

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

In the Matter

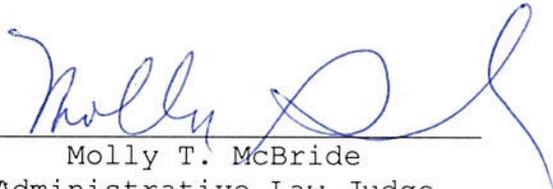
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the Application of **S.C. Spencer Electric, Inc.**  
for Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 54005

RECOMMENDED ORDER

- by -



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Molly T. McBride  
Administrative Law Judge

July 29, 2021

## **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 ("NYSDED") to deny S.C. Spencer Electric, Inc. ("Spencer" or "applicant") certification as a woman-owned business enterprise ("WBE") be modified and, as so modified, 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 ("NYCRR") Parts 140-144, by Spencer challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Spencer submitted an application to the Division on May 2, 2014 seeking WBE re-certification (Exhibit A). By letter dated March 29, 2017, the Division denied the application (Exhibit 2).

Applicant appealed from the denial and filed a written appeal dated April 13, 2017. The Division responded to the appeal by filing an affidavit of Raymond Emmanuel dated December 19, 2020, and a brief submitted by Bella Satra, Esq., counsel for the Division, dated December 19, 2020.

## **ELIGIBILITY CRITERIA**

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's ownership and operation, are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). 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. On administrative appeal, the

applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]).

### **POSITIONS OF THE PARTIES**

#### Position of the Division

The Division asserts that applicant failed to meet six criteria for certification. The Division found that applicant failed to demonstrate the following:

(1) that the woman owner owns at least 51% of the business enterprise pursuant to 5 NYCRR 144.2(a)(5);

(2) that the woman owner's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1);

(3) that the woman owner shares in the risks and profit in proportion to her ownership interest pursuant to 5 NYCRR 144.2(c)(2);

(4) that the woman owner makes decisions pertaining to the operation of the enterprise pursuant to 5 NYCRR 144.2(b)(1);

(5) that the woman owner has demonstrated adequate managerial experience or technical competence to operate the business pursuant to 5 NYCRR 144.2(b)(i); and

(6) that the woman owner does have the right to make business decisions unrestricted under the corporate bylaws or other documents pursuant to 5 NYCRR 144.2(b)(2).

#### Position of the Applicant

Spencer 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. S.C. Spencer Electric, Inc. is an electrical contracting company that provides services to public works projects (Exhibit 1, 5.B.).

2. S.C. Spencer Electric, Inc., at the time of the application for recertification, was owned by husband and wife Jolene A. Chrzanowski, 50.5%, and Scott W. Chrzanowski, 49.5% (Exhibit 4).

3. Jolene Chrzanowski is Vice President/Secretary and Scott Chrzanowski is President/Treasurer of S.C. Spencer Electric, Inc. (Exhibit 1, 3.A.).

4. The woman owner, Jolene Chrzanowski, and her husband Scott Chrzanowski made a capital contribution of \$10,000 to the company from their joint bank account (Exhibit 5, 2010 WBE certification application, question 8). Nothing in the record indicates that the woman owner made a capital contribution independent of her husband.

5. The 2014 corporate tax return of applicant business indicates that the woman owner, Jolene Chrzanowski, and her husband Scott Chrzanowski received equal shares of shareholder income in 2014 (Exhibit 8, Schedule K-1). The 2014 return indicates that for the 2014 tax year, Scott Chrzanowski received Officer's compensation of \$69,250 and Jolene Chrzanowski received Officer's compensation of \$19,925 (Exhibit 8, form 1125-E).

6. The 2016 W-2 wage and tax statements submitted by applicant in support of the recertification application indicate that Scott Chrzanowski was paid wages of \$118,594.96 and Jolene Chrzanowski was paid wages of \$22,075.00. The remaining employees were paid wages as follows; Andrew Allen, \$75,197.01, Bryan Chrzanowski, \$90,411.21, Jason Klossner, \$59,800.27, Patrick Salmon, \$12,902.52, James Suderley, \$38,635.93 (Exhibit 16). The 2014 income tax returns of the corporation indicate that Jolene was paid wages of \$19,925 and Scott was paid wages of \$69,250 (*id.*).

7. The bylaws for applicant business define the duties of the corporate officers. The bylaws state that the President "shall be the principal executive officer of the corporation...shall in general supervise and control all of the business and affairs of the corporation" and the vice president "shall perform any other duties as may be assigned by the president" (Exhibit 14).

8. The application for WBE certification filed in 2010 indicated that Scott Chrzanowski was responsible for estimating,

marketing and sales, supervising field operations; Jolene Chrzanowski was responsible for negotiating bonding, negotiating insurance, and managing and signing payroll; both Scott and Jolene were responsible for financial decisions, preparing bids, hiring and firing, purchasing equipment and supplies, negotiating contracts, and acting as signatories on business accounts (Emanuel affidavit, Exhibit 5, 14.A.).

9. Scott Chrzanowski is a licensed electrician, working in the field since 1991. He also has an electrical construction and maintenance certification from SUNY College of Technology at Canton, as well as certification for commercial wiring (Exhibit 6). Jolene Chrzanowski has an associate's and bachelor's degree in business administration and work experience as an auditor/junior accountant, senior administrative assistant, and admissions coordinator before joining applicant business in 2000 as an employee (Exhibit 7).

## **DISCUSSION**

This report considers the appeal of applicant from the Division's determination to deny certification as a woman-owned business enterprise (WBE) pursuant to Executive Law Article 15-A.

### **OWNERSHIP**

#### 1. Capital Contribution

The Division claims that Jolene Chrzanowski did not make a capital contribution to the business that is proportionate to her equity interest. Section 144.2(a) of 5 NYCRR, Eligibility criteria, provides:

*(a) Ownership. For the purposes of determining whether an applicant should be granted or denied minority- or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:*

*(1) the contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the*

*business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.*<sup>1</sup>

The Division's denial letter states that applicant failed to provide proof of the woman owner's capital contribution to the business enterprise in proportion to her equity interest (Exhibit 2). The application filed in 2010 states that Jolene Chrzanowski and Scott Chrzanowski made a joint capital contribution in the amount of \$10,000 (Exhibit 5, No. 8) and applicant has acknowledged that the funds came from a joint bank account of Jolene and Scott (Appeal letter of S.C. Spencer Electric, Inc. dated July 28, 2017). No proof, support or explanation was offered in the written appeal of how the capital contribution was solely from the woman owner. In fact, the woman owner agreed the funds came from a joint account she owned with her husband and they combined their earnings in that account.<sup>2</sup> The Division consistently denies applications for WBE certification where an applicant fails to substantiate the source of the capital contribution by the woman-owner or where, as here, the contribution is from assets jointly held with an ineligible individual (Scott Chrzanowski).<sup>3</sup>

Applicant's arguments are not sufficient to overturn the Division's determination. Applicant has not presented sufficient evidence to demonstrate that the woman owner made a capital contribution to the business enterprise that is proportionate to her equity interest.

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<sup>1</sup> The Division amended 5 NYCRR 144.2 effective December 22, 2020. This appeal was filed in 2017 and therefore the regulations in effect at that time are applicable and referenced herein.

<sup>2</sup> Applicant appeal dated July 28, 2017 at 2.

<sup>3</sup> The Recommended Orders and Final Orders are available at the New York State Department of Economic Development website at: [www.esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-appeal-hearings](http://www.esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-appeal-hearings). See e.g. *Matter of OTONE Mechanical Construction, Inc.*, Recommended Order dated April 25, 2017 at 6-7 (proceeds from jointly held marital property did not constitute a capital contribution solely by the woman-owner), Final Order 17-28 dated May 2, 2017; *Matter of Hertel Steel Inc.*, Recommended Order dated February 10, 2017 at 3-5 (business not eligible for WBE certification where the money to purchase the business was from a jointly owned bank account), Final Order 17-12 dated March 10, 2017; *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 at 4-6 (proceeds of a home equity line of credit on jointly held marital property did not qualify as capital contribution of the woman-owner), Final Order 17-21 dated March 27, 2017.

## 2. Company ownership

The Division also denied the recertification application on the basis that the woman owner does not own at least fifty-one percent of the outstanding stock in the business enterprise as required by 5 NYCRR 144.2(a)(5). Applicant acknowledges that at the time of the recertification application, the woman owner held 50.5% of the stock of the business enterprise and her husband owned 49.5%. Applicant states that it was a mistake made by their attorney and it was corrected in March 2017, after the denial was issued (Appeal letter dated July 28, 2017). Scott Chrzanowski was the sole owner of applicant business from at least 2000 until 2010 when 50.5% of the shares of stock in the business were issued to Jolene. Applicant provided a letter from the attorney who represented them for the stock transfer who acknowledged that he made a mistake in 2010 when calculating the distribution of the shares (Applicant appeal, April 26, 2017 letter of William J. Reilly, Esq.). The attorney stated it was his intent to have Jolene receive 51% of the shares of stock (*id.*).

Applicant's arguments are not sufficient to overturn the Division's determination. Applicant acknowledged that the woman owner did not own at least 51% of the outstanding stock in the business enterprise at the time of the application for recertification.

## 3. Risks and Profits

Woman owners must share in the risks and profits in proportion with their ownership interest in the business enterprise to qualify for WBE certification (5 NYCRR 144.2[c][2]). The Division denied the application because the woman owner's compensation is significantly less than her husband Scott Chrzanowski and, therefore, she is not sharing in the risks and profits in proportion to her equity interest (Exhibit 2). The documents submitted by applicant show that the husband and wife owners were compensated as follows:

2014: Scott \$69,250 W-2 wages, \$6,388 shareholder income; Jolene \$19,925 W-2 wages, \$6,517 shareholder income (Exhibit 8, Form 1125-E & Schedule K-1).

2015: Scott \$91,055 W-2 wages; Jolene \$21,400 W-2 wages (Exhibit 17, Form 1125-E).

2016: Scott \$118,594 W-2 wages; Jolene \$22,075 W-2 wages<sup>4</sup> (Exhibit 16).

Applicant explained on its appeal that the woman owner was paid significantly less than her husband because the NYS Department of Labor audited the business in 2003 and required the husband be paid a prevailing wage pursuant to the State's labor laws. Accordingly, Spencer is required to compensate him at the higher rate as he works in the field (Applicant appeal at 3). The owners had intended to "pay both officers a lesser wage to allow for working capital in the company to allow for future growth" (*id.*). The woman owner stated that she has chosen to be paid less as she "prefers to see long term success in the business which will end up meaning long term success for myself" (*id.*). The regulations require the woman owner to share in the risks and profits in proportion to their equity interest (see 5 NYCRR 144.2[c][2]). Applicant has not indicated that the woman owner was compensated for her majority interest in the business through wages, or that she was compensated in a nonmonetary way or given any other benefits to reflect her majority ownership. She is paid significantly less than all the employees of the business and her husband, the minority shareholder, was paid more than five times the wife's earnings in 2016.

Applicant's arguments are insufficient to overturn the Division's determination that the woman owner does not share in the risks and profits of the business. The woman owner is not sharing in the risks and profits in proportion to her equity interest.

## **OPERATION**

### 1. Business decisions

The application was also denied on the basis that the woman owner does not make decisions pertaining to the operation of the business enterprise as required by 5 NYCRR 144.2(b)(1). More specifically, Division stated that the minority shareholder

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<sup>4</sup> The Division noted that three employees of Spencer were paid as follows in 2016: Bryan Chrzanowski \$90,411, Andy Allen \$75,197, and Jason Klossner \$59,800 (Exhibit 16 & Affidavit of Raymond Emanuel, p.24).

Scott Chrzanowski is primarily responsible for managing significant operations of the business related to estimating and supervising field operations while the woman owner is primarily responsible for managing administrative and financial aspects of the business (see Exhibit 2). The application indicates that the woman owner is solely responsible for the following duties: (1) negotiating bonding, (2) negotiating insurance, and (3) managing and signing payroll.<sup>5</sup> The woman owner performs the following duties with her husband: (1) financial decisions, (2) preparing bids, (3) hiring and firing, (4) purchasing equipment and supplies, (5) negotiating contracts, and (6) acting as signatories on business accounts.<sup>6</sup> Scott Chrzanowski solely performs the following duties: (1) estimating, (2) marketing and sales, and (3) supervising field operations.<sup>7</sup> Applicant applied for certification as a Disadvantaged Business Enterprise (DBE) with the U.S. Department of Transportation. The application required a breakdown of job duties by the owners. For the most part the information is the same as the breakdown on the WBE application. One difference of note is that on the DBE certification application it indicates the woman owner supervises field operations "seldom" (Exhibit 13). That is the only indication in the file that the woman owner is engaged in any work in the field. The DBE certification application states that the woman owner frequently engages in bidding and estimating while the WBE application states Scott does the estimating for the business and both are responsible for preparing bids. The DBE application indicates the woman owner frequently attends bid openings and lettings. In reviewing the totality of the duties performed by the woman owner, it appears the woman owner, while actively engaged in the many of the administrative business operations, performs most of the her other work (i.e. bid work, financial decisions, hiring & firing, negotiating contracts) with her husband. As noted by the Third Department in *In the Matter of Northeastern Stud Welding Corporation*, 621 N.Y.S. 2d 170, "petitioner is, in actuality, a family-owned business, with [woman owner] sharing control of its operations and management, and responsibility for managerial decisions and business transactions, with her husband" (*In the Matter of Northeastern Stud Welding Corp*, at 171). The facts

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<sup>5</sup> Exhibit 5.

<sup>6</sup> Id.

<sup>7</sup> Id.

presented here indicate that the applicant is a family-owned business.

Applicant's arguments are not sufficient to overturn the Division's determination with respect to business decisions. Accordingly, the determination to deny applicant WBE status should be affirmed on this ground for denial.

## 2. Managerial experience/technical competence

The application was denied on the basis that the woman owner has not demonstrated adequate managerial experience or technical competence to operate the business enterprise pursuant to 5 NYCRR 144.2(b)(1)(i). More specifically, the Division determined that Scott Chrzanowski has demonstrated trainings and certifications relevant to providing electrical contracting services, and the woman owner does not have any demonstrated training or credentials related to electrical contracting (see denial letter). Applicant argues on its appeal that there "are no areas of the entire business that I (woman owner) do not have a part in" (Applicant appeal at 3). The resumes of the woman owner and Scott Chrzanowski were submitted with the application (Exhibits 6 & 7). Scott's resume demonstrates experience and training in electrical contracting, but no business management training or experience (See Exhibit 6). The woman owner's resume demonstrates experience and education in business management (See Exhibit 7). She has an associate's degree and a bachelor's degree in business administration, five years in a position performing many of the management tasks she performs today and has been with applicant business overseeing day to day activities since 2000 (*id.*). Applicant has demonstrated that the woman owner's education and experience provide sufficient managerial experience and technical competence to allow her to perform the core functions of managing the company. The applicant has also demonstrated that it is the woman owner who is performing the core functions related to management of the business operations.

Scott's training and experience do not demonstrate an ability to perform the core functions of the management of the business nor has any proof been submitted to demonstrate he performs the core functions identified on the application related to management and operation.

The applicant's arguments are sufficient to overturn the Division's determination with respect to managerial experience/technical competence. Applicant has demonstrated that the woman owner has both experience and education to perform the core duties and functions of the management of the business. Applicant has sufficiently demonstrated that the woman owner is performing the core functions of management of the company. Accordingly, the determination to deny applicant WBE status should be modified to strike this ground for denial.

### 3. Control

The application was also denied on the basis that the corporate bylaws and other governing documents of the business enterprise do not allow the woman owner to make decisions without restrictions pursuant to 5 NYCRR 144.2(b)(2). The bylaws submitted with the application (Exhibit 14) provide that Scott Chrzanowski, president of the business, "shall be the principal executive officer of the corporation and ... supervise and control all of the business and affairs of the Corporation" (*id.*). Scott was named president on January 7, 2017 by the Board of Directors (Exhibit 15). Scott is also president of the Board of Directors (*id.*). Section 144.2(b)(2) requires the woman owner to make decisions without restrictions. The woman owner does not have that ability pursuant to the bylaws of the company. Although it was argued in the appeal that the husband and wife shareholders make decisions together (Appeal at 3), it is indisputable that the bylaws restrict the authority of the woman owner to make business decisions unrestricted.

Applicant's arguments are not sufficient to overturn the Division's determination. Applicant has acknowledged that the corporate bylaws and governing documents do not permit the woman owner to make decisions without restrictions<sup>8</sup>.

### **CONCLUSIONS**

1. S.C. Spencer Electric, Inc. failed to demonstrate that the woman owner, Jolene Chrzanowski, has made a capital contribution to the business that is in proportion to her ownership interest

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<sup>8</sup> Applicant appeal at 4.

in the form of money, expertise, experience or knowledge pursuant to 5 NYCRR 144.2(a)(1).

2. S.C. Spencer Electric, Inc. failed to demonstrate that the woman owner, Jolene Chrzanowski, owned at least fifty-one percent of the outstanding stock in the business enterprise at the time of the application pursuant to 5 NYCRR 144.2.

3. S.C. Spencer Electric, Inc. failed to demonstrate that the woman owner, Jolene Chrzanowski, shares in the risks and profits in proportion to her ownership interest in the business enterprise pursuant to 5 NYCRR 144.2(c)(2).

4. S.C. Spencer Electric, Inc. failed to demonstrate that the woman owner, Jolene Chrzanowski, makes decisions pertaining to the business enterprise pursuant to 5 NYCRR 144.2(b)(1).

5. S.C. Spencer Electric, Inc. demonstrated that the woman owner, Jolene Chrzanowski, has adequate managerial experience or technical competence to operate the business enterprise pursuant to 5 NYCRR 144.2(b)(1)(i).

6. S.C. Spencer Electric, Inc. failed to demonstrate that the corporate by-laws and other documents governing the business enterprise permit the woman owner to make decisions without restrictions pursuant to 5 NCYRR 144.2(b)(2).

#### **RECOMMENDATION**

The Division's determination to deny S.C. Spencer Electric, Inc.'s application for certification as a woman-owned business enterprise should be modified and, as so modified, affirmed, for the reasons stated herein.

**Exhibit Chart**  
**Matter of S.C. Spencer Electric, Inc.**  
**NYS DED File ID No. 54005**

<b>EXHIBIT NO.</b>	<b>DESCRIPTION</b>
APP-1	Application for WBE re-certification
DED-2	Denial of WBE certification letter
DED-3	Notice to proceed via written Appeal
APP-4	Stock ledger
DED-5	2010 MWBE Application
APP-6	Resume of Scott Chrzanowski
APP-7	Resume of Jolene Chrzanowski
APP-8	SC Spencer 2014 Federal Tax return
APP-9	Excerpt of letter submitted by Applicant during recertification
APP-10	SUNY Certificate in Electrical Construction and Maintenance Scott Chrzanowski
APP-11	Certificate in Commercial Wiring, Scott Chrzanowski
APP-12	DEC Certificate Scott Chrzanowski
APP-13	SC Spencer DBE Application
APP-14	By-laws of SC Spencer
APP-15	Minutes of Board of Directors Meeting Jan. 7, 2017
APP-16	SC Spencer 2016 W-2 Wage and Tax statement
APP-17	SC Spencer 2015 Federal Tax return
APP-18	Letter submitted by Ms. Chrzanowski in Support of Application