

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

In the Matter

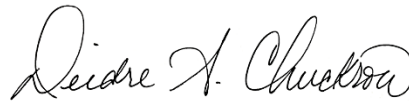
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the Application of GILLIGAN ELECTRIC CORP.
for Recertification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60524

REVISED RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
January 7, 2025

This matter considers the appeal by Gilligan Electric Corp. (“Gilligan” 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 10, 2023, Gilligan applied for recertification as a woman-owned business enterprise (“WBE”). Gilligan based its application on Ms. Jennifer J. Gilligan. (DED Exhibit 1).
2. On January 26, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - a. The minority group members or women relied upon for certification do not share in the risks and profits of the business enterprise in proportion to their equity interests therein as required under 5 NYCRR §144.2(b)(3);
 - b. The minority group members or women relied upon for certification are encumbered in their ability to realize the benefits of ownership of the business enterprise and/or are subject to undue restrictions against alienating such ownership interests as required under 5 NYCRR §144.2(b)(4);

- c. The minority group members or women relied upon for certification do 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);
 - d. The minority group members or women relied upon for certification do 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);
 - e. The minority group members or women relied upon for certification do not devote time on an ongoing basis to the daily operation of the business enterprise as required under 5 NYCRR § 144.2(c)(3); and
 - f. The minority group members or women relied upon for certification is not the highest-ranking officer of the business enterprise, or does not control the board of directors or serve as a general partner as required under 5 NYCRR § 144.2(d)(1).
3. Gilligan submitted a request to appeal via hearing, dated February 6, 2024. (DED Exhibit 3).
 4. A Notice of Hearing was sent to all parties on September 3, 2024. (DED Exhibit 4).
 5. A hearing was held and concluded on December 9, 2024.
 6. At the hearing the Division conceded the second denial ground, 5 NYCRR §144.2(b)(4), and the sixth denial ground, 5 NYCRR § 144.2(d)(1).

FINDINGS OF FACT

7. Gilligan is engaged in the business of full-service electrical contracting. (DED Exhibits 1 and 2; Hearing Testimony of Ms. Gilligan).
8. Ms. Gilligan is the woman owner relied upon for certification and is the President and 60% owner of the applicant business; Mr. Matthew Gilligan, Ms. Gilligan's husband, is the Vice-President and 40% owner. (DED Exhibits 1 and 2).

9. The critical functions of Gilligan are electrical contracting services. (DED Exhibits 1 and 2; Hearing Testimony of Ms. Colleen Barton).

10. The compensation of Gilligan’s owners as reported on W2s is as follows:

Name	2019 W2	2020 W2	2021 W2	2022 W2
Jennifer Gilligan	████████	████████	████████	████████
Matthew Gilligan ¹	████████	████████	████████	████████

(DED Exhibits 5, 7, 9, and 12).

11. The applicant business’ IRS tax filings provide the following information regarding officer income and compensation:

Name	2019	2020	2021
	K1 OBI ²	K1 OBI	K1 OBI
	1125-E ³	1125-E	1125-E
Jennifer Gilligan	████████	████████	████████
Matthew Gilligan	████████	████████	████████

(DED Exhibits 6,8, and 10).

12. Mr. Gilligan is a union journeyman electrician, and 80% to 90% of his work is under a union contract, as such his compensation is governed by the prevailing wage rules, as set by the union. (Hearing Testimony of Ms. Gilligan).

13. Ms. Gilligan has a Bachelor of Science in economics and finance and an MBA. Her day-to-day business responsibilities include overseeing daily operations of Gilligan, and responding to bids, invoicing, reviewing and signing contracts, creating and implementing marketing programs, procuring new business, accounting, payroll, HR, customer relations, scheduling,

¹ Compensation for Mr. Gilligan is rounded to the nearest dollar value.
² Ordinary Business Income
³ Compensation of Officers

and working with the IBEW Union. Ms. Gilligan does not hold any licenses. (DED Exhibits 1, 16, and 17; Hearing Testimony of Ms. Gilligan).

14. Mr. Gilligan is a licensed master electrician and is a foreman for the applicant business. He has a background which includes 30 years in the electrical contracting industry and has worked as a foreman and journeyman since 1998. His responsibilities at the applicant business include design and building electrical projects, creating estimates for jobs, hiring and training new staff, and overseeing field operations when necessary. (DED Exhibits 16, 18, and 19; Hearing Testimony of Ms. Gilligan).

15. Only the City of Rochester requires an electrician's license to perform electrical work within the city, surrounding counties do not require licensure. A license is required for fire alarm and security installations by New York State. Gilligan does almost no fire alarm and security work and 80% of the electrical work completed by the business are done outside of the City of Rochester. Most electricians are not licensed, and of those who are licensed it is estimated that only 10% of those licensed hold master's licenses. (Hearing Testimony of Ms. Gilligan; Hearing Testimony of Ms. Colleen Barton).

16. Ms. Gilligan has been around the electrical contracting field for thirty years and is able to and has completed some small electrical projects when needed. Through her work history she has engaged in site supervision though only union members are permitted under union contracts to work on union projects. Almost all of her work occurs in the office, with field supervision usually done by the business' foremen. She shares responsibility for job estimation with Mr. Gilligan and can and does review prints and creates estimates on her own when needed. Estimates are often done jointly to cross check work and to check for errors. The applicant

business uses a specific book and software to create estimates, and Ms. Gilligan is trained to and does use both in creating estimates. (Hearing Testimony of Ms. Gilligan).

17. Gilligan’s workday for it crews is 7:00 a.m. to 3:30 p.m. Ms. Gilligan works full time for the applicant business and is always available by phone. Ms. Gilligan’s hours vary anywhere from four to eight hours a day. The business’ hours, outside of the hours for fieldwork are fluid, with work getting done when it needs to be completed and is not governed by set hours. Ms. Gilligan states that hours vary as a business owner, and that she does business when it needs to be done. Ms. Gilligan also works part time for the Town of Riga, sets her own hours, which range from 10 to 20 hours a week, and works remotely for that position. (DED Exhibit 16; Hearing Testimony of Ms. Gilligan).
18. Ms. Gilligan states that she is aware when a job is not being done correctly, and that she trained her children in the business, which she describes as sometimes a “family affair.” (Hearing Testimony of Ms. Gilligan).
19. Mr. Peter J. Stoller is the Executive Director of the Rochester NY Chapter of the National Electrical Contractors Association, Inc. (“NECA”) of which Gilligan is a member. Ms. Gilligan is the exclusive point of contact with NECA and is also the point of contact with IBEW. (APP Exhibit A).

APPLICABLE LAW

5 NYCRR § 144.2 (b)(3) states as follows:

Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein. In determining whether the profits of the business enterprise are shared proportionately with minority group members or women, the division may consider, for example and without limitation, means by which the proceeds of the business enterprise are conveyed to individuals or entities.

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 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.

5 NYCRR § 144.2 (c)(3) states as follows:

Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 Gilligan 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

Ms. Jennifer Gilligan, President and 60% owner of Gilligan, appeared at the hearing on behalf of the applicant business. Ms. Gilligan testified on behalf of Gilligan and offered one exhibit, APP Exhibit A, which was admitted into evidence over the objection of the Division.

Ms. Misha Wright, Appeals Counsel, Empire State Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Colleen Barton, Associate Certification Analyst, Division of Minority and Women’s Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 through 23.

I. Prior Certification

The Division acknowledges that Gilligan 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 Gilligan 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, Gilligan had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the October 10, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division denied Gilligan's application for recertification on the basis that Gilligan failed to demonstrate that the woman owner, relied upon for certification, shared in the risks and profits of the business enterprise in proportion to her ownership interest as required by 5 NYCRR §144.2(b)(3). This provision requires that the owner relied on for certification enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Spring Electric, Inc.*, Recommended Order, March 17, 2017 (Final Order 17-21, March 27, 2017), *Matter of Keith Titus Corporation, Inc.* Recommended Order, October 9, 2019 (Final Order 19-29, January 16, 2020), and *Matter of Darr Construction Equip. Corp.* Recommended Order, August 30, 2022 (Final Order 22-11, Nov. 7, 2022). When evaluating whether a woman owner receives “a

proportional ‘profit’ to their equity interest” it is both rational and necessary “to review relative compensation.” *Matter of Darr, supra*. In addition, the Division may consider and compare wages between the owner relied on for certification and other non-qualifying co-owners in its determination regarding this regulation. See *Matter of JP Race Painting, Inc. Recommended Order*, March 27, 2018 (Final Order 18-21, March 30, 2018).

The Applicant bears the burden of establishing that the minority group member 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).

In this instance, while the ordinary business income distributions as reported on the business tax returns, is divided in proportion to the ownership interests of Ms. Gilligan and Mr. Gilligan, the same tax documents provide that the compensation of officers, as reported on the 1125-E forms, are not in proportion to those ownership interests. Mr. Gilligan received \$[REDACTED] in compensation in 2020 and \$[REDACTED] in 2021, and Ms. Gilligan received \$[REDACTED] and \$[REDACTED] in those same years respectively. (DED Exhibits 8 and 10). This information mirrors the information reported on the W2’s, and the W2 wage information for 2019 and 2022, also provide that Mr. Gilligan received more than double in wages than did Ms. Gilligan. (DED Exhibits 5, 7, 9, and 12).

Ms. Gilligan argued on appeal that the Division should not include salary in determining compensation for the owners and that the discrepancy in compensation is based on union prevailing wage laws and rules and cannot be altered. Ms. Gilligan further argued that the business cannot afford to pay her more than Mr. Gilligan, stating that to pay her more would force the business to close. However, no specific information was provided regarding how the impact of

increasing Ms. Gilligan's income, in proportion to her ownership interest would harm the business. (Hearing Testimony of Ms. Gilligan). Additionally, wages have been consistently included in compensation. See *Matter of C.W. Brown v. Canton*, 216 AD 2d 841 (3rd Dept. 1995) and *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (NY Sup. Ct. 2017).

Accordingly, the applicant failed to satisfy their burden that the Division's denial was not based upon substantial evidence. Therefore, based upon the foregoing, the Division's determination that the party relied upon for certification does not share in the risks and profits in proportion to her equity interest, as required under 5 NYCRR § 144.2(b)(3) is supported by substantial evidence.

III. Industry-Specific Competence

The Division also denied Gilligan's application for recertification as a WBE on the basis that Gilligan failed to demonstrate that Ms. Gilligan 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 February 7, 2022), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019). Notwithstanding the Division's requirements, a lack of hands-on experience is not itself enough to deny certification, and industry practice should also be considered. (*Matter of Era Steel Constr. Corp. v Egan*, 145 A.D.2d 795 (1988)). In considering this regulation, the Division shall consider:

- (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)(1).

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).

The Division argued that the applicant failed to provide sufficient evidence to establish that Ms. Gilligan possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, specifically citing to the fact that she is not a master electrician and that her educational background is in business and not in electrical contracting. (DED Exhibit 2; Hearing Testimony of Ms. Barton). In its determination the Division relied heavily on the resumes of Ms. Gilligan and Mr. Gilligan, determining that Ms. Gilligan relied on Mr. Gilligan's

educational background and experience as a master electrician, citing to his degree in electrical construction, his master electrician license for the city of Rochester, his New York State Security and Fire Alarm license, and his more than 35 years of work history as an electrical foreman and journeyman. (DED Exhibit 2).

The applicant argued that the evidence provided in the application in conjunction with the testimony of Ms. Gilligan at hearing clarified other information, provided with the application, and support a finding that the Division did not have substantial evidence that Ms. Gilligan lacks industry-specific competence. The Division appears not to have focused on some of the information included on both Ms. Gilligan's resume and in narrative responses to questions asked by the Division during the application process which provides more detail regarding her work for Gilligan since 2011.

Ms. Gilligan has been President of Gilligan since 2011, and her resume provides that she “[o]verse[s] daily operations. Her resume is short on detail but does include that she holds full responsibility for profits and loss, creates and implements all marketing programs, and procures new business. (DED Exhibit 17). Narratives provided with the application state that Ms. Gilligan has worked “hand in hand” for 13 years in the electrical contracting business with Mr. Gilligan, that she performs contract and administrative duties for the business, that she responds to bids, reviews and signs contracts, works directly with the International Brotherhood of Electrical Workers (“IBEW”), and attends both trainings and owners meetings with the local chapter of the National Electrical Contractors Association (“NECA”). The narrative states: “We continue to further our education through multiple NECA conventions and various vendor training” (DED Exhibits 16 and 17).

Ms. Gilligan testified at the hearing that while her responsibilities at the business are primarily office based, and include all administrative and HR responsibilities, she is capable of, and has done, electrical work in the field, and has supervised field workers, albeit infrequently. (Hearing Testimony of Ms. Gilligan). Ms. Gilligan testified that her knowledge of the electrical industry comes from both her 30-year marriage to Mr. Gilligan, and from her work at the applicant business for more than 13 years. She testified that she has worked in the field on occasion, though admits that there are jobs in which she cannot participate as she, herself, is not a union member, but she can evaluate the work of others. (Hearing Testimony of Ms. Gilligan). She also testified that she is actively involved in the bidding process, which includes the reading of prints, determining the equipment and labor needs required, and pricing the equipment and the labor for the project. The business uses specific books and software in the bidding process, items on which Ms. Gilligan has been trained and uses frequently. Ms. Gilligan and Mr. Gilligan do the bidding work both independently and jointly, and always check each other's work for errors. (Hearing Testimony of Ms. Gilligan). Additionally, Ms. Gilligan's resume states that she was responsible for increasing sales revenue, which requires industry-competence to do. (DED Exhibit 17)

Testimony was also provided that licensure of electricians is only required in a few municipalities, and in the greater Rochester area, only for the city of Rochester. (Hearing Testimony of Ms. Gilligan; Hearing Testimony of Ms. Barton). Ms. Gilligan clarified that the majority of the work done by the applicant business is not within Rochester, and that most electricians, including those working for Gilligan, do not hold a license, nor are they required for the work done by the business. (Hearing Testimony of Ms. Gilligan). In addition, while Ms. Gilligan acknowledged that a New York state license is required for fire alarm work, she testified that the business does very little work in this area. (Hearing Testimony of Ms. Gilligan) Further,

the information regarding licensure provided by Ms. Gilligan was confirmed by the testimony of the Division's witness. (Hearing Testimony of Ms. Barton)

The applicant also provided a letter of support from Mr. Peter J. Stoller, Executive Director of the Rochester chapter of NECA, and while some of the letter is irrelevant, the information regarding the fact that Ms. Gilligan is the point person for the applicant business and the local chapter of the IBEW is clarifying. (APP Exhibit A; see *Scherzi, supra*). Mr. Stoller states that since he began as the Executive Director in November of 2012, all dealings between the IBEW and the applicant business have been with Ms. Gilligan, and includes inquiries regarding staffing jobs, referrals, and placing apprentices. (APP Exhibit A).

The regulation provides that industry specific experience obtained through direct work experience shall be considered by the Division in their evaluation for certification. 5 NYCRR § 144.2(c)(1)(iii). Further, a lack of hands-on experience is not enough, by itself, to deny certification. (See, *Era Steel, supra*). Here the material before the Division along with the testimony of the applicant's witness, provides credible detail regarding the extent of Ms. Gilligan's adequate industry-specific competence, without the need to rely on others, and clarifies information already before the division at the time of application. Under *Scherzi* "it is not only appropriate for an agency to consider the testimony offered at an administrative hearing in rendering its determination, it is required, as '[n]o decision, determination or order shall be made except upon consideration of the record as a whole.'" *Scherzi, supra*, citing *Matter of Haug v State Univ. of NY at Potsdam*, 32 NY3d 1044, 1046 [2018]; *Matter of A.A.C. Contr., Inc. v NYS Dept. of Economic Dev.*, 179 AD3d 1343, 1344 [2020]; and SAPA § 306[1]. In this instance, as in *Scherzi*, the testimony regarding Ms. Gilligan's knowledge of the industry and of the applicant business "did not constitute new evidence previously unavailable at the time of the application but,

instead, served to explain and clarify” information “submitted as part of [the] application . . .” *Scherzi, supra*, at 1469.

I find the application, the resumes and the narrative provided with the application, along with the testimony of Ms. Gilligan persuasive that Ms. Gilligan has adequate, industry-specific competence to make critical decisions without relying on other persons. Importantly, a woman’s lack of technical competence is not dispositive of the ineligibility of WBE certification if such woman owner possesses relevant managerial experience. See *Era Steel, supra*. Ms. Gilligan’s more than thirteen years in the industry, as presented in the application and its supporting documents, clarified by the testimony received at the hearing, demonstrates that she has adequate industry-specific competence, as required under 5 NYCRR §§ 144.2(c)(1), to make critical business decisions without relying on others. Based upon the foregoing, the applicant has met its burden. The Division’s denial is not supported by substantial evidence.

IV. Operation

The Division also denied Gilligan’s application for recertification as a WBE on the basis that the applicant failed to demonstrate that Ms. Gilligan 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*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*.

In its evaluation, the Division determined that the critical functions of Gilligan, based on the application and what products and services the applicant business provides to clients, is electrical contracting services, including electrical installation. (DED Exhibits 1 and 2; Hearing Testimony of Ms. Barton). Ms. Gilligan's day-to-day responsibilities for the applicant business, as provided with the application, are all offsite activities, and include responding to bids, invoicing, reviewing and signing contracts, accounting, payroll, HR, customer relations, and scheduling. Ms. Gilligan testified that she "wears multiple hats" in the work she does for the business, but acknowledged that she does everything, with the exception of field work, namely electrical installations. (Hearing Testimony of Ms. Gilligan). Ms. Gilligan stated that she cannot do much of the work as she is not a union member, and that it is Mr. Gilligan who works in the field. (DED Exhibits 16 and 18; Hearing Testimony of Ms. Gilligan).

It is well settled that where an employee or non-qualifying owner have more significant experience than the owner relied on for certification, and such an employee or non-qualifying owner, actively engages 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*. In the instant case, in relation to daily duties, Mr. Gilligan designs and builds the electrical projects, is a foreman for the business, engages in project management, and works in the field. (DED Exhibits 16 and 18). Further, Mr. Gilligan works regular business hours, working forty hours a week for the business, during their regular hours of operation, while Ms. Gilligan works a varied schedule, working when necessary to get her work done, but not necessarily during the operational hours of the business. (DED Exhibit 16; Hearing Testimony of Ms. Gilligan).

Here, the evidence presented establishes that it is Mr. Gilligan who is responsible for the day-to-day field operations of the business enterprise, and Ms. Gilligan is responsible for the administrative and executive functions of the business. Based on the foregoing, I find that the Division's determination that Gilligan 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.

V. Time Devoted

Lastly, the application was denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). The Division has consistently found that part-time work for a business does not qualify as devoting time to the daily operation of the business. See *Matter of Brandt Equipment, LLC* Recommended Order, April 28, 2020 (Final Order 20-06, June 2, 2020).

Ms. Gilligan testified that she works full time for the applicant business, though she stated that her hours are fluid and can vary from anywhere between four and eight hours a day, but that she is always available by phone. Ms. Gilligan testified that her hours may fall outside the hours for fieldwork, and that as a small business owner she works when work needs to be completed and is not governed by set hours. (Hearing Testimony of Ms. Gilligan). Ms. Gilligan acknowledged that she also works part time for the Town of Riga, but testified that she sets her own hours, which range from 10 to 20 hours a week, and works remotely for that position. In addition, business is conducted for Gilligan "in the upstairs of our barn", therefore Ms. Gilligan can easily perform work. (DED Exhibit 16; Hearing Testimony of Ms. Gilligan).

The Division's determination relies on Ms. Gilligan's outside responsibilities, her potentially shorter daily hours, and the fact that Mr. Gilligan works a set 40 hours a week. (DED Exhibit 20.) The Division argued that the information provided with the application was insufficient to establish that Ms. Gilligan devotes time on an ongoing basis to the applicant business, as required by the regulation, citing to her narrative answers which stated that "she works anywhere from 4-8 hours a day," and that she works part time for the Town of Riga, with hours that vary between 10-20 hours a week. (DED Exhibit 2; Hearing Testimony of Ms. Barton).

At hearing, Ms. Gilligan testified that she works full time for the applicant business, with hours that are flexible and fall outside of the regular workday for her union employees. In addition, Ms. Gilligan testified that her work for the Town of Riga is parttime and remote, and that she does that work during times which fall outside of her responsibilities for the applicant business. (Hearing Testimony of Ms. Gilligan).

Ms. Gilligan's credible testimony regarding her time devoted to the business, together with corroborating evidence in the letter submitted by Mr. Stoller, that she is the point of contact for manpower and staffing, is sufficient to show that she satisfied the requirement under 5 NYCRR§144.2(c)(3). Based on the foregoing, I find that the Division's determination to deny Gilligan's certification under 5 NYCRR §144.2(c)(3) was not based on substantial evidence.

CONCLUSION

Gilligan 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(b)(3) and 144.2(c)(2) was not based on substantial evidence. Gilligan did however, meet its burden with respect to the eligibility criteria at 5 NYCRR § 144.2(c)(1) and 144.2(c)(3).

RECOMMENDATION

The Division's determination to deny Gilligan's application for recertification as a woman-owned business enterprise should be modified in part, and as modified, affirmed.

In the Matter of Gilligan Electric Corp.
DED File ID No. 60524
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Letter of Support	Y	Y
DED 1	Application for Recertification	Y	Y
DED 2	Denial Determination (1/26/2024)	Y	Y
DED 3	Appeal Form	Y	Y
DED 4	Notice of Hearing (9/3/2024)	Y	Y
DED 5	2019 W3	Y	Y
DED 6	2019 GE Tax Returns	Y	Y
DED 7	2020 W3 (GE)	Y	Y
DED 8	2020 GE Taxes	Y	Y
DED 9	2021 W3 (GE)	Y	Y
DED 10	GE 2021 Taxes	Y	Y
DED 11	2021 Personal Taxes (Matthew Gilligan and Jennifer Gilligan)	Y	Y
DED 12	2022 W3 Gilligan Electric	Y	Y
DED 13	2022 Extension Gilligan Electric	Y	Y
DED 14	By-laws Gilligan Electric	Y	Y
DED 15	Minutes and Waiver of Notice of First Meeting of Board of Directors of Gilligan Electric Corp.	Y	Y
DED 16	Narrative Duties and Responsibilities	Y	Y

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 17	Jennifer Gilligan Resume	Y	Y
DED 18	MLG (Matthew Gilligan) Resume	Y	Y
DED 19	Master Electrician License (Matt Gilligan)	Y	Y
DED 20	CNB Contract	Y	Y
DED 21	813-006 Executed Contract	Y	Y
DED 22	Contract for 243 Gorham	Y	Y
DED 23	Gilligan-Brockport Executed Contract	Y	Y