

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

In the Matter

- of -

**Spalding Hardware Co., Inc. dba Standish Jones Building Supply
for Certification as a Minority-Owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 59418

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
March 6, 2024

This matter considers the written appeal by Spalding Hardware Co. Inc. dba Standish Jones Building Supply, (“Spalding” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On November 23, 2022, Spalding applied for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On July 21, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members relied upon for certification have not demonstrated that they are the highest-ranking officer and/or control the Board of Directors and/or serve as a general partner, as required by 5 NYCRR § 144.2(d)(1); and
 - (b) The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR § 144.2(e).
3. Spalding submitted a request to appeal the denial determination on August 7, 2023. (DED Exhibit 4).
4. A Notice to Proceed Via Written Appeal was sent to Spalding on August 14, 2023 (DED Exhibit 3).
5. Spalding’s written appeal, with exhibits, was submitted on December 1, 2023. (DED Exhibit 5; APP Exhibit A)

6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated December 29, 2023, and a brief of Lisa S. Berk, counsel for the Division, dated January 4, 2024.

FINDINGS OF FACT

7. Spalding is in the business of hardware retail. (DED Exhibit 1).
8. The women relied on for certification are Kathryn Ulrich, President and 33.3% owner and Nancy Webber, 33.3% owner. The remaining 33.3% is owned by Dennis Ulrich. (DED Exhibit 1).
9. Spalding operates under a membership agreement with Ace Hardware Corporation (“Ace Hardware”). (DED Exhibit 6). The membership agreement states that all members must comply with all provisions of the by-laws and policies of Ace Hardware. (DED Exhibit 6).
10. The agreement states, “Ace Hardware unilaterally, without limitation, reserves the sole and exclusive right to amend, modify and change the Appellant’s operational requirements under any condition. . .” The agreement also provides that amendments may include the image, appearance, and décor of the applicant’s store, as well as the types of merchandise, services, and equipment to be acquired by, used, or offered by the applicant. The agreement requires Spalding to obtain Ace Hardware’s written approval prior to assigning or transferring the membership to another purchaser or successor of the business. (DED Exhibit 6).
11. The membership agreement also places obligations on the applicant business for purchasing their inventory, including a low volume service charge, compliance with Ace Hardware’s by-laws, successor and assignment restrictions and limits on the members credit and merchandise orders. Inventory spreadsheets submitted with the application, demonstrate that Spalding buys almost their entire inventory from Ace Hardware. (DED Exhibits 6, 7, and 8).

APPLICABLE LAW

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

Control. Minority group members and women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control of the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

5 NYCRR § 144.2 (e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 Spalding 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. Control

The Division denied Spalding’s application for certification on the grounds that the women relied upon for certification are not the highest-ranking officers of the business enterprise, do not control the board of directors, or serve as a general partner as required by 5 NYCRR § 144.2(d)(1). In evaluating this regulation, the Division requests a list of the applicant business’ corporate directors and regularly examines an applicant’s by-laws and operating agreements. (See e.g. *Matter of ADK Water Solutions, Inc.*, Recommended Order, June 12, 2023 (Final Order 23-07, Aug. 10, 2023), *Matter of LHS International, Inc.*, Recommended Order, June 6, 2023 (Final Order 23-07, Aug. 11, 2023), and *Matter of S.C. Spencer Electric, Inc.* Recommended Order July 29, 2021 (Final Order 22-04, March 31, 2022).

Here, Ms. Ulrich and Ms. Webber are the women relied on for certification, each with a 33.3% ownership interest in the applicant business. (DED Exhibit 1). Ms. Ulrich is the President of Spalding and Ms. Webber is an owner. (DED Exhibit 1). As part of the application, the applicant provided a copy of its membership agreement with Ace Hardware. (DED Exhibits 1 and 6). Spalding paid a fee to become an Ace Hardware member pursuant to a Capital Stock Subscription

Agreement, and agreed to be subject to all of the provisions of Ace Hardware's by-laws. (DED Exhibit 6). The membership agreement provides, among other provisions, that Ace Hardware Corp. may "unilaterally, without limitation. . . amend, modify and change the operational requirements under any condition and to the extent which [Ace Hardware] may deem necessary or desirable. . . "(DED Exhibit 6). In addition, the agreement requires Spalding to obtain Ace Hardware's written approval prior to assigning or transferring the membership to another purchaser or successor of the business. (DED Exhibit 6).

On appeal, Applicant states that they were mistaken in providing the membership agreement with Ace Hardware and now offers a copy of the by-laws and corporate resolutions of Spalding. (APP Exhibit A; DED Exhibit 5). However, these submissions cannot now be considered as the information was not before the Division at the time of the denial and does not clarify and explain previously submitted materials. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Both Ms. Ulrich and Ms. Webber are encumbered in their ownership, as they are required to comply with Ace Hardware's by-laws and operational requirements. Thus, neither controls the board, under which the business operates.

Thus, the Division's determination that the women owners, relied upon for certification, are not the highest-ranking officers of the business enterprise, and do not control the board of directors, as required by 5 NYCRR § 144.2(d)(1) is supported by substantial evidence.

II. Independence

The Division also denied Spalding's application for certification as a WBE on the basis that the applicant business failed to demonstrate that it operates independently, as required by 5 NYCRR § 144.2(e). (DED Exhibit 2). To determine whether a business operates independently the Division shall consider, but is not limited to the following: "(1) Whether the business enterprise

shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space; (2) Whether the business enterprise transacts business primarily with one other entity; and (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.” (5 NYCRR § 144.2 (e) (1) (2) and (3)). (See *Matter of Acme Lightning Rod, LLC*, Recommended Order, March 6, 2020, (Final Order, April 21, 2020) and *Matter of Laura Li Industries, LLC*, Recommended Order, December 20, 2023 (Final Order, February 7, 2024). When evaluating independence in relation to membership or franchise agreements, the Division looks at the number and extent of restrictions set forth in said agreement. (See *Application of KPN Management Corporation*, Recommended Order, October 20, 2023 (Final Order, November 27, 2023).

Here, the restrictions, fees, and obligations that Spalding must operate under as per the membership agreement with Ace Hardware, evidence that the business does not operate independently. (DED Exhibit 6). The membership agreement requires minimum purchase levels that the applicant business must make annually and imposes a low volume service charge if the applicant fails to meet the required spending threshold. (DED Exhibit 6). This purchase requirement makes the business enterprise reliant on Ace Hardware for their inventory, and inventory spreadsheets submitted with the application, demonstrate that Spalding buys almost their entire inventory from Ace Hardware, thus forcing them to do most of their business with only one supplier. (DED Exhibits 6, 7, and 8). Further, the agreement also provides that amendments may include the image, appearance, and décor of the applicant’s store, as well as the types of merchandise, services, and equipment to be acquired by, used, or offered by the applicant, further restricting the applicant business’ independence. (DED Exhibit 6).

Based on the foregoing, I find that the applicant has not demonstrated that Spalding operates independently. Accordingly, the Division's determination that the business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e) is supported by substantial evidence.

CONCLUSION

Spalding 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(d)(1) and 144.2(e) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Spalding Hardware Co.'s application for certification as a woman owned business enterprise should be affirmed.

In the Matter of Spalding Hardware Co., Inc.
 DED File ID No. 59418
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal Submission with Exhibits	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Appellant's Appeal Form	Y	Y
DED 5	Applicant's Written Appeal Submission with Exhibits	Y	Y
DED 6	Ace Hardware Membership Agreement and Stock Subscription	Y	Y
DED 7	Applicant's Inventory Spreadsheet – Lockport Inventory	Y	Y
DED 8	Applicant's Inventory Spreadsheet – Standish Inventory	Y	Y