

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

In the Matter

- of -

the Application of **Signs Now of Rochester, Inc.**  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51830

RECOMMENDED ORDER

- by -



Richard A. Sherman  
Administrative Law Judge

March 29, 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 to deny Signs Now of Rochester, Inc. ("Signs Now" or "applicant"), certification as a women-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

## **PROCEEDINGS**

This matter involves the appeal by 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that Signs Now does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by Signs Now for WBE certification by letter dated July 3, 2017 (exhibit 4). The letter set forth one ground under 5 NYCRR 144.2 for the denial. Applicant filed a request for a hearing ("hearing request") by letter dated August 1, 2017. The Division advised applicant that the hearing on this matter would be held on November 27, 2018 (letter from the Division to applicant, dated October 26, 2018).

During a conference call on November 15, 2018 the parties indicated that they were amenable to pursuing this matter through written submissions rather than through a live hearing. Subsequently, I set the following schedule for the parties' filings: applicant's written appeal ("written appeal"), on or before December 17, 2018; Division's reply ("Division's reply"), on or before January 28, 2019; and applicant's reply ("applicant's reply"), on or before February 11, 2019. Frank J. Fields, Esq., The Glennon Law Firm, P.C., represented applicant on the appeal. Benson V. Martin, Esq., New York State Department of Economic Development, represented the Division. A list of the exhibits submitted by the parties is appended to this report.

The parties timely submitted their respective filings on the appeal in accordance with the schedule noted above. This office received hardcopy of the last filing, applicant's reply, on February 13, 2019, whereupon, the record closed.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a WBE are established by regulation (*see* 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for Signs Now 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 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

### Position of the Division

The Division cites one ground for the denial of Signs Now's application. Specifically, the Division notes that applicant is a franchisee of Sign & Graphics Operations LLC ("SGO") and argues that applicant failed to establish that its franchise agreement permits the women owners, Julie St. Germaine and Jacqueline Ciresi, to make decisions without restrictions (exhibit 4 at 2 [citing 5 NYCRR 144.2(b)(2)]).

### Position of Applicant

Applicant argues that, although Signs Now is a franchisee, the women owners "operate their business completely at their own discretion" (hearing request at 2). Applicant further argues that the restrictions contained in the franchise agreement "are only designed to protect the viability of the branded products which the Applicant is licensed to sell [and] do not implicate the way the Applicant conducts its business" (*id.*).

## FINDINGS OF FACT

1. Signs Now is a corporation, established in 1999, and is in the business of sign manufacturing, including the manufacture of directional signs, exterior monument signs, vinyl graphics, and a variety of other signage (exhibit 1 at 1-2 [items 1.B, 1.Q, 1.R]; *id.* at 3 [items 4.A-C]).

2. The women owners, Julie St. Germaine and Jacqueline Ciresi, own 100 percent of the business enterprise, each holding a 50 percent ownership interest (exhibit 1 at 2 [item 2.A]).

3. Signs Now is a franchisee and operates under a franchise agreement with SGO, dated February 1, 2016 (written appeal at 1; exhibit A).

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Signs Now as a WBE pursuant to Executive Law Article 15-A. As discussed below, the Division cites one ground in support of upholding the denial.

### Control: Corporate Documents

The applicable regulatory criterion states that the enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (5 NYCRR 144.2[b][2]).

Applicant acknowledges that the franchise agreement includes "restrictions" but argues that those restrictions "are only designed to protect the viability of the branded products which the Applicant is licensed to sell [and] **do not implicate the way the Applicant conducts its business**" (written appeal at 3 [emphasis in original]). Applicant further argues that "[t]o hold otherwise would effectively bar any women or minority-owned franchisees from ever attaining certification from the Division" (*id.*). Additionally, applicant notes that the franchise agreement states that SGO and applicant are "independent contractors" and that applicant's employees "will be entirely under [applicant's] control and direction" (*id.* at 4).

Applicant also submitted a letter from the President of SGO ("SGO letter") stating that the requirements under the franchise agreement "relate primarily to the use of our tradename" and that

"Julie [St. Germaine] and Jackie [Ciresi] use the franchise network for benchmarking purposes and cooperative leveraging in purchasing agreements and informational resources as it relates to their business; however, our franchise members control the day-to-day operation of the business"

(exhibit C at 1<sup>1</sup>).

The Division cites numerous provisions of the franchise agreement in support of its argument that the women owners do not have authority to make business decisions without restrictions. The Division asserts that, among other things, the terms of the franchise agreement

"restrict Appellant's ability to: transfer ownership interests; change the location of its business; negotiate terms for a lease or sublease of its place of business; choose a supplier; . . . choose the products and services that it sells; . . . set its employees'

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<sup>1</sup> Applicant quotes this paragraph of the SGO letter in its written appeal, but the quotation is not consistent with the text of the SGO letter. Notably, the SGO letter does not, as applicant asserts, include the following text: "*all of our franchise owners operate their own independent businesses. Thus, their inclusion in the Franchise does not affect their ability to make their own business decisions*" (written appeal at 4 [emphasis in original]).

required qualifications; . . . set the terms of client contracts; and choose its bookkeeping, accounting, data processing and recordkeeping processes"

(Division reply at 3-4 [citations omitted]; *see also* exhibit 2 at 2 [affidavit of Alan Culbreath, sworn on January 28, 2019, ¶ 7]; exhibit 3 ¶¶ 1[C][2], 1[D], 2[A]; 2[B]; 2[D]; 8[B]; 8[D]; 8[G]).

The Division also notes that the franchise agreement obligates applicant to abide by requirements contained in confidential manuals that were not disclosed to the Division<sup>2</sup> (Division reply at 4). The franchise agreement states that "[t]he Confidential Manuals contain mandatory and suggested specifications, standards, operating procedures, and rules" (exhibit 3 ¶ 4[C]). Accordingly, there are undisclosed "restrictions on the manner in which Applicant may be operated" (Division reply at 4-5).

In its reply brief, applicant discounts the restrictions noted above and states that it "continues to have the ability to control all day-to-day operations of the business, including . . . supplier selection, targeting of clients, . . . hiring and firing decisions, . . . location selection, . . . and all other aspects of [its] business" (applicant reply at 2). Applicant again asserts that to uphold the denial determination "would effectively bar" all franchisees from being certified by the Division (*id.*).

The Division's denial determination is supported by substantial evidence. As discussed above, the franchise agreement places restrictions on the women owners' decision making in relation to the transfer of ownership interests (exhibit 3 ¶ 1[C][2]), location of the business (*id.* ¶ 1[D], 2[A]), terms of leases and subleases (*id.* ¶ 2[B]) and other business matters. Accordingly, by its express terms, the franchise agreement does not "permit . . . women who claim ownership of the business enterprise to make decisions without restrictions" (5 NYCRR 144.2[b][2]). Additionally, the franchise agreement states that applicant is obligated to follow requirements contained in confidential manuals that were not disclosed to the Division.

Finally, applicant's concern that the Division's denial determination creates a bar for any franchisee to qualify for certification is misplaced. The Division considers each application on its own merits. The denial determination in this matter relies upon the express terms of the franchise agreement signed by this applicant. Accordingly, the denial determination does not preclude a different result where another franchisee, operating under a different franchise agreement, applies for certification.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Signs Now's corporate governance documents do not authorize women owners to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

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<sup>2</sup> The franchise agreement states that "the Confidential Manuals' contents are confidential and that [applicant] will not disclose the Confidential Manuals to any person other than . . . employees who need to know its contents" (exhibit 3 ¶ 4[C]).

## **CONCLUSION**

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny Signs Now's application on the basis of whether the women owners, Julie St. Germaine and Jacqueline Ciresi, are permitted by corporate governance documents to make decisions pertaining to business operations without restrictions (*see* 5 NYCRR 144.2[b][2]).

## **RECOMMENDATION**

For the reasons stated herein, the determination of the Division to deny Signs Now of Rochester, Inc. certification as a women-owned business enterprise should be affirmed.

**Matter of Signs Now of Rochester, Inc.**  
**DED File ID No. 51830**

**Exhibit List**

<b>Exhibit</b>	<b>Description</b>
A	SGO Franchise Agreement with Signs Now, dated February 1, 2016
B	Department WBE Denial Letter to Signs Now, dated July 3, 2017
C*	Letter from SGO Parent Company, re: Signs Now, dated March 6, 2017
D	National Women's Business Enterprise Certification, granted November 3, 2015
1	Signs Now WBE Application, submitted March 1, 2017
2	Affidavit of Alan Culbreath, sworn January 28, 2019
3	SGO Franchise Agreement with Signs Now, dated February 1, 2016
4	Department WBE Denial Letter to Signs Now, dated July 3, 2017
5	Applicant's Written Appeal dated December 17, 2018

\* This exhibit is under tab "D" in applicant's written appeal. It is, however, referred to in the written appeal as "Exhibit C" (*see* written appeal at 4). The item under tab "C" of the written appeal is an exhibit to, and part of, the franchise agreement (exhibit A).