

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

In the Matter

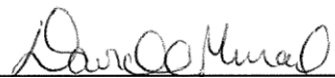
- of -

the Application of WNY Tile & Stone Corp.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 66945

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 28, 2023

This matter considers the written appeal by WNY Tile and Stone Corp., (“WNY” 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 December 2, 2019, Ms. Kimberly Caron, as President, applied on behalf of WNY for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On January 10, 2022, 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 of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (b) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
 - (c) 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, as required under 5 NYCRR §144.2(c)(2); and
 - (d) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5

NYCRR §144.2(c)(3).

3. WNY timely filed a notice of appeal on February 16, 2022 (APP Exhibit 1).
4. A notice to proceed via written appeal was sent to WNY on October 4, 2022 (DED Exhibit 3).
5. WNY submitted its written appeal on March 25, 2022 via counsel Luke Brown (APP Exhibit 2).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated May 12, 2023, and a brief of Laurel Wedinger-Gymes, Esq., counsel for the Division, dated May 25, 2023.

FINDINGS OF FACT

7. WNY is engaged in the business of ceramic tile and carpeting installation (DED Exhibit 1).
8. Kimberly Caron is the President and 51% owner of WNY. Her husband, Jason Caron is the Vice President and 49% owner of WNY (DED Exhibit 1).
9. In 2018, Ms. Caron received \$ [REDACTED] in wages and her proportional distribution from WNY, while Mr. Caron received \$ [REDACTED] in wages and his proportional distribution. Ms. Caron also received \$ [REDACTED] in wages from Kaleida Health where she worked as a nurse (DED Exhibits 6, 7 and 10).
10. In 2019, Ms. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED] from WNY, while Mr. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED]. Tax Form 1125-E evidences that Ms. Caron devoted 50% of her time to the business (DED Exhibits 8, 9 and 10).
11. In 2020, Ms. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED] from WNY, while Mr. Caron received \$ [REDACTED] in wages and a distribution of

\$ [REDACTED], totaling \$ [REDACTED] (DED Exhibits 7, 8 and 10).

12. Mr. Caron's resume reflects years of experience in the flooring industry. He estimates jobs and works in the field as an installer. He is responsible for evaluating employee performance and training new employees. He does final walk-throughs and communicates with the foremen on the projects. Mr. Caron is solely responsible for supervising field operations and negotiating contracts (DED Exhibits 1, 6 and 11).
13. Ms. Caron's resume reflects that she has been employed as a nurse since 2009. She spends 24-36 hours per week as a registered nurse. Her duties at WNY include ensuring projects start on time and meet contract deadlines, providing insurance certificates, employee scheduling, payroll, banking and human resources (DED Exhibits 5 and 11).

APPLICABLE LAW

5 NYCRR §144.2(b)(3) states as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(c) states as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. 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.
- (3) Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 WNY 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).

DISCUSSION

I. Ownership

5 NYCRR §144.2(b)(3) 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.

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.

In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD2d 841 (3rd Dept. 1995), the Court found that the Division's review of tax returns provided substantial evidence supporting the Division's consideration of whether a woman-owned business met the eligibility criterion at former 5 NYCRR §144.2(c)(2) concerning sharing of risks and profits.

The tax documents show that in 2018, Ms. Caron received \$ [REDACTED] in wages and her proportional distribution from WNY, while Mr. Caron received \$ [REDACTED] in wages and his proportional distribution. In 2019, Ms. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED] from WNY, while Mr. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED]. In 2020, Ms. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED] from WNY, while Mr. Caron received \$ [REDACTED] in wages and a distribution of \$ [REDACTED], totaling \$ [REDACTED] (DED Exhibits 7, 8, 9 and 10).

This is a disproportionate allocation and supports the conclusion that Ms. Caron did not share in the profits of WNY in proportion to her equity interest as required by 5 NYCRR §144.2(b)(3).

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this

requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Caron does not have any industry specific expertise. She is a registered nurse and her skills pertaining to WNY are related to general business or office management. She does not possess any academic or technical training relevant to the industry (DED Exhibits 1 and 5). The core functions of the business are the installation of ceramic tile and carpeting (DED Exhibit 1). Ms. Caron does not have training or experience in those areas. As President, she oversees the general running of WNY and her job duties include ensuring that projects start on time and meet contract deadlines, providing insurance certificates, employee scheduling, ordering and scheduling delivery of materials, payroll, retirement benefits, banking, invoicing and human resources (DED Exhibits 5 and 11). She does not have the training or experience in the industry necessary to supervise the work of the employees.

Mr. Caron has years of experience in the flooring industry (DED Exhibit 6). His duties include estimating jobs with the majority of his hours spent working in the field as an installer. He provides direct access to general contractors and the Foreman in charge of the project. He is responsible for evaluating employee performance, does final walk-throughs, communicates with the foremen of projects, and deals with change orders and changes in materials and scheduling (DED Exhibit 10).

5 NYCRR §144.2(c)(2) states that “... 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 for which certification is sought. 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”.

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”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

WNY’s critical functions are to estimate and bid jobs to generate revenue and perform the installation of ceramic tile and carpeting. Mr. Caron solely makes decisions with regard to estimating, bid preparation and supervising field operations (DED Exhibit 11). Ms. Caron has no experience in the tile or carpet installation industry, and she failed to demonstrate that she can bid on or complete any work related to tile or carpet installation.

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR §144.2(c)(3). Ms. Caron has separate employment as a registered nurse and oversees the general running of WNY (DED Exhibit 4). She alleges that she spends 24-36 hours per week as a registered nurse and 36- 40 hours per week at WNY. She has not shown that she is onsite daily. Mr. Caron works 40-50 hours in the field per week. He has direct access to the general contractors and foremen in charge of the projects and works in the field (DED Exhibit 11). Substantial evidence supports the determination that Ms. Caron does not devote sufficient time on an ongoing basis to the daily operation of the business.

CONCLUSION

WNY did not meet its burden to demonstrate that the Division’s determination to deny its

application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(3), 144.2(c)(1), 144.2(c)(2) and 144.2(c)(3) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny WNY's application for certification as a woman-owned business enterprise.

In the Matter of WNY Tile & Stone Corp.
DED File ID No. 66945
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	WNY Articles of Incorporation	Y	Y
DED 5	Resume of Kimberly Caron	Y	Y
DED 6	Resume of Jason Caron	Y	Y
DED 7	Kimberly Caron W-2's 2018/2020	Y	Y
DED 8	Jason Caron W-2 2020	Y	Y
DED 9	2019 1125-E for WNY	Y	Y
DED 10	WNY K-1's 2018-2020	Y	Y
DED 11	Narrative prepared by Kimberly Caron	Y	Y
DED 12	WNY Corporate Bylaws	Y	Y
APP 1	Notice of Appeal	Y	Y
APP 2	Written Appeal submission	Y	Y