

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

In the Matter

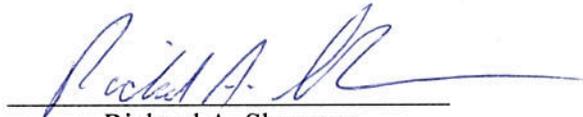
- of -

the Application of **Creative Connections LLC**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60169

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink, appearing to read "Richard A. Sherman", is written over a horizontal line.

Richard A. Sherman
Administrative Law Judge

December 8, 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 Creative Connections LLC ("Creative Connections" or "applicant"), certification as a women-owned business enterprise ("WBE") be reversed 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 Creative Connections does not meet the eligibility criteria for certification as a WBE.

The Division denied the application filed by Creative Connections for WBE certification (exhibit A) by letter dated February 3, 2016 (exhibit B). The denial letter sets forth two grounds under 5 NYCRR 144.2 for the denial. Applicant filed a request for appeal, dated February 9, 2016 (exhibit 9). The Division advised applicant that the hearing on this matter would be held on September 27, 2016 (Notice of Appeal Hearing from the Division to Elizabeth Barrow, dated June 6, 2016).

I convened the hearing at approximately 12:00 p.m. on September 27, 2016, at the Division's offices, 633 Third Avenue, New York, New York. Kevin Cox, Esq., Camardo Law Firm, P.C., represented Creative Connections and called one witness, Elizabeth Barrow. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Cleneice Mincey, a senior certification analyst for the Division. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. The recording was provided to this office on October 5, 2016, whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied 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 or 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 WBE certification for Creative Connections 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

The Division argues that applicant failed to demonstrate that:

(1) "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;" and

(2) "the minority or woman owner(s) make decisions pertaining to the operations of the enterprise or devote time on an ongoing basis to the daily operation of the enterprise"

(exhibit B at 2 [citing 5 NYCRR 144.2]).

Position of Applicant

Applicant argues that Elizabeth Barrow, the woman owner, has "ongoing daily involvement with business operations, as Creative Connections' President" and that "[e]quity ownership was set up on the advice of our lawyer and accountant . . . and has never been an issue" (exhibit 9). Applicant also states that, with regard to equity, it would be "open to any changes necessary" to achieve WBE certification (id.).

FINDINGS OF FACT

1. Creative Connections was established on May 25, 2004, and is a provider of college and career services for low-income students in New York City public schools (exhibits A at 2 [item 1.R], 3 [items 3.B-D]; 13 [organizational documents]).

2. Elizabeth Barrow is the President of Creative Connections and has been the sole member and sole owner of Creative Connections since it was established in 2004 (exhibits A at 2 [item 1.P], 13 at 32-33, 17; compact disc ["CD"] #1¹ at 49:10, 50:20).

¹ The audio recording of the hearing is contained on two compact discs, identified as "CD #1" and "CD #2."

3. The initial capital contribution for Ms. Barrow 's ownership interest was in the amount of [REDACTED] (exhibits G, 13 at 33; CD #1 at 40:40, 50:20).

4. Ms. Barrow has been a faculty member at Eliot Feld's Ballet Tech ("Ballet Tech"), the New York City Public School for Dance, since 1989 and was the Director of Faculty at Ballet Tech from 1991 through 2004 (exhibits A at 6 [item 6.C], C at 1; CD #1 at 45:15).

5. In 2004, Ms. Barrow stepped down as Director of Ballet Tech to open and operate Creative Connections (exhibit C at 1; CD #1 at 45:55).

6. At the time of Creative Connection's application for WBE certification, Ms. Barrow worked a maximum of 15 hours per week at Ballet Tech (CD # 1 at 46:15).

7. Earl Hagan is Ms. Barrow's husband and is the CEO of Creative Connections (exhibits A at 2 [item 1.O], F at 1; CD #2 at 8:56).

8. Mr. Hagan is not, and has never been, a member or an owner of Creative Connections (exhibits A at 2 [item 1.P], 13 at 32-33, 17; CD #1 at 49:10).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Creative Connections as a women-owned business enterprise² pursuant to Executive Law Article 15-A. The Division cites two bases in support of upholding the denial, each of which is discussed below.

Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires 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]).

The Division argues that applicant failed to demonstrate that Ms. Barrow contributed money to Creative Connections in proportion to her ownership interest in the enterprise (exhibit B at 2; CD #1 at 2:45 [citing 5 NYCRR 144.2[a][1]). Specifically, the Division argues that, although the record contains some documentation indicating that Ms. Barrow paid [REDACTED] for her 100 percent ownership of Creative Connections, there is no evidence of the source of that money (CD #1 at 3:05, 15:25 – 16:30; CD #2 at 42:50). Therefore, the Division argues, the record does

² 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 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"]).

not demonstrate that Ms. Barrow contributed the funds that were used to purchase her interest in Creative Connections.

Applicant argues that the record before the Division demonstrates that Ms. Barrow is the lone capital contributor to the enterprise (CD #1 at 1:50, 50:20; CD #2 at 49:30). In support of its position, applicant cited to documentation from its application materials concerning the ownership of Creative Connections (CD # 1 at 49:10 – 50:20 [citing exhibit 13]; see also findings of fact ¶¶ 2-3]). The testimony at hearing and application materials demonstrate that Ms. Barrow owns a 100 percent interest in Creative Connections and that, in 2004 when creative Connections was established, she paid ██████ for that ownership interest (id.).

The Division did not contest applicant's representation regarding Ms. Barrow's ownership of Creative Connections. The Division argues, however, that it could not determine the source of the funds used to purchase Ms. Barrow's ownership interest (CD #1 at 3:05; CD #2 at 42:50). Without documentation of the source of a capital contribution, the Division argues it cannot determine whether a woman owner contributed capital in proportion to her ownership interest (id.).

Applicant challenged the Division's argument on the basis that the 2004 transaction that resulted in Ms. Barrow's ownership of the enterprise is too old to expect a business to have maintained records showing the source of funds (CD # 1 at 31:00; CD # 2 at 13:05, 49:45; exhibit G). Applicant also argued that the documents submitted with the application should be deemed sufficient proof of Ms. Barrow's capital contribution (CD #1 at 31:00, 50:20; CD #2 at 49:30, 49:45).

Applicant's position as it relates to documentation of the capital contribution is persuasive. The Division offered no business rationale as to why an enterprise would maintain documents demonstrating proof of the source of funds for a transaction that occurred over a decade ago. Indeed, the Division's witness testified that banks only maintain transaction records for "approximately seven years" (CD #1 at 31:20). Despite this, the absence of documentation of the source of funds for a transaction in 2004 is cited by the Division as a basis for denying the application for certification. I conclude that the Division's position on this point is untenable in relation to the 2004 capital contribution.

On this record, the Division's determination with regard 5 NYCRR 144.2(a)(1) is not supported by substantial evidence.

Operation: Decision Making/Devote Time

The applicable regulatory criteria state that:

"[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:

"(i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.

"(ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

"(iii) Minority group members or women must show that they devote time on an ongoing basis to the daily operation of the business enterprise" (5 NYCRR 144.2[b][1]).

In its denial letter to the applicant, the Division did not identify Ms. Barrow's managerial experience, technical competence, working knowledge or ability to operate Creative Connections as bases for denying the application. Indeed, the record reflects that Ms. Barrow has an extensive background in education and oversight of faculty (see e.g. exhibit C at 1-2 [noting that Ms. Barrow has over 25 years of teaching experience, was the Director of Faculty at Ballet Tech for nearly 15 years, and holds both undergraduate and graduate degrees in education]). Accordingly, 5 NYCRR 144.2(b)(1)(i) and (ii) are not at issue.

The Division argues, however, that Ms. Barrow's outside employment prevents her from devoting sufficient time to the daily operation of the business (CD #1 at 3:45). The Division analyst testified that Ms. Barrow's employment as a ballet instructor at Ballet Tech affects her ability to work with Creative Connections' clients (id. at 14:25). The Division analyst stated that Ms. Barrow teaches 30 hours per week at Ballet Tech and that this reduced the time that Ms. Barrow could devote to Creative Connections (id. at 37:30, 37:40). The analyst also testified that the Division might approve Creative Connections' WBE application if Ms. Barrow were to significantly reduce the number of hours she teaches ballet (id. at 37:55).

Ms. Barrow testified that she never taught 30 hours per week at Ballet Tech and that the most she ever taught was 15 hours per week (CD #1 at 46:10). She also testified that she recently reduced her work schedule at Ballet Tech and is now teaching ballet only eight hours per week (id. at 46:20). Ms. Barrow testified that she stepped down from her position as Director of Faculty at Ballet Tech when she opened Creative Connections in 2004 (id. at 45:55; see also exhibit C at 1 [resume showing Ms. Barrow held the position of Director of Faculty from 1991 to 2004]). She further testified that she feels strongly about continuing to teach at Ballet Tech because it helps her keep her "finger on the pulse" of what is happening in New York City public schools and gives her more credibility with the coaches at Creative Connections (CD #2 at 20:40).

With regard to the time devoted to Creative Connections, the regulations state only that the "[m]inority group members or women must show that they devote time on an ongoing basis to the daily operation of the business enterprise" (5 NYCRR 144.2[b][1][iii]). Notably, the regulation does not require that a specific number of hours be devoted to the enterprise. Here, the documentation that was before the Division indicates that Ms. Barrow devoted between 30 and 50 hours per week to the enterprise (see exhibit D [interview CD] at 14:20 [Ms. Barrow's statement that she devotes 30 hours per week to Creative Connections]; exhibit E at 6 [stating that Ms. Barrow devotes 35 hours per week to Creative Connections]; exhibit 19 [narrative of Ms. Barrow's duties stating that she devotes between 35 and 50 hours per week to Creative Connections]).

Although the number of hours that Ms. Barrow devotes to Creative Connections is not established with precision, the record that was before the Division indicates that Ms. Barrow devotes at least 30 hours per week to the enterprise. Moreover, Ms. Barrow stated in her application interview that she devotes time to Creative Connections "almost every day" and clarified that meant working "seven days a week" (exhibit D at 14:20, 14:40). Other documents that were before the Division also indicate that Ms. Barrow devotes time to the enterprise on an ongoing basis (see exhibit 18 at 1 [stating that the enterprise has five "core/full-time staff members"], exhibit 6 [listing Ms. Barrow as one of five "full-time" staff members]; exhibit 19 [noting Ms. Barrow's day-to-day activities at Creative Connections]).

Division counsel argued in his closing argument that because Ms. Barrow teaches 15 hours per week at Ballet Tech, it was reasonable for the Division to conclude that she could not devote sufficient time to Creative Connections during normal business hours (CD #2 at 44:30). During the hearing, however, the Division did not identify any documentation that was before the Division at the time of the denial that indicated the number of hours Ms. Barrow was teaching at Ballet Tech.

As noted previously, the Division analyst testified that Ms. Barrow worked 30 hours per week at Ballet Tech, but the analyst did not cite any documentation to support that assertion, and I could find none. I have reviewed each of the documents proffered by the Division at the hearing (exhibits A, B, C, E, F, G) and the application interview (exhibit D), and could find no statement regarding the number of hours that Ms. Barrow was teaching at Ballet Tech. Accordingly, these application materials do not contain substantial evidence to support the analyst's assertion that Ms. Barrow works at Ballet Tech 30 hours per week. Indeed, I could find no documentation in the application materials that would support a holding that Ms. Barrow was working any specific number of hours at Ballet Tech.

Division counsel's statement that Ms. Barrow worked 15 hours per week at Ballet Tech at the time of the application refers only to Ms. Barrow's testimony at the hearing (see CD #2 at 44:30). That testimony was not before the Division at the time it made the denial determination and, therefore, may not be relied upon as substantial evidence in support of the denial.

The Division also argues that Ms. Barrow delegated significant managerial functions of the business to her husband, Earl Hagan (CD #1 at 3:55). The Division analyst testified that Ms. Barrow handles the financial aspects of the enterprise and makes some employment decisions, but Mr. Hagan "performs the day-to-day duties and functions for the business" (id. at 10:30, 13:05). The Division analyst further testified that Mr. Hagan manages the core functions of the enterprise (id. at 14:30), such as supervising staff (id. at 14:40), marketing (id. at 14:45), and handling education and teaching services (id. at 14:55).

Ms. Barrow testified that when she first established Creative Connections she did everything, including personally going to the schools, meeting with the principals and meeting with grant managers (CD #2 at 10:05). As the business grew, however, that was no longer practical (id.). Among other things, she noted that travel time to some of the schools served by Creative Connections "can easily be an hour and a half subway ride" (id. at 10:40). She further testified that to handle the growth of the business she hired employees, delegated work and "surround[ed] [her]self with quality people" (id. at 10:50). With regard to Mr. Hagan's role, Ms.

Barrow testified that he was an important part of the company, but that he reports to her and has no authority to make final decisions for the enterprise (id. at 11:05, 11:15). Ms. Barrow also has the authority to fire Mr. Hagan (see exhibit A at 4 [item 7]; exhibit D at 22:30 [application interview wherein Ms. Barrow notes Mr. Hagan's value to the enterprise, but states that there are circumstances under which she would replace him]; exhibit 13 at 17-18 [Limited Liability Company Agreement of Creative Connections LLC, May 25, 2004, at 8-9]).

The documentation before the Division at the time of its determination to deny the WBE application supports applicant's position with regard her authority over the operations of Creative Connections. Ms. Barrow's resume states that she has grown the company from a "small consulting firm" to a "full-fledged development organization" with "a core staff of six people [and] over 30 coaches" (exhibit C at 1). As noted earlier, her resume also reflects an extensive background in education and oversight of faculty (id. at 1-2 [noting that Ms. Barrow has over 25 years of teaching experience, was the Director of Faculty at Ballet Tech for nearly 15 years, and holds both undergraduate and graduate degrees in education]).

Applicant also supplied a document containing job descriptions for key personnel at Creative Connections (exhibit E). The document is largely hierarchical, with the president, Ms. Barrow, listed first, and a programing assistant listed last (id. at 1, 6). The document is signed by Creative Connections' employees and, in addition to the job descriptions, states the purpose of each position within the company and states who each employee reports to (id.). Although Ms. Barrow conceded at hearing that many of the employee job descriptions state that the employee reports to Mr. Hagan (CD #2 at 32:55, 33:50, 39:05), she also testified that Mr. Hagan reports to her (id. at 40:00) and noted that his job description states that he reports to her (id. at 41:25). Ms. Barrow's job description expressly states that she is "the primary decision maker for all operations and programs of Creative Connections" (Exhibit E at 1). In contrast, Mr. Hagan's job description states that he oversees day-to-day operations and is "the primary implementer under the leadership and decision making of the President" (id.).

Additionally, the limited liability company agreement under which Creative Connections was formed expressly provides that "[t]he business and affairs of the Company shall be managed by the Members, who shall be responsible for policy-setting, approving the overall direction of the Company and making all decisions affecting the business and affairs of the Company" (exhibit 13 at 17-18 [Limited Liability Company Agreement of Creative Connections LLC, May 25, 2004, at 8-9]). Ms. Barrow was named as the sole member of Creative Connections at the time it was formed in 2004 and remains the sole member today (see findings of fact ¶ 2).

On this record, the Division's determination with regard 5 NYCRR 144.2(b)(1) is not supported by substantial evidence.

CONCLUSION

As discussed above, applicant has met its burden to demonstrate that the Division's determination to deny the application of Creative Connections for certification was not based on substantial evidence.

RECOMMENDATION

For the reasons stated herein, the Division's determination to deny the application of Creative Connections for certification as a women-owned business enterprise should be reversed.

**Matter of Creative Connections LLC
DED File ID No. 60169**

Exhibit List

| Exh. # | Description |
|---------------|---|
| A | Creative Connections WBE Application, Submitted July 17, 2015 |
| B | Department denial letter to Creative Connections, Dated February 3, 2016 |
| C | Resume of Elizabeth Barrow |
| D | Compact Disc: Application interview between the Division and Ms. Barrow |
| E | Creative Connections Job Descriptions |
| F | Resume of Earl Hagan |
| G | Creative Connections Letter, dated 12/22/15, Re: Initial Capital Contribution |
| 1 | Bank of America Account Agreement |
| 2 | WBE Application Affidavit |
| 3 | WBE Application, Attachment A |
| 4 | WBE Application, Attachment B |
| 5 | MWBE Goal Calculation Sheet |
| 6 | MWBE Notice of Intent to Participate |
| 7 | Department of State Entity Information, Creative Connections LLC |
| 8 | Department of State Entity Information, Creative Connections Foundation, Inc. |
| 9 | Notice of Appeal |
| 10 | Division Request for Additional Supporting Documents |
| 11 | Certificates of Publication (response to exhibit 10) |
| 12 | Certificate of Authority (response to exhibit 10) |
| 13 | Organizational Documents of Creative Connections (response to exhibit 10) |
| 14 | Initial Capital Commitment (response to exhibit 10) |
| 15 | Profit and Loss Standard (response to exhibit 10) |
| 16 | Hagan and Barrow Personal Tax Returns (response to exhibit 10) |
| 17 | Letter Re: Changes of Ownership (response to exhibit 10) |
| 18 | Employee Job Descriptions (response to exhibit 10) |
| 19 | Narrative of Day-to-day Duties of Elizabeth Barrow (response to exhibit 10) |
| 20 | Lease Agreement and Payment Documents (response to exhibit 10) |
| 21 | Apple Computer Receipts (response to exhibit 10) |