

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501

In the Matter

- of -

the Application of PARK SALES & SERVICE, INC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 68237

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 25, 2023

This matter considers the appeal by Park Sales & Service, Inc, (“Park Sales” or “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 (5 NYCRR) parts 140144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On September 29, 2020, Nancy Rossi, as President, applied on behalf of Park Sales for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On August 1, 2022, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR §144.2(b)(2);
 - (b) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (c) Ownership must not have been allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5);

(d) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1); and

(e) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2).

3. On September 14, 2022, Park Sales submitted a Request for a Hearing. (APP Exhibit 1)

4. On August 18, 2023, a Notice of Hearing was sent to all parties. (Tribunal Exhibit 1)

5. On September 19, 2023, a hearing was held and concluded.

FINDINGS OF FACT

6. Park Sales is a business engaged in sales, repair, and maintenance of portable fire extinguishers. (DED Exhibit 2) Nancy Rossi is the President of Park Sales and has a 51% ownership interest. Lawrence Rossi is the Vice President and has a 49% ownership interest. (DED Exhibit 2)

7. Prior to 2009, Mr. Rossi had a 100% ownership interest. He gifted 51% ownership interest in 2009 to Ms. Rossi. No capital contribution was made by Ms. Rossi. (DED Exhibits 3 and 4)

8. In 2020, Ms. Rossi was paid [REDACTED] and Mr. Rossi was paid [REDACTED]. (DED Exhibits 6 and 7)

9. Nancy Rossi's duties include calculating, preparing and issuing bills, invoices, account statements, and financial statements, preparing and processing payroll, reconciling bank transactions, preparing purchase orders and expense reports, completing and submitting tax returns, worker's compensation forms, pension contribution forms and other government documents. (DED Exhibit 8)

10. Lawrence Rossi was a service technician from 1977 to 1988. His duties included responding

to customer service calls, ordering parts and materials and supervising repair shop workers. He was the President/Service Manager from 1988 to 2009. He supervised service technicians, scheduled service calls, ordered parts and materials, and supervised repair shop workers. He is the Vice President and his duties remain the same as when he was the President/Service Manager. (DED Exhibit 8)

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

5 NYCRR §144.2(b)(3) states in relevant part as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(b)(5) states as follows:

Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or woman-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria described herein.

5 NYCRR §144.2(c) states in relevant part as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by

expertise or experience in office management or general business administration, among other things...

- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
 - (i) The products or services the business enterprise provides to clients; and
 - (ii) The means by which the business enterprise obtains contracts or orders.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Park Sales for certification as a WBE 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 Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. (*See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021))

DISCUSSION

Nancy Rossi and Lawrence Rossi testified at the hearing on behalf of Park Sales. Park Sales offered no exhibits.

Amy O'Connor, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Glenn Butler,

Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1, 2, 3, 4, 6, 7 and 8.

The Division denied Park Sales' application for certification as a WBE on the basis that Park Sales failed to demonstrate that the capital contribution of the party relied upon for certification was proportionate to her ownership interest therein, as required by 5 NYCRR § 144.2 (b) (2). (DED Exhibit 2)

Ms. Rossi acknowledged that the transfer of 51% ownership from Lawrence Rossi was a gift and no capital contribution was made for her ownership interest. (DED Exhibits 3 and 4) The Division's witness, Director Glenn Butler, testified that he has worked at the NYS Department of Economic Development for 11 years. He reviewed the documentation submitted by Park Sales and determined that a capital contribution was not made by Ms. Rossi for her ownership interest. Accordingly, I find that Appellant failed to demonstrate at the time of her application that she made a capital contribution proportionate to her ownership interest. (Hearing Testimony of Glenn Butler)

The Division also denied certification on the basis that Ms. Rossi does not share in the risks and profits of the business in proportion to her equity interest as required by 5 NYCRR § 144.2 (b)(3). (DED Exhibit 2) The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

The 2020 tax return for Park Sales reflect that Ms. Rossi was paid [REDACTED] and Mr. Rossi

was paid [REDACTED]. Mr. Rossi, as a 49% owner, made substantially more than Ms. Rossi, as a 51% owner. (DED Exhibits 6 and 7) Ms. Rossi acknowledged in her testimony that she was paid less, but argued that it shouldn't matter because both of their wages were deposited into their joint bank account. (Hearing Testimony of Nancy Rossi)

Where a woman relied upon for certification obtains her ownership interest through a transfer from another person, the applicant “must demonstrate that such transfer was supported by reasonable consideration, and must meet all other certification criteria...” 5 NYCRR §144.2(b)(5). Ms. Rossi was gifted her ownership interest from Mr. Rossi. She made no capital contribution for her ownership interest. (DED Exhibits 3 and 4)

I find that Appellant failed to demonstrate at the time of her application that she shares in the risks and profits of the business in proportion to her ownership interest, as required by 5 NYCRR § 144.2(b)(3), and failed to demonstrate that the transfer of ownership was supported by reasonable consideration and met all other certification criteria as required by 5 NYCRR § 144.2 (b)(5).

The Division further denied certification on the basis that Ms. Rossi does not possess adequate, industry-specific competence to make critical business decisions without relying on other persons, as required by 5 NYCRR §144.2(c)(1), and that she does not make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required by 5 NYCRR §144.2(c)(2). (DED Exhibit 2)

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the

denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

5 NYCRR §144.2(c)(2) states that “... women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders.”

Nancy Rossi’s duties include: calculating, preparing and issuing bills, invoices, account statements, and financial statements, preparing and processing payroll, reconciling bank transactions, preparing purchase orders and expense reports, completing and submitting tax returns, worker’s compensation forms, pension contribution forms and other government documents. (DED Exhibit 8) Ms. Rossi confirmed in her testimony that these are her duties. (Hearing Testimony of Nancy Rossi)

Lawrence Rossi was a service technician from 1977 to 1988. His duties included responding to customer service calls, ordering parts and materials and supervising repair shop workers. He was the President/Service Manager from 1988 to 2009. He supervised service technicians, scheduled service calls, ordered parts and materials, and supervised repair shop workers. He is the Vice President and his duties remain the same as when he was the President/Service Manager. (DED Exhibit 8) Mr. Rossi confirmed in his testimony that these are his duties. (Hearing Testimony of Lawrence Rossi)

The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

The critical functions of the business are sales, repair and maintenance of fire extinguishers. (DED Exhibit 1) Ms. Rossi's resume does not reflect any experience or expertise regarding repair and maintenance of fire extinguishers. Mr. Rossi has over 33 years of experience in the industry. (DED Exhibit 8)

Ms. Rossi mainly handles administrative functions for the business. The main business operational duties are handled by Mr. Rossi, including supervision of the service technicians, scheduling of service calls, ordering parts and supervision of repair shop workers. (DED Exhibit 8)

Park Sales has failed to demonstrate that Ms. Rossi possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, and has failed to demonstrate that Ms. Rossi makes operational decisions on a day-to-day basis with respect to the critical functions of the business, as required by 5 NYCRR §§144. (c)(1) and 144.2 (c)(2).

CONCLUSION

Park Sales did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria found at 5 NYCRR §§144.2(b)(2), 144.2(b)(3), 144.2(b)(5), 144.2(c)(1) and 144.2(c)(2), was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny Park Sales' application for certification as a woman-owned business enterprise.

In the Matter of PARK SALES & SERVICE, INC
 DED File ID No. 68237
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Ownership Transfer Letter	Y	Y
DED 4	Ownership Transfer Meeting Minutes	Y	Y
DED 5	Park Sales & Service 2019 Federal Tax Return	N	N
DED 6	Park Sales & Service 2020 W2s	Y	Y
DED 7	Park Sales & Service 2020 Federal Tax Return	Y	Y
DED 8	Resumes of Nancy Rossi and Lawrence Rossi	Y	Y
DED 9	Park Sales & Service Bylaws	N	N
APP 1	Request to Appeal	Y	y
Tribunal 1	Notice of Hearing	Y	Y