

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

In the Matter

-of-

the Application of **QUALITY INDUSTRIES, INC.**,
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 49270

RECOMMENDED ORDER



Helene G. Goldberger
Administrative Law Judge

June 4, 2019

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 (DED or Respondent) to deny the application filed by Quality Industries, Inc. (Quality or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Quality applied for certification as a woman-owned business enterprise on November 13, 2014. *See*, Exhibit (Ex.) DED-1. By letter dated January 11, 2017 (Ex. DED-2), the Division determined that Quality does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. By letters dated January 23, 2017 and April 24, 2017, Renee Raboy, President, appealed from the Division's determination to deny Quality's application for WBE certification (Exs. DED-5 and 6). Attorney for Respondent DED submitted a Memorandum of Law in Response to the Appeal (MOL) dated May 2019 and an Affidavit (Aff.) of Alan Culbreath, the Associate Agency Services Analyst for DED, who had reviewed Quality's application in his prior position as Senior Certification Analyst. Attached to Mr. Culbreath's affidavit are six exhibits. A list of the Respondent's exhibits is attached hereto. Ms. Raboy attached copies of W-2 forms for herself and her husband, David Raboy, for March and April of 2017. I have not considered these records in making this Recommended Order because they were not part of the 2014 application.¹

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise based on information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR 144.4(e).

STANDARD OF REVIEW

On this administrative appeal, Quality bears the burden of proving that the Division's denial for WBE certification is not supported by substantial evidence (*see*, State Administrative Procedures Act § 306[1]). The substantial evidence standard "demands only that a given

¹ Similarly, I have not considered a letter dated May 29, 2019, that Ms. Raboy sent to me.

inference is reasonable and plausible, not necessarily the most probable,” and the 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

The Division denied the application filed by Quality for certification as a woman-owned business enterprise with a letter dated January 11, 2017 (*see*, Ex. DED-4). The Division determined that Quality failed to demonstrate: (1) that women share in the risks and profits in proportion with their ownership interest in the business enterprise as required by 5 NYCRR § 144.2(c)(2). The Division made its determination based on Quality’s application that stated that there was no family relationship to other principals in the business despite the revelation in the tax returns that Renee and David Raboy are married. *Culbreath Aff.* ¶ 9. In addition, the Division maintains that the 2013 W-2 showed that Mr. Raboy earned ██████████ in salary from Quality in 2013 and Ms. Raboy earned ██████████ in salary. *Culbreath Aff.* ¶ 11 and Ex. DED-3. Based on this information, the Division concluded that Quality has not met the required criteria for certification.

Quality

In the correspondence she submitted to respond to and appeal from the Division’s determination, Renee Raboy, Quality’s current president, did not essentially dispute the evidence presented by the Division. *See, e.g.*, Exs. DED-5 and 6. However, while admitting that her salary was less than David Raboy’s, Renee Raboy provides that because David “is a top producer” in sales and draws his salary on commission, the compensation he receives reflects that status. Ms. Raboy explains further that she has taken less in salary in order to assist the company’s financial situation and shares in her husband’s compensation. She states that the company has been certified by the Division twice in the past and her “understanding . . . was that as a married couple we were naturally in compliance.” Ex. DED-6, p. 2. She further included that she had use of a vehicle and health insurance in addition to her pay. *Id.* Ms. Raboy included W-2 forms from March and April 2017 to demonstrate that the company was moving towards compliance with “this directive.” *Id.*

FINDINGS OF FACT

1. Quality Industries, Inc. is located at 1595 Ocean Avenue, Unit B1, Bohemia, New York. The company is a warehouse distributor of domestic fasteners, chemicals and paints, abrasives, hydraulic and pneumatic hose and fittings, electrical supplies, tools and shop supplies. Ex. DED-1, §§ 1.E, 5.A.

2. Quality was sold to Renee Raboy and David Raboy, a non-minority male, in October 1991 by Arthur Raboy, who established the firm in 1964. Renee Raboy obtained 50% of the company and David Raboy obtained 49%. Ex. DED-1, §§ 3.A, 3.C.
3. In Quality's application to DED, Ms. Raboy stated that there was no family relationship to other owners or principals of the company. Ex. DED-1, 3.D.
4. The 2013 joint tax return of Renee and David Raboy indicates that the couple are married. Ex. DED-2.
5. The 2013 W-2 Wage and Tax Statements submitted with the application reveal that Mr. Raboy received [REDACTED] in wages from Quality while Ms. Raboy received [REDACTED] in wages. Ex. DEC-3.

DISCUSSION

This Recommended Order considers Quality's response and appeal (January 23, 2017 and April 24, 2017) from the Division's January 11, 2017 determination to deny the company's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. Exs. DED-5, 6. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's January 11, 2017 denial letter (*see*, Ex. DED-4), Quality did not demonstrate that women shared in the risks and profits in proportion with their ownership interest in the business enterprise. 5 NYCRR § 144.2(c)(2).

I. Proportional Share in the Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR § 144.2[c][2]). This provision ensures that women and minority business owners receive the benefits that accrue to a business as a result of State contracting preferences from a MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits.

The analyst, Alan Culbreath, who reviewed the Quality application noted in his affidavit that Quality's application contained "conflicting representations." Culbreath Aff., ¶ 9. Specifically, Mr. Culbreath points to the negative response in the application to the question that asked if there was a family relationship to other members of the company. *Id.*, Ex. DED-2. Mr. Culbreath also focused on the disparate salaries of Renee and David Raboy. Culbreath Aff., ¶ 11, Ex. DED-3.

While Ms. Raboy notes in her response to the Division's determination that Quality had twice previously received WBE certifications, that is not a ground to continue certification in the face of evidence indicating that Quality did not meet the requirements. As Administrative Law Judge Daniel O'Connell noted in his Recommended Order in *Matter of Watson Farms, LLC* ([July 19, 2018], https://esd.ny.gov/sites/default/files/012819_WatsonFarmsLLC_RO.pdf, Final Order 18-49 is available from the New York State Department of Economic Development Division of Minority and Women's Business Development) the doctrine of equitable estoppel cannot be invoked against a governmental agency in the exercise of its governmental function (see e.g. *Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Env'tl. Conservation*, 119 AD3d 1172, 1173 [2014]).

See also, *Matter of National Recovery Solutions, LLC*, Recommended Order (May 25, 2017), https://esd.ny.gov/sites/default/files/052517_NationalRecoverySolutions_RO.pdf, Final Order 17-31, available from the New York State Department of Economic Development Division of Minority and Women's Business Development; (business not eligible for certification when the woman owner and majority shareholder received the same compensation as her husband).

Ms. Raboy does not dispute that she was paid significantly less than her husband. She asserts that because he is a salesman and his income is based upon commission, the salary he receives reflects that status. Ex. DED-6, p. 1. However, these facts still do not show compliance with the regulatory requirements. Ms. Raboy provides also that she took less in salary to assist the company's financial position. Ex. DED-6. Ms. Raboy also mentions in the appeal that she had access to a vehicle and received health insurance as part of her compensation. *Id.* But there was no documentation of this compensation provided with the application. Finally, Ms. Raboy maintains that because she and her husband shared in the compensation, she was not disadvantaged. *Id.* But this only further establishes that the company functioned as a family-owned business rather than as a women-owned one. See, *Matter of C.W. Brown, Inc. v Canton*, 216 AD2d 841, 843 (3d Dep't 1995).

While Ms. Raboy submitted 2017 W-2 forms with Quality's appeal (Ex. DED-6) to demonstrate that the company was "working towards compliance with this directive," I cannot consider this post-application submission. 5 NYCRR § 144.5(a). In any case, this information does not alter the status of the company as a family-owned one.

CONCLUSION

For the reasons set forth above, Quality failed to demonstrate that Ms. Raboy

shared in the risks and profits in proportion with her ownership interest pursuant to 5 NYCRR § 144.2(c)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's January 11, 2017 determination to deny Quality's application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

MATTER OF QUALITY INDUSTRIES, INC.

NYS DED FILE ID No. 49270

EXHIBIT LIST

Exhibit No.	Description	ID	Rec'd	Notes
DED-1	Quality's Application – 11/13/14	√	√	
DED-2	2013 Joint Tax Returns – Renee and David Raboy	√	√	
DED-3	2013 W-2 – Renee and David Raboy	√	√	
DED-4	January 11, 2017 Denial	√	√	
DED-5	Renee Raboy Response to Denial – January 23, 2107	√	√	
DED-6	Quality Appeal – April 24, 2017	√	√	