

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

In the Matter

- of -

the Application of Watson Farms, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 47585

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

July 19, 2018

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 the application filed by Watson Farms, LLC (Watson Farms, or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal by Watson Farms 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. Watson Farms challenges the determination of the Division that applicant does not meet the eligibility criteria for certification as a WBE.

Mary Lou Watson submitted an application on behalf of Watson Farms for certification as a WBE on June 27, 2014 (*see* WBE Exhibit 21). The Division denied Watson Farms' application by letter dated April 10, 2017 (*see* WBE Exhibit 25). The Division's April 10, 2017 letter identified four grounds related to the eligibility criteria outlined at 5 NYCRR 144.2 for the denial.

By letter dated April 29, 2017 from Ms. Watson, applicant responded to the Division's April 10, 2017 denial letter, and requested a hearing. The Division issued a Notice of Appeal Hearing dated March 9, 2018, which scheduled the hearing for April 3, 2018, at 11:00 a.m. at the Division's offices located at 625 Broadway, Albany, New York. At the Division's request and with applicant's consent, I issued a Notice of Adjournment, dated March 26, 2018, which adjourned the hearing from April 3, 2018 to April 9, 2018, at 11:00 a.m. at the Division's Albany offices.

The hearing convened as scheduled. David G. Burch, Jr., Esq. (Barclay Damon, LLP, Syracuse, New York)¹ appeared at the hearing on behalf of Watson Farms. Mary Lou Watson, Kurt Watson, and Joanna Barton testified for Watson Farms. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Drina Holden, Senior Certification Analyst, testified for the Division.

During the hearing, the Division asked me to take official notice of the pages from the New York State Department of Environmental Conservation's (DEC) web site concerning the requirements for certification as a commercial pesticide applicator. The Division provided a hard copy of the web pages. (*See* attached Exhibit Chart.)

Section 145.1 of 5 NYCRR outlines the procedures for the conduct of an appeal hearing. These regulations, however, are silent about requests for taking official notice. Nevertheless,

¹ With a letter dated March 15, 2018, Mr. Burch identified himself as counsel for Watson Farms.

State Administrative Procedure Act (SAPA) § 306(4) states, in relevant part, that official notice may be taken of facts within the specialized knowledge of an agency. Pursuant to SAPA § 306(4), I took official notice of the DEC's web pages at the April 9, 2018 hearing (*see* Compact Audio Disk [CD] 3, Track 1 at 38:58-39:22.)

The parties offered 27 exhibits during the hearing. An exhibit chart is attached to this recommended order.

An audio recording of the administrative adjudicatory hearing was made. The Office of Hearings and Mediation Services received copies of four compact audio disks on May 3, 2018. Whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise. Staff reviews the business enterprise as it existed at the time the application was filed based on representations in the application, as well as information filed in supplemental submissions (*see* 5 NYCRR 144.4[e] and 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division staff's determination to deny the application filed by Watson Farms for certification as a WBE is not supported by substantial evidence (*see* SAPA § 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" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY 3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Division Staff

In the April 10, 2017 denial letter (*see* WBE Exhibit 25), Division staff stated that Watson Farms failed to meet four criteria for WBE certification as set forth in 5 NYCRR 144.2 concerning Ms. Watson's ownership and operation of the business enterprise. Specifically, with respect to ownership, the Division contended that applicant did not show that Ms. Watson shares in the risks and profits in proportion to her ownership interest in the business enterprise as required by 5 NYCRR 144.2(c)(2).

Concerning the operation of Watson Farms, the Division asserted that applicant failed to demonstrate that Ms. Watson makes decisions pertaining to the operation of the business enterprise in accordance with 5 NYCRR 144.2(b)(1). The Division asserted further that Watson

Farms did not show that Ms. Watson has adequate managerial experience or technical competence to operate the enterprise as required by 5 NYCRR 144.2(b)(1)(i). Finally, the Division contended that applicant failed to demonstrate that Ms. Watson devotes time on an ongoing basis to the daily operation of the business enterprise in accordance with 5 NYCRR 144.2(b)(1)(iii).

Watson Farms, LLC

Mary Lou Watson organized Watson Farms as a limited liability company in 2001; she is the only member. The Division certified Watson Farms as a woman-owned business enterprise from 2003 to 2017. According to Watson Farms, the circumstances of the business enterprise were consistent during the period it was certified as a woman-owned business enterprise, and remain so.

Watson Farms contended that Ms. Watson manages all aspects of the business enterprise. In addition, she is the only person at Watson Farms who is a Certified Nursery and Landscape Professional (CNLP) by the New York State Nursery and Landscape Association, Inc. Watson Farms contended further that Kurt Watson is an operating engineer, and that as a union member, he is paid prevailing wages on an hourly basis. Consequently, his earnings have been greater than Mary Lou Watson's compensation from the business enterprise. Although Ms. Watson has another job, Watson Farms argued that Ms. Watson addresses the needs of her landscaping business in the evening and on weekends. Ms. Watson relies on Joanna Barton to prepare and organize the paperwork associated with operating the business enterprise. (*See* CD 1 at 04:16, 04:32, 05:11; CD 4 at 20:22, 21:06, 22:24, 24:35.)

As part of the review of the subject application for WBE certification, Watson Farms observed that Division staff neither interviewed Ms. Watson or any other employee, nor visited the business enterprise. According to Watson Farms, the Division did not provide a rational basis for denying its application for WBE certification. (*See* CD 1 at 07:20; CD 4 at 24:35.)

FINDINGS OF FACT

1. Mary Lou Watson organized Watson Farms as a limited liability company in 2001. She is the only member, and has the authority to manage the business and affairs of Watson Farms. (*See* WBE Exhibits 1 and 8; CD 1 at 08:35, 24:20, 54:53-55:39, 55:50-56:46.)
2. Watson Farms is a mid-size business that provides landscape services to public and commercial enterprises, and residential property owners. The scope of services provided includes hardscapes, such as patios and retaining walls, plantings, sod and lawns, pond construction, and installation of irrigation systems, among other things. Watson Farms also operates a retail garden center in Lafayette (Onondaga County), New York. The retail garden center sells seasonal annuals, perennials, shrubs, trees, as well as mulch products and top soil. (*See* CD 1 at 08:35, 09:44.)
3. Kurt Watson is Ms. Watson's spouse. In 2001, Watson Farms hired Kurt Watson to work as the field manager for the business enterprise. Since 1987, Mr. Watson has been a member of the International Union of Operating Engineers, Local 545. As such, Mr.

Watson earns the prevailing hourly wage consistent with the requirements set by the New York State Department of Labor. (See CD 1 at 27:25, 37:19, 38:49; CD 2, Track 2 at 25:41; CD 3, Track 1 at 08:26, 14:13, 17:45.)

4. In 2003, 2006, and 2009, the New York State Department of Economic Development, Division for Minority and Women's Business Development, certified Watson Farms as a woman-owned business enterprise (see WBE Exhibit 13; CD 1 at 29:29, 31:00).
5. On behalf of Watson Farms, Ms. Watson filed an application for WBE certification on June 27, 2014 (see WBE Exhibit 21; CD 1 at 32:11; CD 3, Track 1 at 22:54).
6. By letter dated April 10, 2017, the Division denied Watson Farms' application for WBE certification (see WBE Exhibit 25).
7. With a letter dated April 29, 2017, Ms. Watson responded to the Division's April 10, 2017 denial letter, and requested a hearing on behalf of Watson Farms.

I. Ownership – Risks and Profits

8. In 2015, Kurt Watson's wages from Watson Farms were [REDACTED]. Mary Lou Watson did not report any earned income from Watson Farms, in 2015. According to Schedule C from the 2015 federal personal income tax return, Watson Farms earned a net profit of [REDACTED]. Because she is the only member of the limited liability company, Mary Lou Watson enjoyed this benefit. (See WBE Exhibit 9; CD 2, Track 2 at 30:25.)

II. Operation

9. In general, Kurt Watson has worked in the landscaping industry from 1980 to the present. In particular, Mr. Watson has worked at Watson Farms since 2001, and his job title is "Manager." He supervises the landscaping crews in the field, contributes to project bids, and negotiates insurance and other contracts. Mr. Watson has an Associate of Arts Degree in Agricultural Business and a Bachelor of Science Degree in Agricultural Economics. He is a certified pesticide applicator by the DEC. (See WBE Exhibit 14; CD 2, Track 2 at 02:41; CD 3, Track 1 at 12:28, 31:00, 31:41, 32:12.)
10. To support its application, Watson Farms provided a copy of Kurt Watson's DEC pesticide certification (see WBE Exhibits 21 at 9, and 24; CD 3, Track 1 at 36:39, 37:45).
11. With respect to Watson Farms, Ms. Watson's résumé just states that she is responsible for the "[o]versight of all business operations" (WBE Exhibit 15). Ms. Watson's résumé does not include any other work experiences related to the landscaping industry.
12. In contrast, Ms. Watson's résumé does offer significant details about all her other work experiences as a health care practitioner and researcher working in the fields of pulmonology (asthma) and neuromuscular science (muscular dystrophy [MD] and amyotrophic lateral sclerosis [ALS]) (see WBE Exhibit 15).

13. From 2005 to the present, Ms. Watson has been the ALS Clinic Coordinator and Senior Clinical Research Associate at SUNY Upstate Medical University (the University). Ms. Watson holds an Associate in Respiratory Science, a Bachelor of Arts Degree in Sociology and Biology, and a graduate degree in management sales and marketing. Ms. Watson is a licensed respiratory therapist and a certified phlebotomist. Ms. Watson's résumé includes a list of articles published in peer-reviewed journals, such as the *Journal of the American Medical Association* and *Neurology*, that she has authored or co-authored, as well as presentations that she has given at meetings and symposia on topics concerning asthma, MD, and ALS. Ms. Watson holds many professional certifications and is a member of various associations related to the fields of pulmonology and neuromuscular science. (See WBE Exhibit 15; CD 1 at 01:03:15; CD 2 Track 2 at 11:52.)
14. For all managerial operations listed in section 4 of the application for WBE certification, Mary Lou Watson is identified as the owner. For many managerial operations, Kurt Watson is also identified, and his title or position is listed as "Manager." For example, Kurt Watson is identified in section 4 of the application as the manager with respect to estimating, preparing bids, negotiating insurance, supervising field operations and negotiating contracts. (See WBE Exhibit 21 at § 4.A.) According to his résumé (see WBE Exhibit 14), Kurt Watson is responsible for these same business operations.
15. Ms. Watson is employed full-time by the University where her schedule is Monday through Friday from 8:00 a.m. to 4:00 p.m. (see WBE Exhibit 22; CD 1 at 44:51; CD 2, Track 2 at 17:24; CD 3, Track 1 at 33:22, 33:37, 33:55).
16. Kurt Watson is a full-time employee of Watson Farms (see WBE Exhibit 14). He is in the field every day (see CD 1 at 41:56).

DISCUSSION

This recommended order considers applicant's appeal from the Division's April 10, 2017 determination (see WBE Exhibit 25) to deny the certification of Watson Farms as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in 5 NYCRR 144.2, the Division identified four bases for the denial with respect to the ownership and operation of the business enterprise. Each basis is addressed below.

I. Prior Certifications

The Division acknowledged that Watson Farms was previously certified as a woman-owned business enterprise (see Findings of Fact No. 4). The Division argued, however, that it is not bound to recertify a previously certified business enterprise if the Division's prior determinations were made in error. The Division contended that based on the subject application and supplemental materials, staff appropriately determined that Watson Farms is not eligible for certification as a woman-owned business enterprise. (See CD 4 at 11:05, 19:22.)

The Division is correct that it is not obligated to recertify Watson Farms as a WBE based on prior determinations. The doctrine of equitable estoppel cannot be invoked against a governmental agency in the exercise of its governmental function (*see e.g. Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]); *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Env'tl. Conservation*, 119 AD3d 1172, 1173 [2014]).

After filing an application, Watson Farms has the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR 144.2. Watson Farms cannot rely upon past determinations of the Division as the only basis for recertification as a woman-owned business enterprise.

II. Interviews and Inspections

With respect to the application for WBE certification that Watson Farms filed on June 27, 2014 (*see* WBE Exhibit 21), the parties agree that Division staff neither interviewed Ms. Watson or any other employee from Watson Farms, nor inspected Watson Farms (*see* CD 1 at 07:20, 34:28; CD 3, Track 2 at 04:24). Applicant, however, cited no authority that requires Division staff to conduct either interviews or site visits before making determinations about applications for WBE certification. Interviews and site visits are optional components of the application review process. Absent any authority, I can grant no relief.

III. WBE Exhibit 27

As noted above, the appeal hearing concerning the subject matter convened at the Division's offices in Albany, New York. However, the Division's witness, Senior Certification Analyst Drina Holden, testified via teleconference from the Division's offices in New York City.

During the hearing, Mr. Burch objected when he observed Ms. Holden reviewing notes during her direct examination by the Division's counsel. A discussion was held on the record (*see* CD 3, Track 1 at 40:28, 40:52; CD 3, Track 2 at 00:19-01:08). Applicant's counsel requested a copy of Ms. Holden's notes (*see* CD 3, Track 2 at 04:01), and Mr. Harmonick agreed to provide a copy of them (*see* CD 4 at 27:34). Until he had the opportunity to review the document, Mr. Burch reserved the right to offer a copy of the notes for the hearing record (*see* CD 3, Track 2 at 04:17).

By email dated June 19, 2018, Mr. Burch acknowledged that the Division's counsel had provided him with a copy of Ms. Holden's notes, and attached a copy of them as a PDF document. Applicant's counsel requested that the notes be included in the record as a hearing exhibit.

The Division responded with an email dated July 10, 2018 from Gretchen Robinson, Esq. Subsequent to the April 9, 2018 hearing, Ms. Robinson was assigned as the Division's legal counsel to this matter when Mr. Harmonick left his position as Assistant Counsel with the

Division. In the July 10, 2018 email, Ms. Robinson said that the Division did not object to identifying Ms. Holden's notes as a hearing exhibit.

Accordingly, the attached Exhibit Chart identifies Ms. Holden's notes as WBE Exhibit 27. During the April 9, 2018 hearing, Ms. Holden's direct examination was recorded on CD 3, Track 1 from 19:45 to 49:46. References to Ms. Holden's direct testimony are noted throughout the recommended order (e.g. Findings of Fact 9, 10 and 15, *supra*) and are identified in **bold**. Ms. Holden's cross-examination by applicant's counsel was recorded on CD 3, Track 2 from 00:19 to 15:21 and on CD 4 from 00:00 to 09:02, whereupon Ms. Holden's examination concluded.

IV. Ownership

Mary Lou Watson organized Watson Farms as a limited liability company in 2001. She is the only member, and has the authority to manage the business and affairs of Watson Farms, according to the terms of the Operating Agreement. (See WBE Exhibits 1 [Articles of Organization] and 8 [Operating Agreement at ¶ 5]; CD 1 at 08:35, 24:20, 54:53-55:39, 55:50-56:46.)

Consistent with the conditions of the application for WBE certification, Ms. Watson provided copies of Watson Farms' federal and New York State tax returns for 2011, 2012, and 2013, as well as copies of the jointly filed personal returns of Mary Lou and her spouse, Kurt Watson, for 2012 and 2013. On August 3, 2016, Division staff requested copies of the Watson's personal tax returns for 2015, and Ms. Watson provided them on August 8, 2016. (See WBE Exhibits 21 [Application] at 8-10, and 9 [2015 Personal Tax Returns]; CD 1 at 33:03, 33:54; CD 2, Track 2 at 06:55, 08:05; **CD 3, Track 1 at 22:22, 23:41.**) At the hearing, the parties offered copies of the Watsons' jointly filed personal returns for 2015 (see WBE Exhibit 9).² Although filed with the application for WBE certification, the other corporate and personal tax returns for 2011, 2012, and 2013 are not part of the evidentiary hearing record.

Staff offered WBE Exhibit 9 to demonstrate that Ms. Watson, as the woman-owner of Watson Farms, does not share in the risks and profits in proportion to her ownership interest in the business enterprise as required by 5 NYCRR 144.2(c)(2). With respect to this eligibility criterion, the basis for the Division's determination is the disparity in the level of compensation that Ms. Watson received in 2015 from Watson Farms compared to the wages earned by Kurt Watson.

In 2015, staff observed that Kurt Watson's wages from Watson Farms were [REDACTED], and that Mary Lou Watson did not report any earned income from Watson Farms.³ According to Schedule C from the 2015 personal return, Watson Farms earned a net profit of [REDACTED] in 2015.

² Watson Farms offered a copy of both the federal and New York State 2015 returns. The Division, however, offered a copy of the federal 2015 return. (See WBE Exhibit 9; CD 2, Track 2 at 06:55, 08:05; **CD 3, Track 1 at 23:32**).

³ As noted above (see Findings of Fact No. 15), Ms. Watson is employed full-time at SUNY Upstate Medical University. Ms. Watson's salary from the University is reported in the Watsons' jointly filed personal tax returns for 2015 (see WBE Exhibit 9). These earnings, however, are not relevant to this matter.

Because she is the only member of the limited liability company, Mary Lou Watson enjoyed this benefit. Staff concluded that Watson Farms did not demonstrate compliance with the eligibility criterion outlined at 5 NYCRR 144.2(c)(2) because, in 2015, Ms. Watson did not receive any income from Watson Farms and the company's net profits were significantly less than Kurt Watson's earnings. (See WBE Exhibit 9; CD 2, Track 2 at 30:25; [CD 3, Track 1 at 24:26, 25:11, 25:35, 46:00, 46:52; CD 3, Track 2 at 12:45].)

Staff's determination with respect to Watson Farms' compliance with 5 NYCRR 144.2(c)(2) is consistent with the court's determination in *Matter of CW Brown, Inc. v Canton*, (216 AD2d 841, 843 [3d Dept 1995]). In *CW Brown*, the court held that staff's review of tax returns, such as those considered in this matter, was substantial evidence to support the Division's determination whether an application for WBE certification meets this eligibility criterion. I conclude, therefore, that the basis for Division staff's determination is rational and should be affirmed.

During the hearing, Ms. Watson credibly testified that she does not draw a salary from Watson Farms, and that she reinvests the retained earnings in the business enterprise. Ms. Watson said that this was a long standing practice. Ms. Watson said that her retained earnings in 2015 were about [REDACTED]. In 2016, Ms. Watson's retained earnings were a loss of [REDACTED] and in 2017, her retained earnings were [REDACTED]. Ms. Watson confirmed that Kurt Watson's salary was about [REDACTED] for each of these years. (See CD 1 at 37:00, 39:39.) Watson Farms, however, did not identify any documentary information submitted with the application for WBE certification to support Ms. Watson's testimony with respect to retained earnings. Moreover, information about the company's retained earnings in 2015, 2016, and 2017 was not before the Division when it was considering Watson Farms' application for WBE certification.

As noted above (see Findings of Fact No. 3), Kurt Watson has been a member of the International Union of Operating Engineers Local 545 since 1987. As a result of his union membership, Kurt Watson earns the prevailing hourly wage consistent with the requirements set by the New York State Department of Labor. (See CD 1 at 27:25, 37:19, 38:49; CD 2, Track 2 at 25:41; CD 3, Track 1 at 08:26, 14:13, 17:45.) Watson Farms offered this information to justify the disparity between Kurt Watson's earnings and the compensation that Ms. Watson receives from Watson Farms. The information concerning Mr. Watson's union membership was offered for the first time at the hearing. During cross-examination, applicant's counsel asked Ms. Holden why Division staff did not inquire about this circumstance. Ms. Holden referred to the application where applicant stated that Watson Farms was not a union shop. (See WBE Exhibit 21 at § 4.F; CD 3, Track 2 at 13:51-15:21.)⁴ Accordingly, further inquiry by Division staff was not necessary.

Because the scope of the review in this proceeding is limited to the application and supporting materials at the time the Division issued its determination, any new information offered during the hearing cannot be considered. With a future application, Division staff would evaluate the merits of this additional information as it relates to applicant's compliance with this eligibility criterion.

⁴ Ms. Watson testified that Watson Farms has a relationship with the local Laborers' Union because certain contracts will require the employment of unionized laborers (see CD 1 at 37:56).

IV. Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise be made by the woman owner. According to the Division, Ms. Watson primarily oversees financial and administrative matters while Kurt Watson oversees the significant functions of the business enterprise related to estimating and supervising field operations (*see* WBE Exhibit 25). For the following reasons, the Division's denial on this ground is based on substantial evidence.

Watson Farms is a mid-size business that provides landscape services to public and commercial enterprises, and residential property owners. The scope of services provided includes hardscapes, such as patios and retaining walls, plantings, sod and lawns, pond construction, and installation of irrigation systems, among other things. Watson Farms also operates a retail garden center in Lafayette (Onondaga County), New York. The retail garden center sells seasonal annuals, perennials, shrubs, trees, as well as mulch products and top soil. (*See* CD 1 at 08:35, 09:44.)

However, the description of the business enterprise provided in the application for WBE certification did not mention the retail garden center. Rather, the information presented in the application focused on the construction related nature of the business enterprise. (*See* WBE Exhibit 21 at §§ 3.B-3.E; [CD 3, Track 1 at 27:11].)⁵

With the application, Watson Farms provided copies of Mary Lou Watson's résumé and Kurt Watson's résumé (*See* WBE Exhibits 21 at 8, 14 [Kurt Watson's Résumé], and 15 [Mary Lou Watson's Résumé]; CD 1 at 59:20, 01:00:07, 01:02:45; CD 2, Track 2 at 01:32, 03:45). According to his résumé, Kurt Watson has worked in the landscaping industry from 1980 to the present. Mr. Watson has worked at Watson Farms since 2001, and his job title is "Manager." He supervises the landscaping crews in the field, contributes to project bids, and negotiates insurance and other contracts. Mr. Watson has an Associate of Arts in Agricultural Business, and a Bachelor of Science in Agricultural Economics. He is a certified pesticide applicator by DEC. (*See* WBE Exhibit 14; CD 2, Track 2 at 02:41; CD 3, Track 1 at 12:28, **31:00, 31:41, 32:12.**) In support of its application, Watson Farms provided a copy of Kurt Watson's DEC pesticide certification (*see* WBE Exhibits 21 at 9, and 24; **CD 3, Track 1 at 36:39, 37:45.**)

Although the owner of Watson Farms, Mary Lou Watson's résumé is that of a health care practitioner and researcher working in the fields of pulmonology (asthma) and neuromuscular science (muscular dystrophy [MD] and amyotrophic lateral sclerosis [ALS]). From 2005 to the present, Ms. Watson has been the ALS Clinic Coordinator and Senior Clinical Research Associate at SUNY Upstate Medical University. All other work experiences listed on Ms.

⁵ The documentary evidence and testimony related to the retail garden center (*see* WBE Exhibits 12 and 12A; CD 1 at 09:44, 10:17, 14:01, 18:10, 20:04, 42:29, 43:10, 43:44, 44:00; CD 3, Track 1 at 02:26, 09:34) are not relevant to this appeal. Applicant did not intentionally withhold the information related to the retail garden center (*see* CD 2, Track 2 at 21:44). Nevertheless, the scope of the review in this appeal proceeding is limited to the application and supporting materials at the time the Division issued its determination. Therefore, the information offered during the hearing about the retail garden center cannot be considered. With a future application, Division staff would evaluate the merits of this additional information as it relates to applicant's compliance with the eligibility criteria.

Watson's résumé are related to the health care industry. Ms. Watson holds an Associate in Respiratory Science, a Bachelor of Arts in Sociology and Biology, and a graduate degree in management sales and marketing. Ms. Watson is a licensed respiratory therapist and a certified phlebotomist. On her résumé, Ms. Watson provides a list of articles published in peer-reviewed journals, such as the *Journal of the American Medical Association* and *Neurology*, that she has authored or co-authored, as well as presentations that she has given at meetings and symposia on topics concerning asthma, MD, and ALS. Ms. Watson holds many professional certifications and is a member of various associations related to the fields of pulmonology and neuromuscular science. (See WBE Exhibit 15; CD 1 at 01:03:15; CD 2 Track 2 at 11:52.) In addition, Ms. Watson is a Certified Nursery and Landscape Professional (CNLP) by the New York State Nursery and Landscape Association, according to her résumé (see WBE Exhibits 7 and 15; CD 1 at 01:01:17, 01:02:25).

With respect to her work experience at Watson Farms, Ms. Watson's résumé states that she is responsible for the "[o]versight of all business operations" (WBE Exhibit 15). In contrast, Division staff observed that Ms. Watson offered significant details about all her other work experiences, which are related to the medical profession, as described above (see WBE Exhibit 15; CD 3, Track 1 at 30:31).

At the hearing, Ms. Watson explained that she had been employed at Watson Landscaping, Inc. (Watson Landscaping) from 1997 to 2001. Watson Landscaping was a business owned and operated by Kurt Watson's family. While working at Watson Landscaping, Ms. Watson was responsible for accounts receivable and payable, managing the payroll, preparing estimates and bids, and doing fieldwork. (See CD 1 at 20:19, 22:00, 58:40.) However, Ms. Watson makes no mention of her work experiences at Watson Landscaping in her résumé (see WBE Exhibit 15). As a result, this information was not before the Division when it was considering the captioned application for WBE certification. Consequently, the significance of Ms. Watson's work experiences at Watson Landscaping cannot be considered now.

Mary Lou and Kurt Watson, as well as Joanna Barton offered testimony during the hearing about their respective roles in preparing estimates and bids. (See CD 1 at 27:25; CD 2, Track 1 at 06:45, 09:20, 10:00; CD2, Track 2 at 37:29; CD 3, Track 1 at 00:20, 02:26, 11:14, 16:30.) In addition, the hearing testimony of applicant's witnesses clarified that Kurt Watson's management responsibilities are limited to supervising landscaping crews in the field. Pursuant to the terms of Articles of Organization and the Operating Agreement for Watson Farms, Kurt Watson is not a manager of the limited liability company. (See CD 1 at 40:32; CD 2, Track 2 at 02:35-03:38; CD 3, Track 1 at 08:26.) These details, however, were not presented in the application or the résumés filed with it. Therefore, the Division did not have this information before making its determination.

Section 4 of the application lists several business operations, and requests information about who is responsible for managing them. In addition, to the names of the individuals, the applicant should provide the title or position of the individual, or individuals, responsible for these operations. For all managerial operations listed in section 4, Mary Lou Watson, as the owner, is identified. For many managerial operations, Kurt Watson is also identified, and his title or position is listed as "Manager." For example, Kurt Watson is identified in section 4 of the application as the manager with respect to estimating, preparing bids, negotiating insurance,

supervising field operations and negotiating contracts. (See WBE Exhibit 21 at § 4.A.) According to his résumé (see WBE Exhibit 14), Kurt Watson is responsible for these same business operations.

In evaluating compliance with the eligibility criterion at 5 NYCRR 144.2(b)(1), Division staff reviews section 4 of the application to identify the significant business functions and who performs them. Significant business functions generate revenue for the business enterprise and are unique to the industry compared to those administrative functions which are common to most businesses.

With respect to Watson Farms, staff reasonably determined that the significant business functions are estimating and supervising field operations. Based on the application for WBE certification and the information presented in the résumés, Kurt Watson, rather than Mary Lou Watson, appears to be responsible for these significant business functions. (See **CD 3, Track 1 at 43:25**; CD 4 at 06:47-07:00.) The Division has consistently held that minority and woman owners must perform significant business operations in order to comply with the eligibility criterion at 5 NYCRR 144.2(b)(1).⁶ Therefore, I conclude that the Division's determination with respect to Watson Farms' compliance with this eligibility criterion is based on substantial evidence.

VI. Managerial Experience or Technical Competence

The Division also determined that Ms. Watson lacks adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i). Although not at issue in this matter, a plain reading of this eligibility criterion supports the interpretation that adequate managerial experience and technical competence in the business enterprise are two independent bases for certification.

The Division stated in the April 10, 2017 denial letter that Kurt Watson has over thirty-five years of relevant managerial experience in the landscaping industry, and is a certified pesticide applicator by DEC. The denial letter also stated that Ms. Watson has no experience with preparing estimates or managing field operations in the landscape industry. In addition, the denial letter contended that Ms. Watson has not demonstrated any training or certifications relevant to the landscaping industry. (See WBE Exhibit 25.) For the reasons outlined below, the Division's determination with respect to this eligibility criterion is supported by substantial evidence.

With respect to Ms. Watson's résumé, her experience in the landscape industry is limited to Watson Farms, and the description offered no details about her duties and responsibilities. Ms. Watson's résumé shows that she has extensive work experiences as a health care practitioner

⁶ See e.g. *Matter of Conxx, Inc.*, NYS DED File No. 60198, October 30, 2017; *Matter of Pioneer Contractors, Inc.*, NYS DED File No. 60574, September 27, 2017; *Matter of Upstate Rebar, LLC*, NYS DEC File No. 61154, September 28, 2017; *Matter of Panko Electrical and Maintenance, Inc.*, NYS DED File No. 9877, August 30, 2017. The Recommended Orders are available at the New York State Department of Economic Development website: <https://esd.ny.gov/doing-business-ny/mwbe-certification-appeal-hearings>. For the Final Orders associated with these matters, contact the Department's Division of Minority and Woman's Business Development, 625 Broadway, Albany, New York 12245. See also *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 890 (3d Dept 1995).

and researcher related to asthma, MD, and ALS. (See WBE Exhibit 15.) During the hearing, however, Ms. Watson testified about significant details that may have merit within the context of a new application for WBE certification for her landscaping business. For example, Ms. Watson previously worked at Watson Landscaping (see CD 1 at 20:19, 22:00, 58:40). Also, with respect to preparing estimates, Kurt Watson's recommendations are limited, and Ms. Barton collects significant preliminary details. Subsequently, Ms. Watson finalizes the estimates. (See CD 1 at 27:25; CD 2, Track 1 at 06:45, 09:20, 10:00; CD2, Track 2 at 37:29; CD 3, Track 1 at 00:20, 02:26, 11:14, 16:30.)

Significantly, Ms. Watson is a Certified Nursery and Landscape Professional (see WBE Exhibits 7 and 15; CD 1 at 50:06). The credential was mentioned on Ms. Watson's résumé. However, applicant did not offer the corroborating documentation until the hearing even though the application for WBE certification directed the applicant to provide copies of *all* licenses, permits, certifications, and accreditations. In contrast, applicant provided a copy of Kurt Watson's certification as a pesticide applicator. (See WBE Exhibits 15, 21, 23, and 24; CD 1 at 50:06, 59:20, 01:02:45; CD 3, Track 1 at 35:20, 35:59, 36:39, 37:45; CD 3, Track 2 at 06:54, 08:02-09:17.)

In summary, the application and supporting materials before the Division at the time it made its determination did not demonstrate that Ms. Watson has the technical competence or managerial experience to operate Watson Farms as required by 5 NYCRR 144.2(b)(1)(i). Watson Farms failed to meet its burden to demonstrate that the Division's denial was not based upon substantial evidence. Accordingly, the Division's denial should be affirmed.

VII. Time

Finally, the Division determined that Ms. Watson does not devote time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR 144.2(b)(1)(iii). The Division based this determination on the following. First, Ms. Watson is employed full-time by SUNY Upstate Medical University. Second, Kurt Watson is employed full-time by Watson Farms during its ordinary business hours. (See WBE Exhibit 25.)

At the hearing, Ms. Watson acknowledged that she is employed full-time by the University where her schedule is Monday through Friday from 8:00 a.m. to 4:00 p.m. (see WBE Exhibit 22; CD 1 at 44:51; CD 2, Track 2 at 17:24; **CD 3, Track 1 at 33:22, 33:37, 33:55**). However, Ms. Watson said that her work schedule at the University is flexible. Due to her vacation benefit from the University (30 days annually), Ms. Watson also explained that she takes off Fridays or Mondays from the University during the landscaping season to work at the Watson Farms office. If Watson Farms has several landscape projects underway, Ms. Watson said that she uses longer blocks of vacation time from the University to devote her time and attention to the landscaping business. (See CD 1 at 44:51, 45:47, 46:22; CD2, Track 2 at 15:06, 16:58, 17:36, 17:57.)

Since being hired in 2015, Ms. Barton sorts and prepares the papers and documents that Ms. Watson needs to review on a daily basis. Ms. Watson will typically stop by the Watson Farms office at the retail garden center before going to the University to drop-off work that she reviewed during the previous evening, and to check on the day's landscaping schedule. Ms.

Watson said that she returns to the Watson Farms office after leaving the University in the late afternoon and, if necessary will stay until 9 or 10 p.m. to complete work related to the landscape business. (See CD 1 at 46:22, 47:24.) While at the University, Ms. Watson is available via telephone, text, and email to communicate with Ms. Barton and Kurt Watson (see CD 1 at 46:22; CD 3, Track 1 at 05:27).

Kurt Watson is a full-time employee of Watson Farms (see WBE Exhibit 14). Ms. Watson testified that Kurt Watson is in the field every day, and that he will report any problems as well as the progress related to the fieldwork to Ms. Watson at the end of the day (see CD 1 at 41:56).

Division staff argued, in general, that landscaping services can only be performed during daylight hours. Staff observed, however, that Ms. Watson's daily work schedule at the University limits the time when she can supervise field work, which is inconsistent with the eligibility criterion. As a full-time employee, Kurt Watson is available to supervise field work, however. (See CD 3, Track 1 at 48:52, 49:38.)

I agree with Division staff. During the hearing, Ms. Watson testified that she would retire from the University "sometime soon" (CD 1 at 53:19). After retiring from the University, Ms. Watson said that she would devote more time to Watson Farms (see CD 1 at 54:06). Accordingly, I conclude that the application and supporting materials before the Division at the time it made its determination did not demonstrate that Ms. Watson devotes time on an ongoing basis to the daily operation of Watson Farms as required by 5 NYCRR 144.2(b)(1)(iii). Watson Farms failed to meet its burden to demonstrate that the Division's denial was not based upon substantial evidence. Accordingly, the Division's denial should be affirmed.

CONCLUSION

For the reasons discussed above, Watson Farms failed to meet its burden to show that the Division's April 10, 2017 determination to deny the application for WBE certification 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 the application filed by Watson Farms, LLC for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart
Matter of Watson Farms, LLC
NYS DED File No. 47585

Hearing Date: April 9, 2018

WBE Exhibit No.	Applicant	Division	Description	Received
1	1		Articles of Organization for Watson Farms	✓
2	2		Balance Sheets 2015 – 2017 for Watson Farms	✓
3	3		Bank Signature Cards – Watson Farms	✓
4	4		Farm Credit Loan Application dated March 13, 2018	✓
5	5		Financial Statements 2013 – 2014 Watson Farms	✓
6	6		Lease Agreement for Watson Farms	✓
7	7		Certified Nursery and Landscape Professional (CNLP) by the New York State Nursery and Landscape Association, Inc.	✓
8	8		Operating Agreement of Watson Farms	✓
9	9	2 No NYS	Personal Income Tax Returns 2015 (Federal and NYS)	✓
10	10		Photo of completed project – NYS Fair Grounds	✓
11	11		Photo of completed project – Oneonta	✓
12	12		Photos of Watson Farms	✓
12A			Photos of Watson Farms	✓
13	13		Previous certifications of Watson Farms as WBE by ESD	✓
14	14	4	Résumé – Kurt Watson	✓
15	15	3	Résumé – Mary Lou Watson	✓

16	16		Sample checks – 2018	✓
17	17		Sample executed construction contracts from 2016 – 2018	✓
18	18		Vehicle Purchase Agreements from 2015	✓
19	19		Watson Farms, LLC – ESD Reviewer Analysis provided on FOIL	
20	20		WBE Personal Net Wealth Affidavit – Mary Lou Watson	
21		1	Certification Application (Application No. 9417848 [10 pages]). Filed 6/27/2014	✓
22		5	Letter dated August 8, 2016 from Mary Lou Watson	✓
23		6	Pesticide Business/Agency Registration (No. 79642) C7604595 Issued: 7/22/2014 Expired: 7/31/2017	✓
24		7	Certified Commercial Pesticide Applicator Applicator Detail Kurt W. Watson	✓
25		8	Division's April 10, 2017 Denial Letter	✓
26			Certification Notice from the New York State Department of Agriculture and Markets	✓
27			Ms. Holden's Notes concerning Watson Farms	✓

Official Notice	Pesticide Applicator/Technician Certification https://www.dec.ny.gov/permits/45618.htm
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