

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

In the Matter

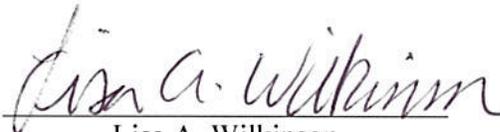
- of -

the Application of **OTONE Mechanical Construction, Inc.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59804

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge
April 25, 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 OTONE Mechanical Construction, Inc. (OTONE or applicant) certification as a woman-owned business enterprise should be modified and, as so modified, affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal, 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, by OTONE challenging the determination of the Division that its application does not meet eligibility criteria requirements for certification as a woman-owned business enterprise (WBE).

On behalf of OTONE, Toni A. Deranleau, president, submitted a Fast Track WBE application for certification as a woman owned business enterprise to the Division on April 7, 2015 (Exhibit 1). By letter dated August 31, 2016, the Division denied the application for failing to meet three eligibility criteria under 5 NYCRR 144.2 with respect to Ms. Deranleau's ownership and operation of OTONE (Exhibit 2).

By letter dated September 13, 2016, Ms. Deranleau filed a notice of appeal on behalf of OTONE and requested a hearing (Exhibit 15). In a notice of appeal hearing dated January 4, 2017 the Division acknowledged OTONE request for a hearing, and scheduled the administrative adjudicatory hearing for 11:00 a.m. on February 14, 2017 at the Division's offices in Albany. The notice also reiterated the Division's bases for the denial.

The hearing convened as scheduled. Ms. Deranleau represented applicant and testified on behalf of OTONE. Kerry Merritt, the office manager of OTONE, also testified for OTONE. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, and Drina Holden, Senior Certification Analyst, appeared on behalf of the Division. During the hearing, the parties offered 12 (twelve) exhibits, all of which I received into evidence. I received 3 (three) additional exhibits following the hearing.

An audio recording of the proceedings was made and I received a compact audio disk on March 20, 2017 (CD) with four tracks (Tr).¹ On March 31, 2017, I sought clarification from Ms. Deranleau with respect to the terms of the buy-out of Christopher Ryder's interest in OTONE in 2011. I stated that OTONE's request to appeal from the Division's determination would be

¹ Tracks 1 and 2 cover the same material. I will refer to tracks (tr) 2, 3 and 4 in this recommended order.

included in the record unless the parties objected, which they did not. I also sent a letter dated April 10, 2017 as a follow up to my March 31 email when I had not heard a response from Ms. Deranleau to my email.

Ms. Deranleau responded by email on April 13, 2017. Mr. Harmonick responded to Ms. Deranleau's submittal by email on April 20, 2017, whereupon I closed the record.² Both responses were received into evidence. A list of the exhibits received into evidence is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). To determine whether an applicant should be granted WBE status, the Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts (*see* 5 NYCRR 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, OTONE, 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 [SAPA] § 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 its August 31, 2016 denial letter, the Division stated that the application failed to meet three criteria for WBE certification concerning Ms. Deranleau's ownership and operation of OTONE (*see* Exhibit 2). With respect to ownership, the Division determined that applicant

² By email dated April 20, 2017, Ms. Deranleau requested that the record remain open as she wanted to consult with her attorney. Mr. Harmonick opposed this request and asked that the record be closed. Inasmuch as both parties have had the opportunity to present evidence at the evidentiary hearing, and in response to my request for additional information pursuant to 5 NYCRR 144.5(a), I closed the record on April 20, 2017.

failed to demonstrate that "the minority or woman owner(s) capital contributions are proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise." The Division asserted that Ms. Deranleau failed to identify sources of contributions on her part to the business separately from her husband. (*See Exhibit 2.*)

With respect to operation, the Division identified two grounds for denial. First, the Division concluded that applicant did not demonstrate that Ms. Deranleau makes decisions pertaining to the operation of the business enterprise as required by 5 NYCRR 144.2(b)(1). The Division stated that Ms. Deranleau's primary responsibilities include 'chairing meetings . . . [r]eview[ing] job costs . . . involve[ing] [herself in] final estimating reviews . . . negotiate[ing] contracts . . . and [r]eview[ing] job costs with [the] General Manager and estimating staff', whereas "male individuals associated with the business are responsible for managing core functions of the business enterprise, including preparing estimates and supervising field operations." Second, the Division determined that applicant did not demonstrate that Ms. Deranleau had adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i). (*See Exhibit 2.*)

OTONE

Ms. Deranleau stated that she is the sole owner of OTONE. She contends that the capital contribution of [REDACTED] from her husband's pension funds and proceeds from a home equity loan in jointly held properties constitute marital property in which she holds a joint interest (*see Exhibit 6 [Ms. Deranleau's consent to her husband's application for pension funds; see also CD Tr 2 19:00, CD Tr 3 5:44].*)

As to the operation of the business enterprise, Ms. Deranleau maintains that she is responsible for all the core management functions of the business enterprise (*see Exhibit 13*). She stated in response to an information request that although she consults with her husband, he is not an officer of the corporation and does not have job responsibilities at OTONE. Ms. Deranleau notes that OTONE is a union shop and she has hired outside managers since OTONE was incorporated in 2008 to help her run the business. (*See Exhibit 1 at 6 of 7; see also CD Tr 2 19:30.*)

FINDINGS OF FACT

I. General

1. OTONE, Mechanical Construction, Inc. (OTONE) is located at 20 Dickson Street, Newburgh, New York 12550.

2. OTONE is a mechanical construction firm specializing in all phases of mechanical construction, 24 hour service, welding and boiler work, storm and weather protection and power house repair and maintenance in the New York City area (Exhibit 1 § 4.A; CD Tr 2 11:15).
3. OTONE was incorporated by Toni Deranleau on May 7, 2008 (Exhibit 1 § 1.Q).
4. Toni Deranleau is the president of OTONE and the sole shareholder of the corporation (Exhibit 1 §§ 2.A and 2.C).
5. OTONE employees 19 full-time employees and one part-time employee (Exhibit 1 § 1.P). During the spring and fall outage season when utilities undertake repair and maintenance activities, OTONE has significantly more employees (*see* CD Tr 2 17:32; *see also* Exhibit 10 [October 2016 payroll records indicating 87 employees]).

II. Ownership/Capital Contribution

6. The start-up capital for OTONE included ██████████ in pension funds held in Dan Deranleau's name in the Steamfitters' Industry Pension Fund. Dan Deranleau is married to Toni Deranleau. (*See* Exhibits 3 and 6 [application for pension benefits].)
7. Toni Deranleau signed off on Dan Deranleau's application for use of pension benefits (*id.*).
8. The start-up capital for OTONE also included the proceeds of a home equity loan in the amount of \$██████████ on a home and property jointly owned by Toni and Dan Deranleau (*see* Exhibit 1 at 6-7).
9. In August 2008, Toni Deranleau hired Chris Ryder to be the general manager of OTONE. Mr. Ryder acquired a thirty percent ownership interest in OTONE in return for a capital investment of \$234,000 (*see id.*; *see also* CD Tr 2 7:07).
10. From August 2008 until April 20, 2011, Toni Deranleau held a 70% interest in OTONE (Exhibit 1 § 2.C).
11. In 2011, Chris Ryder reached a settlement with OTONE, Dan Deranleau and Toni Deranleau to buy out his ownership interest for ██████████ (*see* Exh 3 [Letter from Chris Ryder dated March 23, 2011]; *see also* CD Tr 3 5:44). The buyout included a lump sum cash payment in the amount of ██████████, of which ██████████ came from OTONE's

operating account and [REDACTED] was secured via a bank loan taken out by OTONE (*see* Exhibits 3 and 13).

12. The bank loan was secured by a pledge agreement and UCC filings on all assets and accounts of OTONE, personal guarantees of Dan and Toni Deranleau, and a confession of judgment by OTONE, Dan Deranleau and Toni Deranleau in the event of a default (*see* Exhibit 3).
13. The 2011 buyout also included a transfer of title to Mr. Ryder of a company vehicle (*id.*).
14. Since April 21, 2011, Toni Deranleau has held a 100% ownership interest in OTONE (Exhibit 1 § 2.A).
15. Dan Deranleau does not have an ownership interest in OTONE (*see* Exhibit 1 § 2).

III. Operation

16. Ms. Deranleau has been the president and chief operations officer of OTONE since the corporation was formed in 2008 (*see* Exhibit 1 § 1.N and Exhibit 4).
17. Ms. Deranleau is solely responsible for hiring key employees. She has hired three different general managers to help her run the business since 2008 and currently employs Mohammed (Moe) Elabbadi, a salaried employee, in that position. (CD Tr 2 11:15).
18. OTONE is a union shop (*see* CD Tr 3 0:01; Exhibit 1 at 6 of 7 [referencing Boilermakers agreement, Laborers Union agreement, and National Power Generation Maintenance agreement]). Ms. Deranleau employs a boilermakers' foreman, steamfitters' foreman, and laborers' foreman, all of whom are union members, to supervise employees based on their job functions. (CD Tr 3 1:12.) All three foreman report to Toni Deranleau and Moe Elabbadi, the general manager, however, there is no supervisor of field operations (CD Tr 3 2:55).
19. Ms. Deranleau chairs meetings with estimating, field operations, and support staff; reviews job costs with project managers; participates in final estimating reviews and determines discounts and markups; negotiates contracts with the general contractor and engineer; and reviews job costs with the general manager and estimating staff (*see* Exhibit 6.)
20. Mr. Deranleau retired on April 1, 2008. He is not employed by and does not receive compensation from OTONE. (*See* Exhibit 1 at 6 of 7 [question 1].)

DISCUSSION

This recommended order considers OTONE's September 13, 2016 appeal from the Division's August 31, 2016 determination to deny certification of OTONE 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 three bases for the denial.

According to the Division, OTONE did not show that Ms. Deranleau's contributions were proportional to her equity interest in the business enterprise as required by 5 NYCRR 144.2(a)(1) (*see* Exhibit 2). In addition, the Division determined that OTONE did not demonstrate that Ms. Deranleau makes decisions pertaining to operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1), or that she possesses adequate technical and managerial experience to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i) (*see* Exhibit 2). Each basis is addressed below.

I. Ownership

Section 144.2(a)(1) of 5 NYCRR provides that the contribution of a woman or minority business owner must be proportionate to the owner's equity interest in the business enterprise, "as demonstrated by, but not limited to, contributions of money, property, equipment or expertise."

According to the Division, documents submitted with the application include financial statements showing lines of credit made available to both Ms. and Mr. Deranleau and retirement plan benefits earned by Mr. Deranleau. Ms. Deranleau failed to identify any sources of contribution attributable solely to her. (*See* Exhibit 2 at 2; *see also* CD Tr 2 5:16 [discussing Mr. Deranleau's retirement account]). The Division is correct that Ms. Deranleau did not identify any capital contribution in the application or supplemental information attributable to assets she owned in her sole capacity.

Ms. Deranleau testified, consistent with the application information, that the capital contributions to the business included [REDACTED] from her husband's pension benefits and [REDACTED] from a home equity loan on two properties she jointly owned with her husband (CD Tr 3 5:44; *see also* Exhibit 1 at 7 of 7). In addition, Christopher Ryder, whom Ms. Deranleau hired in 2008 to be the general manager of OTONE, contributed [REDACTED] in return for a 30% interest in the business (*see* Exhibit 1 at 7 of 7). Ms. Deranleau contends that the pension benefits constitute marital property in which she has a joint ownership interest with her husband (CD Tr 2 19:00). Similarly, she and her husband jointly own the real estate from which proceeds were generated from the home equity line of credit (*see* Exhibit 1 at 7 of 7; *see also* CD Tr 3 5:44).

In evaluating whether a woman owner has made a capital contribution proportionate to her ownership interest in the business enterprise, the Division looks to whether the contribution came from funds personally held by the woman owner. The Division considers capital contributions of marital property to be contributions by both the husband and wife to the business enterprise and not a contribution solely by the woman owner. In *Matter of NCS Home, Inc. d/b/a NCS Technologies*³, the Director affirmed the denial of an application for failure meet the ownership criteria of 5 NYCRR 144.2(a)(1) in part because the capital investments by the husband and wife owners of the business enterprise came from a joint bank account. The business enterprise was more in the nature of a family business. Similarly, in *Matter of KTR Trucking, LLC*⁴, the Director upheld the denial of an application based in part on the fact that the capital contribution consisted of proceeds from a home equity loan taken out by the fiancé of a woman owner on property only the fiancé owned.

Kerry Merritt, OTONE's officer manager, testified that Ms. and Mr. Deranleau have been married for 40 years (CD Tr. 3 12:07), at which point it is hard to segregate assets acquired during marriage. Ms. Deranleau testified that under the law, she has a property interest in her husband's retirement benefits and had to provide a sworn statement to the steamfitters' union regarding her consent to her husband's election of benefits (*see* CD Tr 2 19:00, CD Tr 3 5:40; *see also* Exhibit 3 [the steamfitters' industry pension fund application for pension benefits]). Ms. Deranleau is correct that she has an interest in her husband's pension funds and jointly held property.

The Division has consistently interpreted 5 NYCRR 144.2(a)(1), however, to require the woman owner to demonstrate that she made a capital contribution to the business enterprise from her own personal assets, not from jointly held assets. The Division has consistently denied certification where the business enterprise was purchased by a husband and wife with comingled assets (*see e.g., Matter of Hertel Steel Inc.*, Recommended Decision [February 10, 2017] available at

https://cdn.esd.ny.gov/mwbe/Data/Hearings/03102017_HertelSteel_RecommendedOrder.pdf; *Matter of Spring Electric, Inc.*, Recommended Decision [March 17, 2017] available from New York State Economic Development Division of Minority and Women's Business Development; Final Order 17-21 [March 27, 2017] available from New York State Economic Development

³ Recommended Order dated June 30, 2016, available at https://cdn.esd.ny.gov/mwbe/Data/Hearings/08042016_NCSHome_RecommendedOrder.pdf; Final Order 16-29 (August 4, 2016) available from New York State Economic Development Division of Minority and Women's Business Development.

⁴ Recommended Order dated October 26, 2016, available at https://cdn.esd.ny.gov/mwbe/Data/Hearings/10272016_KTRTruckingRecommendedOrder.pdf; Final Order 16-54 (October 28, 2016) available from New York State Economic Development Division of Minority and Women's Business Development.

Division of Minority and Women's Business Development.⁵ The fact that Ms. Deranleau's husband does not have an ownership interest in OTONE and is not employed by OTONE sets this case apart from some of the other cases decided by the Division, but these distinctions are not material when the Division's consistent position has been that the woman owner must demonstrate she made a capital contribution from her own personal assets in proportion to her equity interest in the business enterprise.

In addition, the facts establish that OTONE, not Ms. Deranleau, financed the buyout of Chris Ryder's 30% interest in the business enterprise. As demonstrated in the record, the buyout included a lump sum cash payment to Mr. Ryder of [REDACTED], financed with [REDACTED] from OTONE's operating account and a [REDACTED] bank loan taken out by OTONE (*see* Exhibits 3 and 13). In addition, OTONE paid Mr. Ryder severance wages in the amount of [REDACTED] over a two year period (*see* Exhibits 3 and 13) and Mr. Ryder received the company vehicle that had been assigned to him, valued between [REDACTED] (*see* Exhibits 1 at 7 of 7 [question 2], 3, and 13; *see also* CD Tr 3 7:19). It is not clear whether the buyout involved a transfer of shares of stock to Ms. Deranleau or a corporate buy-back. In any case, Ms. Deranleau did not make any capital contributions when she became the sole owner as a result of OTONE's buyout of Mr. Ryder's interest.

The Division has held that loans taken out on behalf of the business enterprise and repaid by the business enterprise do not constitute a capital contribution by the woman owner (*see e.g., Matter of Spring Electric, Inc., supra*). Similarly, equipment purchases by the business enterprise do not constitute a capital contribution by the woman owner (*see Matter of Atlantic Environmental Consulting, LLC*, Recommended Order [August 5, 2016] available at https://cdn.esd.ny.gov/mwbe/Data/Hearings/08082016_AtlanticEnvironmentalTesting.pdf; Final Order 16-38 [August 18, 2016] available from New York State Economic Development Division of Minority and Women's Business Development).

During the hearing, Ms. Merritt testified that OTONE's retained earnings should be considered as evidence of Ms. Deranleau's capital contribution to the business enterprise (CD Tr 3 12:07). The Division, however, has previously rejected the notion that retained earnings can be relied upon as evidence of a capital contribution by the woman owner (*see Matter of Beam Mack Sales and Service, Inc.*, Recommended Order dated October 31, 2016, available from New York State Economic Development Division of Minority and Women's Business Development; Final Order 16-35 [November 1, 2016] available from New York State Economic Development Division of Minority and Women's Business Development).⁶

⁵ Although the Recommended Order is listed on <https://esd.ny.gov/mwbe/mwbehearings.html> the link does not work.

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In sum, OTONE has not met its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that the woman owner did not make a capital contribution in proportion to her equity interest in the business enterprise.

II. Operation

In its August 31, 2016 letter, the Division cited two grounds for denial with respect to operation. First, the Division determined that Ms. Deranleau did not make decisions pertaining to the operation of OTONE as required under 5 NYCRR 144.2(b)(1) (*see* Exhibit 2 at 2). With respect to this criterion the Division stated, “[t]he application indicates that Ms. Deranleau’s primary responsibilities include ‘chair[ing] meetings . . . review[ing] job costs. . . involv[ing] [herself in] final estimating reviews . . . negotiate[ing] contracts. . . and [review[ing] job costs with [the] General Manager and estimating staff’ (*id.*). According to the Division, “[m]ale individuals associated with the business are responsible for managing core functions of the business enterprise, including preparing estimates and supervising field operations” (Exhibit 2).

Ms. Holden testified on behalf of the Division that based on her review of Ms. Deranleau’s resume most of Ms. Deranleau’s experience was as an insurance broker for State Farm insurance before she became president of OTONE and not in mechanical construction (CD Tr 2 6:44; *see also* Exhibit 4). She concluded that since Ms. Deranleau was not responsible for estimating projects and field work, other individuals had to be responsible for those tasks. Ms. Holden looked at the website for OTONE and saw that Dan Deranleau was identified as the general manager and described as having forty-five years managerial experience in the industry and Moe Elabbadi was responsible for project estimating. Ms. Holden concluded from this information that male individuals performed the core functions of the business. (*See* CD Tr 2 6:44-11:14.)

As discussed below, the Division’s reliance on OTONE’s website to draw conclusions with respect to Mr. Deranleau’s involvement in the business was not reasonable. The application and hearing record establish that since 2008 Ms. Deranleau has been the president and chief operations officer of the business (*see* Exhibit 1 § 2 and Exhibit 4; *see also* CD Tr 3 16:45). As the president, Ms. Deranleau reviews project estimates (*see* Exhibit 4 and CD Tr 3 at 4:00); has the sole discretion to approve job proposals, enter into contracts, and make hiring and firing decisions (*see* Exhibit 4; CD Tr 2 11:15, CD Tr 3 16:45); and oversees project work (*see* Exhibit 4). Ms. Deranleau has in fact hired three general managers since 2008 to help her run the business.

Notably, OTONE is a union shop. All of the employees, except the general manager, are union members who are paid union wages pursuant to a contract, including the three foremen

who supervise the boilermakers, steamfitters and laborers, respectively (CD Tr 3 1:12). The foremen manage field operations with respect to their particular area of expertise and report to both Ms. Deranleau and the general manager (*id.*). Ms. Deranleau testified that pursuant to the union contract, she does not have a designated supervisor of field operations (CD Tr 3 1:12) and is always not welcome at union job sites, though she tries to get to jobs as often as she can (CD Tr 2 11:15). The foremen come to her or the general manager with any issues or questions (CD Tr 3 1:12).

Based upon my review of the administrative record, OTONE has established that Ms. Deranleau makes decisions pertaining to the operation of the business and is involved in the core functions of the business. The Division's determination to the contrary is not supported by substantial evidence.

The Division also concluded that Ms. Deranleau does not have adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.21(b)(1)(i). The Division stated that Ms. Deranleau did not possess "any relevant training or managerial experience prior to becoming President of OTONE Mechanical Construction, Inc.", whereas "Mr. Deranleau possesses over forty-five years of relevant industry experience" (Exhibit 2 at 3). The Division's denial based on this eligibility criteria is not supported by substantial evidence.

A threshold legal issue related this criterion is Division staff's reading of 5 NYCRR 144.2(b)(1)(i) to require that a woman owner acquire managerial experience *prior* to managing the business enterprise seeking WBE certification, essentially at a different company. The eligibility criterion of 5 NYCRR 144.2(b)(1)(i) simply states that "woman owners must have adequate experience or technical competence in the business enterprise seeking certification." There is no express requirement regarding where or when this experience must be obtained. Division staff's reading of 5 NYCRR 144.2(b)(1)(i) imposes an additional burden on a woman owner to have obtained managerial experience prior to assuming a managerial role in the business enterprise seeking certification. This interpretation goes well beyond the express terms of the regulation (*see Matter of J.A. Marshall*, 221 AD2d 759 [3rd Dept 1995] [relevant inquiry is whether a woman owned business satisfies the criteria for certification at the time the application was filed]).

The senior certification analyst testified that in evaluating a woman owner's managerial experience she is looking for subject matter expertise (CD Tr 3 at 10:58). The record shows that as of August 31, 2016, Ms. Deranleau had been the president and chief operations officer of OTONE for more than eight years and effectively managed the operations of the business (*see* Exhibit 1 § 2 and Exhibit 4; *see also* CD Tr 2 19:30). Ms. Deranleau testified how she started the business from her home, hired key employees, obtained critical insurance coverage,

implemented accounting procedures and obtained financing (CD Tr 2 11:15, TR 3 1:12, 16:45). Ms. Deranleau reviews all job costs, approves final estimates (CD Tr 3 16:45; *see also* Exhibit 5) and negotiates contracts on behalf of OTONE (*id.*) (CD Tr 2 11:15). According to Ms. Deranleau, if you can hire quality employees in key areas and effectively manage the company's "books," including insurance and payroll, you can run a successful business. Ms. Deranleau said that through her experience insuring contractors, she acquired expertise in how such businesses need to be operated and applied this knowledge to OTONE. (CD Tr 2 11:15; *see also* CD Tr 3 16:45.) Documents submitted with the application show that in 2014 shareholders' equity totaled more than [REDACTED], evidence of a successful business operation (*see* Exhibit 12).

The circumstances here with respect to the operation of the business are closely analogous to those in *Matter of Era Steel Const. Corp. v Egan* (145 AD2d 795 [3d Dept 1988]). OGS denied WBE certification to Era Steel on the grounds that the woman owner lacked "the operational control on a daily basis in the field and the working technical knowledge needed to operate a steel erecting business" (145 AD2d at 798 [internal quotations omitted]). The business in *Matter of Era Steel* was a union shop focused on steel construction (*see id.* at 797). The woman owner did not have specific construction experience, however, she hired a foreman, crew, and professional estimator for each project (*see id.* at 797-798). The uncontested evidence was that no one other than the woman owner had any ownership interest in petitioner or control over its operations (*see id.* at 797).

The court determined in *Matter of Era Steel* that OGS's imposition of an absolute requirement that the woman owner possess technical knowledge and experience directly conflicted with its own guidelines, which provided that where the actual management of the business is contracted out to individuals other than the woman owner, the woman owner must possess the ultimate authority to control the business (*see id.* at 798). Nothing in the record suggested that the woman owner lacked such control. The court held that that "OGS either lacked a factual foundation for its reasons to deny the application or disregarded the express standards contained in its guidelines" and, thus, acted arbitrarily and capriciously (*id.*; *see also J. A. Marshall, supra*).

The Division's regulations state in relevant part that "where the actual management of the business enterprise is contracted out to individuals other than . . . women, . . . women must demonstrate that they have the ultimate power to hire and fire these managers, that they exercise this power and make other substantial decisions which reflect control of the business enterprise" (5 NYCRR 144.2([c])[3]). OTONE is a union shop and employees are hired and rehired on a seasonal basis pursuant to a union contract to coincide with spring and fall repair and maintenance activities at New York City power plants (CD Tr 3 16:45). That Ms. Deranleau relies on skilled union employees to perform repair and maintenance tasks does not mean that she lacks the managerial expertise to run OTONE or that her involvement in the business is

menial or strictly administrative in nature. The record demonstrates to the contrary. Ms. Deranleau has ultimate authority to hire and fire employees, as evidenced by her hiring of three general managers, two of whom she let go, and makes significant decisions regarding, and has complete control over, the operations of the business enterprise (CD Tr 2 11:15).

The Division's conclusion that Dan Deranleau, rather than Toni Deranleau, operates OTONE is not supported by substantial evidence. As part of the application review, Division staff asked Ms. Deranleau to "[p]lease explain in detail Dan Deranleau's duties and responsibilities as Vice President of [Otone] Mechanical, the financial compensation he receives on an annual basis and how that compensation is determined" (Exhibit 1 at 6 of 7). Ms. Deranleau replied, "Dan Deranleau has no duties or responsibilities as Vice President of OTONE. He is not and has never been Vice President. He has never received any compensation" (Exhibit 1 at 6-7; *see also* CD Tr 2 at 19:30, CD Tr 2 19:30, CD Tr 3 16:00).

Counsel for Division staff stated that Ms. Deranleau responded literally to Division staff's question concerning his position as vice president, but did not provide insight into who was performing the respective functions for the business. Consequently, the senior certification analyst consulted OTONE'S website, saw that Mr. Deranleau identified as the general manager, and concluded based on the website that Mr. Deranleau was the individual in the business enterprise with the requisite managerial experience (CD Tr 3 24:20; *see* exhibit 5 [screen shot of OTONE website obtained August 31, 2016]). No indication exists in the administrative record that Mr. Deranleau ever held the position of vice president at OTONE.

The screen shot of OTONE's website taken on August 16, 2016, the date of the denial letter, indicates that Mr. Deranleau is the general manager of OTONE (*see* Exhibit 5). No other documents in the record, however, including federal tax returns corroborate the website or otherwise indicate that Mr. Deranleau was employed by OTONE. Ms. Deranleau testified that she has had to hire general managers to help her run the business because her husband has been unable to work due to health issues (CD Tr 2 19:30). Ms. Merritt stated that OTONE hired someone to develop the website in 2008 when the business was established, but has not relied on the website to generate business (CD Tr 3 20:10). According to Ms. Merritt, OTONE has generated business by developing relationships with power plant operators. Ms. Merritt testified that OTONE is not an expert in website design and has not focused on updating its website because it is not important to the business. (CD Tr 3 20:10.)

In sum, applicant responded to Division staff's specific questions. If the senior certification analyst wanted applicant to address a more general question concerning Mr. Deranleau's involvement in the business, she could have easily posed such a question to applicant. To disregard applicant's response to the question that was asked, however, and rely

on information posted on the company website to deny the application without any further communications with applicant was not reasonable under the circumstances.

Based on my review of the application and hearing record, applicant has demonstrated that Ms. Deranleau makes decisions pertaining to the operation of the business enterprise and has adequate managerial experience to operate the business as required by 5 NYCRR 144.2(b)(1) and (b)(1)(i) respectively. Therefore, I recommend that the Director conclude the same and modify the August 22, 2016 denial with respect to these bases.

CONCLUSIONS

1. With respect to the ownership criterion at 5 NYCRR 144.2(a)(1), OTONE has not met its burden to show that the Division's August 31, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1) and 5 NYCRR 144.2(b)(1)(i), OTONE has met its burden to show that the Division's August 31, 2016 determination to deny the application for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny OTONE's application for certification as a woman-owned business enterprise should be modified as to the operation criterion at 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(i), and, as so modified, affirmed for the reasons stated in this recommended order.

Attachment: Exhibit List

Division of Minority and Women's Business Development
Exhibit Chart Matter of OTONE, Inc.
WBE File No. 59804
Hearing Date: February 14, 2017 (Albany)

Exhibit No.	Description
1	OTONE, Inc. Certification Application Application No. 7758591 Submitted: April 7, 2017
2	Division's denial letter dated August 31, 2016
3	2008 Documentation for NYS WBE printed copy of PDF file
4	Resume Toni Deranleau
5	Screen shot of OTONE website
6	Steamfitters Industry Pension Fund Application for Pension Benefits
7	Nugent & Haeussler, P.C. Letter re OTONE 2015 Financial Statements
8	Letter from Mary A. Pendergast dated February 10, 2017 of the Minsler Agency, Inc.
9	Letter from Anthony Casillo, Vice President, Salisbury Bank, dated February 10, 2017
10	Payroll Journal dated October 19, 2016
11	OTONE Expenses by Vendor Summary October – December 2016
12	OTONE 2014 Schedule L
13	OTONE Response to 5 NYCRR 144.5(a) request
14	Division Response to 5 NYCRR 144.5(a) request
15	OTONE Appeal Letter September 13, 2016

Ruling: Exhibits 1-12 received into evidence (CD Tr 4 00:30). Exhibits 13-15 received into evidence on April 20, 2017.