

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

In the Matter

- of -

the Application of Dove Creative Landscapes, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 67331

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 27, 2023

This matter considers the written appeal by Dove Creative Landscapes, Inc., (“Dove” 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 February 5, 2020, Ms. Antonia Panepinto, as President, applied on behalf of Dove for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 14, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) 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);
 - (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 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).
3. Dove timely filed a Request to Appeal on May 11, 2023 (APP Exhibit A/ DED Exhibit 3).
 4. A notice to proceed via written appeal was sent to Dove on May 16, 2023 (DED Exhibit 4).
 5. Dove filed its written appeal by letter dated June 12, 2023 (APP Exhibit B).
 6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated September 21, 2023, and a brief of Karen Bernstein Esq., counsel for the Division, dated September 22, 2023.

FINDINGS OF FACT

7. Dove is engaged in the business of landscaping and lawn maintenance (DED Exhibit 1).
8. Ms. Antonia Panepinto is the President and has a 100% ownership interest. (DED Exhibit 1).
9. The application states that Ms. Panepinto made a capital contribution of \$ [REDACTED] from a savings bank account on April 3, 2019. The wire transfer agreement dated April 3, 2019, lists the customer's name as Mark Rubin (Dove's accountant) and the beneficiary as Dove Creative Landscapes, and the amount of the wire transfer as \$ [REDACTED]. A copy of the TD Bank statement for Dove for the period April 1, 2019, to April 30, 2019, lists an incoming wire transfer from Mark Rubin on April 3, 2019, in the amount of \$ [REDACTED] (DED Exhibit 1).
10. The application also stated that Ms. Panepinto paid \$ [REDACTED] for her shares on February 14, 2019 (DED Exhibit 1).

11. The application lists Ms. Panepinto as President and Mr. Panepinto as Vice President of the Board of Directors (DED Exhibit 1). Section 6.4 of the Bylaws states “Subject to these by-laws, the authority and duties of all officers shall be determined by, or in the manner prescribed by, the board of directors.” Section 6.5 of the Bylaws states “The President shall be the principal executive officer of the corporation and, subject to the control of the board of directors, shall in general supervise and control all of the business and affairs of the corporation.” (DED Exhibit 11).
12. Ms. Panepinto is solely responsible for financial decisions and shares responsibility with Mr. Panepinto for negotiating bonding and insurance, marketing and sales, hiring and firing, purchasing equipment/sales, managing and signing payroll, negotiating contracts, and the bank account signatory. Mr. Panepinto is responsible for estimating, preparing bids, and supervising field operations (DED Exhibit 1).

APPLICABLE LAW

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

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
1. Money;
 2. Property;
 3. Equipment; or
 4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

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)(2) states as follows:

(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:

(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.

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 Dove 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

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

It is the responsibility of the applicant "to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution." *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

The application stated that Ms. Panepinto paid \$ [REDACTED] for her shares on February 14, 2019. No documentation was submitted to support this claimed contribution (DED Exhibit 1).

The application also stated that Ms. Panepinto made a capital contribution of \$ [REDACTED] from a savings bank account on April 3, 2019. The wire transfer agreement dated April 3, 2019, lists the customer name as Mark Rubin and the beneficiary as Dove Creative Landscapes, and the amount of the wire transfer as \$ [REDACTED]. A copy of the TD Bank statement for Dove for the period April 1, 2019, to April 30, 2019, lists an incoming wire transfer from Mark Rubin on April 3, 2019, in the amount of \$ [REDACTED] (DED Exhibit 1). This was nearly two months after Ms. Panepinto alleged she acquired her shares.

On appeal, Ms. Panepinto asserted that the \$ [REDACTED] “used to start the business” was a personal loan from Mark Rubin. Mr. Rubin supported that claim by letter attached to the appeal submission (APP Exhibit B). No promissory note or loan document was provided to support this claim. In determining whether a loan constitutes a capital contribution, the Division evaluates the terms of the loan and whether the loan is guaranteed or repaid by the woman owner. See *Matter of Mac Fhionnghaile & Sons Elec. Contracting*, Recommended Order dated November 16, 2017, Final Order 18-01 dated January 3, 2018. The alleged loan from Mr. Rubin does not constitute a personal capital contribution because there is no evidence describing the terms of the loan to evaluate.

Ms. Panepinto also provided evidence of a line of credit with TD Bank in the amount of \$ [REDACTED] issued on August 21, 2019, in the name of the business, and two lines of credit from Sheffield Financial in unknown amounts listed on April 7, 2020, and March 9, 2020, both in the name of Ignazio Panepinto. These three lines of credit do not constitute a personal contribution by Ms. Panepinto because they are either in the name of the business or Ignazio Panepinto. See *Matter of Environmental Consulting, LLC*, Recommended Order dated August 5, 2016, Final Order 16-

38 dated August 18, 2016 (bank line of credit was in husband's name and credit was made available to husband, not woman owner).

The application also lists a line of credit at TD Bank in the amount of \$ [REDACTED] with "Ignazio and Antonia" listed as the guarantors (DED Exhibit 1). No documentation was submitted to support this claim, and it does not constitute a personal capital contribution since Mr. and Mrs. Panepinto are listed as joint guarantors. See *Matter of Gordon & Zoerb Elec. Contractors, Inc.*, Recommended Order dated April 30, 2020, Final Order 20-07 dated June 2, 2020.

The Division's determination to deny the application on the basis that Dove failed to demonstrate that Ms. Romano made capital contributions to Dove in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

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.

The application stated that Ms. Panepinto as President and Mr. Panepinto as Vice President constitute the Board of Directors (DED Exhibit 1). Section 6.4 of the Bylaws states "Subject to these by-laws, the authority and duties of all officers shall be determined by, or in the manner prescribed by, the board of directors." Section 6.5 of the Bylaws states "The President shall be the principal executive officer of the corporation and, subject to the control of the board of directors, shall in general supervise and control all of the business and affairs of the corporation." (DED Exhibit 11).

Dove 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, Ms. Panepinto does not control the Board.

The Division's determination to deny the application on the basis that Dove failed to demonstrate that Ms. Romano 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.

II. Operation

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).

Dove's products and services include landscaping and lawn maintenance (DED Exhibit 1). Ms. Panepinto does not have experience in the business' critical functions. Mr. Panepinto and Mr. Anthony Rossito are responsible for estimating and preparing bids. Both Mr. and Ms. Panepinto are responsible for negotiating bonding and insurance, marketing, and sales, hiring and firing, purchasing equipment/sales, managing and signing payroll, and negotiating contracts, and are signatories for business accounts (DED Exhibit 11). Mr. Anthony Rossito and Mr. Joseph Puccio are responsible for supervising field operations (DED Exhibits 1 and 12).

Ms. Panepinto stated that employees "take care of the accounts/customers lawn needs, maintenance, clean ups and openings... I, Antonia, take care of the contracts, banking, insurance,

payroll, and general bookkeeping.” She stated her duties include “bookkeeping, contracts, insurance, payroll, hiring and firing.” (DED Exhibit 7). Ms. Panepinto’s resume lists her duties as “advertising, preparing contracts, billing, and hiring.” (DED Exhibit 13).

Ms. Panepinto is solely responsible for financial decisions. All other duties are shared or controlled by someone else, including supervising field operations (DED Exhibits 1, 7 and 13). Therefore, Ms. Panepinto is not responsible for overseeing the day-to-day operations of the business. See *Matter of HVAC Systems Corp.*, Recommended Order dated August 9, 2023, Final Order 23-08 dated August 17, 2023 (certification denial upheld where woman owner’s duties were financial decisions, bid preparations, bonding, insurance, purchasing, payroll, and contracts negotiations; and non-eligible owner’s duties were marketing, sales, hiring, firing, and supervising field operations).

In a narrative submitted on August 11, 2021, Ms. Panepinto states she aides and assists her employees on a day-to-day basis, engages directly in customer service activities including advising them on healthy lawn care, creates flower beds and aligns plantings, makes suggestions as to suitable plantings, shops at nurseries, and arranges landscapes for employees to plant (DED Exhibit 7). This statement is inconsistent with the other information provided in the application (DED Exhibit 1).

On appeal, Ms. Panepinto states that Mr. Puccio and Mr. Rossito have never worked for her. She stated they have no relationship to the business (APP Exhibit B). This statement is inconsistent with the application, which lists Mr. Puccio as “super”, Mr. Rossito as “Project Manager/super”, and that they are jointly responsible for supervising field operations (DED Exhibit 1).

The Division's determination to deny the application on the basis that Dove failed to demonstrate that Ms. Panepinto makes operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

III. Control

The Division also denied certification on the ground that Ms. Panepinto is not the highest ranking officer or control the board of directors, as required under 5 NYCRR §144.2(d)(1).

As stated above, Dove is managed by the Board of Directors. Ms. Panepinto serves at the pleasure of the Board (DED Exhibits 1 and 11). The Board may adopt rules and regulations, create executive committees, and grant them powers, determine the authority and duties of all officers, and prescribe the duties of the President (DED Exhibit 11).

The Division's determination to deny the application on the basis that Dove failed to demonstrate that Ms. Panepinto is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

CONCLUSION

Dove 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)(2), 144.2(b)(4) 144.2(c)(2) and 144.2(d)(1) 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 Dove's application for certification as a woman-owned business enterprise.

In the Matter of Dove Creative Landscapes, Inc.
DED File ID No. 67331
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant's Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Wire Transfer Agreement	Y	Y
DED 6	TD Bank Statement	Y	Y
DED 7	Application Narrative	Y	Y
DED 8	TD Bank Line of Credit Screenshot	Y	Y
DED 9	Sheffield Financial Lines of Credit	Y	Y
DED 10	Commercial Security Agreement	Y	Y
DED 11	Corporate By-Laws	Y	Y
DED 12	Contracts for Services	Y	Y
DED 13	Resume of Antonia Panepinto	Y	Y