

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

In the Matter

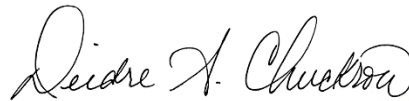
- of -

the Application of GIN-SKYE CONSTRUCTION, Inc.
for Recertification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61939

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
May 29, 2024

This matter considers the appeal by Gin-Skye Construction, Inc. (“Gin-Skye” 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 November 28, 2022, Gin-Skye applied for recertification as a women-owned business enterprise (“WBE”). Gin-Skye based its application on Ms. Brenda Stollings. (DED Exhibit 1).
2. On July 26, 2023, the Division denied the application on the following grounds (APP Exhibit 1; 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 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); and
 - c. 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).

3. Gin-Skye submitted a request to appeal the denial determination, dated August 3, 2023. (DED Exhibit 3).
4. A Notice of Hearing was sent to all parties on February 7, 2024 (APP Exhibit 2; DED Exhibit 4).
5. A hearing was held on April 11, 2024, April 17, 2024, and continued and concluded on April 24, 2024.

FINDINGS OF FACT

6. Gin-Skye is engaged in the business of fabrication, supply, and installation of guardrail, safety fencing, decorative fencing, and traffic signs. The business' primary North American Industry Classification System (NAICS) codes relate to "Fence Installation," "Highway, Street, and Bridge Construction," and "Landscape Services." (DED Exhibit 1; Hearing Testimony of Brenda Stollings).
7. Brenda Stollings is the woman owner relied upon for recertification and is the President and 100% owner of the applicant business. Ms. Stollings incorporated the business in 2012, is the sole shareholder and only officer of Gin-Skye. (DED Exhibits 1 and 2; APP Exhibit 1; Hearing Testimony of Brenda Stollings).
8. Gin-Skye is incorporated in West Virginia and its corporate headquarters is located at 876 Big Ugly Creek, Harts, West Virginia (WV), with their New York office located at 550 Main Street, Westbury, NY. Ms. Stollings' primary residence is 876 Big Ugly Creek, Harts, WV, which is a single-family home owned by Ms. Stollings since 1999. (APP Exhibits 15, 24, 30, 45, and 46; DED Exhibits 1, 7, 8, 11, and 13; Hearing Testimony of Brenda Stollings).

9. Ms. Stollings has a WV driver’s license with a CDL, Class B endorsement. (Hearing Testimony of Brenda Stollings).
10. Ms. Stollings spends ten months of the year living at 71 Magnolia Street, Westbury, NY, and has done so for the past seven years. The property, a mother-daughter style home, is owned by Mr. Ralph Guercia, who resides on the first floor of the residence. Ms. Stollings pays no rent to Mr. Guercia. Ms. Stollings states that she has lived in New York for at least six months of the year since 2005. (Hearing Testimony of Brenda Stollings).
11. Ms. Stollings’ 2021 Nonresident and Part-Year Resident tax return states that she did not maintain living quarters in New York State in 2021. (APP Exhibit 46; DED Exhibit 13).
12. Mr. Guercia was the highest paid employee of Gin-Skye in 2021 and 2022, receiving \$ [REDACTED] and \$ [REDACTED] in gross wages respectively. (APP Exhibits 24 and 30; DED Exhibits 7 and 8).
13. Ms. Stollings received \$ [REDACTED] in wages and compensation in 2021 and \$ [REDACTED] in 2022. (APP Exhibits 24 and 30; DED Exhibits 7 and 8).
14. The following individuals are listed as employees and received the following salaries from Gin-Skye in 2021 and 2022:

Employee Name	Title	2021 Salary	2022 Salary
Abrego, Rafael	Laborer, Local 731		\$ [REDACTED]
Angel, Jefferson	Foreman, Local 580	\$ [REDACTED]	\$ [REDACTED]
Aviles, Juan	Foreman, Local 580	\$ [REDACTED]	\$ [REDACTED]
Breitfeller, Frank	Teamster, Local 282	\$ [REDACTED]	\$ [REDACTED]
Claros, Jorge	Iron Worker, Local 580	\$ [REDACTED]	\$ [REDACTED]
Ehms, William	Estimator	\$ [REDACTED]	\$ [REDACTED]
Garcia, Wilson	Laborer, Local 1298	\$ [REDACTED]	\$ [REDACTED]
Gonzalez, Jose	Laborer, Local 731		\$ [REDACTED]
Gratton, Gregory			[REDACTED]
Guercia, Ralph	Super, Local 580	\$ [REDACTED]	\$ [REDACTED]
Hernandez, Vincent	Teamster, Local 282	\$ [REDACTED]	\$ [REDACTED]
Igoe, Thomas J.	Laborer, Local 731	\$ [REDACTED]	\$ [REDACTED]
Levan, George	Laborer, Local 1298		\$ [REDACTED]

Employee Name	Title	2021 Salary	2022 Salary
Martinez, Jose	Operator, Local 138	\$ [REDACTED]	\$ [REDACTED]
McKiel, Andrew	Foreman, Local 580	\$ [REDACTED]	\$ [REDACTED]
Osario, Jose	Laborer, Local 731	\$ [REDACTED]	\$ [REDACTED]
Sagastizado, Hector	Iron Worker, Local 580	\$ [REDACTED]	\$ [REDACTED]
Samartino, Michael	Mechanic		\$ [REDACTED]
Santos, Rene	Laborer, Local 731	\$ [REDACTED]	
Sobel, Ariana	PW LAB		\$ [REDACTED]
Stollings, Brenda	President	\$ [REDACTED]	\$ [REDACTED]
Valladares, Miguel	Laborer, Local 731	\$ [REDACTED]	\$ [REDACTED]
Velez, Michele	Office Manager	\$ [REDACTED]	\$ [REDACTED]
Wroblewski, Mark	Estimator	\$ [REDACTED]	\$ [REDACTED]

(APP Exhibits 1, 5, 40; DED Exhibits 1, 7, 8; Hearing Testimony of Brenda Stollings).

15. An amended 2022 tax return was filed on March 8, 2024, which states that the “original tax return was missing a bonus expense to the shareholder,” and amends the compensation received by Ms. Stollings from \$ [REDACTED] to \$ [REDACTED]. (APP Exhibits 41 and 48; Hearing Testimony of Brenda Stollings).
16. Ms. Stollings’ personal 2020 federal tax return provides that all of Ms. Stollings’ taxable income is reportable only in West Virginia. Ms. Stollings’ 2021 Nonresident and Part-Year Resident tax return states her wages earned in New York State were \$ [REDACTED]. (APP Exhibits 45 and 46; DED Exhibit 13).
17. Ms. Stollings began work for Westbury Fence & Guide Rail Co. (Westbury) in July of 2005. Westbury was located in Westbury, New York, and owned by Mr. Guercia from 2001 to 2014. Mr. Guercia hired Ms. Stollings in 2005 to be a truck driver, and she continued to work for Westbury until she began the applicant business in 2012. (APP Exhibits 15 and 19; DED Exhibits 11 and 12; Hearing Testimony of Brenda Stollings).
18. Ms. Stollings worked at Westbury until August of 2012 and held the following positions: Clerical Office Manager and Truck Driver from May 2005 until June of 2007; Field Crew

Supervisor, July 2007 to June 2009; Assistant Estimator and Project Manager, August 2009 to July 2011; Head of Estimating & Purchasing, August 2011 to August 2012. (APP Exhibit 15; DED Exhibit 11; Hearing Testimony of Brenda Stollings).

19. Ms. Stollings' experience at Westbury includes the direct supervision of field work, explaining plans and contracts to staff and clients, resolving complaints and construction problems, scheduling and confirming site ready status, liaison to general contractors, and material vendors, preparing and processing purchase orders, estimating, bidding, and purchasing. (APP Exhibits 11 and 15).
20. Mr. Guercia is a member of Local 580 Ironworks and began work as field foreman for Westbury in 1998. He was the President and owner of Westbury from 2001 until 2014. He was Vice-President and worked as a supervisor and foreman for Royal Guard Fence from 2014 until 2016, and then began working for Gin-Skye in December of 2016 and remains employed for the applicant business as a supervisor and foreman. (APP Exhibit 19; DED Exhibit 12).
21. Mr. Guercia's experience includes ironwork, running of day-to-day operations and field operations, supervising field operations including the supervision of union workers, ordering materials for jobs, scheduling, supervision of projects including the installation of fencing, guardrail, overhead signs and structures. Mr. Guercia has a 30 hr. OSHA certification and a Class "A" driver's license. (APP Exhibit 19; DED Exhibit 12).
22. Ms. Stollings' application states that a typical workday for her is working from 8 a.m. to 4:30 p.m., Monday through Friday, and on occasion on a Saturday. A typical workday includes "looking at projects to be bid, getting price quotes, speaking to customers and suppliers. Handling any issues that may arise. Working with my staff to get updates on the day-to-day items they are handling." (DED Exhibit 1).

23. Mr. Nicholas Gullino is a project manager for Laser Industries, a general contracting firm engaged in the business of civil site construction, excavation, concrete, and fence, who has worked with Gin-Skye on a project for the Long Island Rail Road (LIRR). Ms. Stollings was Mr. Gullino's main point of contact during the pendency of the LIRR project. Mr. Gullino spoke with Ms. Stollings several times a week, spoke with union foreman on the job site, and occasionally saw Ms. Stollings at the job site. (Hearing Testimony of Nicholas Gullino).
24. Thomas Matias, a Sergeant with the MTA Bridges and Tunnel Police, coordinated with Gin-Skye, a contractor on the Verrazano Bridge, on a project of installing suicide fencing. Sgt. Matias was responsible for coordinating highway safety and speed zones during the two-year long project and his only point of contact with Gin-Skye was Ms. Stollings. Sgt. Matias met Ms. Stollings on site, saw her at the site between 2 to 3 times, and spoke with her between six to a dozen times over the two-year period. (Hearing Testimony of Thomas Matias)
25. Peter Ruttura is the Vice President of Ruttura & Sons, Construction Co., Inc., (Ruttura) a concrete excavation and site development company who has subcontracted fence work to Gin-Skye approximately two years ago and continues to work with them on a project. Mr. Ruttura's point of contact at Gin-Skye is Ms. Stollings, and he has spoken to her between six to a dozen times regarding the projects, sometimes at the job site and sometimes on the phone. Mr. Ruttura has also spoken to Mr. Guercia on the job site a few times. (Hearing Testimony of Peter Ruttura).
26. Timothy Alex Concannon is the President and owner of Gateway Demo/Civil Corp. ("Gateway") Gateway has contracted with Gin-Skye at least 3 to 5 times in the past couple of years, and Ms. Stollings is the contact for each of those contracts, and is the point person for any contract issues. (Hearing Testimony of Timothy Alex Concannon).

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.

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 Prominent 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

Richard B. Ziskin, Esq., of The Ziskin Law Firm, LLP, appeared at the hearing on behalf of Gin-Skye Construction, Inc. The following witnesses testified on behalf of Gin-Skye: Brenda Stollings, President; Nicholas Gulino, Project Manager, Laser Industries; Sgt. Thomas Matias, MTA Bridge and Tunnel Police; Peter Ruttura, Vice President, Ruttura & Sons, Construction Co., Inc.; Timothy Alex Concannon, President, Gateway Demo/Civil Corp. Gin-Skye offered the following exhibits which were admitted into evidence: APP Exhibits 1, 2, 12, 13, 15, 19, 22, 24, 30, 35,36, 37, 39, 40, 41, 45, 46, 48, 51, 56, 58, and 59.

Mr. William Chen, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division:

Rasheda Edwards, Senior Certification Analyst, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

I. Prior Certification

The Division acknowledged that Gin-Skye was previously certified as a woman-owned business enterprise (“WBE”). 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 Gin-Skye 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, Gin-Skye had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the November 28, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division denied Gin-Skye’s application for recertification on the basis that Gin-Skye failed to demonstrate that the woman owner, relied upon for recertification, 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 ensures that the woman owner receives the benefits received by a

business resulting from State contracting preferences from a WBE certification, and that non-qualifying persons do not receive a disproportionate share of such benefits. See *Matter of Spring Electric, Inc.*, Recommended Order, March 17, 2017 (Final Order 17-21, March 27, 2017) and *Matter of Darr Construction Equip. Corp.* (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*, Recommended Order, March 27, 2018 (Final Order 18-21, March 30, 2018).

The Applicant bears the burden to establish that the owner relied upon for certification has met the certification requirements. 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 its determination the Division relied on the applicant business’ 2021 and 2022 Federal Tax Returns, the company’s W2s for both 2021 and 2022, and a list of employees provided by the applicant in response to questions from the Division during the application process. (APP Exhibits 1, 22, 24, 30, 37, and 40; DED Exhibits 2, 5, 6, 8, and 14). In 2021 Ms. Stollings received \$ [REDACTED] in compensation, less than at least eighteen other employees. The highest paid employee was Mr. Ralph Guercia, a supervisor and foreman for Gin Skye, who earned \$ [REDACTED]. Other employees who earned more than Ms. Stollings in 2021 include Ms. Michele Velez, Gin-Sky’s office manager, who received \$ [REDACTED] and both business’ estimators, William Ehms and Mark Wroblewski, who received \$ [REDACTED] and \$ [REDACTED], respectively. In 2022 Ms. Stollings received \$ [REDACTED], less than nineteen other employees, including Mr. Guercia, Ms. Velez, Mr.

Ehms, and Mr. Wroblewski who received \$ [REDACTED], \$ [REDACTED], \$ [REDACTED], and, \$ [REDACTED] respectively.

Counsel for the applicant argued that Ms. Stollings, as the sole shareholder of Gin-Skye, is the only person who shares in the risks and profits of the business, that the Division misconstrues risks and profits and should not consider wages towards risks and profits, and that Ms. Stollings is being penalized both for reinvesting in the company and for hiring competent unionized employees and paying those employees their required prevailing wage rate, and thus taking a lower wage for herself.

In determining whether the person relied upon for certification shares in the risks and profits proportionally to their ownership interest, “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(b)(3)). It is well settled that the Division may rely on salary statements in support of a determination that an applicant does not share in the risks and profits in proportion to their ownership interest. See *Matter of C.W. Brown, Inc. v Canton*, 216 AD2d 841, 843 (3d Dept 1995), *Matter of Bore Tech, LLC*, Recommended Order, June 1, 2021 (Final Order 21-05, Feb. 7, 2022), and *Matter of National Recovery Solutions, LLC*, Recommended Order, May 25, 2017 (business not eligible for certification where woman-owner and majority shareholder received the same compensation as other employee-owner) (Final Order 17-31, June 5, 2017).

Here, there is no dispute that Ms. Stollings is the 100% owner and sole shareholder of the applicant business. Notwithstanding her 100% ownership interest, the evidence before the Division at the time of the application, demonstrates that Ms. Stollings earns less than the majority of employees of Gin-Skye. In making its determination the Division reviewed the information before

it as to what the firm earns and how much compensation the owner receives, including 2021 and 2022 W2s and business tax returns for the years 2019 through and including 2022. (APP Exhibits 1, 24, 30, 35, 36, 37, and 40; DED Exhibits 2, 5, 6, 7, 8, 9, and 10; Hearing Testimony of Rasheda Edwards). The Division's witness testified, that in the case of a 100% owner, the Division is looking to see that the owner is the highest earner at the business. (Hearing Testimony of Rasheda Edwards). W2s submitted with the application as well as tax returns all demonstrated that the only compensation that Ms. Stollings received were wages, as reflected in her W2s and that she received less in earnings than at least eighteen other employees, including Gin-Sky's office manager, Michele Velez, a non-union employee, in both 2021 and 2022.

On appeal, applicant introduced copies of checks made out to Ms. Stollings from Gin-Skye which were described as bonus payments by Ms. Stollings for the year 2022, and totaled \$ [REDACTED]. (APP Exhibit 48). In addition, an amended Federal Tax Return for the applicant business, which was filed on March 8, 2024, for the year 2022, was also introduced. The amended return provided that the original 2022 return failed to include information regarding bonus payments in the amount of \$ [REDACTED] received by Ms. Stollings, putting her compensation at \$ [REDACTED] and not the reported \$ [REDACTED]. Those documents present new information which was not before the Division at the time of application and do not seek to clarify or explain previously submitted materials, and therefore they cannot now be considered. (See *Matter of Lida Strategic Solutions, Inc.* Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019), and *Scherzi Systems, supra*).

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 Gin-Skye's application for certification as a WBE on the basis that Gin-Skye failed to demonstrate that Ms. Stollings 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)). 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 AD2d 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. Stollings has experience in the actual installation of fencing, guiderails or working directly in the field on client projects and thus does not possess industry-specific competence relating to the critical functions of the applicant business, which includes the fabrication, supply and installation of fencing, railing work, and sign panels. (APP Exhibit 1; DED Exhibit 2). In its determination the Division relied heavily on the resumes of Ms. Stollings and Mr. Guercia, determining that Ms. Stollings relied on Mr. Guercia's experience as an ironworker, supervisor, and foreman, and cited to Mr. Guercia's over twenty years of experience in the field. The Division also argued that Ms. Stollings working for Mr. Guercia before starting her own business, his years of hands-on experience, his standing as the highest earner of the applicant business, and the lack of evidence that Ms. Stollings lived in New York also supported the Division's determination.

Counsel for the applicant argued that the evidence provided in the application in conjunction with the testimony of the witnesses at hearing which clarified that information, support a finding that the Division did not have substantial evidence that Ms. Stollings lacks industry-specific competence. Counsel argues that the Division overlooked information on Ms. Stollings'

resume which details her work at Westbury from 2005 until 2012 and lists her experience as: direct supervision of field work; explaining plans and contracts to staff and clients; resolving complaints and construction problems; scheduling and confirming site ready status; serving as a liaison to general contractors, EICs, and material vendors; preparing and processing purchase orders; and estimating, bidding, and purchasing in favor of Mr. Guercia's work experience.

Ms. Stollings testified at the hearing that she established Gin-Skye in 2012 and named the business after her daughters, Ginger and Skye, and that her responsibilities at the business include "everything" from payroll, to bidding, to finding jobs, "it's the whole bit." Ms. Stollings began working in the field in 2005 when she accepted a position as a truck driver for Mr. Guercia's company, Westbury, in 2005, and continued to work for Westbury until August of 2012. (APP Exhibit 15; DED Exhibit 11; Hearing Testimony of Brenda Stollings). According to Ms. Stollings' testimony, and to her resume, she worked for Westbury in several capacities, including as a clerical office manager, truck driver, field crew supervisor, estimator, project manager, and as head of estimating and purchasing. Further, in a narrative response to a question regarding Ms. Stollings' daily duties, responsibilities, and hours worked at Gin-Skye, applicant stated that Ms. Stollings works from 8:00 a.m. to 4:30 p.m. Monday through Friday, and some Saturdays, and that she looks at projects to bid on, gets pricing quotes, speaks to customers and suppliers, gets updates on the day-to-day items handled by her staff, and handles issues "that may arise." (APP Exhibit 15; DED Exhibits 1 and 11; Hearing Testimony of Brenda Stollings).

Ms. Stollings testified in detail regarding her employees, the work they do, and her role in high level management of the projects Gin-Skye is contracted to complete. In addition, Ms. Stollings stated that she sometimes drives trucks for the business, and that she is adept at reading and explaining blueprints, a skill she states she learned on the job, to her customers and staff. Ms.

Stollings, both in a narrative in response to questions in the application and through testimony, testified that she works five days a week, from 8:00 a.m. to 4:30 p.m. (DED Exhibit 1; Hearing Testimony of Brenda Stollings).

Several witnesses testified on behalf of the applicant regarding their experiences in working with Gin-Skye and with Ms. Stollings. All the witnesses testified that they have subcontracted work with Gin-Skye and that their primary point of contact, and generally their only point of contact, is Ms. Stollings, and that she handles all contract issues for the applicant business. (Hearing Testimony of Nicholas Gulino, Thomas Matias, Peter Ruttura, and Timothy Alex Concannon).

Ms. Edwards, testifying for the Division, stated that the determination regarding whether Ms. Stollings had adequate industry specific competence to make critical business decisions without relying on others was based upon several factors. Included in the determination process were the critical functions of the business, which were determined by information included in the application, including NAICS codes; the resumes of Ms. Stollings and other key employees; the employee list; and the day-to-day narrative regarding what each person does for the applicant business. (DED Exhibit 1; Hearing Testimony of Rasheda Edwards). The Division determined that the critical functions of the business included the fabrication, supply, and installation of guardrail, safety fencing, decorative fencing, and traffic signs. (APP Exhibit 1; DED Exhibit 2; Hearing Testimony of Rasheda Edwards).

In their determination, the Division acknowledges that Ms. Stollings worked as a truck driver in the industry, as a field crew supervisor, where she conferred with “supervisory personnel, owners, contractors, or design professions to discuss and resolve matters, such as work procedures, complaints, or construction problems,” and she directed and supervised field workers. (APP

Exhibit 1; DED Exhibit 2). In addition, the Division also acknowledged that Ms. Stollings was both an assistant and eventually head estimator and project manager for Westbury prior to her beginning her own business in the same field. (APP Exhibit 1; DED Exhibit 2). Notwithstanding the foregoing, the Division determined that because other employees also engaged in critical functions of the business, and because Mr. Guercia, based on his resume, has more experience than Ms. Stollings, and that there was no evidence that demonstrated that Ms. Stollings' responsibilities or daily duties included "the actual installation of fencing, guiderails or working directly in the field on client projects," she did not possess adequate industry specific competence to make critical business decisions. (APP Exhibits 1, 15, and 19; DED Exhibits 2, 11, and 12; Hearing Testimony of Rasheda Edwards).

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). Further, earnings play no part in this regulation, therefore, Mr. Guercia's compensation, while relevant under other regulations, has no place in the consideration of Ms. Stollings industry-specific competence. Here, the material before the Division along with the testimony of the applicant's witnesses, provides credible detail regarding the extent of Ms. Stollings' knowledge of all operations of the business, and clarifies information already before the division at the time of application. Under *Scherzi Systems* "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. Stollings’ 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. Stollings, Messrs. Gulino, Ruttura, Concannon, and Sgt. Matias persuasive that Ms. Stollings 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. Stollings’ more than fifteen years in the industry, which includes her role as owner of Gin-Skye for more than ten years, her managerial experience obtained over her tenure at both the Westbury and the applicant business, 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

Finally, the Division denied Gin Skye’s application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Stollings 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. (*Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

The Division determined that the critical functions of Gin-Skye all occur in New York, and that all the employees, with the exception of Ms. Stollings, work in New York. However, the application, and the accompanying documents submitted by the applicant business, demonstrate that Ms. Stollings resides in West Virginia, and as such is not physically present to supervise or handle issues that arise in the field operations on job sites. (APP Exhibit 1; DED Exhibit 2). The Division argues that to make operational decisions on a day-to-day basis, regarding the critical functions of the business, Ms. Stollings must be present and working in New York.

Counsel for the applicant does not dispute that Ms. Stollings needs to be present in New York, and instead argues that Ms. Stollings makes operational decisions on a day-to-day basis relating to the critical functions of the business, and that the evidence presented supports that finding, emphasizing Ms. Stollings’ role in contracting, estimating, and bidding. In addition, counsel argues that the testimony adduced at hearing establishes that Ms. Stollings lives in New York for ten months out of the year, and is in New York running the operations of Gin-Skye.

Both the Division and Applicant conflate the issues presented under the regulatory provisions of 5 NYCRR § 144.2(c)(1) and § 144.2(c)(2). The regulation at § 144.2(c)(1) relates to

whether the person relied upon possesses adequate industry specific competence to make critical business decisions without relying on others, while § 144.2(c)(2) concerns whether the person relied upon is making operational decisions on a day-to-day basis. The issue regarding Ms. Stollings' industry specific competence, having already been addressed in section III, *supra*, will not be addressed here, and the focus instead will be on whether Ms. Stollings is making operational decisions on a day-to-day basis.

Here, the evidence before the Division at the time of the application, included Ms. Stollings' resume, W2s for 2021 and 2022, and her personal income tax returns for 2020 and 2021. Those documents all list her residence as West Virginia. In addition, the narrative regarding Ms. Stollings workday and responsibility is silent as to where Ms. Stollings performs her job duties, and says nothing about field supervision, instead stating that she gets updates from her staff regarding "the day-to-day items they are handling." The narrative, which also provides the New York office address, states in the same paragraph that the corporate office is located in West Virginia, which is also the home address of Ms. Stollings. (DED Exhibit 1).

At the hearing, Ms. Stollings testified that she has lived in New York, at various addresses, since 2005, and that when she first began working for Westbury she lived in New York for six months a year, and the other six months in West Virginia. (Hearing Testimony of Brenda Stollings). Ms. Stollings stated that she has been living in New York for ten months out of the year since starting Gin-Skye in 2012, and that she has lived at 71 Magnolia Street in Westbury, New York for the past seven years. Ms. Stollings does not pay rent at the Magnolia Street address, and states that the mother-daughter type residence belongs to Mr. Guercia who resides on the first floor, and she on the second. (Hearing Testimony of Brenda Stollings). Ms. Stollings also testified that she works from Gin-Skye's New York's office, also located in Westbury. No leases or other

proof of residency were presented to the Division or offered at the hearing regarding Ms. Stollings' living arrangements in New York, and Mr. Guercia did not testify at the hearing. Further, while the applicant's additional witnesses all testified that they met with Ms. Stollings in person, either in the New York office, or on a job site, on occasion, that information is new information. (Hearing Testimony of Nicholas Gulino, Thomas Matias, Peter Ruttura, and Timothy Alex Concannon). As the testimony regarding Ms. Stollings living and working in New York is new information, not merely clarifying, and was not before the Division at the time of the application, it cannot now be considered. (See *Scherzi*, supra, and *Lida*, supra). Even if this information was considered, only Nicholas Gulino testified to seeing Ms. Stollings in the New York office with regularity, while Thomas Matias, Peter Ruttura, and Timothy Alex Concannon testified to only seeing Ms. Stollings a handful of times either in the New York office or on the job site during the pendency of their projects. (Hearing Testimony of Nicholas Gulino, Thomas Matias, Peter Ruttura, and Timothy Alex Concannon).

The information presented to the Division, all put Ms. Stollings as living full time in West Virginia. (APP Exhibits 15, 24, 30, 45, and 46; DED Exhibits 1, 7, 8, 11, and 13). The 2020 tax returns provided to the Division include both Ms. Stollings' Federal and West Virginia returns and state that all her earnings from Gin-Skye were earned in West Virginia. (APP Exhibit 45). No New York State tax filing, for the 2020 return, for Ms. Stollings, was produced or offered to the Division or on appeal. While Ms. Stollings' 2021 tax returns include both a West Virginia and New York filing, the New York Nonresident and Part-Year Resident form, indicates that Ms. Stollings did not maintain living quarters in New York in 2021, and that of the \$[REDACTED] she earned from Gin-Skye, only \$[REDACTED] is credited to New York. (APP Exhibit 46; DED Exhibit 13). In addition, Ms. Stollings' West Virginia return credits all \$[REDACTED] earned to West Virginia. (APP Exhibit 45).

Ms. Stollings testified that she leaves all her tax filings up to her accountant, who is the accountant for both the business and her personally. She went on to testify that she doesn't review her personal filings, and relies solely on him for their accuracy, and thus any errors in the filing are solely his responsibility, notwithstanding that she signed those documents. This testimony is not persuasive. (Hearing Testimony of Brenda Stollings)

Here, the evidence presented to the Division at the time of application is that Ms. Stollings was living and working for Gin-Skye in West Virginia, making it implausible for her to oversee the day-to-day operations of the business, especially considering that all the work is performed in New York. Based on the foregoing, the Division's determination that Gin-Skye has not demonstrated that Ms. Stollings 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

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

RECOMMENDATION

The Division's determination to deny Gin-Skye Construction, Inc.'s application for certification as a woman-owned business enterprise should be modified in part, and as modified, affirmed.

In the Matter of Gin-Skye Construction, Inc.
DED File ID No. 61939
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1/DED 2	Denial Letter	Y	Y
DED 1	Application for Recertification	Y	Y
APP 2/DED 4	Notice of Hearing / Conference	Y	Y
APP 12	WBE Certificate – NYS SBS	Y	Y
APP 13	WBE Certificate – Port Authority	Y	Y
APP 15/DED 11	Brenda Stollings Resume	Y	Y
APP 19/DED 12	Ralph Guercia Resume	Y	Y
APP 22/DED 14	Gin-Skye Employee List	Y	Y
APP 24/DED 7	2021 W2s	Y	Y
APP 30/DED 8	2022 W2s	Y	Y
APP 35/DED 10	2019 Gin-Skye Tax Return	Y	Y
APP 36/ DED 9	2020 Gin-Skye Tax Return	Y	Y
APP 37/ DED 5	2021 Gin-Skye Tax Return	Y	Y
APP 40/ DED 6	2022 Gin-Skye Tax Return	Y	Y
APP 41	2022 Gin-Skye Amended Tax Return	Y	Y
APP 45	2020 Brenda Stollings Tax Returns	Y	Y
APP 46/DED 13	2021 Brenda Stollings Tax Returns	Y	Y

APP 48	2022 Brenda Stollings, Additional Payments	Y	Y
APP 51	El Sol Contracting ES II JV Subcontract	Y	Y
APP 58/DED 15	550 Main Street Lease Agreement 1.30.23	Y	Y
APP 59	550 Main Street Rent Payments 6 months	Y	Y
DED 3	Request for Appeal	Y	Y