

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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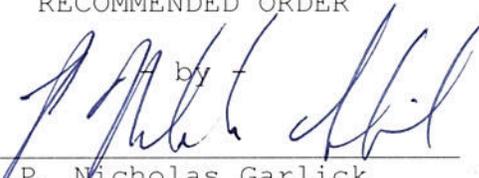
In the Matter

- of -

the Application of
Grammy Enterprises, LLC
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59719

RECOMMENDED ORDER

by 

P. Nicholas Garlick
Administrative Law Judge

October 3, 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 Grammy Enterprises, LLC ("applicant") for certification as a woman-owned business enterprise ("WBE") be 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 Grammy Enterprises, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Grammy Enterprises, LLC's application was submitted on March 30, 2015 (Exh. DED3).

The application was denied by letter dated December 22, 2015, from Bette Yee, Director of Certification Operations (Exhs. A & DED5). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Rose Mary Curtin's ownership of the Grammy Enterprises, LLC and its independence.

By letter January 22, 2016, Rose Mary Curtin, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated June 10, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before June 24, 2016 (Exh. B).

With a cover letter dated June 24, 2016, counsel for the applicant submitted its written appeal which consisted of a cover letter, the appeal and ten exhibits (listed in the attached exhibit chart as A-J).

In a five page memorandum dated July 20, 2016, the Division responded to the applicant's appeal. Enclosed with the response

were seven exhibits (described in the attached exhibit chart as DED1-DED7).

On July 21, 2016, this matter was assigned to me.

By email dated July 21, 2016, counsel for the applicant requested an opportunity to reply to the Division's papers on or before August 12, 2016. By email date the same day, I granted counsel's request.

With a cover letter dated August 12, 2016, applicant's counsel replied. The papers consisted of twelve page memorandum and two exhibits (listed in the attached exhibit chart as K-L).

In a three page memo dated August 8, 2016, the Division provided its sur-reply. At this time, the record closed.

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 two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Rose Mary Curtin'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).

Second, the Division found that the applicant failed to demonstrate that the applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

Position of the Applicant

Grammy Enterprises, LLC 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. Grammy Enterprises, LLC is in the business of leasing and potentially transporting retro-fitted roll off containers (Exh. DED3 at 3).

2. Grammy Enterprises, LLC was established on January 21, 2009 and is entirely owned by Rose Mary Curtin (Exh. DED3 at 3). The firm has a mailing address of P.O. Box 608, 137 Widgeon Court, Great River, New York (Exh. DED3 at 1).

3. Grammy Enterprises, LLC was capitalized with a contribution of [REDACTED] on September 11, 2014 (Exh. D & DED3 at 3). This contribution was made in the form of two checks signed by Ms. Curtin to the firm in September and October 2014; both

checks are written on accounts listing both Ms. Curtin and her husband as joint owners (Exh. E).

4. Documents provided with the application show that over [REDACTED] of Grammy Enterprises, LLC's revenue was generated from a single client, Statewide Roofing, Inc., a company owned by Ms. Curtin's husband, during the period beginning on December 1, 2014 and ending on December 4, 2015. During this time, a total of [REDACTED] of revenue was generated of which only [REDACTED] was to a company other than Statewide Roofing, Inc. (Exh. DED4 ¶10-¶18, DED7).

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 two bases related to Ms. Curtin's ownership and operation of Grammy Enterprises, LLC. Each basis is discussed individually, below. In addition, applicant's counsel has raised several other issues on the appeal and these are also addressed.

Ownership

In its denial letter, the Division stated it had determined that the applicant failed to demonstrate that the woman owner Rose Mary Curtin's capital contributions were 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).

On the appeal, applicant's counsel points to information in the application that states Ms. Curtin contributed [REDACTED] to the firm in the form of equity/saving on September 11, 2014 (Exh. D & DED3 at 3). As proof of this contribution, counsel attaches copies of two checks signed by Ms. Curtin to the firm in September and October 2014; the checks are written on joint accounts listing both Ms. Curtin and her husband on the checks (Exh. E).

Counsel also attaches to the appeal a letter from Ms. Curtin to him, dated June 22, 2016, in which she states that one check was written on her regular checking account which she uses

to deposit her pension and social security checks. She uses this account to pay her personal and household bills. While her husband is listed as a joint owner of the account, she states that he has never written a check on it and that he has his own checking account. The second check she deposited in the business came from a second joint account in which she deposited an inheritance she received. The only reason this account is in both names is for estate planning purposes. (Exh. F). Based on this letter, counsel argues that the Division erred in its denial on ownership grounds.

In its response, the Division states that the denial was based on Ms. Curtin's failure to submit any evidence that she made a contribution to Grammy separately from her husband. In his affidavit, Elhussein Sarhan, a senior certification analyst with the Division, states that it is the practice of the Division to consider contributions of jointly held money to a business as joint contributions. Based on this practice, Mr. Sarhan concluded the two checks (Exh. E) should be considered joint contributions from both Mr. and Ms. Curtin. Accordingly, he concluded that Ms. Curtin had not demonstrated a contribution to the business in proportion with her 100% interest. (Exh. DED4 ¶7-¶9). The Division argues that its approach is consistent with New York State law on the ownership of assets deposited into jointly held accounts. With respect to the letter dated June 22, 2016 (Exh. F), the Division notes that this document was not before it when the denial determination was made on December 22, 2015 and is not relevant to the question whether the Division's determination was based upon substantial evidence.

In his reply, applicant's counsel argues if the Division had published and given notice of its practice concerning joint bank accounts, Ms. Curtin would not have added her husband's name to her account. He asserts further that the appeal should consider the information in Ms. Curtin's June 22, 2016 letter, because the Division's practice of considering contributions of jointly held money to a business as joint contributions was unpublished and thus unknown to the applicant. Failure to consider the new information in Ms. Curtin's letter on appeal regarding the sources of the firm's capital would constitute a

violation of the due process fundamental fairness rights of Ms. Curtin.

The evidence of Ms. Curtin's capital contribution submitted by the applicant that was before the Division at the time of its denial consisted of two checks from joint accounts. The subsequent explanation provided in Ms. Curtin's June 22, 2016 letter (Exh. F) is untimely and cannot be considered on appeal, because it was not before the Division at the time the denial was issued.¹ Because of this the applicant has failed to demonstrate that the woman owner's, Rose Mary Curtin'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). The two checks, written on joint bank accounts provide substantial evidence to support the Division's denial.

Independence

The second ground asserted for denial was that the Division found that the applicant failed to demonstrate that the applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

On the appeal, counsel states he is unsure of the exact facts underlying the Division's denial on this ground, but assumes that the denial was based on the issue of the company's capital contribution and offers information from the application regarding Ms. Curtin's duties at the company (Exhs. G & DED3 at 3-4), proof that Ms. Curtin is the only person authorized to sign checks on behalf of the company (Exh. H), a series of invoices to various clients (Exh. I), and the operating agreement of the LLC showing Ms. Curtin as its sole member (Exh. J).

In its response, the Division argues that Grammy Enterprises, LLC does not satisfy WBE certification criteria because it derives the vast majority, over ██████ of its revenue from a single client, Statewide Roofing, Inc., a company owned

¹ Even if it were to be considered, the letter is unsworn and the claims are not substantiated by any evidence, such as bank statements, proof of her inheritance, and so on.

by Ms. Curtin's husband. In his affidavit, Mr. Sarhan states he reviewed invoices and other business records for the period beginning on December 1, 2014 and ending on December 4, 2015. During this time a total of [REDACTED] of revenue was generated of which only [REDACTED] to a company other than Statewide Roofing, Inc. Based on this information, Mr. Sarhan concluded that Grammy Enterprises, LLC was reliant on Mr. Curtin's business and therefore not independent (Exh. DED4 ¶10-¶18, DED7). In addition, the Division points out that at the time of the application, Grammy did not have any [REDACTED] [REDACTED] as further support of its lack of independence. With respect to other invoices supplied on the appeal (Exh. I), the Division notes that all but one of these is dated after the denial letter and the remaining one, which was not provided with the application, is too small in amount to make a difference to this analysis. To bolster its argument, the Division cites Skyline Specialty, Inc. v. Gargano (294 AD2d 742 [3d Dept. 2002]) as a case where a business was determined not to be independent because it derived more than 85% of its revenue from a single client, which also shared employees and facilities. The Division concludes that the application reflected Grammy as a shell of a business which primarily provided services to a company owned by Mr. Curtin.

In his reply, counsel argues that the Division failed to engage in a fair and complete investigation of how the firm operates and that there is not substantial evidence to support the Division's denial. In an attempt to bolster the record on appeal, two more new letters from Ms. Curtin are provided (Exhs. K & L), neither of which address the Division's stated reason for the denial on this ground, specifically, Grammy Enterprises, LLC's dependence upon Statewide Roofing, Inc. for the vast majority of its revenue. Instead, these letters discuss Ms. Curtin's operation of Grammy Enterprises, LLC and the reply discusses Ms. Curtin's operation of the firm, which was not cited as a grounds for denial. Applicant's counsel also challenges the Division's reliance on Skyline Specialty, arguing that the circumstances of that case are different from the matter on appeal. Counsel concludes with the statement that the denial constitutes the acceptance and endorsement of what can

only be characterized as a sexist refusal by Sarhan to accept the reality that Ms. Curtin is capable of running her business independent of the unrelated business of her husband.

In its sur-response, the Division argues that while the facts of Skyline Specialty are not precisely on point, many of the differences are due to the minimal existence of Grammy Enterprises, LLC and that the case should control the outcome here.

The evidence in the record, discussed above, including the fact that Grammy Enterprises, LLC relies almost exclusively on revenue from Statewide Roofing, Inc. supports the conclusion that the applicant failed to demonstrate that the applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2). The Division's denial was based on substantial evidence.

Other Issues

In addition to the grounds for denial discussed above, applicant's counsel raises several other issues.

The first issue raised by counsel on the appeal is that the Division failed in its constitutional and regulatory obligation to provide the applicant with a sufficiently specific statement of the denial grounds. Citing Block v Ambach (73 NY2d 323 [1989]), the applicant argues that the unsupported conclusory statements in the Division's January 22, 2016 denial letter fail to satisfy this obligation. This due process claim has been addressed by the additional briefing authorized in this case, as discussed above, and applicant's counsel does not raise this issue again in its reply brief. Throughout the course of this administrative proceeding, the applicant has been provided a detailed explanation of the rationale underlying the Division's denial as well as an opportunity to respond.

The second issue raised by applicant's counsel in his reply is that the Division's practice of considering contributions of jointly-held money, property, or equipment by spouses to a business enterprise as joint contributions by both spouses is, in fact, a rule as that term is defined in the State Administrative Procedures Act (SAPA) § 102. Because it is a

rule and was not properly promulgated, the practice is invalid and unenforceable. The Division, in its sur-response, argues that its practice was not a rule, but rather a reasonable interpretation of an existing rule constituting instructions to Division staff to implement 5 NYCRR 144.2(a)(1). The practice, the Division states, is guidance to agency staff regarding who meets a predetermined test of eligibility, and does not create or deny substantive rights of members of the public (see SAPA § 102(2)(b)(iv); Cubas v Martinez, 8 NY3d 611, 621 [2007]). The Division argues that its practice is an interpretation of its own, duly promulgated regulations, and is a reasonable approach to treating contributions from jointly held accounts. The Division is correct in its analysis. The practice of considering contributions of jointly-held money, property, or equipment by spouses to a business enterprise as joint contributions by both spouses is not a rule as that term is defined in SAPA § 102. Applicant's counsel's argument should be rejected.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Rose Mary Curtin'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).

2. The applicant failed to demonstrate that the applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

RECOMMENDATION

The Division's determination to deny Grammy Enterprises, LLC's application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of
Grammy Enterprises, LLC**

**DED File ID No. 59719
Exhibit List**

Exh. #	Description	# of pages
DED1	NYS DOS filing receipt	1
DED2	Biography of Rose Mary Curtin	2
DED3	Application	10
DED4	Affidavit of Elhoussein Sarhan	5
DED5	Denial letter	3
DED6	Capitalization checks	1
DED7	Invoices and payment records	435
A	Denial letter (same as DED5)	3
B	Appeal scheduling letter	2
C	Document list	5
D	Ownership information for LLC	1
E	Capitalization checks (same as DED6)	1
F	Letter requesting appeal	1
G	Part of application	2
H	Letter from bank	1
I	Invoices	9
J	Operating Agreement	11