

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

In the Matter

- of -

**the Application of Tech Scan Services, Inc. d/b/a All Wired Up Electric
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 54600

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
June 16, 2023**

This matter considers the written appeal by Tech Scan Services, Inc. d/b/a All Wired Up Electric (“Tech Scan” 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 June 2, 2016, Arlene Cassino, as Vice-President, applied on behalf of Tech Scan for certification as a WBE (DED Exhibit 1).
2. On December 30, 2019, the Division denied the application on the following grounds:
 - (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);
 - (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);
 - (c) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii); and
 - (d) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).

3. Tech Scan timely filed a notice of appeal on January 27, 2020 (APP Exhibit 1).
4. A Notice of Written Appeal was sent to Tech Scan on February 14, 2020 (DED Exhibit 2).
5. Tech Scan submitted its written appeal by letter dated March 20, 2020 (APP Exhibit 2).
6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated March 8, 2023, and a brief of Laurel Wedinger-Gyimesi, Esq., counsel for the Division, dated April 6, 2023.

FINDINGS OF FACT

7. Tech Scan provides construction related electrical contractor services, based in Suffolk County, Long Island, New York (DED Exhibit 1).
8. Ms. Arlene Cassino is the Vice-President of Tech Scan and has an 85% ownership interest. Mr. Archie Cassino is the President of Tech Scan and has a 15% ownership interest (DED Exhibit 1).
9. Ms. Cassino's resume states that she worked as a hair colorist in a salon for 18 years, worked as a real estate broker, and was involved in a catering business (DED Exhibit 5).
10. Mr. Cassino holds a Master Electrician license and has over 15 years of experience in the electrical industry (DED Exhibits 4 and 14).
11. Ms. Cassino handles the financial aspects of the business, including negotiating insurance, marketing and sales, purchasing equipment, and is a signatory for business accounts (DED Exhibit 1).
12. Mr. Cassino is solely responsible for "managerial operations such as estimating, preparing bids, negotiating bonding, supervising field operations, and negotiating contracts" (DED Exhibit 1).

13. The 2015 joint personal tax returns and W-2's issued by Tech Scan reflect that Ms. Cassino was paid \$ [REDACTED] and Mr. Cassino was paid \$ [REDACTED] (DED Exhibits 6 and 9).
14. The 2016 W-2's issued by Tech Scan reflect that Ms. Cassino was paid \$ [REDACTED] and Mr. Cassino was paid \$ [REDACTED] (DED Exhibit 10).
15. The Corporate Bylaws state that the Company's President shall also be the CEO of the Company and "shall have general charge of the entire business of the corporation" (DED Exhibit 13).

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.

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

Articles of incorporation, corporate bylaws... or other agreements must permit ...women who claim ownership of the business enterprise to make those decisions without restrictions.

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 Tech Scan for certification 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)). Accordingly, applicant's attachments to APP Exhibit 2 will not be considered unless otherwise noted below.

DISCUSSION

I. 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. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in

proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017). 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.

In 2015, Ms. Cassino received a salary of \$ [REDACTED] and received profits of \$ [REDACTED], totaling \$ [REDACTED], while Mr. Cassino received a salary of \$ [REDACTED] and received profits of \$ [REDACTED], totaling \$ [REDACTED]. In 2016, Ms. Cassino received a salary of \$ [REDACTED] and profits of \$ [REDACTED], totaling \$ [REDACTED], while Mr. Cassino received a salary of \$ [REDACTED] and profits of \$ [REDACTED], totaling \$ [REDACTED] (DED Exhibits 6, 9 and 10). Ms. Cassino, as 85% owner, makes substantially less than Mr. Cassino, a 15% owner.

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 Tech Scan, as required by 5 NYCRR former § 144.2(c)(2), is supported by substantial evidence.

II. Operation

The eligibility criteria for MWBE 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).

Tech Scan provides construction related electrical contractor services. The core revenue generating functions of the business involve electrical maintenance for all electrical systems (DED Exhibit 1). Mr. Cassino is licensed as a Master Electrician and he is solely responsible for estimating, preparing bids, negotiating bonding, supervising field operations, and negotiating contracts (DED Exhibit 1). Ms. Cassino handles the financial related duties, including negotiating insurance, marketing and sales, purchasing equipment and is a signatory for the business accounts (DED Exhibit 1).

The Division's finding that Ms. Cassino does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

With regard to technical competence, where the woman-owner has no training or experience and the operations staff have more substantive and more significant experience, the Division's determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the woman-owner must identify the management experience and day-to-day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

"Working knowledge" is established by demonstrating an ability to review and evaluate other employees' work. See *Upstate Electrical, LLC*, supra at 1346.

Mr. Cassino is a Master Electrician with extensive history performing electrical services (DED Exhibits 4 and 14). Ms. Cassino has no such licensing or work history in the industry. Through 2016, she identified her career as either a hair colorist or a homemaker. Her resume

reveals no background, expertise, managerial experience or technical competence in the business seeking certification (DED Exhibit 5).

Mr. Cassino oversees the administrative portions of the business, while Mr. Cassino performs the revenue generating operations of the business.

The Division's finding that Ms. Cassino did not establish that she, as the woman-owner of Tech Scan had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

III. Control

5 NYCRR former §144.2(b)(2) requires that the relevant business agreements must permit the woman-owner to make decisions without restrictions. In determining whether the applicant meets this requirement, the Division may consider the company's bylaws. See *Matter of S.C. Spencer Electric, Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 21, 2022. In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (1995), unrestricted control was not established where the corporate structure did not prevent the woman-owner from making operational decisions, however, the corporate bylaws provided that the woman-owner's husband, as President and CEO, had sole management authority.

As stated above, Mr. Cassino is the President and Ms. Cassino is the Vice-President of Tech Scan (DED Exhibit 1). The corporate bylaws state that the firm's President shall be the CEO of the firm and "shall have general charge of the entire business of the corporation". The duties of the Vice-President are "delegated by the President" (DED Exhibit 13). Ms. Cassino, as the Vice-President, is not permitted to make decisions without restrictions.

The Division's finding that the relevant business agreements do not permit Ms. Cassino to make decisions without restrictions, as required by 5 NYCRR former § 144.2(b)(2), is supported by substantial evidence.

CONCLUSION

Tech Scan did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a WBE with respect to the eligibility criteria under 5 NYCRR former §§144.2(a)(1), 144.2(c)(2), 144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(2) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Tech Scan's application for certification as a WBE should be affirmed.

In the Matter of Tech Scan Services, Inc. d/b/a All Wired Up Electric
 NYS DED File No 54600
 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Certification dated June 2, 2016
DED 2	Division's denial letter dated December 30, 2019
DED 3	Notice to Proceed via written appeal dated February 14, 2020
DED 4	Master Electrician License
DED 5	Arlene Cassino Resume
DED 6	2015/2016 Cassino Joint Personal Tax Returns
DED 7	2014 Cassino Joint Personal Tax Return
DED 8	2015 Tech Scan Tax Return
DED 9	2015 Tech Scan W-2's
DED 10	2016 Tech Scan W-2's
DED 11	Tech Scan Articles of Incorporation
DED 12	Tech Scan Organizational Meeting Minutes 8/26/02
DED 13	Tech Scan Bylaws
DED 14	Archie Cassino Resume
APP 1	Applicant's Notice of Appeal dated January 27, 2020
APP 2	Applicant's Appeal letter dated March 20, 2020