

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

In the Matter

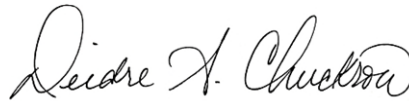
- of -

the Application of Montgomery Service, Inc.
for Recertification as a Minority Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62070

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
January 29, 2024

This matter considers the written appeal by Montgomery Service, Inc. (“MSI” 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, 2022, MSI applied for recertification as a women-owned business enterprise (“WBE”). MSI based its application on Ms. Candace Kozaczka. (DED Exhibit 1).
2. On July 20, 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. MSI submitted a request to appeal the denial determination, dated July 20, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to MSI on July 27, 2023 (DED Exhibit 4).
5. A written appeal letter with submissions was filed on August 28, 2023, by Applicant.

6. The Division filed an Affidavit of Eugenio Alcantara, Director of Certification, dated November 9, 2023, and a brief of Karen L. Bernstein, counsel for the Division, dated November 10, 2023.

FINDINGS OF FACT

7. MSI is engaged in the business of auto/truck repair, including 24-hour towing, road service, hauling and recovery. (DED Exhibit 1).
8. Candace Kozaczka is the woman owner relied upon for certification. Ms. Kozaczka is the President and Controller and owns 100% of MSI. (DED Exhibit 1).
9. The critical functions of MSI are auto and truck repair, road service, towing, recovery and hauling, estimating, preparing bids, and negotiating contracts. (DED Exhibit 1).
10. Ms. Kozaczka has been with MSI since 1998 and her responsibilities include tax filings, financial statements and general ledger, payroll and human resources, accounts receivable and payable, bank reconciliation, inventory control, and advertising. Ms. Kozaczka has a Bachelor of Science degree in business and her prior work experience is as an accountant, controller, and office manager. (DED Exhibit 7).
11. Mr. Albert Montgomery is the Manager of MSI and has worked for MSI since its inception as an auto and truck mechanic. Mr. Montgomery manages the office and the shop and does some towing and service calls. He is responsible for writing up invoices, scheduling towing and hauling, scheduling appointments in the shop, and helps with daily operations. (DED Exhibits 7 and 8).

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 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 MSI for certification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's

conclusions and factual determinations are not supported by “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” *Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Prior Certification

The Division acknowledges that MSI 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 MSI 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, MSI had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the October 10, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Industry-Specific Competence

The Division denied MSI's application for recertification as a WBE on the basis that the applicant failed to demonstrate that Ms. Kozaczka 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. Kozaczka has adequate, industry-specific competence, training, or licensure, in auto or truck repair, or in towing

and hauling. Ms. Kozaczka's experience is in administrative work and accounting. There is no evidence that she has any expertise in the core revenue generating functions of the applicant business. (DED Exhibit 7). The only evidence regarding anyone having industry experience and competence is the information provided regarding Mr. Montgomery, who is an experienced auto and truck mechanic, is the Manager of MSI, and is engaged in the core revenue generating functions of the business. (DED Exhibits 7 and 8). Here, the only additional information supplied by the applicant is in the request for appeal, where the applicant provides information on current clients and updates to the business' licensure, neither of which is relevant to the issue of industry competence. (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 MSI's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Kozaczka 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). MSI's business is auto and truck repair, as well as towing and hauling. (DED Exhibit 1). Ms. Kozaczka's prior experience, as per her resume, is in accounting, office management, business finance and tax. Her role at MSI is purely financial and administrative in nature and involves the financial end of the business as well as advertising. (DED Exhibit 7). She is not involved in estimating, scheduling, or the work of auto/truck repair, towing, or hauling. (DED Exhibits 7 and 8). Her duties are administrative and do not involve the critical functions of the applicant business.

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*). Here, the evidence presented establishes that Ms. Kozaczka's role at MSI is administrative while others, namely Mr. Montgomery, not relied on for certification, are responsible for the day-to-day operations of the business enterprise.

Based on the foregoing, I find that the Division's determination that MSI 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

MSI did not meet its burden to demonstrate that the Division's determination to deny its application for certification 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 Montgomery Service, Inc.'s application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Montgomery Service, Inc.
 DED File ID No. 62070
 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 Certification	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	All Licenses, Permits, Certifications	Y	Y
DED 6	Licenses or Permits	Y	Y
DED 7	Narrative and Resume of Candace Kozaczka	Y	Y
DED 8	Narrative	Y	Y
DED 9	Largest Contracts	Y	Y
DED 10	Sales Journal Report	Y	Y