

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

**In the Matter**

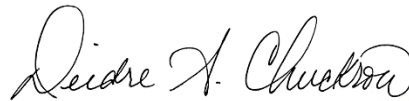
**- of -**

**the Application of Eastern Office Supply of Upstate New York, Inc.**  
**for Recertification as a Woman-Owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 61344**

**RECOMMENDED ORDER**

**-by-**



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**Deidre A. Chuckrow**  
**Administrative Law Judge**  
**June 10, 2024**

This matter considers the written appeal by Eastern Office Supply of Upstate New York, Inc. (“EOS” 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 October 19, 2022, EOS applied for recertification as a women-owned business enterprise (“WBE”). EOS based its application on Ms. Gale M. Tiberio. (DED Exhibit 1).
2. On August 17, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) The woman owner relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under 5 NYCRR § 144.2(c)(1); and
  - (b) The woman owner relied upon for certification does not 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).
3. EOS submitted a request to appeal the denial determination, dated September 15, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to EOS on October 4, 2023 (DED Exhibit 4).

5. An undated written appeal with submissions was filed by Frederick W. Killeen, Esq., of Killeen and Bradt, LLC, on behalf of the applicant.
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated May 10, 2024, and a brief of Dennie Byam, counsel for the Division, dated May 24, 2024.

### **FINDINGS OF FACT**

7. EOS is engaged in the sale, installation, and service of technology products including audio/video systems, flat panel displays and projectors, lighting control systems, automated window coverings, teleconferencing and video conferencing equipment, and climate control and smart home systems. (DED Exhibit 1).
8. Gale Tiberio is the woman owner relied upon for certification. Ms. Tiberio is the President and Treasurer and owns 80% of EOS.<sup>1</sup> Mr. Phil Tiberio, is the Vice President and owns 20% of the business. (DED Exhibits 1, 2, 5, and 6; APP Exhibit A).
9. The critical functions of EOS are the sale, installation, and maintenance of audio equipment, computer and network cables, and fiber optic cables. (DED Exhibit 1).
10. Ms. Tiberio has been with EOS since 1984, as an owner and partner of the business, previously known as Eastern Typewriter and Office Supply Company, from July 1984 until December 2005, and as President and Treasurer since January 2006. Ms. Tiberio's responsibilities include all financial matters and record keeping such as: accounts payable and receivable; monitoring billing, inventory, service; profit and loss statements; check book control; accounting; audits and legal matters; H/R; payroll; and banking accounts. (DED Exhibits 5 and 8).

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<sup>1</sup> The Division's Denial Determination incorrectly states that Ms. Tiberio is the 100% owner of the applicant business.

11. Phil Tiberio, Ms. Tiberio's husband, is responsible for sales at EOS and his duties include the overseeing of shipping and receiving, customer service, and purchasing. In addition, Phil Tiberio is responsible for all inside and outside sales of copiers, office equipment, and supplies, all furniture sales, equipment and furniture installation, A/V installation, and customer training and demonstrations. (DED Exhibits 6 and 8).
12. Thomas 'Tom' Tiberio is the IT Technologies Manager for EOS. Tom Tiberio has worked for EOS since May of 2003 and runs the day-to-day operations for EOS' Technical Services Dept., oversees all projects and installations, and provides proposals, sales materials, and documentation for all jobs.<sup>2</sup> Tom Tiberio is certified by Biamp, has six Crestron Technical Institute Certifications in digital media, commercial systems, and commercial sales and marketing, and is certified by Extron as an A/V associate. (DED Exhibits 7 and 9).
13. Travis Degele, an employee of EOS has certifications from the Sharp Academy for servicing and maintaining specific Sharp products, and a Core Certification Certificate from Crestron. (DED Exhibit 9).
14. Andrew Reid, an employee of EOS, has certifications from the Sharp Academy, for servicing and maintaining specific Sharp products. (DED Exhibit 9).

### **APPLICABLE LAW**

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

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

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<sup>2</sup> The Division's Denial Determination incorrectly names Phil Tiberio, on page four of the Determination, instead of Tom Tiberio. Tom Tiberio, and not Phil Tiberio, attended the University at Albany and graduated in 2007, worked as an intern for NY Urban Planning, and sits on the Village of Scotia's Zoning Board of Appeals. (DED Exhibits 2 and 7).

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.

5 NYCRR § 144.2 (c)(2) states as follows:

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 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.

### **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 EOS 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**

### **I. Prior Certification**

The Division acknowledges that EOS 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 EOS 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, EOS had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the October 19, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

### **II. Industry-Specific Competence**

The Division denied EOS's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Tiberio possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience

in office management or general business administration, among other things.” (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021)), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)).

The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this 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).

Nowhere in the materials before the Division is there any evidence that Ms. Tiberio has adequate, industry-specific competence, training, or licensure, in the sale, installation, or maintenance of audio equipment, computer and network cables, and fiber optic cables. Ms. Tiberio’s experience is in office administrative, financial, and accounting work of the business. (DED Exhibits 5 and 8). There is no evidence that she has any expertise in the core revenue generating functions of the applicant business. (DED Exhibits 1, 5, and 8). The only evidence regarding anyone having industry experience and competence is the information provided

regarding Messrs. Phil Tiberio, Tom Tiberio, Travis Degele, and Andrew Reid. Phil Tiberio is listed as being responsible for equipment and A/V installation, as well as customer training and demonstrations. (DED Exhibits 6 and 8). Tom Tiberio is the applicant business' IT Technologies Manager and holds certifications relating to the products sold, installed, and maintained by the applicant business. (DED Exhibits 1, 7, and 9). In addition, both Messrs. Degele and Reid are certified in the maintenance of several specific products sold by EOS. (DED Exhibit 9).

Applicant submits an affirmation of Ms. Tiberio on appeal which describes her duties at EOS. (APP Exhibit A). The affirmation provides no new information, but clarifies information already before the Division, and as such is admissible. (See *Scherzi Systems*, supra). On appeal, Applicant argues that Ms. Tiberio's 39 years of experience in the operation of the business, and her 17 years as the Chief Executive and financial officer qualify her for recertification. Ms. Tiberio's affirmation states that she manages and supervises the daily operations of the business, and that she is fully familiar with all aspects of the business. (APP Exhibit A). However, while it is undisputed that Ms. Tiberio is the 80% owner, President, and Treasurer of EOS, all of the information presented by the applicant, evidences her experience is in the administrative side of the business, such as accounting, payroll, accounting, and human resources, and not in the core revenue functions of the business, which include the installation, service, and maintenance of information technology products. (DED Exhibits 1, 5, 8, and 9; APP Exhibit A).

Thus, the Division's determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.



### III. Operation

The Division also denied EOS' application for recertification as a WBE on the basis that the applicant failed to demonstrate that Ms. Tiberio makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains contracts or orders." 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division determined, based on the application, what products and services the applicant business provides to clients. (DED Exhibits 1 and 2). EOS' business is the sale, installation, and service of technology products including audio/video systems, flat panel displays and projectors, lighting control systems, automated window coverings, teleconferencing and video conferencing equipment, and climate control and smart home systems. (DED Exhibit 1). The critical functions of EOS are the sale, installation, and maintenance of audio equipment, computer and network cables, and fiber optic cables. (DED Exhibit 1). There is no evidence that Ms. Tiberio is involved in the core revenue functions of the business which include the sale, installation, and maintenance of technology equipment.

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). Businesses where the non-eligible spouse, or family member, has the education and expertise to perform the specialized work and the owner spouse relied upon for certification handles the administrative aspects is considered a family-owned business, which does not meet the criteria for WBE certification. (*Matter of Occupational Safety, supra* at 1583).

Here, the evidence presented establishes that Ms. Tiberio's role at EOS is administrative and financial while others, namely Tom Tiberio, not relied on for certification, are responsible for the day-to-day operations of the business enterprise. Tom Tiberio's resume states specifically that he runs the day-to-day operations of the Technical Services Department, he oversees all projects and installations, and provides proposals, sales materials, and documentation for all jobs. (DED Exhibit 7). While Ms. Tiberio states, in her affirmation on appeal, that her duties include "the daily supervision and management of all aspects of the business operations," she only lists financial and administrative responsibilities, such as supervising applicable training requirements and certifications, and provides nothing indicating that she is involved in the core revenue generating functions of the business. (APP Exhibit A). Nowhere in the application is there any evidence of her involvement in the core revenue generating functions of the business. (DED Exhibits 1, 5, 8, and 9).

Based on the foregoing, I find that the Division's determination that EOS has not demonstrated that the woman owner relied upon for certification makes 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) is supported by substantial evidence.

### **CONCLUSION**

EOS did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a minority woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1), and 144.2(c)(2) was not based on substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny Eastern Office Supply of Upstate New York, Inc.'s application for recertification as a woman-owned business enterprise should be affirmed.

In the Matter of Eastern Office Supply of Upstate New York, Inc.  
 DED File ID No. 61344  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Letter and Submissions	Y	Y
DED 1	Application for Recertification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Appellant's Appeal Request Form	Y	Y
DED 4	Notice to Proceed by Written Appeal Submission	Y	Y
DED 5	Gale Tiberio Resume	Y	Y
DED 6	Phil Tiberio Resume	Y	Y
DED 7	Thomas Tiberio Resume	Y	Y
DED 8	Owner Duties and Hours Narrative	Y	Y
DED 9	Licenses, Permits, Certifications, Accreditations	Y	Y
DED 10	The Wesley Community Invoice	Y	Y
DED 11	Guilderland Library Invoice	Y	Y
DED 12	CDPHP Invoice	Y	Y
DED 13	ADNET Technologies Invoice	Y	Y
DED 14	NAICS Codes Invoices and Contracts	Y	Y