

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

In the Matter

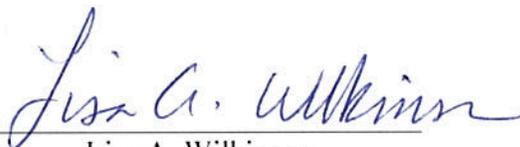
- of -

the Application of **Elevator Maintenance of Buffalo, Inc.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59971

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge

November 30, 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 Elevator Maintenance of Buffalo, Inc. (Elevator Maintenance or applicant) certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

By a letter dated May 3, 2016, the Division determined that Elevator Maintenance does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied Elevator Maintenance's application (see Exh 2). In a letter dated May 17, 2016, James Bennett, Esq., of Bennett Schechter Arcuri & Will, LLP, on behalf of Elevator Maintenance, requested to appeal from the Division's determination to deny WBE certification (see Exh 3).

The Division acknowledged Elevator Maintenance's request for an appeal in writing in a notice of appeal dated June 2, 2016, and directed that written submissions be submitted by July 20, 2016. The notice also reiterated the Division's bases for the denial.

Elevator Maintenance filed appeal papers dated July 12, 2016 (see Exh 5). The Division filed a response dated November 2, 2016, with exhibits (see Exh 6). The matter was assigned to Administrative Law Judge Lisa Wilkinson. An exhibit chart 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 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 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, Elevator Maintenance, as the 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 May 3, 2016 denial letter, the Division asserted that the application failed to meet three criteria for WBE certification as outlined in 5 NYCRR 144.2 concerning the ownership, operation, and control of Elevator Maintenance (see Exh 2).

With respect to ownership, the Division determined that Elevator Maintenance did not meet the ownership criteria outlined at 5 NYCRR 144.2(c)(2) because the application failed to demonstrate that the women owners enjoy the customary incidents of ownership and share in the risks and profits in proportion with their ownership interests in the business enterprise. The Division also determined that Elevator Maintenance did not meet the ownership criteria outlined at 5 NYCRR 144.2(a)(1) because the application failed to demonstrate that the women owners’ contributions are proportionate to their equity interests in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

With respect to operation, the Division determined that Elevator Maintenance failed to demonstrate that the women owners possess the requisite managerial experience or technical competence needed to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i) inasmuch as neither of the women owners has prior experience supervising field work in the elevator industry or is a licensed elevator installer.

With respect to control, the Division determined that relevant business agreements do not empower the women owners to control the management of the business without restrictions as required by 5 NYCRR 144.2(b)(2). Section 5 of Article V of the corporate bylaws of Elevator Maintenance provides that the President shall have general charge of the business. Mr. Joseph Cattarin is the President of Elevator Maintenance (See Exh 6 at 185-202 of 202 [By-Laws of Elevator Maintenance]).¹

Elevator Maintenance

In a letter dated May 17, 2016, Elevator Maintenance stated that the women owners do enjoy the customary incidents of ownership in proportion of their ownership interest in the business. Each of the owners receives a salary based on their experience in the company and their ownership percentage. Elevator Maintenance contends that elevator maintenance work is inherently dangerous and requires technical skills for complex work and that is why Joseph Cattarin receives a salary that is “slightly more than the other owners” (see Exh 3 at 1).

¹ The citation to the pages of Exhibit 6, the Division Response dated November 2, 2016, refer to the pages in the PDF file.

Elevator Maintenance further contends that both the women owners provide great expertise and experience that is vital to the business, stating that Mary Jo Cattarin manages day to day operations and has done so for more than 25 years and that Judith Cattarin has been involved with the business for many years as Joseph Cattarin's spouse (see id. at 1-2). Elevator Maintenance maintains that the amendment to the bylaws executed on February 4, 2015, specifically states that the CEO (Mary Jo Cattarin) shall have the "general charge of the business, affairs and property of the Corporation" and that "the President shall assist the CEO with the general charge of the business, affairs and property of the Corporation under the auspice and direction of the CEO" (id.). In its appeal, counsel for Elevator Maintenance states that the amendment to by-laws was intended to be submitted as part of Elevator Maintenance's original application for WBE certification and was either inadvertently omitted or not received or reviewed by the Division (Exh 5 at 3 n 1).

FINDINGS OF FACT

I. General

1. Elevator Maintenance of Buffalo, Inc. (Elevator Maintenance) is located at 701 Seneca Street, Buffalo, NY 14210 (see Exh 1 Certification Application submitted June 4, 2015 [12 pages]).
2. Elevator Maintenance installs, maintains, and repairs elevators (see id. at 3.C).
3. From 1983 to 1985, Joseph S. Cattarin worked as an apprentice at Elevator Maintenance (Exh 6 at 126 and 181 of 202 [resume]). From 1985 to 1991, he was the office manager at Elevator Maintenance responsible for payroll, quarterly taxes, and all aspects of accounting, union benefits, and scheduling daily work for mechanics (see id.). From 1991 to the present, Mr. Cattarin has been the President/Owner of Elevator Maintenance responsible for overseeing all aspects of daily operations of the business, interviewing and hiring employees, surveying for potential new installations, modernizations and repair work, preparing proposals for new installations, modernizations and repair work, meeting with project managers on construction jobs, obtaining required insurance, bonding, etc. per job specifications, and preparing ALA billing for construction jobs (see id.)
4. Joseph Cattarin obtained an Elevator Installer License issued by the City of Buffalo (see Exh 6 at 183 of 202).
5. Mary Jo Cattarin studied to be a medical assistant at Erie Community College and has been the office manager of Elevator Maintenance since 1991 (see Exh 6 at 125 and 180 of 202 [resume]).
6. Judith Cattarin obtained an Associate of Applied Science medical laboratory technology degree from Trocaire College in Buffalo, NY (id. at 124 and 179 of 202 [resume]). She is a New York State licensed clinical laboratory technician, and worked continuously at Mercy Hospital in Buffalo from 1976 to the date of the application (see id.).

7. On behalf of Elevator Maintenance, Judith Cattarin submitted an application for certification as a woman owned business enterprise dated June 4, 2015 (see Exh 1 at 1).
8. The shareholders of Elevator Maintenance are Mary Jo Cattarin, Judith Cattarin, and Joseph Cattarin (see Exh 1 at 2.A [Ownership Information for Corporation]).
9. By letter dated May 3, 2016, the Division denied Elevator Maintenance's application for certification as a woman owned business enterprise (see Exh 2).

II. Ownership

10. None of the shareholders made a contribution of cash or capital to the business enterprise (see Exh 1 at 2.C).
11. The holdings of the shareholders of Elevator Maintenance are: Mary Jo Cattarin - 10 common shares; Judith A. Cattarin - 41 common shares; and Joseph Cattarin - 49 common shares (id. at 2.D) for a total of 100 shares of common stock.
12. There are 200 authorized shares of common stock and 100 issued shares (id. at 2.E).

III. Operation

13. Mary Jo Cattarin is the chairman of the board (CEO), Joseph S. Cattarin is president, and Judith A. Cattarin is vice president (see Exh 1 at 3, 4.A).
14. Mary Jo and Joseph are jointly responsible for financial decisions, estimating, preparing bills, negotiating bonding, negotiating insurance, and negotiating contracts (see id. at 1, 2, 3, 4, 5, and 11).
15. Mary Jo, Joseph, and Judith are responsible for marketing and sales, hiring and firing, purchasing, equipment and sales, and signature for business accounts contracts (see id. at 6, 7, 9 and 12).
16. Mary Jo is responsible for managing and signing payroll (see id. at 10).
17. Joseph is responsible for supervising field operations (see id. at 8).

IV. Control

18. Pursuant to bylaws submitted with the application, "[t]he President shall be the chief executive officer of the Corporation and, subject to the direction of the Board of Directors shall have general charge of the business, affairs and property of the Corporation and general supervision over its officers and agents" (see Exh 6 at 194 of 202).

19. The offices of vice-president, and treasurer of Elevator Maintenance are subordinate to the office of the president (see id.).
20. The bylaws submitted with the application do not provide for the separate office of the CEO of Elevator Maintenance, but describe the president as the chief executive officer (see id.).

DISCUSSION

This recommended order considers Elevator Maintenance's May 17, 2016 appeal from the Division's May 3, 2016 determination to deny certification of Elevator Maintenance as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion that follows addresses the bases for the Division's denial.

Referring to the eligibility criteria outlined at 5 NYCRR 144.2, the Division identified the following bases for the denial. According to the Division, Elevator Maintenance did not show that the women owners enjoy the customary incidents of ownership and share in the risks and profits in proportion with their ownership interests in the business enterprise (see Exh 2 at Ownership, 5 NYCRR 144.2[c][2]). The Division also concluded that Elevator Maintenance did not meet the ownership criteria outlined at 5 NYCRR 144.2(a)(1) because the application failed to demonstrate that the women owners' contributions are proportionate to their equity interests in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

With respect to the operation of the business enterprise, the Division determined that neither Mary Jo Cattarin nor Judith Cattarin have either the managerial experience and technical competence, or the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii) (see Exh 2 Operation). Only Joseph Cattarin is a licensed elevator installer and has experience supervising field work in connection with the business enterprise (see id.). Neither of the women owners have experience supervising field work with elevator installation and maintenance or is a licensed elevator installer (see id.).

With respect to control, the Division determined that EMB failed to demonstrate that the women owners make business decisions without restrictions (see id. at Control). Section 5 of Article VI of the corporate bylaws of Elevator Maintenance provides that the President shall have general charge of the business and Joseph S. Cattarin is the President (see id.).

Ownership

Elevator Maintenance is a family-owned business. Joseph J. Cattarin, the father of Joseph S. Cattarin and Mary Jo Cattarin, became the sole shareholder of the corporation in 1982. (Exh 6, Letter from Aaron Felmet to Christopher Gefferd dated November 16, 2015, at 39-41 of 202). In 1985, Joseph J. began gifting shares of common stock to his son Joseph S. Cattarin, who became the majority shareholder on December 28, 2000, and the sole owner of the corporation on October 12, 2011 with 85 shares of issued common stock (see id.). On February

4, 2015, Joseph S. Cattarin transferred 26 shares of common stock of Elevator Maintenance to his wife Judith Cattarin (see Exh 6 at 113 of 202) and 10 shares of common stock to his sister Mary Jo Cattarin (see Exh 6 at 115 of 202). Elevator Maintenance issued an additional 15 shares of common stock to Judith Cattarin on February 4, 2015 (see Exh 6 at 114 of 202). As a result of the transfer, Joseph S. Cattarin owns 49 percent of the issued common stock and Judith and Mary Jo together own 51 percent of issued common stock (see Exh 1 at 2 Ownership Information).

To be certified as a WBE, an applicant must demonstrate that the ownership and control by a woman owner is “real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents” (5 NYCRR 144.2[c][2]). The purpose of this requirement is to ensure that the women actually bear the risks and benefits of owning the business and are not merely owners based solely on corporate documents.

The first prong of the ownership requirement is the capital contribution test which provides that “the contribution of the . . . woman owner must be proportionate to [her] equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise” (5 NYCRR 144.2[a][1]).

Elevator Maintenance’s application lists the value of the capital contribution by Joseph Cattarin, Judith Cattarin, and Mary Jo Cattarin at \$0.00 (see Exh 1 at 2.D [shareholder holdings]). As part of its investigation, on October 20, 2015, the Division asked Judith Cattarin to provide additional information demonstrating how each of the owners’ equity interest in the business, either by contributions of money, property, purchased equipment or expertise, is proportional to their ownership interest (see Exh 1 at 10 of 12). Counsel for the Elevator Maintenance submitted a response by letter dated November 16, 2016, stating that Judith Cattarin’s 41% equity interest represents her contributions as a key employee of the corporation, where she works 25 hours a week after reducing her hours as a health care professional (see Exh 6 at 40 of 202). Mary Jo Cattarin has been the manager of Elevator Maintenance from 1991 to the present and, due to the fact that Joseph S. Cattarin does not have children, he wanted to ensure that the corporation stayed with the family (see id.).

On appeal, counsel stated that Judith’s 30 years of uncompensated contributions to the business, and lower salary today, are reflected in her higher equity interest and that Mary Jo has been compensated for her work as an employee (see Exh 5 at 7-8). Counsel further stated that it is impossible to value the contribution of the women owners to the business (see id.).

The Division’s determination that women owners did not contribute to the business enterprise is supported by substantial evidence. Notably, Elevator Maintenance has provided no evidence of contributions of money, property, or equipment by its women owners (see 5 NYCRR 144.2[a] [1], Exh 6 at 10-11 of 202 [Affidavit of Glen Butler at ¶ 12]) or any objective basis upon which to value the purported contributions of the women owners. The submissions indicate that Judith Cattarin primarily worked as a health care professional and only recently became involved in the enterprise in February 2015 as vice president in charge of accounts payable and receivables, working on a part-time basis (see id. at 40 and 179 of 202). Until February 2015, Mary Jo worked as an employee and was compensated in wages (see id. at 180 of 202).

The record also supports the Division’s determination that the women owners of Elevator Maintenance do not share in the risks and profits of the business in proportion to their majority interests (see 5 NYCRR 144.2[c][2]). Joseph Cattarin received significantly greater compensation from the business in its most recent tax year, notwithstanding the allocation of a majority of common stock to the women owners (see *id.* at 11 of 202 [Butler Aff ¶¶15-16]). According to Elevator Maintenance’s 2015 federal tax return, Joseph Cattarin was paid [REDACTED] compared to Judith Cattarin and Mary Jo Cattarin who received [REDACTED] respectively (see *id.* at 140 of 202 [Form 1125-E Compensation of Officers]). This is consistent with employee payroll records for the first quarter of 2015 which show that Joseph received [REDACTED] (see Exh 1 at 121 of 202) while Judith received [REDACTED] (see *id.* at 116 of 202) and Mary Jo received [REDACTED] (see *id.* at 119). On the basis of wages, Joseph Cattarin makes more than Judith and Mary Jo combined.

The 2015 schedule of income distribution shows that Elevator Maintenance distributed [REDACTED] in ordinary income to Joseph, [REDACTED] to Judith and [REDACTED] to Mary Jo, reflecting their annual stock ownership for 2015, taking into account the stock transfers in February (Exh 1 at 137-139 of 202 [Schedule K-1 - shareholder’s share of income, deductions and credits]). Even if income distributions in 2016 reflect the current majority stock ownership of Judith and Mary Jo for the entire year, the relatively small amount of income distributed in comparison to compensation paid to Joseph would still show Joseph receiving a disproportionate share of wages as compared to the women owners.

The foregoing analysis is summarized in the following table:

Shareholder	Common Stock Ownership 02/04/15	Compensation of Officers (\$)	2015 First Quarter Wages (\$)	2015 Schedule K-1 (\$)	Contribution (\$)
Joseph S. Cattarin	49 Shares	[REDACTED]	[REDACTED]	[REDACTED]	0.0
Judith Cattarin	41 Shares	[REDACTED]	[REDACTED]	[REDACTED]	0.0
Mary Jo Cattarin	10 Shares	[REDACTED]	[REDACTED]	[REDACTED]	0.0

The Division may take into account disproportionate allocation of wages between male and female owners of a business in determining whether to certify a business as a WBE (see *Matter of C.W. Brown Inc. v Canton*, 216 AD2d 841, 843 [3d Dept 1995]). Applicant contends that Mr. Cattarin’s significant wage disparity should not preclude it from certification because of the highly technical and skilled nature of the work Mr. Cattarin performs (Exh 3 at 1). Applicant relies upon *Matter of J.A. Marshall Sheet Metal & Roofing Inc. v State of New York*, 221 AD2d 759 [3d Dept 1995]). However, that case involved higher wages fixed by a union contract. Applicants have made no representation nor presented evidence that Mr. Cattarin’s wages, which are significantly greater than the women owners combined, are fixed by a union contract (see Exh 1 at 140 of 202 [Form 1125-E Compensation of Officers]).

In the face of this evidence, the Division's determination that the women owners do not share proportionately in the risks and profits of the business is supported by substantial evidence.

II. Operation

Woman owners of a business seeking certification as an MWBE must "have adequate managerial experience or technical competence in the business enterprise seeking certification" (5 NYCRR 144.2[b][1][i]). The objective of this and other operational requirements is to determine whether minority or woman business owners operate the core functions of the business enterprise.

The Division will consider whether the women owners possess the academic degrees, training and apprenticeships, and licensure in industries, where such credentials exist, related to the services provided by the business, and whether the women owners possess prior managerial experience in the relevant industry that demonstrates their ability to operate the business without relying on others (see Exh 6 at 4 of 202). A business that relies on the technical training or experience of a non-minority male individual is not eligible for certification (see Matter of Northeastern Stud Welding Corp. v Webster, 211 AD2d 889, 891 [3d Dept 1995]).

The application materials establish that neither of the women owners of Elevator Maintenance has formal training, experience or relevant credentials in installing and servicing elevators. On the other hand, at least as of September 30, 2015, Joseph Cattarin was licensed by the City of Buffalo as an elevator installer (see Exh 6 at 183 of 202). He began his career at Elevator Maintenance, and rose to managing the operations of Elevator Maintenance as its president (see id. at 181 of 202). Contrary to the assertions of counsel for applicant that the license was issued to Elevator Maintenance, not Joseph Cattarin, the expertise of Mr. Cattarin is not only relevant but required for him and the company to obtain an elevator installer license. The City of Buffalo requires applicants for elevator installer licenses to demonstrate: (1) an acceptable combination of experience and education credits or verifiable work experience in the elevator industry in construction, maintenance and service/repair; (2) certificates of completion of required course work of National Elevator Industry Educational Program, or a two-year/four-year degree in electronics, engineering or other relevant fields; (3) a mechanic's certificate; and (4) satisfactory completion of a written examination administered by the City of Buffalo (see City of Buffalo Ordinance § 167-7[B]). Joseph Cattarin's listing on the elevator installer license along with Elevator Maintenance is significant because he is the only officer who possess and can demonstrate the required expertise to be a certified elevator installer (see Ex. 6 at 181 of 202).

In the face of these facts, the Division's determination that the ability of Elevator Maintenance to conduct its business rests entirely on Mr. Cattarin's credentials and technical expertise is supported by substantial evidence. To have the requisite technical expertise, the woman owners must have the ability to evaluate the work of their male co-owners and employees (see Matter of Northeastern Stud Welding, 211 AD2d at 891). Although it is not mandatory for the women owners to possess a particular license or credential to meet the requirements of 5 NYCRR 144.2(b)(1)(i), the absence of the same is strong evidence that they do not have the ability to evaluate the work of Mr. Cattarin.

III Control

To qualify as a WBE, “[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make [] decisions without restrictions” (5 NYCRR 144.2[b][2]). If power is vested in individuals other than women, the women will not be deemed to control the business enterprise.

The application identified Mr. Cattarin as the president of Elevator Maintenance and Ms. MaryJo Cattarin as the “CEO” of the business (see Exh 1 at 3, 2.A and Exh 6 at 11 [Butler Aff ¶ 23]). The corporate by-laws of Elevator Maintenance submitted with the application materials state that the president is the chief executive officer of the business with general charge of its officers and affairs (Exh 6 at 194 of 202). The by-laws do not provide for the separate office of “CEO”, thereby making Joseph Cattarin the highest ranking officer of Elevator Maintenance (*id.*, [Butler Aff ¶ 26]).

The Division may properly exercise its discretion to conclude that the gender of the highest-ranking officer of a business is determinative of whether the business is controlled by women for purposes of 5 NYCRR 144.2(b)(2) (see *Matter of C.W. Brown*, 226 AD2d at 843). The Division’s determination here that Mr. Cattarin is legally empowered to control the management of Elevator Maintenance in the ordinary course of business, and that the women are subordinate to him, is supported by substantial evidence.

On appeal, counsel for Elevator Maintenance states that its by-laws were amended on February 4, 2015, and intended to be submitted as part of the original application for WBE certification (Exh 5 at 3 and n 1). Applicant’s counsel surmises that the amendments were either inadvertently omitted from the application or otherwise not received or reviewed by the Division (see *id.*). The amendment to the by-laws establishes the position of chief executive officer (CEO), transfers the power from the president to the CEO, and restates the description of the office of president to state that the president shall assist and work under the direction of the CEO (see *id.*).

Counsel’s unsubstantiated assertions are insufficient to establish that the Division received the amendment to the by-laws. The Division is entitled to make its determination based on the application itself and the information revealed in supplemental submissions. The by-laws submitted by the applicant clearly indicates that president controls the enterprise and Joseph Cattarin is the president as stated in the application (see Exh 6 at 194 and Exh 1 at 4, 2.A). Even if the by-law amendments were considered, the Division’s determination that Elevator Maintenance does not meet the requirements for certification would stand nonetheless for the reasons discussed above with respect to the ownership and operational requirements.

CONCLUSIONS

1. With respect to the ownership criteria at 5 NYCRR 144.2(a)(1) and (c)(2), Elevator Maintenance did not meet its burden to show that the Division’s May 3, 2016

determination to deny the application of Elevator Maintenance for WBE certification is not based on substantial evidence.

2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1)(i), Elevator Maintenance did not meet its burden to show that the Division's May 3, 2016 determination to deny the application of Elevator Maintenance for WBE certification is not based on substantial evidence.
3. With respect to the control criteria at 5 NYCRR 144.2(b)(2), Elevator Maintenance did not meet its burden to show that the Divisions May 3, 2016 determination to deny the application of Elevator Maintenance for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Elevator Maintenance's application for certification as a woman-owned business enterprise should be affirmed for the reasons set forth above.

Attachment: Exhibit List

Division of Minority and Women's Business Development

Exhibit Chart

Matter of Elevator Maintenance of Buffalo, Inc.

NYS DED File ID No. 59971

Exhibit No.	Description
1	Certification Application filed by Elevator Maintenance of Buffalo, Inc. Application No.: 6810596 Submitted: June 4, 2015
2	Division's denial letter dated May 3, 2016
3	Elevator Maintenance of Buffalo Inc.'s request for an appeal dated May 17, 2016
4	Division's notice of appeal dated June 2, 2016
5	Elevator Maintenance written appeal dated July 12, 2016
6	Division Response dated November 2, 2016

Ruling: Exhibits 1 through 6 received.