SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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In the Matter of the Application of
SUNRISE CREDIT SERVICES, INC.,

Petitioner,

Index No. 158924/2016

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

Decision, Order and Judgment

LOURDES ZAPATA, as Executive Director of the NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT, and NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT,

Respondents,

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St. George, J.S.C.:

Currently before the Court is an Article 78 petition challenging the June 22, 2016 determination of respondents which denied petitioner's application for certification as a woman-owned business. Respondents answer and oppose the petition. For the reasons below, the Court grants the petition and dismisses the proceeding.

Background

Sunrise Credit Services, Inc. (Sunrise) provides debt collection services. Diane Doan-Plowman (Diane), a nonparty, owns 51% of the stock of Sunrise Credit Services, Inc. (Sunrise) and serves as Sunrise's CEO. The petition states that since January 2013 Diane has had complete control over Sunrise's operations. Petitioner explains that Diane's brother Richard Doane (Richard) and Diane previously owned 50% of petitioner's stock each and operated as co-owners,

but that after Richard became president of the Association of Credit and Collection Professionals (ACA) in 2012, he was unable to continue full time at the company. Accordingly, Diane took over as majority owner and became CEO of petitioner. Richard continued as president and retained 45.2% of the stock.[1]

In August 2014 petitioner applied for certification as a women-owned business enterprise (WBE). Respondents denied the application in an order dated November 18, 2015. The decision, issued by Bette Yee, the Director of Certification Operations at respondent New York State Department of Economic Development (DED), Division of Minority and Women's Business Development (the Division) petitioner did not qualify as a woman-owned business in two respects. First, petitioner did not show that Diane shared in the risks and profits proportionate to her ownership and in other ways enjoyed the benefits and powers of ownership. Second, petitioner did not show that Diane had unrestricted power to make business decisions (*See* 5 NYCRR 144.2). The denial letter indicated that petitioner could reapply for certification in two years, showing that the circumstances have changed.

Petitioner appealed the determination. On June 22, 2016, Administrative Law Judge (ALJ) P. Nicholas Garlick issued a recommended order based on the March 18, 2016 and May 26, 2016 submissions of petitioner and the Division, respectively. Initially, ALJ Garlick noted that the Division reviews the applicant business as it existed on the application submission date, and that petitioner bore the burden of showing that the determination was a reasonable and plausible one, not that it was the most reasonable and plausible decision (citing *Matter of Ridge Rd. Fire Dist. V Schiano*, 16 NY3d 494, 499 [2011]). The ALJ noted that Diane's brother, Richard Doane (Richard), owned 45.2% of the stock. He stated that Diane's 2014 salary was $128,250, slightly

[1] Two other company officers, both longtime employees, own the remaining shares.

over half of her brother's $233,750 salary.[2] In addition to his ownership interest, Richard served as president of petitioner. The corporate bylaws stated that the president was the CEO, had general control of the business, affairs, and property of the corporation, and had general supervisory powers over the business' officers and agents. The ALJ did acknowledge Diane's salary and title, however, and noted that petitioner was certified as a WBE by the State of New Jersey, the Women's Business Enterprise National Council, and the California Public Utilities Commission. He found that petitioner's other certifications were not relevant because petitioner had not shown that the criteria was the same as or similar to those used in New York.

The ALJ first considered the issue of ownership, particularly the Division's finding that Diane did not enjoy the normal incidents of ownership or have a share in the risks and profits of the company proportionate to her share in the business. Diane contended that he took over the company due to business and philosophical reasons, and argued that her salary was lower than those of Richard and her other partners because, as CEO during a lean period, she could not justify giving herself a raise. She stated that her total compensation package is the highest in the company. The ALJ rejected her arguments, however, because she did not identify what evidence in her application documents supported her claims or explain what elements comprised her compensation package. The ALJ further noted that the affidavits petitioner submitted did not address the issue of compensation.

Next, the ALJ considered whether to uphold the Division's finding that Diane did not have the unrestricted power to make decisions concerning the company. Diane stated that although old minutes of board meetings referred to a limitation on the president's spending authority, the

[2] The ALJ also noted that two other officers of petitioner owned 1.9% of the stock apiece, and received a salary of $226,780 each.

company never enforced this provision. She provided several affidavits stating that Diane regularly made business decisions on behalf of petitioner. The ALJ agreed with the Division that because the bylaws provide that the president is the CEO and has decision-making power for the company, and because petitioner did not show any evidence that Diane had the final say in all corporate decisions, petitioner had not established that Diane controlled the company. Instead, even if, as petitioner contended, she made the day-to-day decisions, the president, Richard, retained the power to overrule her. Thus, her control was not unrestricted. Based on these two findings, the ALJ recommended that the Division's determination be affirmed. Respondent Lourdes Zapata, Executive Director of the Division, accepted the ALJ's recommendations and denied petitioner's appeal.

Current Proceeding

After the final determination, petitioner commenced this Article 78 proceeding, naming Zapata and the Division as respondents. Petitioner contends that the determination is without basis and contrary to the evidence. Petitioner stated that the Executive Director wrongly relied solely on Diane's W-2 wages. They state that she should have considered Sunrise's 2014 tax returns, which showed that, when considering Diane's salary along with her 51% profits from petitioner's business income, her compensation is the highest. Petitioner states that Diane's explanation for her lower salary was reasonable and respondents should have accepted it as such.

Furthermore, petitioner suggests that respondents did not consider the bylaws as a whole. It explains that the bylaws did not account for the existence of a CEO as separate from the president, and therefore the full authority of both were vested in the president. It argues that respondents irrationally ignored the fact that the bylaws gave the board of directors the power to create additional officers and to delegate any of the president's powers to the new and previously

existing officers. It contends that respondents' decision not to consider the affidavits was not rational. It quotes several of these affidavits, from officers of the company, who indicate that she had full control of the company and even authorized changes to the telephone system despite the objections of some of the officers.

Petitioner also states that respondents violated the Division's procedures, which required them to visit the office of an applicant and interview some of its officers prior to issuing a ruling. Petitioner argues that the ALJ violated mandatory procedures by foregoing a hearing and by considering only the documents the parties submitted on appeal and ignoring the materials that petitioner submitted along with its WBE application. These procedural errors, petitioner contends, mandate reversal (*See Frick v Bahou*, 56 NY2d 777 [1982]). Petitioner also states there was no contrary evidence showing that it was not a WBE. Because respondents ignored critical evidence, ignored portions of the bylaws, and committed procedural violations, petitioner contends, the Court remand the matter back to respondents, and direct them to reverse their earlier determination. Petitioner also seeks attorney's fees in addition to the normally awarded costs and disbursements.

Respondents' answer challenges petitioner's contentions. Respondents rely on the controlling regulation, 5 NYCRR § 144.2 (b) (2), which requires proof that the woman who claims ownership of the company has authority "without restriction." They state that the final determination is rational because petitioner's bylaws vest ultimate control in Richard. They further state that petitioner failed to show fulfillment of the second requirement, that the woman claiming ownership "enjoy[s] the customary incidents of ownership and . . . share[s] in the risks and profits, in proportion with their ownership interest in the business enterprise" (5 NYCRR § 144.2 [c] [2]). They note that the 2014 tax return upon which petitioner relies was not part of petitioner's original application package, but was provided as a supplement. They point out that although that tax return

shows that Diane's salary and profits gave her the highest overall compensation package, in other, less profitable years, her total compensation package was lower. The profits can vary from year to year. Respondents suggest that it therefore was rational for the ALJ to rely on Diane's salary alone in determining that she did not enjoy the incidents of ownership or have a proportionate share of petitioner's risks and profits. They cite 5 NYCRR Part 144.2, and states that based on their analysis petitioner did not satisfy all the requirements therein. They point out that although Diane states that she makes all decisions affecting the company and has final say, there has been no amendment to the provision in the bylaws that grants the ultimate power to the president. They note that the ALJ referenced petitioner's 2014 federal tax return in his analysis.

Respondents argue that dismissal is proper in light of the standard of review applicable in Article 78 proceedings. They stress that the Court's only role is to determine whether the challenged determination was rational (citing, *inter alia*, *Matter of Peckam v Calogero*, 12 NY3d 424, 431 [2009]). Furthermore, the court must sustain the ruling even if it would have reached a different result (*Id.*). They additionally note that the court's review is limited to the evidence that was before the agency (*Rizzo v New York State Division of Hous. & Comm. Renewal*, 16 AD3d 72, 75 [1st Dept], *aff'd*, 6 NY3d 104 [2005]). They allege that petitioner chose to forego an evidentiary hearing, instead opting for a written appeal. Citing *Matter of C.W. Brown, Inc. v Canton* (216 A.D.2d 841, 843 [3rd Dept 1995]), they state that unless full control is vested in the woman who allegedly runs a business, the application must be denied. They contrast it with the facts in *Ignelzi Interiors v New York Dep't of Small Bus. Serv.* (31 Misc. 3d 642, 651 [Sup. Ct. N.Y. County 2011), which reached a different outcome based on the bylaws of the business in question.

In addition, they claim that they did not violate their own regulations. The provisions of the New York Codes Rules and Regulations on which petitioner relies (5 NYCRR 144.3 [h], [i]) refer to site visits but do not mandate them. Although in many instances the Division does conduct a site visit and interview staff, respondents state, where, as here, there is "clear documentary evidence," these additional lines of review are unnecessary (Respondents' Mem. of Law, p. 13). As for the lack of a hearing, respondents note that petitioner was permitted to appeal by way of a hearing or by written submissions. When petitioner submitted a written appeal, respondents state, she thus opted for the latter. In such a case, respondents had the discretion to hold or waive a hearing based on the written submissions. Furthermore, they point out, petitioner did not insist on a hearing at any point during the appeals process and that its December 15 letter requesting review requested a written appeal "as well as a hearing with the examiner if necessary" acknowledged that respondents had the discretion to proceed without a hearing if unnecessary. As for the ALJ's failure to consider the original application materials, respondents cite to 5 NYCRR 144.5 (a), which limits the ALJ's review to "the information set forth in the request for a hearing relating to the information provided with the certification application," and thus requires the applicant to sift through the voluminous application materials and submit only the relevant information from the application to the ALJ. They note that the ALJ stated as much in his recommended order.

In reply, petitioner reiterates its earlier arguments. In addition, it challenges respondents' argument that retained stock should not be considered in calculating compensation. It argues that the ALJ ignored the minutes of its January 2, 2013 Board of Directors and Shareholders meeting (R 000804-000812), which states, in pertinent part, that Diane "has controlling interest and operational authority above all others" (R 000804). It states that, contrary to respondents' contention, 5 NYCRR 144.5 (a) explicitly requires the ALJ to "conduct a hearing" when a hearing

is requested. It acknowledges that its December 17, 2015 requested a written appeal with a hearing if necessary, but states that it was pro se and did not realize that a hearing would not take place. A hearing, it argues, would have given petitioner the opportunity to focus on the parts of its initial application that supported its appeal. It contends that because it referred to the application materials in its appeal and the Division attached the application materials to its opposition, the ALJ was required to consider the Board minutes, and all the additional materials in the application. Petitioner argues that if the ALJ could not find supporting documentation, he should have asked petitioner for further information rather than deny the appeal. Petitioner rejects respondents' argument that the ALJ's refusal to consider the 2013 tax returns did not prejudice petitioner, arguing that because Diane's compensation package exceeded Richard's that year, and because the minutes of January 2, 2013 showed that Diane had ultimate control of the company, the ALJ may well have reached a different conclusion.

Discussion

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. (*Pell v Bd. of Educ.*, 34 N.Y.2d 222, 231 [1974]; Roberts v. Gavin, 96 A.D.3d 669, 671 [1st Dep't 2012]). An action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Pell*, 34 N.Y.2d at 231; *see Roberts*, 96 A.D.3d at 671). A court may not substitute its judgment for that of the agency if a rational basis exists for an agency's action or determination. (*Roberts*, 96 A.D.3d at 671). This standard applies to challenges to denials of certification as a woman-owned business (*See Elite Contractors, Inc. v Office of Regional & Economic Development of the Port Authority of New York and New Jersey*, 50 AD3d 507, 508 [1st Dept 2008]). "Agencies are required to abide by their own regulations," however (*Gilman v New*

York State Div. of Housing & Commun. Renewal, 99 NY 2d 144, 151 [2002]). The failure to do so is deemed arbitrary and capricious where it substantively impacts the determination (*See Era Steel Const. Corp. v Egan*, 145 AD2d 795, 799 [3rd Dept 1988]).

After a thorough consideration of the parties' arguments and papers, the Court denies the petition. First, it was rational of the ALJ to rely on Diane's wage statements in denying petitioner's claim. As petitioner notes, the profit distribution varied from year to year. Although the ALJ could have considered the profit distribution system in determining Diane's compensation package, petitioner did not explain what the package included or point to where the ALJ could find the pertinent materials. In her letter in support of petitioner's appeal, Diane simply states, without further explanation, "I am very happy with my compensation package" (Appeal Letter of Diane Doane, March 17, 2016 [Appeal Letter], at p 5). In her affidavit in support, she simply states, without explanation, "as you can see from the documents we provided, my *total* compensation is by far the highest in the company" (Diane Doane Aff. in Support of Appeal [D. Doane Aff., at ¶ 4). This does not explain what other elements comprised her package or mention that she received income from her shares of stock. The certified transcript of the record of administrative proceedings (Transcript) is 1350 pages long. Given the vagueness of the above comments, the ALJ was not required to search the extensive documents before him, and to search the documents petitioner filed with its WBE application to find whatever documents may relate to Diane's conclusory statement that she received the most compensation. Instead, it was petitioner's job to explain its position and point the ALJ to the pertinent documents.[3] Moreover, nowhere in its

[3] The Court does not consider the issue of whether the ALJ should have considered the retained profits when he evaluated Diane's compensation package. At no point did any of respondents consider Diane's share of the profits in considering her compensation. Therefore, the arguments are not pertinent.

application to respondents or in its papers here does petitioner explain why Richard, who by petitioner and Diane's accounts was barely involved in the operation of the company, continued to receive a salary of $233,750. It was rational for the ALJ to consider Richard's salary in reaching his conclusion.

It was also rational for the ALJ to consider the provision in the bylaws which vested ultimate control to the president via his veto power even though Diane has day-to-day control and in fact makes all decisions. In support of its application, petitioner states that Diane "run[s] the entire operation without any restrictions to [her] authority" (Appeal letter at p.5). In her affidavit, Diane simply argues that she is "the majority owner and operator of Sunrise and need no additional authority to make any decision impacting the company" (D. Doane Aff., at ¶ 3). In support, she refers the ALJ to "the attached documents offered for your review, as well as the underlying record and countless documents provided to [DED]" (*Id.*, at ¶ 2).

Petitioner's argument that a hearing is mandated is incorrect. The notification letter petitioner received gave it the option of appealing by submitting documents or by seeking a hearing. In the former situation, it was the ALJ, not the appellant, who had the discretion to determine whether a hearing was required. It is irrelevant that petitioner proceeded without counsel at the time. This is not a situation in which petitioner is an unsophisticated party. Instead, as petitioner has shown – and as Diane forcefully argued in her appeal to the ALJ – petitioner is a business which earns millions of dollars in profits every year, and Diane is an adept businesswoman capable of handling complex decisions. It is petitioner's responsibility to read the materials provided and follow the applicable directions. The Court also notes that there is precedent for a written appeal without a hearing (*See, e.g., Ignelzi Interiors, Inc.*, 31 Misc. 3d 642,

644 [Sup. Ct. NY County 2011] [involving "a written appeal of a denial of the [minority-owned business] status."

As petitioner contends, the regulations on which it relies show that a site visit is contemplated as part of the evaluation process.[4] The Court denies the petition notwithstanding this error, however, because petitioner not shown that the failure to visit the business impacted respondent's decision. Its argument that, had respondents visited the site they could have interviewed the employees and reached a different conclusion is speculative and contrary to the evidence before this Court. The affidavits by other officers and employees of the firm – the individuals whom respondents seemingly would have interviewed during an onsite visit – were considered by the ALJ and it did not alter its decision. The Court has considered petitioner's additional arguments and finds them unpersuasive. Therefore it is

ORDERED that this petition is denied, and this proceeding is dismissed. The Clerk is directed to enter judgment accordingly.

Dated: 12/7, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE

[4] Respondents' argument to the contrary is not persuasive, though petitioner has not shown the visit is mandatory in all circumstances.