

NEW YORK STATE  
DEPARTMENT OF ECONOMIC DEVELOPMENT  
633 THIRD AVENUE  
NEW YORK, NY 10017

In the Matter

- of -

the Application of **R/E/D Group, LLC**  
for Certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59042

RECOMMENDED ORDER

- by -



Daniel P. O'Connell  
Administrative Law Judge

February 24, 2017

## **SUMMARY**

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny the R/E/D<sup>1</sup> Group, LLC (the RED Group or applicant) certification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

## **PROCEEDINGS**

With a letter dated February 24, 2016, the Division determined that the RED Group does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied its application (*see* WBE Exh. 6). By letter dated March 24, 2016, Paul V. Ciminelli, Esq., Ciminelli & Ciminelli, PLLC, on behalf of the RED Group, appealed from the Division's determination to deny WBE certification.

Although initially scheduled for September 6, 2016, the administrative adjudicatory hearing was adjourned at the RED Group's request. Subsequently, in a notice of appeal hearing dated September 1, 2016, the Division rescheduled the hearing for 11:00 AM on November 14, 2016 at the Division's offices in Albany. The notice also reiterated the Division's bases for the denial.

The administrative adjudicatory hearing convened as scheduled. Mr. Ciminelli represented the RED Group. Laura Payne-Bourcy, Ph.D. and Scott Shablak, Ph.D. testified on its behalf. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Iliana Farias, Senior Certification Analyst, testified for the Division. During the hearing, the parties offered nine exhibits, which included a copy of the completed application for WBE certification filed by the RED Group (WBE Exh. 5 [submitted September 15, 2014]). All exhibits were received into the evidentiary hearing record (CD2 48:05). A chart, identifying all the exhibits, is attached to this recommended order.

An audio recording of the administrative adjudicatory hearing was made. The Office of Hearings and Mediation Services received a copy of two compact audio disks (CD1 and CD2) on November 30, 2016. Whereupon, the hearing record closed.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [5 NYCRR] § 144.2). To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on

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<sup>1</sup> Research, Evaluation, and Development.

representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts.

## STANDARD OF REVIEW

On this administrative appeal, the RED Group, as applicant, bears the burden of proving that the Division's denial of its application for WBE certification 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 the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

## POSITIONS OF THE PARTIES

### The Division

In the February 24, 2016 denial letter, the Division determined that the application failed to meet two criteria for WBE certification concerning Laura Payne-Bourcy's ownership and control of the RED Group (*see* WBE Exh. 6). With respect to ownership, the Division asserted that the RED Group did not demonstrate that Dr. Payne-Bourcy's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). With respect to control, the Division asserted that the RED Group did not demonstrate that Dr. Payne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

At the November 14, 2016 hearing, the Division moved to amend the February 24, 2016 denial to add an additional basis. For the first time during the review of the RED Group's application for WBE certification, the Division asserted at hearing that Dr. Payne-Bourcy failed to demonstrate that she owned 51% of the RED Group, as required by 5 NYCRR 144.2(a).<sup>2</sup> (CD1 03:06.)

### R/E/D Group, LLC

By letter dated March 24, 2016 from Mr. Ciminelli, the RED Group appealed from the Division's February 24 2016 determination to deny its application for WBE certification. The RED Group argued that the denial of its application for WBE certification was an error. The RED Group argued further that it proved that Dr. Bayne-Bourcy made a capital contribution in

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<sup>2</sup> Pursuant to the terms of the September 22, 20104 operating agreement (*see* WBE Exh. 1), the RED Group is a limited liability company. With respect to ownership of a business enterprise, the eligibility criteria at 5 NYCRR 144.2(a) distinguish among a sole proprietorship (*see* 5 NYCRR 144.2[a][3]), a partnership (*see* 5 NYCRR 144.2[a][4]), and a corporation (*see* 5 NYCRR 144.2[a][5]). Although it is not clear which of these three regulatory provisions would apply to the RED Group, the statutory definition of the term "women-owned business enterprise" includes limited liability companies, among others, and requires women to own at least 51% of such businesses (*see* Executive Law § 310[15]).

proportion to her equity interest in the business enterprise through an initial contribution of money, property, equipment and expertise, as well as her ongoing contribution of expertise, as required by 5 NYCRR 144.2(a)(1). The RED Group asserted that it showed that Dr. Bayne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(1). The RED Group stated that at the hearing, it would provide documentation to support the arguments outlined in the March 24, 2016 letter about compliance with the eligibility criteria outlined at 6 NYCRR 144.2.

In an email dated November 15, 2016 from Mr. Ciminelli, the RED Group objected to any consideration of the Division's allegation that Dr. Payne-Bourcy failed to demonstrate that she owned 51% of the RED Group, as required by 5 NYCRR 144.2(a). In the alternative, the RED Group moved to re-open the hearing record to further develop this issue.

### **FINDINGS OF FACT**

1. Effective September 22, 2004, Laura Payne-Bourcy, Ph.D. and Scott Shablak, Ph.D. executed an operating agreement to form the R/E/D Group (the RED Group), a limited liability company (LLC). Dr. Payne-Bourcy and Dr. Shablak are the only members to the RED Group. The members work from their respective residences, which are located outside of Rochester and Syracuse, respectively. (*See* WBE Exhs. 1 and 5; CD1 07:08, 08:42, 10:03.)
2. The RED Group provides educational consultation services to promote bulk grant development and evaluation systems that monitor academic progress. In addition, the RED Group provides related research services. (CD1 06:23.)
3. On behalf of the RED Group, Dr. Payne-Bourcy submitted an application for WBE certification with the Division on September 15, 2014 (*see* WBE Exh. 4).
4. By letter dated February 24, 2016, the Division denied the RED Group's application for certification as a woman-owned business enterprise (*see* WBE Exh. 6).
5. When the RED Group was formed, each member owned 50%. Pursuant to the terms of the September 22, 2004 operating agreement, Dr. Shablak received 51% of the voting rights and Dr. Payne Bourcy received 49% of the voting rights. (*See* WBE Exh. 1 [Exhibit C] at C-1; CD1 08:53, 54:40, 59:57, CD2 25:20.)
6. In 2014, the members of the RED Group executed an agreement concerning the transfer and assignment of their respective interests (the membership transfer agreement) (*see* WBE Exhs. 4 and 7).<sup>3</sup> The intended results of the membership transfer agreement were as follows. First, Dr. Payne-Bourcy's membership rights in the RED Group would change from 50% to 51% and her voting rights would change from 49% to 51%. Second,

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<sup>3</sup> WBE Exhibits 4 and 7 are copies of the membership transfer agreement. Except as noted, a comparison of WBE Exhibits 4 and 7 shows that the terms and conditions of the membership transfer agreement are identical. With respect to WBE Exhibit 4 (at 4), the members signed the document on September 24 and 29, 2014. With respect to WBE Exhibit 7 (at 4), the members signed the document on July 1, 2014.

Dr. Shablak's membership rights in the RED Group would change from 51% to 49% and his voting rights would change from 51% to 49%. (CD1 25:46, 26:45, 40:23-43:25, 49:32-50:23.)

7. Dr. Payne-Bourcy provided capital for the business enterprise, and Dr. Shablak provided experience and expertise (*see* WBE Exhs. 1 [Exhibit B] at B-1, and 5 at 3; CD1 09:03, 25:59.) Documentation concerning the source of Dr. Payne-Bourcy's contribution is not part of the hearing record.
8. Both members of the RED Group have authority to sign checks and to authorize payments (CD1 11:00).
9. Since 2004, Dr. Payne-Bourcy has used a contract template developed by the RED Group's original legal counsel, and maintains the records associated with the contracts executed between the RED Group, and its clients or subcontractors (CD1 11:48). All copies of the contract documents provided to the Division in support of the RED Group's application for WBE certification were signed by both Dr. Payne-Bourcy and Dr. Shablak (CD2 18:30).

## **DISCUSSION**

This recommended order considers the RED Group's March 22, 2016 appeal from the Division's February 24, 2016 determination to deny its application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. Referring to the eligibility criteria outlined at 5 NYCRR 144.2, the Division identified the following bases for the denial.

With respect to ownership, the Division asserted that the RED Group did not demonstrate that Dr. Payne-Bourcy's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). With respect to control, the Division asserted that the RED Group did not demonstrate that Dr. Payne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). In addition, the Division asserted at hearing that Dr. Payne-Bourcy failed to demonstrate that she owns 51% of the RED Group, as required by 5 NYCRR 144.2(a). (*See* WBE Exhibit 6; CD1 03:06.) Each basis is addressed below.

### **I. Ownership**

For the first time during the review of the RED Group's application for WBE certification, the Division asserted, at the November 14, 2016 hearing, that the RED Group failed to demonstrate that Dr. Payne-Bourcy owns 51% of the business enterprise, as required by 5 NYCRR 144.2(a) (CD1 03:06). In an email dated November 15, 2016 from Mr. Ciminelli, the RED Group objected to any consideration of the Division's allegation that the RED Group does not meet the eligibility criterion outlined at 5 NYCRR 144.2(a). In the alternative, the RED Group moved to re-open the hearing record to further develop this issue.

In an email dated November 17, 2016 from Mr. Harmonick, the Division argued that the proof offered at the hearing should be considered. Based on the hearing record, the Division asserted that the Director should find that Dr. Payne-Bourcy does not own at least 51% of the business enterprise and, therefore, conclude that the RED Group does not comply with the eligibility criterion outlined at 5 NYCRR 144.2(a). In the alternative, Mr. Harmonick stated that the Division would accept the opportunity to respond to any additional written submissions from the RED Group that may be authorized.

I deny the Division's untimely request to consider an additional basis to deny the RED Group's application for WBE certification as prejudicial. Making such a request for the first time at the hearing did not provide sufficient notice to applicant. I note that, after an adjournment requested by applicant's counsel, the hearing concerning the captioned application for WBE certification was re-scheduled for November 14, 2016, some eight months after the Division initially issued its denial letter on February 24, 2016. Since February 24, 2016, the Division had more than sufficient time before the November 14, 2016 hearing to amend the original denial letter to include any additional bases prior to the hearing, but did not do so. Moreover, I deny the RED Group's request to re-open the record of this hearing to consider compliance with the eligibility criteria outlined at 5 NYCRR 144.2(a). As discussed above, the issue concerning this eligibility criterion is no longer relevant, and is not addressed further in this recommended order.

With respect to the bases expressly stated in the Division's February 24, 2016 denial letter, the Division asserted that the RED Group did not show that Dr. Payne-Bourcy's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Dr. Payne-Bourcy testified that when the RED Group was formed, she made a capital contribution to the business enterprise, and that Dr. Shablak provided experience and expertise. Exhibit B to the September 22, 2004 organization agreement shows that Dr. Payne-Bourcy made an initial capital contribution to the RED Group. In addition, the RED Group's application for WBE certification states that Dr. Payne-Bourcy provided a [REDACTED] capital contribution on September 1, 2014. (*See* WBE Exhs. 1 [Exhibit B] at B-1, and 5 at 3; CD1 09:03, 25:59.)

However, Division staff testified that although requested during the review of the application for WBE certification, the RED Group did not provide any documentation to substantiate the response in the application concerning Dr. Payne-Bourcy's capital contribution (CD2 07:02). At hearing, the RED Group did not identify any document from the materials submitted in support of the application to refute the testimony offered by the Division staff.

In the absence of any documentation to substantiate Dr. Payne-Bourcy's capital contribution to the business enterprise, particularly with respect to its source or sources, the Division staff reasonably concluded that the RED Group failed to demonstrate that Dr. Payne-Bourcy made a contribution as required by the eligibility criteria outlined at 5 NYCRR 144.2(a)(1). Accordingly, I conclude that Division's staff's determination with respect to this

eligibility criterion was based on substantial evidence, and recommend that the Director conclude the same.

With respect to control, the Division asserted that the RED Group did not demonstrate that Dr. Payne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). As part of the review of the RED Group's application and supporting documents for WBE certification, Division staff observed the following. First, both partners share responsibility for all business operations (*see* WBE Exh. 5 [§ 4.A] at 4-5, CD2 17:10). Second, both members of the RED Group have authority to sign checks and to authorize payments (CD1 11:00). Third, all copies of the contract documents provided to the Division in support of the RED Group's application for WBE certification were co-signed by Dr. Payne-Bourcy and Dr. Shablak (CD2 18:30).

At the hearing, the RED Group referenced the transfer agreement, which had been submitted in support of the application for WBE certification, to show that subsequent to the execution of the September 22, 2004 operating agreement, Dr. Shablak had transferred a percentage of his membership rights and interest to Dr. Payne-Bourcy in 2014 (*see* WBE Exhs. 4 and 7). According to the RED Group, the intended results of the transfer agreement were that Dr. Payne-Bourcy's membership rights in the RED Group would be 51%, and her voting rights would be 51%. (*See* WBE Exhs. 4 and 7; CD1 25:46, 26:45, 40:23-43:25, 49:32-50:23.)

The RED Group contended that the transfer agreement produced the intended results (CD1 24:00, CD2 39:25, 41:48). The Division asserted, however, that the terms of the transfer agreement are ambiguous. From the Division's perspective, the transfer agreement resulted in a net transfer of 0.5% membership rights from Dr. Shablak to Dr. Payne-Bourcy. The Division contended that 1% of Dr. Shablak 50% shares is 0.5%. As a result of the transfer, Dr. Payne-Bourcy's membership rights in the RED Group would be 50.5%, and her voting rights would be 50.5%, according to the Division. (CD2 35:06.)

The transfer agreement relates to two eligibility criteria. The first is whether Dr. Payne-Bourcy owns at least 51% of the business enterprise as required by 5 NYCRR 144.2(a). For the reasons outlined above, I denied the Division's request to consider this issue at the hearing. However, the transfer agreement also relates to whether Dr. Payne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The discussion that follows addresses the latter criterion.

Whether the transfer agreement actually produced the intended results cannot be determined on the record of this proceeding. The first *whereas* clause of the transfer agreement references a December 22, 2004 [sic] operating agreement, not the original September 22, 2004 operating agreement. Also referenced in the first *whereas* clause of the transfer agreement are an addendum dated August 1, 2008, and two revisions, dated October 10, 2008 and September 9, 2009, respectively. (*See* WBE Exhs. 4 and 7.) However, the documents referenced in the transfer agreement (*i.e.*, the December 22, 2004 operating agreement, and the August 1, 2008 addendum, with revisions dated October 10, 2008 and September 9, 2009) are not part of the hearing record. In addition, the RED Group offered no evidence at the hearing to demonstrate how, if at all, the December 22, 2004 operating agreement, the August 1, 2008 addendum, and

the revisions may have modified the original terms of the September 22, 2004 operating agreement concerning the membership percentages and voting percentages.<sup>4</sup> (See WBE Exh. 1 [Exhibit C] at C-1.) Consequently, the RED Group failed to meet its burden of proof with respect to how the transfer agreement demonstrates that Dr. Payne-Bourcy makes business decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

Aside from the lack of clarity associated with the transfer agreement, Division staff further observed that both partners share responsibility for all business operations. Staff referred to the responses in § 4.A of the application, which identified the individuals responsible for managerial operations. For all managerial operations, Dr. Payne-Bourcy and Dr. Shablak are both identified. (See WBE Exh. 5 at 4-5; CD2 17:10). As noted above, Dr. Payne-Bourcy said that both members of the RED Group have authority to sign checks and to authorize payments (CD1 11:00).

Finally, since 2004, Dr. Payne-Bourcy explained that she has relied on a contract template developed by the RED Group's original legal counsel, and maintains the records associated with the contracts executed between the RED Group, and its clients or subcontractors (CD1 11:48). Nevertheless, all copies of the contract documents provided to the Division in support of the RED Group's application for WBE certification were co-signed by Dr. Payne-Bourcy and Dr. Shablak (CD2 18:30).

With respect to control, Division staff reasonably concluded that the RED Group did not demonstrate that Dr. Payne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). Accordingly, I conclude that Division's staff's determination with respect to this eligibility criterion was based on substantial evidence. I base this conclusion on the following. First, the RED Group's responses in § 4.A of the application, which identify both Dr. Payne-Bourcy and Dr. Shablak as the individuals responsible for all managerial operations. Second, both members of the RED Group have authority to sign checks and to authorize payments. Third, all copies of the contract documents provided to the Division were co-signed by Dr. Payne-Bourcy and Dr. Shablak. I recommend that the Director conclude that Division's staff's determination with respect to this eligibility criterion was based on substantial evidence.

## CONCLUSIONS

1. The RED Group did not demonstrate that Dr. Payne-Bourcy made a capital contribution proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

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<sup>4</sup> As part of its rebuttal case (CD2 27:17-29:13), the RED Group offered WBE Exhibit 8, which is a copy of New York Partner's Schedule K-1 (IT-204-IP) for tax year 2014. The partner identified on WBE Exhibit 8 is Dr. Payne-Bourcy. Line H of Schedule K-1 reports that at the beginning of the year, the partner's share of profits, loss, and capital was 50%, and that at the end of the year, the partner's share of profits, loss, and capital was 51%. Upon review of the entire record developed at the hearing, however, I do not assign any weight to WBE Exhibit 8.

2. The RED Group did not demonstrate that Dr. Payne-Bourcy makes business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

### **RECOMMENDATION**

The Division's determination to deny the RED Group's application for certification as a woman-owned business enterprise should be affirmed for the reasons discussed above.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development  
 Exhibit Chart  
**Matter of the R/E/D Group, LLC**  
**WBE Case No. 59042**  
 Hearing Date: November 14, 2016

<b>WBE Exhibit No.</b>	<b>Description</b>
1	Operating Agreement of the R/E/D Group, LLC September 22, 2004
2	Correspondence from May-Margaret Zehr Superintendent of Schools Oneida City School District
3	Correspondence dated November 11, 2016 from Leslie LaRosa Assistant Superintendent of the Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES
4	Amendment Transfer and Assignment of Membership Interest Signed by Scott Shablak, Ph.D., September 29, 2014 Signed by Laura Payne-Bourcy, Ph.D., September 24, 2014
5	Certification Application by R/E/D Group Application No. 9916185 Started: 8/25/2014 Submitted: 9/15/2014 9 pages
6	Division's denial letter dated February 24, 2016
7	Amendment Transfer and Assignment of Membership Interest Signed by Scott Shablak, Ph.D., July 1, 2014 Signed by Laura Payne-Bourcy, Ph.D., July 1, 2014
8	New York State Department of Taxation and Finance New York Partner's Schedule K-1 – R/E/D Group, LLC IT-2014-IP Tax Year 2014
9	WBE Application No. 9916185 Certification Application: Q & A Document Request by the Division January 19, 2016 (1:37 PM)

All exhibits received into evidence (CD2 48:05).