



New York State
Department of Economic Development
Division of Minority and Women's
Business Development

In the matter of the appeal of

Scherzi Systems, LLC

FINAL ORDER 22-02

From a denial of certification as a Women-owned Business Enterprise pursuant to Executive Law Article 15-A.

This order arises from an administrative appeal pursuant to section 144.2 of title 5 of the New York Codes, Rules and Regulations (“NYCRR”) and a CPLR article 78 proceeding brought on behalf of Scherzi Systems, LLC (“Scherzi Systems”). Appellant seeks reversal of the decision of the Division of Minority and Women’s Business Development (the “Division”), dated October 10, 2017, to deny Scherzi Systems certification as a Woman-owned Business Enterprise (“WBE”). By judgment entered September 30, 2021, the Appellate Division, Third Department annulled the Division’s Final Order 19-16 dated September 6, 2019, and “remitted [the matter] to the Director to issue a new determination on all the evidence presented.” (Memorandum and Judgment at 6)

For the reasons below, and after considering the administrative record including pertinent portions of the appeal hearing testimony, I hereby issue a new determination granting WBE certification to Scherzi Systems.

Procedural History

The Division denied Scherzi Systems’ application for WBE certification in a letter dated October 10, 2017, on the grounds that the business failed to satisfy one “ownership” and three “operations” criteria for certification. The ownership issue was whether Scherzi Systems demonstrated that Dana Scherzi, the woman relied upon for certification, made capital contributions in proportion to her equity interest in the business enterprise (5 NYCRR § 144.2[a][1]).¹ The operational issues were whether the Scherzi Systems sufficiently demonstrated

¹ The Division amended 5 NYCRR § 144.2 on November 17, 2020, with an effective date of December 2, 2020. Because Scherzi Systems’ application for certification was analyzed under

that Dana Scherzi (1) makes decisions as it pertains to the operation of the business enterprise (5 NYCRR § 144.2[b][1]), (2) has adequate managerial experience or technical competence to operate the business (5 NYCRR § 144.2[b][1][i]), and (3) has the working knowledge and ability needed to operate the business enterprise (5 NYCRR § 144.2[b][1][ii]).

Scherzi Systems initiated an administrative appeal and requested a hearing on December 8, 2017. The hearing occurred on June 11, 2019 before Administrative Law Judge Richard A. Sherman (the “ALJ”). A copy of the audio recording was provided on June 14, 2019; after the ALJ received closing briefs from the parties, the hearing record closed on July 12, 2019. In a Recommended Order dated July 25, 2019, the ALJ recommended reversal of the Division's denial determination. In Final Order 19-16, September 6, 2019, then-Director of the Division Valerie White rejected the recommendation of the ALJ and affirmed the Division's denial determination. The Final Order 19-16 did not consider the administrative hearing testimony, stating, “(a)ny other conclusion, based on testimony at the hearing, that was not part of the application, is insufficient to meet the substantial evidence standard, as it would be improperly considered (*sic*) facts not in evidence, and therefore irrelevant for purposes of this proceeding.” (Final Order 19-16 at 3-4) Scherzi Systems thereafter commenced a CPLR article 78 proceeding to annul the Director's determination, and the proceeding was transferred to the Appellant Division, Third Department (the “court”).

In its Memorandum and Judgment dated August 19, 2021, the court found that “the Director limited her consideration of the facts to those materials that were provided in support of the application and disregarded the hearing testimony . . .” (Memorandum and Judgment at 5) Invoking the State Administrative Procedure Act §306, the court opined that “it is not only appropriate for an agency to consider the testimony offered at an administrative hearing in rendering its determination, it is required, as “[n]o decision, determination or order shall be made except upon consideration of the record as a whole.”” (Memorandum and Judgment at 5, [citations omitted]). Ultimately, the court annulled the Director’s determination and “remitted [the matter] to the Director to issue a new determination on all the evidence presented.” (Memorandum and Judgment at 6)

Scope of Review for New Determination

In complying with the court’s order and revisiting the record of Scherzi Systems, I note that the Division has authority to set procedures on how an administrative record is developed for review. Pursuant to Executive Law § 314 and 5 NYCRR 144.1, the Director is “to establish rules and regulations providing for criteria for the certification of minority and women-owned business enterprises, including procedures for the . . . evaluation of applications.” (*Matter of A.A.C. Contr., Inc. v. New York State Dept. of Economic Dev.* 195 AD3d 1284, 1286 [2021], citations and internal quotation removed)

The regulations in effect at the time of Scherzi System’s application stated that a business’ request for a hearing “shall state the bases upon which the denial of certification is being appealed and shall be based on information or documents provided with an application.” 5 NYCRR §

the prior version of the regulation, this Final Order cites to the prior version, unless otherwise specified.

144.4(e).² The regulations further provided that an ALJ “shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application.” *Id.* § 144.5(a).

Consistent with these principles and established procedures of the Division, the court in its Memorandum and Judgment followed its invocation of SAPA §306 with a clear qualification; after mandating that “it is required” for an agency “to consider the testimony offered at an administrative hearing in rendering its determination,” the court clarified: hearing testimony must be considered where “particularly . . . as here, the hearing testimony at issue *did not constitute new evidence* previously unavailable at the time of the application, *but, instead, served to explain and clarify technical terms and documentation that petitioner had submitted as part of its application...*” (Memorandum and Judgment at 5-6, emphasis added)

Analysis

Accordingly, the Division reviews anew the materials available to the Division at the time of Scherzi Systems’ original application, considering the hearing testimony and incorporating pertinent portions into the administrative record for review. Scherzi Systems’ eligibility—upon the one ownership and three operational criteria identified in the denial letter—is reviewed with respect to the core revenue generating function of the business, self-identified by Scherzi Systems as NAICS code 541511 - "Custom Computer Programming Services," the sole NAICS code that Scherzi Systems included in its application.

Operations of the Business:

As the ALJ stated, “(t)he Division’s denial on the basis of operational criteria (was) premised, in large part, on the Division’s assessment that the core function of Scherzi Systems is custom software development and that this is the province of James Scherzi, not Dana Scherzi.” (Recommended Order at 8) Indeed, the Division’s Final Order 19-16 asserted that, “(w)hile the application has demonstrated that Ms. Scherzi has experience in IT project management and consulting, information provided as part of the application did not establish that she performs duties and responsibilities, commonly associated with NAICS code 541511.” (Final Order 19-16 at 3) As outlined in both the Recommended Order and in Final Order 19-16, the Division’s assessment was based significantly upon analysis of Dana Scherzi’s resume and narrative of her day-to-day duties in the business.

Dana Scherzi’s short-form resume, as submitted at the time of application, stated that she had “12 years of experience in corporate IT” and held “a degree in Astrophysics form Barnard College, Columbia University.” Her longer-form resume also submitted at the time of application indicated that she had “Project Management Consulting” and “Corporate Training” roles at Scherzi Systems, had worked in the “Information Technology Department” of AXA US, and held a

² The Division’s amended regulations expressly provide that “[a]ll parties shall be given the opportunity to present evidence and oral argument, provided, however, the evidence presented shall be limited to such relevant documentation that, in the case of denial, was before the division at the time of the denial determination.” 5 NYCRR § 145.2(b)(1) [2020]. And, in, developing the appeal record “upon the proceedings of a hearing or written appeal,” “(s)uch additional information shall be limited to information that was before the division at the time of denial or at the time of intent to revoke.” 5 NYCRR §145.2(b)(4) [2020]

number of certifications in “Project Management” and as a “Software Tester.” As presented in the application, the credentials did not necessarily indicate to the analyst reviewing the application that Dana Scherzi was as expert as James Scherzi in the business’ core revenue-generating function of providing “custom computer programming services.” The analyst testified that Dana Scherzi’s resume, certifications and narrative of daily duties did not apparently indicate that she had experience specifically managing custom software development projects. (Transcript at 393, 397, 407.) Rather, those documents indicated only to the analyst that Ms. Scherzi had experience and expertise in project management more generally. (Transcript at 396-397, 410-412, 414-417.) The analyst also testified that “pretty vague” references to project management did not establish that Dana Scherzi performed work in the business’s core function of custom software development. (Transcript at 416-417)

However, Dana and James Scherzi’s hearing testimony clarified technical terminology and explained the representations in Dana Scherzi’s resume and narrative, and showed that she had documented experience and training (including managerial experience) pertaining specifically to computer programming. Dana Scherzi explained that representations regarding “management” in her resume pertained specifically to management of projects involving computer programming, and “for people in the industry, that’s implied.” (Transcript at S-215 / R-529). The testimony also clarified that Ms. Scherzi had technical competence, working knowledge, and ability that fell squarely within the area of work typically associated with NAICS code 541511- Custom Computer Programming Services. (See Transcript at S-234-235 / R-548-549) Ms. Scherzi’s testimony explained that her prior work and degree in Astrophysics required extensive computer programming in various languages (Transcript at 437-438, 441), and that her experience at AXA’s IT Department had included computer programming. (Transcript at 442-443) Thus Dana Scherzi’s resume, provided as part of the original application and explained through pertinent hearing testimony, documented her extensive and relevant programming knowledge and managerial experience in the field. In contrast, no managerial experience was outlined in Mr. Scherzi’s resume. Clarified by the hearing testimony, documentation provided at the time of application showed that Dana Scherzi has the skills and experience to oversee the work of custom computer programming, not just general project management or generalized information technology work.

Likewise, the hearing testimony served to clarify application information describing how roles and responsibilities were divided between Dana and James Scherzi with respect to business decisions and helped demonstrate that Dana Scherzi independently makes decisions at Scherzi Systems. As submitted in Section 4A of the application for certification, Dana Scherzi apparently performed only 3 out of the 12 specified areas of managerial operations on her own (Negotiating Bonding, Supervision of Field Operation, and Managing and Signing Payroll). Since both Dana and James Scherzi were listed for the other areas, other managerial operations set forth in the application were apparently done by or with the help of James Scherzi, a non-qualifying individual. However, the hearing testimony served to explain the responses provided in Section 4A: for example, while both James and Dana Scherzi were listed as responsible for “Finances,” Dana Scherzi testified that she is the final decisionmaker for business decisions. Dana Scherzi elaborated that while she and James Scherzi were both listed as responsible for many roles in the application, he only served as a backup, making certain decisions in her absence, and authorizing only a very small percentage of the estimates and contracts issued by the business. (Transcript at S-159-160,

167 / R-473-474, 481) As summarized by the ALJ, such testimony is consistent with the “detailed descriptions of the respective duties undertaken by Dana Scherzi and James Scherzi at Scherzi Systems” that were provided at the time of application. (Recommended Order at 10).

With the clarification and explanation of technical terms provided in hearing testimony, the information submitted at the time of application served to document that Dana Scherzi 1) made decisions pertaining to the operation of the custom computer programming services business, 2) had adequate managerial experience and technical competence to operate the business, and 3) had the working knowledge and ability needed to operate the business. In short, Dana Scherzi demonstrated independent operational control of Scherzi Systems.

Ownership: *Capital Contribution Proportionate to Equity Interest*

Capital contribution in the form of money, property, equipment, or expertise—proportionate to an owner’s equity interest—must be demonstrated to satisfy the “ownership” criterion for certification. (5 NYCRR § 144.2[a][1]) Neither Dana Scherzi nor James Scherzi made any monetary contribution for their ownership interests in Scherzi Systems. James Scherzi did not make a monetary contribution for his 100% ownership interest when the company was founded in 2011; Dana Scherzi did not make a monetary contribution for her 51% ownership that she acquired in 2014. While Dana Scherzi did not make a monetary contribution in proportion to the 2% greater equity interest that she held relative to James Scherzi, the application materials, as explained through the hearing testimony, serve to demonstrate that Dana Scherzi did make a capital contribution of expertise in proportion to her majority equity interest in Scherzi Systems.

Specifically, the application materials and testimony indicate that the value of Dana Scherzi’s capital contribution in the form of expertise was quantifiably higher than James Scherzi’s based on her greater experience, greater earning potential outside of the business, and her roles held within the business. As Dana Scherzi wrote in the application, “Since I was a significantly higher earner in the private sector (\$100k+ to his prior annual income of ~\$65k) and my skills bill at a higher rate, my professional contribution was worth as much if not more than his.” (Application, WBE response letter 5/18/2017). The application also showed that Scherzi Systems’ total receipts improved substantially each year from 2014 (the year Dana Scherzi assumed full time responsibilities in the business) through 2016, increasing from \$129,497 in 2014 to \$425,390 in 2016, an increase of approximately 230 percent. (Application at 1.V.) The increase in revenues alone, as presented in the application, was not attributable solely to Dana Scherzi’s capital contribution. However, in light of the hearing testimony explaining the large increase in the business’ receivables per year from 2014 forward, the increase in profitability of the company is attributable to the contributions in expertise of Dana Scherzi, specifically in managing software programmers. Dana Scherzi’s resume and narrative, as provided in the application and informed by the hearing testimony, demonstrated that she brought value to the business, through her expertise and experience in computer programming and software project management, that was commensurate to her equity interest in Scherzi Systems.

Reversal of the original denial determination is based upon review of the record as a whole, including hearing testimony, without looking beyond the original application materials. Relevant portions of the hearing testimony were incorporated into the record upon which this final

determination was made because they served to clarify and explain information already contained in the application materials. The record supports a determination that Dana Scherzi made capital contributions of expertise that were sufficiently quantifiable to show they were proportionate to her equity in the business, and that she independently operates the business.

It is hereby **ORDERED** that the decision to deny certification, dated October 10, 2017, is reversed. Accordingly, Scherzi Systems, LLC will be listed in the Division's directory for Minority and Women-owned Business Enterprises.



Jerome A. DuVal
Executive Director
Division of Minority and Women's
Business Development

February 2, 2022