

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

- of -

the Application of Dale Workforce Solutions, LLC
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58083

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
February 1, 2024

This matter considers the written appeal by Dale Workforce Solutions, LLC (“DWS” 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 November 30, 2022, DWS applied for certification as a women-owned business enterprise (“WBE”). DWS based its application on Ms. Sarah Martin. (DED Exhibit 1).
2. On April 25, 2023, the Division denied the application on the following ground (DED Exhibit 2):
 - (a) The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR § 144.2(e).
3. DWS submitted a request to appeal the denial determination, dated May 21, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to DWS on May 25, 2023 (DED Exhibit 4).
5. A written appeal letter, with submissions, was filed on June 22, 2023, by the applicant. (APP Exhibit A)
6. The Division filed an Affidavit of Matthew LeFebvre, Associate Certification Director, dated October 12, 2023, and a brief of Karen L. Bernstein, counsel for the Division, dated October 18, 2023.

FINDINGS OF FACT

7. DWS provides “technology and business talent. . . with a focus on. . . Program Managers, Project Managers, Business Analyst, Crum Coach, Agile Project Manager, Salesforce, SAP, Workday, RPA, DevOps, [and] Cybersecurity. . .” (DED Exhibit 1).
8. Sarah Martin, the woman-owner relied upon for certification, is the President of DWS and the 51% owner. Mary Holtzman is an investor and owns 49% of the applicant business. The applicant business was established in June of 2012 and acquired by Ms. Martin and Ms. Holtzman in October of 2019. (DED Exhibit 1).
9. Ms. Martin worked as the President of Mitchell Martin Inc. (MMI) from April 2018 to October of 2020, and as the CEO of Mitchell Martin Healthcare, LLC (MMH) from May of 2017 until April of 2018.¹ MMH is a division of MMI. (DED Exhibit 10; APP Exhibit A).
10. Applicant leases its office space from MMH. The fee for the lease between January 1, 2022, and September 30, 2023, was \$ [REDACTED] per month. 2021 tax returns state that the business paid \$ [REDACTED] in rental expenses. (DED Exhibits 1 and 12; TRIB Exhibit I).
11. “Post covid” the applicant sublet a portion of one of MMI’s satellite offices, as office space was available due to the pandemic induced remote workforce. (APP Exhibit A).
12. MMI loaned the applicant business \$ [REDACTED] in 2021-2022. “The purpose of the loan is to fund payroll and other operating expenses until Dale Workforce Solutions, LLC establishes independent financing.” DWS states in their application that they borrowed from MMI when they “were unable to secure a line of credit.” At the time of application, the remainder due on the loan was \$ [REDACTED]. The loan to MMI was paid in full, with interest, after DWS secured a credit line from WSFS bank in November of 2022. (DED Exhibits 12 and 13; APP Exhibit A).

¹ There is no familial relationship between Ms. Martin and Mitchell Martin Inc. (DED Exhibit 1).

13. MMI is a subcontractor to the applicant for two of DWS' clients. The revenue generated by that business makes up less than 10% of DWS' revenue. (DED Exhibit 1; APP Exhibit A).
14. DWS pays a monthly retainer to MMI for "recruiting, technical support and advisory services such as legal and HR . . ." The retainer accounts for less than 8% of DWS' expenses. "DWS currently outsources IT support (email hosting) and legal/HR advisory services to MMI." (DED Exhibit 1; APP Exhibit A).
15. All of DWS' revenue is generated from direct clients. Most of their revenue comes from the IT staffing business, and of the 228 placements made by DWS, 19 temporary placements involved MMI. "In those cases, DWS had a direct contract with the client (as the prime contractor) and subcontracted with MMI to provide services." (APP Exhibit A).
16. Applicant states that it is common business practice, in IT staffing, to use subcontractors. MMI is 1 of 52 subcontractors utilized by DWS. (APP Exhibit A).
17. Applicant outsources several different office functions, such as timesheet collection billing, accounts payable, collections, and other payroll functions to third party providers including Roundtable Group and Paycom. DWS also contracts with a firm for recruitment process outsourcing. (APP Exhibit A).

APPLICABLE LAW

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 CHF 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).

The explanations provided by the applicant in its appeal submission provide clarity to information already before the Division and is therefore admissible and will be considered by the Tribunal. (See *Scherzi Systems*, *supra*).

DISCUSSION

I. Independence

The Division denied DWS' application for certification as a WBE on the basis that the applicant business failed to demonstrate that it operates independently, as required by 5 NYCRR § 144.2(e). (DED Exhibit 2). To determine whether a business operates independently the Division shall consider, but is not limited to the following: “(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, and whether such benefits are consistent with standard industry practices.” (5 NYCRR § 144.2 (e) (1) (2) and (3))

The Division regularly denies certification where the applicant business is so entwined with another business, such as operating out of the same space, where one business leases the space to the other under unusually favorable terms, where the applicant business is dependent on the other for capitalization and other basic functions, or where a business primarily transacts with one other business entity. (See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6, 2020, Final Order dated April 21, 2020) (applicant denied certification where it shared board members, personnel, office space, etc., and paid that same entity as a subcontractor to perform majority of work)). See also, *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD 2d 742 (3rd Dept. 2002) (holding the applicant business was so entangled with another business by sharing personnel, offices, etc. that it clearly was not independent).

Here, the applicant business is engaged in the business of staffing and employee placement. (DED Exhibit 1; APP Exhibit A). The business leases office space from MMI, a competitor and

former employer of Ms. Martin. The business has a lease agreement and pays rent for the space. In addition, DWS outsources its email and IT support and legal/HR advisory services to MMI for a fee paid by DWS to MMI. Finally, DWS entered into a loan agreement with MMI to cover start up costs, as they could not secure a loan from a banking institution. (DED Exhibits 1, 10, 12, and 13; APP Exhibit A; TRIB Exhibit 1).

Here, notwithstanding the information provided by the applicant in their appeal submission, which included an explanation of the industry practice of using subcontractors, and the reasons for borrowing money from MMI and not a banking institution, there is substantial evidence that DWS receives a tangible benefit from MMI. The business applicant subleases office space from MMI and uses them for IT support, including the hosting of their email. DWS also contracts with MMI for HR and legal assistance; they use MMI as one of their subcontractors; and they entered into a loan with MMI for funds to cover their initial operating expenses. (DED Exhibits 1 and 13; APP Exhibit A; TRIB Exhibit I) Thus, the totality of the circumstances, that the applicant business receives benefits from MMI in several different areas, provides substantial evidence that DWS receives a tangible benefit from MMI, and as such has not demonstrated that DWS operates independently, as required under 5 NYCRR § 144.2(e)(3).

CONCLUSION

DWS 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(e) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Dale Workforce Solution's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Dale Workforce Solutions, LLC
DED File ID No. 58083
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Brief and Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Securities Purchase Agreement between Mary Holtzman and Lois Dale-Holtzman, dated December 1, 2020	Y	
DED 6	Securities Purchase Agreement between Sarah Martin and Lois Dale-Holtzman, dated December 1, 2020	Y	
DED 7	Stock Ledger	Y	
DED 8	Securities Purchase Agreement between Mary Holtzman and Lois Dale-Holtzman, dated January 1, 2021	Y	
DED 9	Securities Purchase Agreement between Sarah Martin and Lois Dale-Holtzman, dated January 1, 2021	Y	
DED 10	Resume of Sarah Martin	Y	Y
DED 11	Minutes of the Organization dated January 15, 2021	Y	Y
DED 12	2021 Business Tax Returns (Federal)	Y	Y
DED 13	Loan Agreement between Appellant and Mitchell Martin, Inc.	Y	Y
TRIBUNAL I	Occupancy Agreement for DWS	N	Y