

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

In the Matter

- of -

the Application of R.I.M. Plumbing and Heating Supply, Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 47129

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 12, 2023

This matter considers the written appeal by R.I.M. Plumbing and Heating Supply, Inc. (“R.I.M.” 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 140-144, 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 November 2, 2017, Ms. Irene Campbell, as majority owner and CEO, applied on behalf of R.I.M. for recertification as a WBE (DED Exhibit 1).
2. On March 22, 2018, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2); and
 - (b) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1).
3. R.I.M. timely filed a Notice of Appeal by letter dated April 2, 2018 (APP Exhibit 1).
4. A Notice of Written Appeal was sent to R.I.M. on April 13, 2018 (DED Exhibit 3).
5. R.I.M. submitted its written appeal by letter dated May 24, 2018 with attachments (APP Exhibit 2).
6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated June 12, 2023, and a brief of Candace Williamson, Esq., counsel for the Division, dated June 23, 2023.

FINDINGS OF FACT

7. R.I.M. is engaged in the business of selling wholesale heating and plumbing equipment, based in Ossining, New York (DED Exhibit 1).
8. Ms. Irene Campbell is the CEO, Secretary and Treasurer and has a 51% ownership interest. Mr. Richard Campbell is the President and has a 35% ownership interest. Mr. Ernest Campbell is the Vice President and has a 14% ownership interest (DED Exhibit 1).
9. In 2016, Ms. Campbell received \$ [REDACTED] in wages, while Mr. Richard Campbell received \$ [REDACTED] in wages and Mr. Ernest Campbell received \$ [REDACTED] in wages. (DED Exhibit 5).
10. Ms. Campbell's duties include working in the accounting office and overseeing the accounts payable and accounts receivable (DED Exhibit 4).
11. Mr. Richard Campbell is "in charge of purchasing and finance for the company" and Mr. Ernest Campbell is "in charge of inside sales" at the Ossining store (DED Exhibit 4).

APPLICABLE LAW

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

The...woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former § 144.2(b)(1) states in relevant part as follows:

(1) Decisions pertaining to the operations of the business enterprise must be made by...women claiming ownership of the business enterprise. The following will be considered in this regard:

- (i) ...women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
- (ii) ...women must demonstrate the working knowledge and ability needed to operate the business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division’s interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

Current 5 NYCRR § 144.2(c)(2) states as follows:

(2) Operational decisions. 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...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 R.I.M. for recertification 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

I. Prior Certification

The Division acknowledges that R.I.M. was previously certified as a woman-owned

business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify R.I.M. based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, R.I.M. had the burden to demonstrate compliance with the eligibility criteria outlined at former 5 NYCRR §144.2 when it submitted the November 2, 2017, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

5 NYCRR former § 144.2(c)(2) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business enterprise. In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3d Dept. 1995), the Court found that the Division's review of tax returns provided substantial evidence to support the Division's consideration of whether a woman-owned business enterprise meets the eligibility criteria.

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.

Ms. Campbell received substantially less compensation from R.I.M. during its 2016 tax year than Mr. Richard Campbell and Mr. Ernest Campbell. She received \$ [REDACTED] in wages, while Richard Campbell received \$ [REDACTED] in wages and Ernest Campbell received \$ [REDACTED] in wages (DED Exhibit 5).

The Division’s finding that the woman-owner relied upon for certification did not share in the risks and profits in proportion with her ownership interest in R.I.M., as required by 5 NYCRR former § 144.2(c)(2), is supported by substantial evidence.

III. Operation

The Division determined that Ms. Campbell does not make decisions pertaining to the operation of R.I.M. as required under 5 NYCRR former §144.2(b)(1).

The eligibility criteria for WBE certification requires that the woman-owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). 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...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

The core revenue generating functions of R.I.M. involve purchasing, marketing and selling plumbing and heating supplies (DED Exhibit 1). Ms. Campbell works in the accounting office and oversees accounts payable and accounts receivable. She works from 9 am to 5 pm on Mondays through Fridays (DED Exhibit 4).

Mr. Richard Campbell is “in charge of purchasing and finance for the company” and Mr.

Ernest Campbell is “in charge of inside sales” at the Ossining store. They work from 7 am to 5 pm on Mondays through Fridays (DED Exhibit 4). The core revenue-generating functions of the business are handled by the non-qualifying male owners.

The Division’s finding that Ms. Campbell does not make decisions pertaining to the operation of the business as required by 5 NYCRR former §§ 144.2(b)(1), is supported by substantial evidence.

CONCLUSION

R.I.M. did not meet its burden to demonstrate that the Division’s determination to deny its application for recertification as a WBE with respect to the eligibility criteria under 5 NYCRR former §§ 144.2(c)(2) and 144.2(b)(1) was not based on substantial evidence.

RECOMMENDATION

The Division’s determination to deny R.I.M.’s application for recertification as a WBE should be affirmed.

Exhibit Chart

In the Matter of R.I.M. Plumbing and Heating Supply, Inc.

NYS DED File No. 47129

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Recertification	Y	Y
DED 2	Division's denial letter	Y	Y
DED 3	Notice to Proceed via written appeal	Y	Y
DED 4	Narrative of Duties and Responsibilities	Y	Y
DED 5	2016 Business Tax Returns	Y	Y
APP 1	Applicant's Notice of Appeal	Y	Y
APP 2	Applicant's Appeal letter with attachments	Y	Y