

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

**In the Matter**  
**- of -**  
**the Application of W.D. KUHN ENTERPRISE, INC.**  
**for Recertification as a Woman-Owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 59335**

**RECOMMENDED ORDER**

**-by-**



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**Deidre A. Chuckrow**  
**Administrative Law Judge**  
**September 25, 2024**

This matter considers the appeal by W.D. Kuhn Enterprise, Inc. DBA Stat Construction (“W.D. Kuhn” 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 February 2, 2021, W.D. Kuhn applied for recertification as a women-owned business enterprise (“WBE”). W.D. Kuhn based its application on Ms. Debra N. Slizewski. (APP Exhibit 1; DED Exhibit 1).
2. On August 1, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - a. The minority group members or women relied upon for certification did 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), and
  - 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. W.D. Kuhn submitted a request to appeal the denial determination, dated August 25, 2023. (DED Exhibit 3).
4. A Notice of Hearing was sent to all parties on February 23, 2024 (DED Exhibit 4).
5. On March 13, 2024, Brendan Wolf, Esq. filed a Notice of Appearance. (TRIB I)
6. On July 18, 2024 the Division conceded the second and third grounds listed in the denial determination and advised of its intent to only move forward on the first denial ground under 5 NYCRR § 144.2(b)(3). (TRIB II)
7. A hearing was held on July 25, 2024. At the conclusion of the hearing, Counsel for the applicant asked to brief the court on the law relating to the denial under 5 NYCRR § 144.2(b)(3), and the parties each submitted briefs to this Tribunal on August 30, 2024.

### **FINDINGS OF FACT**

8. W.D. Kuhn is engaged in the business of commercial and residential paving and excavating, drainage, concrete flat work, concrete curbing, pavement maintenance, site grading, and septic installation and repair. (APP Exhibit 4; DED Exhibit 1).
9. Debra Slizewski, the woman owner relied upon for recertification, is the 52% owner of the applicant business and is its President, Treasurer, and Secretary. David W. Kuhn, Ms. Slizewski's brother, is the 48% owner and Vice President of W.D. Kuhn. (APP Exhibits 1 and 3; DED Exhibits 1 and 2; Hearing Testimony of Ms. Slizewski).
10. The business is a family business, originally owned by Ms. Slizewski and Mr. Kuhn's father, Walter Kuhn, and at one time ownership was shared among those three individuals. (Hearing Testimony of Debra Slizewski).

11. Schedule 1125E of the applicant business' tax returns for the years 2020, 2021, and 2022 provide the following information regarding the respective compensation for the officers of W.D. Kuhn:

Source	David Kuhn	Debra Slizewski
<b>2020</b>		
2020 1125-E Compensation	\$ [REDACTED]	\$ [REDACTED]
2020 K-1 Business Income	\$ [REDACTED]	\$ [REDACTED]
2020 W2 Wages	\$ [REDACTED]	\$ [REDACTED]
<b>2021</b>		
2021 1125-E Compensation	\$ [REDACTED]	\$ [REDACTED]
2021 K-1 Business Income	\$ [REDACTED]	\$ [REDACTED]
2021 W2 Wages	\$ [REDACTED]	\$ [REDACTED]
<b>2022</b>		
2022 1125-E Compensation	\$ [REDACTED]	\$ [REDACTED]
2022 K-1 Business Income	\$ [REDACTED]	\$ [REDACTED]
2022 W2 Wages	\$ [REDACTED]	\$ [REDACTED]

(DED Exhibits 5 through 13).

12. The applicant business is an “open shop,” and is required to pay its employees a prevailing wage, as set by New York State, when working on a public work project and government funded work sites. Mr. Kuhn, and other employees, not including Ms. Slizewski, working for the applicant business, are paid an hourly rate, based on either the prevailing rate or the market rate, based on their roles within the industry, depending on whether the contract is a public or

private contract respectively. Wages may be higher in an option shop, as compared to a Union shop, as supplemental benefits are not included in open shop compensation. (Hearing Testimony of Ms. Slizewski).

13. Ms. Slizewski has discretion in setting her own salary and sets it “based on [her] needs.” Ms. Slizewski does not pay herself in accordance with the industry standard, and does not know what the industry standard is for her role as President and owner. Instead of taking a higher salary, Ms. Slizewski keeps money in the business to gain equity and plans to take that from the business “when the time comes.” (Hearing Testimony of Ms. Slizewski).
14. The precise percentage of public and private work done by the applicant business for the years 2020, 2021, and 2022 is unknown and was not reported in the application materials. Ms. Slizewski states that the breakdown is approximately 40% public work and 60% private, with the number of public contracts likely being lower than that differential in 2021 and 2022. (Hearing Testimony of Ms. Slizewski).
15. The applicant business was profitable in 2020, 2021, and 2022. Distributions of business profits, as reported on the K-1 form, for 2020, 2021, and 2022 were distributed in proportion to Ms. Slizewski’s and Mr. Kuhn’s ownership interests. (DED Exhibits 5-7).

### **APPLICABLE LAW**

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...

## **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 W.D. Kuhn 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**

Brendan R. Wolf, Esq., of Couch White, LLP, appeared at the hearing on behalf of W.D. Kuhn. The following witness testified on behalf of W.D. Kuhn: Debra Slizewski, President, Treasurer, and Secretary, W.D. Kuhn. W.D. Kuhn offered the following exhibits which were admitted into evidence: APP Exhibits 1- 8, 10.

Ms. Anequa Pond, Esq., Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Ms. Leslie Becraft, Senior Certification Analyst, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1- 13.

## I. Prior Certification

The Division acknowledged that W.D. Kuhn 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 W.D. Kuhn 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, W.D. Kuhn had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the February 2, 2021, application and supporting materials and cannot rely on the past determinations of the Division.

## II. Ownership

The owner relied upon for certification must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to their ownership interest in the business. (5 NYCRR §144.2(b)(3)). 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 Keith Titus Corporation*, Recommended Order, Oct. 9, 2019 (Final Order 19-28, January 16, 2020); *Matter of Quality Industries, Inc.*, Recommended Order, June 4, 2019 (Final Order 19-15, August 2, 2019); *Matter of Spring Electric*, Recommended Order, March 17, 2017 (Final Order

17-21, March 27, 2017). The Division may rely on wage statements, and consistently includes wages in determining the compensation of owners. *Matter of C.W. Brown v. Canton*, 216 AD 2d 841 (3<sup>rd</sup> Dept. 1995); *Sunrise Credit Services, Inc. v. Zapata and NYS Department of Economic Development*, et al, 57 Misc. 3d 1225 (NY Sup. Ct. 2017); see also, *J. Bognar Construction, LLC*, Recommended Order, March 25, 2024 (Final Order 24-04, July 18, 2024).

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).

Counsel for the applicant argues that Ms. Slizewski received her pro-rata share of the company profits, in accordance with her ownership interest, as represented by the K-1s submitted with the application. (DED Exhibits 5 – 7). Counsel concedes that Ms. Slizewski received less in wages than Mr. Kuhn, the 48% owner of the applicant business, but contends that she “had no choice but to pay prevailing wages in accordance with NYS Labor Law on public works projects, which make up a sizeable percentage of [W.D. Kuhn]’s business.” Counsel further argues that based on the laws regarding prevailing wage, Ms. Slizewski had no discretion regarding how much Mr. Kuhn and other employees were paid, and that had she altered the way in which she compensated her employees she would be in violation of New York State labor laws, at least as relating to public work projects. In reference to paying less to employees on private projects, Counsel argues that to pay less would jeopardize her ability to hire and retain staff.

The Division argues that the Division appropriately considered both income distribution, as listed on the K-1 forms, and the wages received by both Ms. Slizewski and Mr. Kuhn for 2020, 2021, and 2022. (DED Exhibits 5-7, and 8-13) The Division determined, based on the total amount



of compensation received by both Ms. Slizewski and Mr. Kuhn, that Ms. Slizewski, the owner relied on for certification, made substantially less than Mr. Kuhn for all three years in which the applicant submitted documentation. The Division also argues that the applicant business was profitable for all three of those years, and that there was no evidence presented as to what percentage of Mr. Kuhn's wages came from public projects.

Ms. Slizewski testified that she is the owner relied upon for certification, and that she owns 52% of W.D. Kuhn and her brother, Mr. Kuhn owns the remaining 48%. She also testified that the applicant business engages in both private and public work, and when asked for a specific breakdown between the two, she estimated that approximately 40% of the work done by W.D. Kuhn was public and the remaining 60%, private. She further testified that the percentage of public work was likely less than her estimation of 40/60 in 2021 and 2022 but could not provide specifics or estimations. (Hearing Testimony of Ms. Slizewski).

There is no dispute regarding the percentage ownership held by both Ms. Slizewski and Mr. Kuhn; there is also no dispute that Ms. Slizewski received 52% of the profit distribution and that Mr. Kuhn received 48%, as listed on the Form K-1 in 2020, 2021, and 2022. (DED Exhibits 5-7; Hearing Testimony of Ms. Slizewski; Hearing Testimony of Ms. Becraft). In addition, the applicant and respondent agree that there is no dispute that Ms. Slizewski's wages for the years 2020, 2021, and 2022 were less than that of Mr. Kuhn's, with Ms. Slizewski making approximately 61% less in 2020, 31% less in 2021, and 34% less in 2022. (DED Exhibits 5-13; Hearing Testimony of Ms. Slizewski; Hearing Testimony of Ms. Becraft). Thus, the only issue before this tribunal is whether the Division's consideration of the wages received by both owners was appropriate under the regulations governing certification and represent substantial evidence to deny certification.

Section 144.2(b)(3) of NYCRR Title 5 states that the woman “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.” Further, “[i]n determining whether the profits. . . are shared proportionately. . . 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)). The Division consistently includes wages in determining the compensation of owners by applicant businesses. See *Matter of C.W. Brown v. Canton*, supra; *Sunrise Credit Services, Inc.*, supra; *Matter of J. Bognar Construction, LLC*, supra; *Matter of Keith Titus Corp.*, supra; *Matter of Spring Electric*, supra.

Here, while Ms. Slizewski received profit distribution, as an officer of the applicant business, in proportion to her equity interest in the business, she received significantly less in wages for all three years in which tax and wage information was submitted. This evidence, regarding the compensation of both owners, is not disputed. The Division considered total compensation including the distribution plus wages and determined that Ms. Slizewski did not share in the risks and profits according to her ownership interest. (DED Exhibits 5-13; Hearing Testimony of Ms. Slizewski; Hearing Testimony of Ms. Becraft).

Additionally, there is no evidence to support appellant’s argument that the disparity in wages was the result of the requirements of prevailing wage laws in New York. At hearing, Ms. Slizewski testified that approximately 40% of the work done by the applicant business in 2020 was public, and that that percentage decreased in 2021 and then again 2022. (Hearing Testimony of Ms. Slizewski). This information was not before the Division at the time of the application, but is deemed as credible and clarifying as to the classification of work done by the applicant business, and is therefore admissible. See *Scherzi Systems*, supra. Notwithstanding, the majority of the work

performed by the applicant business is private, and therefore most of the work completed is not subject to prevailing wage laws.

Based on the foregoing, the Division's determination to deny the application on the basis that W.D. Kuhn failed to demonstrate that Ms. Slizewski shares in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR § 144.2(b)(3), is supported by substantial evidence.

### **CONCLUSION**

W.D. Kuhn 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).

### **RECOMMENDATION**

The Division's determination to deny W.D. Kuhn Enterprise, Inc.'s application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of W.D. Kuhn Enterprise, Inc.  
DED File ID No. 59335  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	Certification Application – Company Profile	Y	Y
APP 2	Certification Application – Changes	Y	Y
APP 3	Certification Application – Owners and Principals	Y	Y
APP 4	Certification Application – Commodities and Services	Y	Y
APP 5	Certification Application – Firm’s Past Work	Y	Y
APP 6	Debra Slizewski – Resume	Y	Y
APP 7	Duties and Responsibilities Summary	Y	Y
APP 8	Q & A Documents	Y	Y
APP 9	February 2024 Email with ESD	N	N
APP 10	OSHA, Erosion & Sediment and Amtrak Contractor Certifications	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal Form	Y	Y
DED 4	Notice of Hearing/Conf (3/18/24)	Y	Y
DED 5	2020 Business Tax Returns	Y	Y
DED 6	2021 Business Tax Returns	Y	Y
DED 7	2022 Business Tax Returns	Y	Y

DED 8	Debra Slizewski 2020 W-2	Y	Y
DED 9	Debra Slizewski 2021 W-2	Y	Y
DED 10	Debra Slizewski 2022 W-2	Y	Y
DED 11	David Kuhn 2020 W-2	Y	Y
DED 12	David Kuhn 2021 W-2	Y	Y
DED 13	David Kuhn 2022 W-2	Y	Y
TRIB I	Notice of Appearance by B. Wolf, Esq.	N	Y
TRIB II	Email from A. Pond Esq., 7/18/2024	N	Y