

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

In the Matter

- of -

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

NYS DED File ID No. 9877

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script that reads "Maria E. Villa". The signature is written in dark ink and is positioned above a horizontal line.

Maria E. Villa
Administrative Law Judge

August 17, 2017

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 Panko Electrical & Maintenance, Inc. ("Panko" 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 Panko does not meet the eligibility criteria for certification as a WBE.

The Division denied Panko's application for WBE certification (Exhibit 1) by letter dated January 30, 2017. Exhibit 2. 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 operates and controls Panko for certification purposes. By letter dated February 28, 2017, applicant appealed from the Division's determination to deny the application. Exhibit 3. Applicant sent a second letter dated May 18, 2017 (Exhibit 4), and the Division responded by letter dated July 25, 2017, providing information as to the appeal process, and notifying applicant of the hearing scheduled for August 8, 2017. Exhibit 5.

The hearing took place as scheduled on August 8, 2017. Applicant was represented by Dawn J. Lanouette, Esq., Hinman, Howard & Kattell, Binghamton, New York. Barbara Panko and Michael Panko testified on behalf of applicant. Division staff was represented by Phillip Harmonick, Esq., and called Glenn Butler, a Senior Certification Analyst for the Division, as a witness. The hearing was recorded on two compact discs, and this report cites to that recording as "Hearing Recording ('HR') at ___." The hearing recording was provided to the administrative law judge on August 10, 2017, and on that date the record closed.

Both applicant and Division staff offered exhibits, and those exhibits 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 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, 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 Panko'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

Division

The Division argued that applicant failed to meet two operational requirements for certification as a woman-owned business, pursuant to Section 144.2 of 5 NYCRR. Specifically, the Division asserted that Barbara Panko, the woman owner, did not make decisions pertaining to Panko's operation, as required by Section 144.2(b)(1). In this regard, the Division cited the following "relevant facts" in the denial letter:

- Panko Electrical & Maintenance is primarily engaged in providing electrical contracting services.
- Mr. Michael J. Panko, the Vice-President of Panko Electrical, is primarily responsible for managing significant operations of the business, including estimating and supervising field operations.

Exhibit 2, at 2.

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

- Ms. Panko has no demonstrated training or technical competence in electrical contracting.
- Mr. Panko has obtained relevant licensure as a master electrician, and serves as the qualifier for various license [sic] of Panko Electrical.

Id.

The Division also took the position that applicant had failed to demonstrate control of the business, specifically, that the woman owner had not demonstrated control of business negotiations through the production of signed documents, as required pursuant to Section 144.2(b)(3). The Division observed that "Mr. Panko executed each of the contracts between Panko Electrical and its clients submitted as part of the application." Exhibit 2, at 3.

Applicant

In its February 28, 2017 notice of appeal, applicant contended that Ms. Panko “substantially operates and controls the business and its day-to-day operations.” Exhibit 3, at 1. Applicant asserted further that Ms. Panko was actively involved in all aspects of the business. With respect to the contracts submitted as part of the application, applicant argued that although the vice-president, Michael Panko, was the eventual signatory of the contracts, the fact that Ms. Panko’s signature did not appear should not be taken to indicate that she was not involved in the contracting process. Finally, applicant maintained that there was no requirement that Ms. Panko hold an electrical license or be considered competent as an electrical contractor, and noted that Panko “was previously certified under these exact same circumstances.” Id., at 2.

FINDINGS OF FACT

1. Panko Electrical & Maintenance, Inc. is an electrical contracting business located at 1080 Chenango Street, Binghamton, New York. Exhibit 1, at 1.
2. The business was established in 1985 by Barbara Panko and her husband, Michael P. Panko. Michael P. Panko has since retired, and Ms. Panko’s son, Michael J. Panko, is now a vice-president. Exhibit 1, at 2-3.
3. Panko has 32 employees. Of those, 20-24 are electricians, and the remaining employees do office work. HR at CD 1, Track 2, at 13:20.
3. Barbara Panko does not have an electrician’s license. Her son, Michael Panko, is certified as a master electrician. Exhibits 7 and 8.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification to Panko as a women-owned business enterprise¹ pursuant to Executive Law Article 15-A. 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. Moreover, the woman owner must have adequate managerial experience or technical competence in the business enterprise seeking certification, pursuant to Section 144.2(b)(1)(i).

Applicant maintained that Ms. Panko made decisions pertaining to Panko’s operation, noting that she had over forty years’ experience running the business. Applicant noted that Barbara Panko provided personal guarantees and financial security for Panko, that she had final say over which jobs Panko would bid upon, and that she managed all of the financial aspects of the business. Applicant argued further that it was not necessary for Ms. Panko to be a licensed

¹ 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”)).

electrician, pointing out that the regulation requires either adequate managerial experience or technical competence, not both.

In support of its arguments, applicant cited to Matter of Beach Erectors, Inc., NYS DED File No. 10619 (Recommended Order, June 14, 2017) (Final Order No. 17-38, June 20, 2017). Matter of Beach is distinguishable. In that case, the woman owner was the president and sole shareholder of a business that was started in 1989. Recommended Order, at 7. Initially, she prepared all the estimates, supervised all the field operations and managed all the projects by herself. Id., at 9. She trained other employees, including her son and her husband, to be project managers. Id., at 7. She prepared the majority of the bid documents, and was solely responsible for supervising field operations, and neither her husband nor her son had the authority to sign bid proposals or estimates, enter into contracts, or make binding financial decisions on behalf of the business. Id., at 8. This factual framework is absent in the instant case, where Ms. Panko does not prepare estimates, supervise field operations, train employees, or possess the technical expertise to evaluate their work. While Ms. Panko testified that she is able to perform “take-offs,” which involve simply counting the number of switches and receptacles required for a job, she stated that she cannot read blueprints, and that she goes to job sites “only once in a great while.” HR at CD 1, Track 2, at 29:55, 47:40 and 53:45.

The Division relied upon Matter of Northeast Stud Welding Corp., 211 A.D.2d 889 (3rd Dept. 1995), in which the court concluded that the denial of an application for certification as a women-owned business was properly denied. The court reasoned 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. Noting that, while not dispositive, the woman owner had no training or expertise in welding, which was the construction service provided by the business, the court observed 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). The court concluded that the enterprise was a family business.

The Division’s arguments on this point are persuasive. As the Division argued, the individuals who manage the significant operations of Panko’s business are non-minority males, who possess the requisite expertise to evaluate the first line workers, as opposed to Ms. Panko, whose role is primarily management of financial matters, rather than overseeing field operations or developing estimates. As was the case in Matter of Northeast Stud Welding, Panko is a family business, rather than a women-owned business enterprise.

The Division also denied the application because, according to the Division, applicant failed to show that Ms. Panko had control of business negotiations. The Division noted that the contracts provided by applicant bore Michael J. Panko’s signature. See Section 144.2(b)(3); Exhibits 9, 10 and 11. It was reasonable for the Division to conclude, based upon the documents provided, that Ms. Panko did not exercise such control. Although applicant’s witnesses testified credibly regarding Panko’s contracting practices, the documentation before the Division indicated that Michael J. Panko signed contracts and held relevant licensure, and that Barbara Panko did not.

Finally, applicant argued that the fact that Panko was previously certified should have been taken into account in reviewing the application. This assertion is unavailing. As the Division notes, a prior error by the agency does not preclude the agency from correcting that error in connection with the review of a subsequent application. See Pascual v. State Bd. of Law Examiners, 79 A.D.2d 1054, 1055 (3rd Dept. 1981) (“[a]n administrative body may correct its erroneous interpretation of the law”).

The Division’s determination was supported by substantial evidence, and should be affirmed.

CONCLUSION

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

RECOMMENDATION

The Division's determination to deny Panko’s application for certification as a women-owned business enterprise should be affirmed.

Matter of Panko Electrical & Maintenance, Inc.
DED File ID No. 9877
Exhibit List

Exhibit No.	Description	Received?
1	June 27, 2016 application	✓
2	January 30, 2017 denial letter	✓
3	February 28, 2017 notice of appeal	✓
4	May 18, 2017 letter from Ronald L. Greene, Esq. to Cathy Powers, NYS DED	✓
5	July 25, 2017 notice of hearing	✓
6	Responsibilities List	✓
7	Electrician Licenses	✓
8	Electrician Licenses	✓
9	Subcontract Agreement – Mancini (2014)	✓
10	Subcontract Agreement – Murnane (2015)	✓
11	Subcontract Agreement – FAHS (2015)	✓
12	By-Laws	✓
13	Shareholder Agreement	✓
14	November 12, 2012 Resolution of the Board	✓
15	Payroll Submission – U.S. Department of Labor	✓
16	Payroll Worksheet	✓
17	Tax Deposit	✓
18	Tax Withholding	✓
19	Certified Payroll	✓
20	Subcontract Agreement – Mancini (2012)	✓
21	Bank Signature Authorization	✓
22	December 16, 2016 Term Note	✓
23	October 2015 Term Note	✓
24	Subcontract Agreement – Mancini (2016)	✓
25	Town of Vestal Operating Permit Application	✓
26	Employer’s Quarterly Federal Tax Return (2016)	✓
27	Employer’s Quarterly Federal Tax Return (2015)	✓
28	Corporate Tax Return (2015)	✓
29	2015 W-3 Transmittal	✓
30	Banking Resolution	✓
31	October 24, 2011 Demand Note	✓
32	May 23, 3013 Term Note	✓

33	Apalachin Fire District Proposal	✓
34	Marcy Correctional Facility Bid	✓
35	Western Surety Company Surety Bond	✓