

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

In the Matter

- of -

the Application of **Island School & Art Supply, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52008

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script that reads "Maria E. Villa". The signature is written in dark ink and is positioned above a horizontal line.

Maria E. Villa
Administrative Law Judge

October 27, 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 Island School & Art Supply, Inc. ("Island School" or "applicant") certification as a women-owned business enterprise¹ ("WBE") be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, challenging the determination of the Division that Island School does not meet the eligibility criteria for certification as a WBE.

The Division denied Island School's application for WBE certification (Exhibit 1) by letter dated March 31, 2016. Exhibit 2. The denial letter sets forth three grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that Linda Thompson enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise (see Section 144.2(a)(1) ("Ownership"));
- (2) applicant failed to demonstrate that Ms. Thompson made decisions pertaining to the operation of the enterprise or devoted time on an ongoing basis to the enterprise's daily operations (see Section 144.2(b)(1)(i) – (iii) ("Operation")); and
- (3) applicant failed to demonstrate that corporate documents and relevant business agreements permitted Ms. Thompson to make business decisions without restrictions (see Section 144.2(a)(b)(2) ("Control")).

On April 27, 2016, applicant filed a notice of appeal from the denial, and counsel for the Division responded by letter dated June 14, 2016, advising applicant of the procedures to file a written appeal. Exhibits 11 and 10. On July 12, 2016, Island School filed its brief to set aside the Division's denial of woman-owned business status ("Applicant's Brief"). Applicant also provided a number of exhibits, as well as the following affidavits: Linda Thompson, sworn to July 7, 2016; Robert W. Thompson, sworn to July 6, 2016; Robert P. Thompson, sworn to July 6, 2016; Beth Collorone, sworn to May 12, 2016; Steven Held, sworn to May 10, 2016; Lois Krugman, sworn to May 9, 2016; Debra Rauseo, sworn to May 13, 2016; and Josephine Zack, sworn to May 10, 2016.

¹ The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR Section 140.1(tt) (defining a women-owned business enterprise as one that is, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women")).

The Division's brief and exhibits in response were received on April 19, 2016 ("Division Response"). The Division's brief and exhibits were accompanied by the affidavit of Cleneice Mincey, sworn to September 6, 2016. On September 13, 2016, applicant requested leave to reply to the Division's brief, attaching the reply. The Division did not object, and therefore applicant's reply brief ("Applicant's Reply") will be considered.

A list of exhibits is attached to this recommended order. Exhibits submitted by Island School were not marked or received to the extent that those exhibits were duplicates of exhibits submitted by the Division and already received into the record.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed 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 representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division's analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Island School's application for WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of Island School's WBE application. With respect to ownership, applicant states that Ms. Thompson has been the owner or operator of Island School since the business was started in 1978. With regard to operation, applicant asserts that Ms. Thompson makes decisions pertaining to the business's operation, and devotes time to that operation on an ongoing basis. Finally, applicant asserts that although Ms. Thompson is not a corporate officer, she in fact controls Island School.

Division

In its response to the appeal, the Division argues that its determination is supported by substantial evidence. Specifically, the Division argues that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman

owner. The Division contended that “Ms. Thompson has ceded operation of the business, and the corresponding benefits, to her sons, Mr. Robert P. Thompson and Mr. Matthew J. Thompson.” Division Response, at 1. In this regard, the Division pointed out that Ms. Thompson’s sons received significantly greater compensation than Ms. Thompson. The Division went on to maintain that Ms. Thompson did not control Island School, because she is not a corporate officer, and not empowered to act on Island School’s behalf. Accordingly, the Division requested that its determination to deny WBE certification to Island School be upheld.

FINDINGS OF FACT

1. Island School & Art Supply, Inc. is located at 3030 Route 112, Medford, New York. Exhibit 1, at 1.
2. Island School supplies educational materials to schools and nursery schools. Exhibit 1, at 3.
3. Linda Thompson does not receive any wage compensation from the business.
4. According to Island School’s most recent tax returns, Ms. Thompson devotes approximately 10% of her time to the business. Exhibits 3, 5, and 6.
5. Pursuant to a consent of shareholders in lieu of meeting, on January 3, 2008, Robert P. Thompson was appointed as president of Island School, and Matthew J. Thompson was appointed secretary/treasurer. Exhibit 7, at 8.
6. The corporate bylaws of Island School provide that the president “shall have general charge of the entire business of the Corporation,” and “shall have the usual powers and duties vested in the President of a corporation.” Exhibit 9, at 13.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Island School as a women-owned business enterprise pursuant to Executive Law Article 15-A.

As an initial matter, applicant argued that the denial was arbitrary and capricious, and without a rational basis, in that the denial failed to provide any relevant facts or substantive details to support the Division’s determination. Applicant went on to point out that it was previously certified by the Division in 2009, and maintained that nothing had changed with respect to the ownership, operation or control of Island School since that certification was granted.

With respect to the prior certification, the Division noted that the appeal did not provide any evidence as to the contents of Island School’s application that led to the 2009 certification. The Division went on to assert that administrative agencies are free to correct a prior erroneous interpretation. The Division observed that the appeal “does not identify any stated position of

the Department to the effect that a woman owner who receives no compensation from a business, is not an officer of that business, and does not make decisions pertaining to the operations of a business or devote time to its daily operation can be relied upon for WBE certification.” Division Response, at 8. Applicant responded that the Division had mischaracterized its argument, and that it was the Division’s failure to explain its denial that rendered the determination procedurally defective.

On appeal, an applicant may request a hearing, or submit a written appeal. In this case, applicant elected to provide a written submission, and the Division filed a response. The Division’s response amplified the three bases for denial set forth in the Division’s March 31, 2016 letter. Moreover, applicant replied to the Division’s response, and that reply was considered on appeal. Applicant’s procedural arguments are unavailing. As discussed below, given the information that was before the Division when the application was considered, the denial was proper and should be affirmed.

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 provided in supplemental submissions and interviews that are conducted by Division analysts. Consequently, additional documents provided by an applicant on appeal are not considered in evaluating whether the Division’s denial was proper.

Ownership

Section 144.2(c)(2) of 5 NYCRR provides that women owners must “enjoy the customary incidents of ownership” and “share in the risks and profits, in proportion with their ownership interest in the business enterprise.” The Division contended that Ms. Thompson could not satisfy this requirement, because her compensation was significantly less than her sons. Specifically, the Division pointed to Island School’s tax returns, which indicated that while Ms. Thompson’s sons received salaries, Ms. Thompson did not, nor did she receive distributions from the business. The Division maintained that any foregone compensation was unquantified, noting that the tax returns submitted with the application indicated that Ms. Thompson devoted approximately 10% of her time to the business. The Department concluded that “members of the Thompson family took salaries in accordance with the time that they devote to the business and that Ms. Thompson’s lack of compensation was not proportionate to her majority interest in Island School.” Division Response, at 3.

Applicant maintained that Ms. Thompson chose to stop receiving a salary during the economic recession, and then “adapted to living without a salary and took Company dividends when needed.” Applicant’s Brief, at 7. Ms. Thompson chose to reinvest the funds into Island School. Applicant argued that Ms. Thompson’s reinvestment of earnings was not unquantified; rather “it is the amount of salary that Ms. Thompson gave up.” Applicant’s Reply, at 2. Applicant also disputed the Division’s claim that the company did not pay dividends during the 2013 and 2014 tax years, pointing out that the returns show cash distributions in 2013 of [REDACTED] and in 2014 of [REDACTED]. Applicant argued that Ms. Thompson, as a shareholder, “retains her right to the Company’s retained earnings and the right to receive dividends,” and concluded that the Division must credit Ms. Thompson for her share of Island School’s retained earnings. *Id.*

In response, the Division pointed out that it “did not disregard any purported reinvestment by Ms. Thompson in Island School because at no point during the application process did Ms. Thompson ever purport to have reinvested funds in Island School by eliminating her salary.” Division Response, at 3.

In support of its position, applicant cites to Matter of Friend Comm’l Contracting Corp., NYS DED File No. 59440 (May 11, 2016). Matter of Friend is distinguishable, because in that case, unlike Ms. Thompson, the woman owner did receive a salary, although it was less than that of another employee. Moreover, the woman owner in Matter of Friend was the sole owner, which is not the situation here. Although Ms. Thompson’s husband also is uncompensated, both of Ms. Thompson’s sons are paid salaries from the business. Thus, Island School is operated more in the nature of a family business, rather than a woman-owned enterprise.

Applicant’s arguments on appeal and the documentation provided are insufficient to establish that the Division’s determination was not based upon substantial evidence. It was reasonable for the Division to conclude, based upon the information provided in the application, that Ms. Thompson did not share in the profits of the business enterprise in proportion with her ownership interest. Consequently, applicant failed to meet its burden with respect to its challenge to this basis for the denial.

Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification. In addition, an applicant must show that the woman owner has the working knowledge and ability needed to operate the business enterprise (see 5 NYCRR Section 144.2(b)(1)(ii)). The regulations also require a showing that the minority or woman business owner makes decisions pertaining to operation, and devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR Section 144.2(b)(1)(iii)).

As part of the application process, the Division requested that Ms. Thompson provide a narrative description of her duties, as well as those of Island School’s key personnel. In response, Ms. Thompson submitted a one-page document that identified her duties as “owner, customer service personnel.” Exhibit 7. The Division analyst, Cleneice Mincey, stated that she inferred from the application that “some of the critical managerial functions for Island School include product selection, managing logistics for shipments of goods, and managing Island School’s physical stores.” Mincey Affidavit, ¶ 18. Ms. Mincey went on to state that “Exhibit 7 indicated that male individuals associated with Island School managed purchasing, logistics, and store management, and that Ms. Thompson’s role was limited to managing ‘customer service personnel.’” Id., ¶ 19.

Applicant responded that the Division focused only upon the phrase “customer service personnel” in Exhibit 7, and ignored the word “Owner.” Applicant argued that the Division had misinterpreted the document by concluding that the employees listed were “managing” the duties listed next to the employees’ names. Applicant maintained that Ms. Thompson used the term

“Owner” to describe her role at Island School, and that on a daily basis, she “manages and controls core operations, oversees tasks performed by other employees, and devotes significant time to the daily operations of the Company.” Applicant’s Reply, at 3.

Despite applicant’s explanation, the conclusions drawn by the Division’s analyst were not unreasonable, based upon the information provided by applicant in Exhibit 7. Applicant asserts that Ms. Thompson sought guidance from the Division as to the level of detail required in the description, and that the Division would not provide such direction. This argument overlooks the fact that the burden is on the applicant to demonstrate that it meets the requirements for certification. Exhibit 7, coupled with the information in the application that indicated that Ms. Thompson devoted only 10% of her time to the business, was sufficient evidence for the Division to conclude that Ms. Thompson had substantially withdrawn from operating the business. As the Division notes, the appeal does not identify any information in the application that would lead the Division to conclude that Ms. Thompson works full-time for Island School, and “instead introduces affidavits that conflict directly with the information in the application.” Division Response, at 4.

The record supports the Division's determination regarding the operation of Island School. Accordingly, the Division's determination that applicant does not satisfy the operation criteria should be sustained.

Control

Section 144.2(b)(2) of 5 NYCRR requires that, in order for a business to be certified as women-owned, “articles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make [] decisions without restrictions.” Pursuant to a consent of shareholders in lieu of meeting, on January 3, 2008, Robert P. Thompson was appointed as president of Island School, and Matthew J. Thompson was appointed secretary/treasurer. Exhibit 7, at 8. Robert P. Thompson and Matthew Thompson are Ms. Thompson’s sons. The corporate bylaws provide that the president “shall have general charge of the entire business of the Corporation,” and “shall have the usual powers and duties vested in the President of a corporation.” Exhibit 9, at 13. Nothing in the application identifies Ms. Thompson as an officer of the business. As a result, the Division asserted that it was unable to determine that Ms. Thompson was permitted by the corporate bylaws to make decisions without restrictions.

In its response, applicant contended that Ms. Thompson, as the owner of the company, “ultimately controls all major decisions.” Applicant’s Reply, at 4. Applicant maintained that given the nature of the company, it would not be difficult for Ms. Thompson “to restructure the officers in the event that they were not following or carrying out her decisions for the Company.” *Id.* In addition, applicant argued that as the majority shareholder, Ms. Thompson could restrict company decision-making at any time, pursuant to the corporate documents. According to applicant, “[i]n order to grow the Company and have a legacy to pass on to her family, Ms. Thompson carefully delegated certain duties and positions to her sons while maintaining ultimate control and decision-making authority.” *Id.*

On this record, applicant's arguments are not persuasive. The Division reviews an application for certification based upon the information provided, and if an applicant does not supply information sufficient to establish control by the woman owner, the application is properly denied. Consequently, the Division's denial of certification was supported by substantial evidence, and should be affirmed.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny Island School's application for certification was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Island School's application for certification as a women-owned business enterprise should be affirmed.

Matter of Island School & Art Supply, Inc.
DED File ID No. 52008
Exhibit Chart

Exhibit No.	Description
1	January 23, 2014 application
2	March 31, 2016 denial letter
3	2012 tax returns
4	March 7, 2016 letter from Cleneice Mincey to Linda Thompson, requesting additional information
5	2013 corporate tax returns
6	2014 corporate tax returns
7	List of Duties
8	Corporate Minutes
9	Corporate By-Laws
10	June 14, 2016 letter from Phillip Harmonick, Esq. to Linda Thompson re: written appeal
11	April 27, 2016 letter from Kimberly B. Malerba, Esq. re appeal request

Exhibit No.	Description
12	May 15, 2008 lease