as well as their resumes (Exhs. DED7 & DED8) show that he has the technical competence and managerial experience to oversee the servicing and installation operations, while his wife oversees the administrative operations of the firm. Based on the evidence in the record, applicant failed to demonstrate that the woman owner, Debora Hummel, has adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Debora Hummel's capital contributions are 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).

2. The applicant failed to demonstrate that the woman owner, Debora Hummel, shares in the risks and profits in proportion with her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

3. The applicant failed to demonstrate that the woman owner relied upon for certification, Debora Hummel, has adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

RECOMMENDATION

The Division's determination to deny David J. Hummel Enterprises, Inc.'s application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
David J. Hummel Enterprises, Inc.**

**DED File ID No. 60649
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Statement regarding capital contribution
DED4	2015 corporate tax returns
DED5	2014 K-1 form
DED6	2013 K-1 form
DED7	Debora Hummel's resume
DED8	David Hummel's resume
DED9	Narrative
A1	Denial letter
A2	Proof of cash investment
A3	Evidence of signed checks
A4	Signature on monthly bank statements
A5	Offer letters of employment
A6	Signed letters to vendors
A7	Personal guarantee on line of credit
A8	Credit applications - vendors
A9	Lease agreement
A10	Affidavits of employees
A11	Application

A12	Narrative re: duties of owners
A13	Application affidavit
A14	Personal net worth affidavit
A15	DOS registration information
A16	Corporate tax returns
A17	Personal tax returns
A18	W2 and 1099 forms
A19	Narrative regarding initial investment
A20	Banking information
A21	Corporate financial statements for 2014 & 2015
A22	Resumes
A23	Articles of incorporation
A24	Stock certificates and ledger
A25	Board minutes 1/4/16
A26	Corporate bylaws
A27	Minutes of first board meeting
A28	Corporate filing receipts