

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

In the Matter

- of -

**the Application of CNE Inc. dba CMIT Solutions of Rochester
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 57631

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 23, 2025

This matter considers the appeal by CNE Inc. dba CMIT Solutions of Rochester (“CNE” 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 recertification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On December 19, 2023, Ms. Cheryl Stein (aka Cheryl Nelan, aka Cheryl Nelan Stein; hereinafter referred to as Cheryl Stein) as President, applied on behalf of CNE for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On March 27, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4);
 - (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);

(d) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1); and

(e) The business enterprise must operate independently, as required under 5 NYCRR § 144.2(e).

3. On April 25, 2024, CNE submitted a Request to Appeal via a Hearing (DED Exhibit 4).
4. On October 11, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 3).
5. A hearing was held and concluded on January 9, 2025.

FINDINGS OF FACT

6. CNE (formerly CMIT Solutions of Monroe) is engaged in the business of IT Management Services (DED Exhibits 1 and 6).
7. Ms. Cheryl Stein is the President and 100% owner of CNE (DED Exhibit 1).
8. CNE is a franchisee of CMIT Solutions LLC (DED Exhibit 5).
9. The Franchise Agreement entered into between CMIT Solutions LLC and CNE Inc. includes the following provisions:

(a) Section 1.5 (a) states “You are granted the right to operate one (1) CMIT Solutions Business only in the Territory described in Exhibit 1 to this Agreement by a map, or by a written description, or both (the “Territory”), and only at a location the physical premises of which are located within the Territory...”

(b) Section 2.4 states “You may relocate your Business office to another place within your Territory only with our consent and in accordance with our then-current standards.”

(c) Section 6.3 states “All ideas, concepts, techniques or materials... whether created by you or for you or your Owners, employees or contactors... will be deemed to be our sole and exclusive property...”

(d) Section 8.2 states “Your Business must offer for sale all onsite information technology solutions, customized training and computer support services, and other services that we periodically specify (collectively the “Services”) and all products that we periodically require.”

(e) Section 8.3 states “Your Business may only provide products and Services to clients and customers located in the Territory, and may only advertise, market and promote the Business to clients and customers located in the Territory...” (DED Exhibit 9).

10. The critical functions of the applicant business are IT and computer services, IT Consulting, remote back-up and data security, computer maintenance, computer network installation and support, end-user help desk, and on-site and remote support services (DED Exhibit 2).

11. Cheryl Stein’s resume indicates that she has a Bachelor of Science degree in Management Science/Marketing and a Master of Business Administration in International Business. She has over 30 years of marketing and business management experience. She “employs technical personnel to support computer network systems of small businesses in the Rochester area.” She “drives sales and marketing efforts while managing all operational aspects.” (DED Exhibits 5 and 6).

12. Cheryl Stein stated she took “courses in HTML, so I could create the first business-to-business website for Eastman Kodak Company... I launched a number of web portals that were ground breaking in their time... I built business cases to get approval for these projects and worked with IT Department to get them done.” She lists her training and certifications to include “B.S. in Management with a Minor in Computer Science”,

earned CompTIA MSP Trustmark”, and “Connectwise Security Fundamentals Certification” She lists her activities in the business to include “Assess the technology needs of my clients... assess IT and cyber security risks and evaluate our internal compliance to regulations and to protect our data as well as our clients’ data” and is the final decision maker for all added partners, products and services.” (APP Exhibit A).

13. Steven Tylock’s resume indicates that he has “Twenty years experience building technology infrastructures in diverse environments: education, research, software development, fortune-50, manufacturing, consulting, not-for-profit, and small business.” He has worked at CNE since 2012. He earned a Bachelor of Arts degree in Computer Science, a Bachelor of Science degree in Business Administration, and a Master of Science degree in Computer Science (DED Exhibit 7)

14. Steven Tylock was the Chief Security Officer and Technical Account Manager at CNE until August 2024. As Technical Account Manager for all of CNE’s clients, he ensures the technical systems at each client are designed to support the business and manages all technical aspects of the account. Mr. Tylock’s prior experience includes numerous roles in the information technology industry since 1986, including systems administration, systems management, systems architect, sales architect, desktop and network services, technical services management, and IT consulting. While he was employed by CNE, he also provided services to CMIT Solutions of Wall Street/Grand Central, a business owned by Evan Stein. CNE and CMIT Solutions of Wall Street/Grand Central shared employees Steven Tylock now works for IT Rockstars Inc., a company owned by Cheryl Stein and Evan Stein. (Hearing Testimony of Steven Tylock; DED Exhibits 2 and 5).

15. A Narrative submitted with the application states “Evan Stein is my husband and runs another CMIT office – CMIT Solutions of Wall Street/Grand Central. They are two

separate businesses... In 2023, we did start to share our technicians – so his employees and my employees work together to serve both sets of clients.... The combined service delivery team is co-managed between Cheryl and Evan. Evan does manage the day to day activities of the team but all decisions affecting the team are made together... last year we brought our two service delivery teams (the techs) together to work as one larger team... We share some of the same cloud-based tools across the team but there is no shared space or equipment” (DED Exhibit 5).

APPLICABLE LAW

5 NYCRR §144.2(b)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

5 NYCRR §144.2(c) states in relevant part as follows:

Operation. 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) Competence in the industry. 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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:
 - (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
 - (ii) The extent to which academic credentials exist for persons employed in the industry; and
 - (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

- (2) Operational decisions. 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.

5 NYCRR §144.2(d) (1) states as follows:

Control. Minority group members or women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 CNE for recertification 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

Cheryl Stein, as President and 100% Owner of CNE appeared at the hearing on behalf of CNE. The following witnesses testified on behalf of CNE: Ms. Cheryl Stein, President of CNE, and Mr. Steven Tylock, former employee of CNE. CNE offered APP Exhibits A, B and C, which were admitted into evidence.

Mr. Kyle Satchell, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Victoria Sawall, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 9.

I. Prior Certification

The Division acknowledges that CNE was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material

submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify CNE based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, CNE had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the December 19, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest. See *Matter of FIS Blue, Inc.*, Recommended Order dated February 1, 2024, Final Order 24-02 dated May 7, 2024 (“FIS is managed by the Board of Directors. The Board determines the duties and authority of all officers. The President is subject to the Board’s control. Therefore, the [woman relied upon for certification] does not control the Board.”).

Section 1.5 (a) of the Franchise Agreements states “You are granted the right to operate one (1) CMIT Solutions Business only in the Territory described in Exhibit 1 to this Agreement by a map, or by a written description, or both (the “Territory”), and only at a location the physical premises of which are located within the Territory...” Section 2.4 of the Franchise Agreements states “You may relocate your Business office to another place within your Territory only with our

consent and in accordance with our then-current standards.” Section 8.2 states “Your Business must offer for sale all onsite information technology solutions, customized training and computer support services, and other services that we periodically specify (collectively the “Services”) and all products that we periodically require.” Section 8.3 of the Franchise Agreement states “Your Business may only provide products and Services to clients and customers located in the Territory, and may only advertise, market and promote the Business to clients and customers located in the Territory...” (DED Exhibit 9). These sections limit CNE’s business operations to a specific Territory. By limiting the areas where CNE can operate and sell, and which products and services may be offered, the Franchise Agreement encumbers Cheryl Stein’s ability to realize the benefits of ownership.

Section 6.3 states “All ideas, concepts, techniques or materials... whether created by you or for you or your Owners, employees or contactors... will be deemed to be our sole and exclusive property...” (DED Exhibit 9). This section hinders Cheryl Stein’s ability to retain the ideas, concepts, techniques, or materials that CNE may create. She is therefore not unencumbered in her ability to realize that benefit of ownership.

Cheryl Stein testified that CNE “is a completely separate legal entity from CMIT Solutions”. She stated that the restrictions listed in the Franchise Agreement do not restrict CNE’s ability to operate its business. (Hearing Testimony of Cheryl Stein). In a narrative submitted with the application, she stated “The Franchisor (CMIT Solutions) provides some marketing support and helps negotiate partner agreements for some of our vendors. They do not provide any of the services to our clients. All the services to our clients are led by my company/team and we bring in various vendors for some of those services as needed.” (DED Exhibit 5).

Victoria Sawall testified for the Division that each of the provisions of the Franchise Agreement listed above restrict CNE's ability to conduct business and therefore encumber Cheryl Stein's ability to realize the benefits of ownership (Hearing Testimony of Victoria Sawall).

The Division's determination to deny the application on the basis that CNE failed to demonstrate that Cheryl Stein is not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4) is supported by substantial evidence.

III. Operation

The Division found that the woman-owner does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1).

The Division also found that the woman-owner did not make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that "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).

The eligibility criteria for WBE 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 minority/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).

Cheryl Stein’s resume indicates that she has a Bachelor of Science degree in Management Science/Marketing and a Master of Business Administration in International Business. She has over 30 years of marketing and business management experience. She “employs technical personnel to support computer network systems of small businesses in the Rochester area.” She “drives sales and marketing efforts while managing all operational aspects.” (DED Exhibits 5 and 6).

Cheryl Stein stated she took “courses in HTML, so I could create the first business to business website for Eastman Kodak Company... I launched a number of web portals that were ground breaking in their time... I built business cases to get approval for these projects and worked with IT Department to get them done.” She lists her training and certifications to include “B.S. in Management with a minor in Computer Science”, earned CompTIA MSP Trustmark”, and “Connectwise Security Fundamentals Certification” She lists her activities in the business to include assess the technology needs of my clients... assess IT and cyber security risks and evaluate our internal compliance... to regulate our data as well as our clients’ data” and is the final decision maker for entire business and all aspects of it.” (APP Exhibit A).

Cheryl Stein testified as to her experience and expertise by highlighting her training and certifications and her activities in the business, as outlined in APP Exhibit A. (Hearing Testimony of Cheryl Stein). During the site visit interview, Ms. Stein stated that her day-to-day responsibilities, included managing the finances, relationships with the clients, managing her staff and marketing. Although Ms. Stein agreed that she is not a “tech” she stated that she manages the vendors and manages the teams. Ms. Stein does not perform the technical work (DED Exhibit 8).

Victoria Sawall testified that Cheryl Stein does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are IT and computer services, IT Consulting, remote back-up and data security, computer maintenance, computer network installation and support, end-user help desk, and on-site and remote support services. She further testified that Cheryl Stein's resume reflects that she does not have the education, training, or experience to oversee the critical functions of the business as the resume included a detailed description of her office/administrative work but lacked any description showing her industry-specific competence. She testified that Steven Tylock has the education, training and experience to oversee the critical functions of the business. (Hearing Testimony of Victoria Sawall; DED Exhibits 1, 2, 6 and 7).

Mr. Tylock's prior experience includes numerous roles in the information technology industry since 1986, including systems administration, systems management, systems architect, sales architect, desktop and network services, technical services management, and IT consulting. As Technical Account Manager for all of CNE's clients, he ensures the technical systems at each client are designed to support the business and manages all technical aspects of the account. (DED Exhibit 2).

Based on the certification application and narratives provided, as well as the site visit conducted, Steven Tylock is responsible for designing and managing technical systems and accounts for all of the applicant business' clients. Additionally, the technician teams from the applicant business and CMIT Solutions of Wall Street/Grand Central were combined into one service delivery team. This team is co-managed by Cheryl Stein and Evan Stein, with Mr. Stein managing the day-to-day activities of the team. (DED Exhibit 2).

Based on the foregoing, I find that the Division's determination to deny CNE's application under 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) was based on substantial evidence.

IV. Control

The Division also denied certification on the ground that Cheryl Stein is not the highest-ranking officer, and where applicable does not control the board of directors, or serve as a General Partner, as required under 5 NYCRR §144.2(d)(1).

The Division argues that “According to the Franchise Agreements, there are standards and requirements that the business must follow and actions or decisions that must be approved by the Franchisor, including the individual(s) authorized to operate the business, the territory in which the business may operate, relocation of the business, technology and equipment utilized by the business, required training and marketing and advertising.” Additionally, the Franchisor holds a special power of attorney for the business. (DED Exhibit 2).

Cheryl Stein testified that the requirements in the Franchise Agreements do not restrict her in her ability to control her business as the highest-ranking officer of the company. She referenced APP Exhibit B which states that:

(a) CNE is “an independently owned and operated franchise”; “The CMIT franchise has very limited control on the vendors CNE chooses to partner with..the franchise required vendors are limited to:

-RMM system use to ensure a level of security across the system;

-A ticketing system that also helps support that level of security”;

(b) “The franchisor does also recommend additional vendors and negotiates favorable terms for the use of those vendors. However, CNE chooses which vendors to use and how to use them.”; and

(c) “The franchisee does not control our independent relationships with our vendors.”

(Hearing Testimony of Cheryl Stein; APP Exhibit B).

Victoria Sawall testified that the provisions of the Franchise Agreement show that Cheryl Stein cannot run her business without the oversight of the Franchisor. (Hearing Testimony of Victoria Sawall; DED Exhibit 9). I concur.

CNE failed to demonstrate that Cheryl Stein is the highest-ranking officer or serves as a General Partner, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

V. Independence

The Division further found that CNE is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “(1) whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space; (2) whether the business enterprise transacts business primarily with one other entity; and (3) whether the business enterprise receives tangible benefits as a result of a connection to another entity.”

A Narrative submitted with the application states “Evan Stein is my husband and runs another CMIT office – CMIT Solutions of Wall Street/Grand Central. They are two separate businesses... In 2023, we did start to share our technicians – so his employees and my employees work together to serve both sets of clients.... The combined service delivery team is co-managed between Cheryl and Evan. Evan does manage the day to day activities of the team but all decisions affecting the team are made together... last year we brought our two service delivery teams (the techs) together to work as one larger team... We share some of the same cloud-based tools across the team but there is no shared space or equipment” (DED Exhibit 5).

Cheryl Stein’s testimony confirmed that CNE shared employees with CMIT Solutions of Wall Street/Grand Central with a “combined service delivery team” and that Evan Stein managed the day-to-day activities of the team. (Hearing Testimony of Cheryl Stein; DED Exhibit 5).

Victoria Sawall testified that by sharing employees, CNE was receiving a tangible benefit from CMIT Solutions of Wall Street/Grand Central and was passing the contracts through to a non-certified business. (Hearing Testimony of Victoria Sawall)

The Division's determination to deny the application on the basis that CNE failed to demonstrate that the business operates independently, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

CNE did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(4), 144.2(c)(1), 144.2(c)(2), 144.2(d)(1), and 144.2(e), 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 CNE's application for recertification as a woman-owned business enterprise.

In the Matter of CNE Inc. dba CMIT Solutions of Rochester
DED File ID No. 57631
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Cheryl Nelan (Stein's) Experience and Expertise in IT	Y	Y
APP B	Relationship of Franchisee with Franchisor	Y	Y
APP C	IT Rockstars Inc. IRS EIN Assignment	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice of Hearing	Y	Y
DED 4	Request to Appeal	Y	Y
DED 5	Narrative in Response to Q&A	Y	Y
DED 6	Cheryl Nelan Stein Resume	Y	Y
DED 7	Steven Tylock Resume	Y	Y
DED 8	Site Interview Transcript	Y	Y
DED 9	Franchise Agreement 1	Y	Y
DED 10	Franchise Agreement 2	N	N
DED 11	Statement How Goods Are Delivered	N	N
DED 12	Colgate Divinity Master Services Agreement	N	N
DED 13	Pathfinder Engineers & Architects Master Services Agreement	N	N
DED 14	Invoice 8871	N	N
DED 15	Invoice 8811	N	N

DED 16	Lease of Commercial Premises	N	N
DED 17	TAG Advisors Master Services Agreement	N	N
DED 18	Smola Consulting Managed Services Agreement	N	N
DED 19	Smola Invoice	N	N