

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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NEW YORK, NY 10017

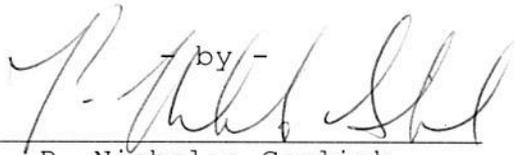
In the Matter

- of -

the Application of
Night Watch Security, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59224

RECOMMENDED ORDER


- by -

P. Nicholas Garlick
Administrative Law Judge

August 5, 2016

SUMMARY

This report recommends that 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 application of Night Watch Security, Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") be modified and, as so modified, affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by Night Watch Security, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Night Watch Security, Inc.'s application was submitted on December 8, 2014 (Exh. DED3).

The application was denied by letter dated October 20, 2015, from Bette Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to Sharon Scalcione's ownership, operation, and control of the applicant.

By letter dated October 30, 2015, Sharon Scalcione, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated December 14, 2015, the Division notified the applicant that the applicant's written appeal should be filed on or before January 18, 2016.

By letter dated December 28, 2015, the applicant submitted its written appeal which consisted of a three page letter and no exhibits.

In a four page memorandum dated June 1, 2016, the Division responded to the applicant's appeal. Enclosed with the response

were nine exhibits, described in the attached exhibit chart as DED1-DED9).

On June 8, 2016, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's 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

Position of the Division

In its denial letter, the Division asserts that the application failed to meet four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Sharon Scalcione, enjoys the customary incidents of ownership and shares in the risks and

profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the woman owner's, Sharon Scalcione's, capital contributions are 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).

Third, the Division found that the applicant failed to demonstrate that the ownership and control of the woman owner, Sharon Scalcione, is real, substantial and continuing and goes beyond the pro forma ownership of the business reflected in the corporate/ownership documents, as required by 5 NYCRR 144.2(c)(2).

Fourth, the Division found that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Sharon Scalcione, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Night Watch Security, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Night Watch Security, Inc. is in the business of installing alarms for burglary and fire systems, closed circuit television systems, audio and video systems, and card access systems (Exh. DED3 at 3). The corporation has a business address of 10 Newton Place, Hauppauge, New York (Exh. DED3 at 1).

2. Night Watch Security, Inc. was established on June 13, 1986 with a cash contribution of \$110 from the personal savings of Frank Scalcione (Exh. DED3 at 2). On November 6, 2009, Mr. Scalcione transferred 51% of the corporation's stock to his wife Sharon Scalcione (Exhs. DED6 & DED7). There is nothing in the

record indicating that Ms. Scalcione made any contribution of money, property, or equipment to become the 51% owner of the applicant.

3. The W-2 wage and tax statements provided with the application state that in 2012, Mr. Scalcione received [REDACTED] from the corporation and his wife was paid [REDACTED] (Exh. DED8 at 1-2). In 2013, Mr. Scalcione received [REDACTED] and his wife was paid [REDACTED] (Exh. DED8 at 3-4).

4. Mr. Scalcione is the president of the corporation (Exh. DED3 at 3; DED9 at 2). The by laws of the corporation state that the "president shall be the chief executive officer of the corporation; he shall preside at all meetings of the shareholders and of the board; he shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect" (Exh. DED9 at 11).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth four bases related to Ms. Scalcione's ownership, operation, and control of Night Watch Security, Inc. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division cited two grounds for denial for failure to meet ownership criteria. First, the Division determined that the applicant failed to demonstrate that the woman owner, Sharon Scalcione, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

On the appeal, Ms. Scalcione states that she shares the risks and profits of the business. She states that her husband has sole responsibility of hiring and firing installers and training these employees. She continues that she has sole responsibility for hiring and firing office staff, whom she also

trains. The appeal does not address the distribution of profits from the business.

In its response, the Division argues that a disproportionate share of the firm's profits flow to Mr. Scalcione. As proof of this claim, the Division states that no information was provided that Ms. Scalcione received any distributions from the firm and a review of the salary information provided shows that Mr. Scalcione is paid more than his wife. Specifically, the W-2 wage and tax statements provided with the application state that in 2012, Mr. Scalcione received [REDACTED] and his wife was paid [REDACTED] (Exh. DED8 at 1-2). In 2013, Mr. Scalcione received [REDACTED] and his wife was paid [REDACTED] (Exh. DED8 at 3-4).

Based on the evidence in the record, specifically the W-2 wage information discussed above, the applicant failed to demonstrate that the woman owner, Sharon Scalcione, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division determined that the applicant failed to demonstrate that the woman owner Sharon Scalcione's capital contributions are 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).

In her October 30, 2015 letter appealing from the denial, Ms. Scalcione states "any monetary contributions come out of our joint business bank account (which I have sole control of) and we each have our areas of expertise." On the appeal, Ms. Scalcione explains further that the business was started with a small amount of personal savings and that due to the nature of the business, they never had to put much money into the business. She explains the roles of her husband and herself within the business, but never addresses whether she made any contribution of her own funds into the corporation.

In its response, the Division argues that Ms. Scalcione failed to provide any information with the application to indicate that she made any contribution for become the 51% owner

of the applicant. The Division notes that it requested proof of the sources of capitalization and investment (Exh. DED3 at 6) and that in response, Ms. Scalcione supplied a letter dated October 25, 2014, which states that she and her husband Frank paid \$110 for the filing receipt when they started the business on June 13, 1986 and that the funds came from their personal savings (Exh. DED4). The filing receipt was also supplied with the application materials and lists Mr. Scalcione as the chairman of the board; no mention of Ms. Scalcione is found on this receipt (Exh. DED5 at 1). Also included with the application was information stating that on November 6, 2009, the Scalciones held a corporate meeting during which it was decided that Ms. Scalcione would become 51% owner of the company and her husband would retain 49% (Exhs. DED6 & DED7). The Division notes that there was nothing in the application materials indicating whether Ms. Scalcione made any contribution of money, property, or equipment to become the 51% owner of the applicant. With respect to Ms. Scalcione's claim in her appeal that her contribution was in the form of expertise, the Division responds that this contribution is insufficient because she was compensated as an employee for this same work.

Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the woman owner Sharon Scalcione's capital contributions are 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).

Operation

The Division determined that the applicant failed to demonstrate that the ownership and control of the woman owner, Sharon Scalcione, is real, substantial and continuing and goes beyond the pro forma ownership of the business reflected in the corporate/ownership documents, as required by 5 NYCRR 144.2(c)(2).

In its response, the Division does not address this ground for denial, therefore, it is deemed withdrawn.

Control

The final ground for denial cited by the Division was the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Sharon Scalcione, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

In the appeal Ms. Scalcione argues that there are no limits on her authority in all matters company related and that she not only assists in all business decision, but often has final say. She does not address whether her title as vice president of the corporation is authorized by relevant corporate documents to make decisions on behalf of the firm.

In its response, the Division notes that Mr. Scalcione is the president of the corporation (Exh. DED3 at 3; DED9 at 2) and that the by laws provided with the application states that the "president shall be the chief executive officer of the corporation; he shall preside at all meetings of the shareholders and of the board; he shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect" (Exh. DED9 at 11). Based on this information, the Division concluded that Mr. Scalcione has all the decision making authority related to the management of the corporation and Ms. Scalcione cannot make decisions without restrictions.

Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Sharon Scalcione, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner, Sharon Scalcione, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

2. The applicant failed to demonstrate that the woman owner Sharon Scalcione's capital contributions are 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).

3. The applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Sharon Scalcione, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny Night Watch Security, Inc.'s application for certification as a woman-owned business enterprise should be modified by striking the third basis for denial. As so modified, the determination should be affirmed, for the reasons stated in this recommended order.

**Matter of
Night Watch Security, Inc.**

**DED File ID No. 59224
Exhibit List**

Exh. #	Description	# of pages
DED1	Applicant's appeal	3
DED2	Denial letter	3
DED3	Application	8
DED4	Memo regarding source of funds	1
DED5	NYSDOS corporate filing information	2
DED6	Proof of transfer of shares	1
DED7	Copy of stock transfer ledger	2
DED8	2012 and 2013 income information	4
DED9	Minutes and by laws of the corporation	16