STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 9, 2015)

ACE CONCRETE CUTTING, LLC	:	
	:	
v.	:	**C.A. No. PC 2014-3460**
	:	
RHODE ISLAND DEPARTMENT OF ADMINISTRATION; RICHARD LICHT, in his capacity as the Director of RHODE ISLAND DEPARTMENT OF ADMINISTRATION; and, MINORITY BUSINESS ENTERPRISE COMPLIANCE OFFICE	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is Appellant Ace Concrete Cutting, LLC's (Ace) appeal of the Rhode Island Department of Administration's (DOA)[1] denial of its application for certification as a Minority Business Enterprise/Woman Business Enterprise (MBE/WBE). Jurisdiction is pursuant to the Rhode Island Administrative Procedures Act (APA), G.L. 1956 §§ 42-35-1 through 42-35-18. For the reasons set forth below, this Court affirms the DOA's decision to deny Ace's application.

I

Facts and Travel

A

MBE/WBE Certification

The Rhode Island General Assembly started the state's MBE/WBE certification program in 1986. Pub. L. 1986, ch. 493, § 1. The purpose of the program "is to carry out the state's

[1] Although Ace listed Richard Licht, in his capacity as the DOA Director, as a Defendant in this matter, pursuant to Super. R. Civ. P. 25, Michael DiBiase, the current Director of DOA, has been substituted for former-Director Richard Licht.

policy of supporting the fullest possible participation of firms owned and controlled by minorities and women [] in state funded and state directed public construction programs and projects and in state purchases of goods and services." G.L. 1956 § 37-14.1-1. The MBE program allows for certification of a business if it is "a small business concern, as defined pursuant to § 3 of the federal Small Business Act, 15 U.S.C. § 632, and implementing regulations, which is owned and controlled by one or more minorities or women." Sec. 37-14.1-3(f). Certification provides the business with greater access to state construction projects because a minimum of ten percent of the dollar value of each state funded or directed project must be awarded to certified MBE/WBE companies. Sec. 37-14.1-6. The certification process is orchestrated by the DOA, which is authorized to promulgate regulations adopting standards for certification. See § 37-14.1-7.

B

History of Ace Concrete Cutting, LLC

Ace is an asphalt and concrete cutting company owned by Debra Stowik. (Admin. R. 1, at 5.) Prior to the creation of Ace, Stanley Stowik (Stanley),[2] Ms. Stowik's husband, owned and operated Advanced Concrete Cutting, LLC (Advanced), a one-man, non-union concrete cutting operation started in 1987. (Tr. at 7.) Ms. Stowik began working for Advanced in 1991 as an office manager. Id. In addition to her duties as office manager, Ms. Stowik travelled to job sites. Id. In order to assess the needs of clients, she learned the trade. Id. In 2001, Advanced hired

[2] For purposes of clarity, Stanley Stowik will be referred to as Stanley rather than Mr. Stowik to distinguish references to Mr. Stowik from Ms. Stowik. No disrespect is intended to Stanley Stowik by this reference.

two additional employees: Richard Dubois[3] and Brian Pena, and later the company expanded to hire more workers. Id. at 8.

In 2006, Ms. Stowik formed Ace. (Admin. R. 40, at 1-2; Tr. at 11.) While Advanced is a non-union company, Ms. Stowik started Ace as a union company because certain jobs require that workers be part of a union.[4] (Tr. at 11, 26.) To acquire the capital to open the business, Ms. Stowik requested a loan from Stanley, who provided the loan from Advanced's accounts. Id. at 11, 14. Ms. Stowik initially hired one employee, Mr. Dubois. Id. at 12. He had been employed by Advanced. Id. One year later, she hired Mr. Pena, also from Advanced, to work for Ace. Id. Over the first three years of operation, Ms. Stowik paid back the start-up loan using Ace's income.[5] (Admin. R. 33, at 1; Tr. at 14-15.)

According to Ms. Stowik, in 2008, Stanley "was starting to get tired and frustrated of taking care of everything," so he gifted half ownership of Advanced to Ms. Stowik. (Tr. at 8.) Then, in 2009, Stanley gifted Ms. Stowik the remaining half ownership of Advanced because he did not want to be involved in the "cutthroat" conditions of the concrete cutting business anymore. Id. Stanley remains on the payroll for Advanced, but rather than running the business or going out on jobs, he "[h]angs around his buildings" and maintains the equipment for both Advanced and Ace. Id. at 10.

[3] Richard Dubois is Ms. Stowik's son. (Admin. R. 12, at 5.)

[4] Ms. Stowik also testified that union regulations will not permit a single company to have both union and non-union members. (Tr. at 27.) However, she did not want to simply convert Advanced to a union company because some jobs would not be economically feasible if she were paying the employees a union wage. (Tr. at 27-28.)

[5] The money paid back to Advanced was taken from the couple's joint checking account. However, Ms. Stowik explained that her accountant had instructed her to take the money from Ace's account as an owner's draw, place it in her personal bank account, and then transfer it to Advanced. The entirety of the loan repayment originated from Ace's accounts. (Tr. at 14-16.)

At the time that Ms. Stowik submitted the MBE/WBE application for Ace, she was the full owner and manager of both companies. She manages the two companies from a central office in the Stowiks' home at 156 Colonial Avenue, Cumberland, Rhode Island.[6] (Admin. R. 40, at 1; Tr. at 23.) The equipment for the two companies is housed at two separate garages. Ace is located at 12 Ryan Avenue while Advanced is located at 5-7 Ryan Avenue. (Tr. at 22, 37, 39.) Both of these garages are owned by SDS Investments, LLC (SDS Investments). Id. at 35. SDS Investments is a company owned by Stanley. Id. Ms. Stowik testified that she goes to those garage sites at the end of each day to give the workers their assignments for the next day. Id. at 23. Otherwise, she works exclusively from the home office. Id. She testified that she divides her day between the two companies, but she effectively works on both all day rather than having designated times to work for each company. Id. at 29-30. Additionally, she testified that the two companies share an email address. Id. at 30. However, each has its own phone number. Id. Both lines ring to the same phone. Id. Ms. Stowik testified that she handles all of the responsibilities of running both companies, including taking calls and emails from prospective clients, evaluating potential jobs, making bids, determining assignments for the employees, and billing. Id. at 29-30.

C

Ace's Application for a Minority Business Enterprise Certification

On October 9, 2013, Ms. Stowik submitted an application to the DOA's Minority Business Enterprise Compliance Office (MBECO) for certification of her companies Ace and

[6] Ms. Stowik testified that Stanley owns the house, and her name is not on the deed. (Tr. at 35, 40.)

Advanced as MBE/WBE.[7] (Admin. R. 22, at 1; Tr. at 2.) On October 18, 2013, MBECO sent a letter to Ms. Stowik indicating that her application was incomplete. (Admin. R. 20, at 1.) MBECO provided a list of additional information required, including Ms. Stowik's contractor's license, a letter from Stanley renouncing his ownership interest in the company, and clarification or correction on the absence of the Ryan Avenue properties and ownership of Advanced on her personal financial statement. Id. On December 6, 2013, Ms. Stowik responded to this inquiry, indicating that the Ryan Avenue properties were solely owned by Stanley and were therefore excluded from her personal financial statement. (Admin. R. 17, at 1.) Additionally, the December 6 letter indicated that Stanley did not renounce his ownership because he never had any ownership interest in Ace. Rather, Ms. Stowik had borrowed $10,000 from Advanced to start Ace, and the loan had been repaid. Id.

On January 14, 2014, MBECO sent another letter to Ms. Stowik indicating that her application remained incomplete. (Admin. R. 16, at 1.) Among the requested information were three repeat requests from the October 18, 2013 letter: a copy of Ms. Stowik's contractor's license,[8] a letter from Stanley renouncing all ownership of Ace, and an explanation for the lack of a listing of ownership of Advanced on Ms. Stowik's personal financial statement. Id. The letter additionally sought clarification of the listing of two pieces of company equipment on Ms. Stowik's personal financial statement. Id. Ace responded on February 13, 2014, repeating its prior assertion that Stanley never owned any interest in Ace, correcting the omission of Advanced on Ms. Stowik's personal financial statement, and explaining that Ms. Stowik had

[7] Ms. Stowik had previously sought certification for Ace in 2009, but MBECO denied certification, finding that Ms. Stowik had failed to prove ownership, control, substantial investment, and continuing operation. (Admin. R. 12, at 1-3.)

[8] The January 14, 2014 letter indicated that the license provided had expired. (Admin. R. 16, at 1.) In Ace's response, it included a copy of Ms. Stowik's renewed contractor's license. (Admin. R. 15, at 1.)

listed the company vehicles on her personal financial statement because the vehicles were subject to loans that she had personally guaranteed. (Admin. R. 15, at 1-2.)

On April 15, 2014, MBECO employee Patsy Peterson conducted a site visit of Ms. Stowik's home office at 156 Colonial Avenue. (Admin. R. 14, at 1.) The report from the site inspection lists Ms. Stowik as the sole member of Ace as well as the person responsible for such responsibilities as disbursing funds, signing loan agreements, communicating with clients, making bids, purchasing equipment, hiring and firing employees, and signing contracts. Id. at 3, 5-6, 8-9, 11. Additionally, the report indicates that both Ace and Advanced are operated out of the 156 Colonial Avenue office. Id. at 7. The report also indicates that the two companies share garage space and Ace receives assistance from Advanced "personnel working on non-union job[s]." Id. at 10.

On April 21, 2014, Ms. Peterson recommended to MBECO's Certification Review Committee (CRC) that Ms. Stowik's application be set down for a hearing to discuss issues of ownership, control, and dependency on a non-minority individual. (Admin. R. 11, at 1.) Specifically, Ms. Peterson raised concerns that Ms. Stowik did not appear to have sufficient education and training to control Ace's operations and that she appeared to be unduly relying upon a non-minority individual. Id. The CRC agreed with Ms. Peterson's recommendation to hold a hearing on Ms. Stowik's applications for Ace and Advanced. (Admin. R. 9, at 2.) In its letter notifying Ms. Stowik of the hearing, MBECO included a breakdown of the MBE regulations and its analysis of Ace's application based on the record at the time, allowing Ms. Stowik to prepare for the hearing and supplement the record. (Admin. R. 8.) Among the issues raised were the listing of Stanley as the owner of Ace on the 2007 and 2009 tax returns,

repayment of the Ace start-up loan from the couple's joint checking account, sharing of space among Ace and Advanced, and Ace's dependency on Stanley. Id. at 6-7.

The CRC conducted the hearing on May 29, 2014, with Ms. Stowik, her attorney, and her daughter, Jacquelyn Dubois, present. (Tr. at 2.) At the start of the hearing, Ms. Stowik's attorney presented the CRC with a supplemental document responding to the concerns raised in the May 6, 2014 letter. Id. at 5. First, Ace stated that the listing of Stanley as the owner of Ace on the 2007 and 2009 tax returns was an accounting error that was rectified in subsequent filings. (Admin. R. 5, at 1.) The letter also included documentation demonstrating that Ms. Stowik used funds from Ace to repay the start-up loan from Advanced. Id. at 1-2, 9-13. In regard to shared space between Ace and Advanced, Ace acknowledged that office space was shared between Ace and Advanced, but each company has its own address, phone number, and garage space. Id. at 2. Ace additionally noted that each company has its own employees, and the companies have only worked together on a contractual basis "in two or three instances" over the last ten years. Id. Ace also asserted that Ms. Stowik is qualified to control the activities of Ace, having worked in a managerial capacity in the concrete cutting business for over twenty years. Id. In regard to rental payments for the garage property, Ace notes that these costs are not payments to Stanley, SDS Investments' owner, because the cost to maintain the property precludes Stanley from netting a profit from the rent. Id. at 3. Finally, Ace presents balance sheets indicating owner draws for 2009-2012, supporting that Ms. Stowik has been receiving funds from her ownership of Ace. Id.

After the CRC received the supplemental information, Ms. Stowik provided a general history of the two companies. The CRC asked Ms. Stowik questions in regard to Stanley's involvement with each company, the repayment of the start-up loan to Advanced, signature

authority on each company's bank account, who makes managerial decisions for each firm—such as hiring, firing, taking jobs, and purchasing new equipment,—the distinctions between Ace and Advanced in terms of physical presence and Ms. Stowik's management of the two, and the garage leases from Stanley's company.

At the conclusion of the CRC hearing, the CRC voted to deny both applications. (Tr. at 54-55.) In the discussion of Ace's application leading up to the denial, the CRC members discussed concerns that Stanley was still involved in the operation of Ace—performing maintenance, earning an admittedly inflated salary from Advanced for the work he does for Ace, managing the garage property that Ace leases, and owning the home that houses the office. Id. at 49, 51-52.[9] One CRC member also raised concerns with the shared home office, the employee transfers from Advanced to Ace, and with Advanced funding the start-up of Ace, noting that it blurs the lines between the two companies. Id. at 52-53. The same CRC member expressed concern for extensive blurring of the lines between Advanced, Ace, SDS Investments, the house, and the couple's joint bank account, given the extent of sharing and transfers that occur among those entities and assets. Id. at 53.

On June 13, 2014, MBECO sent a written denial of the application to Ms. Stowik. (Admin. R. 1, at 1.) The letter detailed the Rules, Regulations, Procedures, and Criteria Governing Certification and Decertification of MBE Enterprises by the State of Rhode Island that the CRC found Ace had not met, and it provided a narrative explaining the factual reasons why the CRC had voted to deny the application. The CRC based its determination on R.I. Code

[9] One of the CRC members raised concern about Mr. Dubois having signatory authority on the bank account, but another member acknowledged the valid ancillary purpose of placing a second signatory on an account for emergency situations. (Tr. at 50, 53-54.)

R. 2-5-2:3.00(D), (E)[10] (certification criteria), 2-5-2:3.02(D), (E), (F)[11] (ownership requirements), 2-5-2:3.03(A), (B), (C)[12] (control requirements), 2-5-2:3.04[13] (substantial

[10] Regulation 2-5-2:3.00 of the Rhode Island Code states, in pertinent part, that:

> "D.O.A. will certify or recertify only those firms which meet all of the requirements as outlined below: . . . (D) Minority, Disadvantaged or Women owners must possess control of the business and the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on management, policy and operations[;] (E) Minority, Disadvantaged, or Women owners must be substantial investors in the business."

[11] Regulation 2-5-2:3.02 of the Rhode Island Code states, in pertinent part, that:

> "An applicant must satisfy either of A, B or C, as well as D, E, and F below in order to be considered 51 percent owned by members of a definable minority group: . . . (D) The Minority, Disadvantaged or Women owners must demonstrate that they are entitled to receive profits from the business firm and that they are entitled to share in any other benefit which accrues to all owners of the business firm; and (E) The Minority, Disadvantaged or Women owners must substantially share in all the risks assumed by the business firm, and (F) The business firm cannot at any time enter into any agreement, option, scheme, or create any rights of conversion, which if exercised, would result in less than 51 percent minority, disadvantaged or women ownership of the business firm."

[12] Regulation 2-5-2:3.03 of the Rhode Island Code states, in pertinent part, that:

> "To prove that the minority, disadvantaged or women owners possess control over the business, an applicant must satisfy all the requirements of Sections A, B, and C below: (A) The Minority, Disadvantaged or Women owners must demonstrate that they have control over: (1) The day-to-day management of the business, and (2) The policy-making mechanism of the business. The ownership and control by the Minority, Disadvantaged or Women owners must be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership document. The Minority, Disadvantaged or Women owners must establish their control by providing substantial evidence that they possess the power to direct or cause the direction of the management of the firm and to make day-to-day as well as major decisions on matters of management, policy, and operations by establishing the following: (a) Have the power to direct or cause the directions of the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the

investment in business requirement), 2-5-2:3.05[14] (continuing operational requirement), and 2-5-2:15.00[15] (guidelines).

> business. (b) Have the authority to hire and fire employees, including those to whom management authority is delegated. (c) Have a thorough knowledge of the financial structure of the business and authority to determine all financial affairs. (d) Have the capability, knowledge and experience required to make decisions regarding the particular type of work engaged in by the MBE. (e) Have displayed independence and initiative in seeking and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business. (B) Any of the following conditions creates an irrefutable presumption that the owners do not have control of the business that is applying for certification. (1) If the applicant has an extremely dependent relationship on a non-minority firm or individual. (C) Any agreement, option, right of conversion, scheme or other restraint, which, if exercised, would result in less than dominant control by the minority owners is prohibited."

[13] Regulation 2-5-2:3.04 of the Rhode Island Code states, in pertinent part, that:

> "The Minority, Disadvantaged or Women owners must demonstrate that they have substantial personal investment in the Business. Proof of such substantial investment must be established by producing evidence of the following: (1) A substantial amount of money invested in the business, or (2) Investment in the form of capital, equipment, contribution of property, space, patents and copyrights. Contributions of personal or professional services alone will not be considered substantial investment for the purpose of this section. However, a contribution of such services will receive consideration when given in conjunction with other tangible forms of investment. There will be an irrefutable presumption that the Minority, Disadvantaged or Women owners have not made a substantial investment in the business if a significant portion of the applicant's equity is financed by a loan or gift from a non-minority corporation, partnership or individual right that has a significant interest in the applicant."

[14] Regulation 2-5-2:3.05 of the Rhode Island Code states, in pertinent part, that "[t]he applicant must be an ongoing business concern; it must demonstrate to the satisfaction of the [CRC] that it was not established solely for the purpose of competing for MBE programs."

[15] Regulation 2-5-2:15.00 of the Rhode Island Code states, in pertinent part, that:

> "[t]his certifying authority is not limited to basing certification or decertification solely on the criteria outlined in these rules and regulations but may consider regulations established by other awarding and/or certifying authorities, including, but not

In explaining the reasoning for the denial, the CRC found issues in establishing ownership because (1) the couple's federal tax returns for 2007 and 2009 listed Stanley as the owner of Ace; (2) the initial start-up loan was funded by Advanced when it was solely owned by Stanley; (3) the home office is located in the couple's house, which is solely owned by Stanley; (4) the garage spaces are owned by SDS Investments, Stanley's business; (5) Mr. Dubois, a non-minority male laborer, is a signatory on Ace's bank account; (6) Stanley receives a disproportionately high salary from Advanced to perform maintenance on both Advanced and Ace's equipment; and (7) Stanley received payments from Ace but there is no evidence that Ms. Stowik received compensation from Ace. (Admin. R. 1, at 5, 6.) Additionally, the CRC was concerned with the lack of demarcation between Ace and Advanced, such as the intercompany transactions and shared office space, employees, email address, and garage space on Ryan Avenue. Id. The CRC also expressed concern that Ms. Stowik did not possess sufficient construction-related experience to control a concrete cutting business independently. Id. at 5. The CRC's overall conclusion on Ace's application is that Ace is "at best, a family owned and operated business enterprise, rather than a WBE." Id. at 6. Ms. Stowik, on behalf of Ace, filed a timely appeal of the denial with this Court pursuant to the APA, § 42-35-15.

II

Standard of Review

This Court's review of a final agency action is guided by the APA, § 42-35-15(g), which provides, in full:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for

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> necessarily limited to, 49 CFR Part 23, 49 CFR Part 26, 13 CFR Part 121 and 13 CFR Part 124."

> further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing the agency decision, this Court sits as an appellate court with a limited scope of review, providing deference to the hearing officer's credibility determinations of the live witness testimony. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 206 (R.I. 1993). The agency members' "impressions as [they] observe[] a witness and listen[] to testimony 'are all important to the evidence sifting which precedes a determination of what to accept and what to disregard.'" Id. (quoting Laganiere v. Bonte Spinning Co., 103 R.I. 191, 196, 236 A.2d 256, 258 (1967)). The Court's review is limited because it observes a cold record and must rely on the agency's observations of live testimony. Id. (citing Laganiere, 103 R.I. at 196, 236 A.2d at 259).

In evaluating the CRC's decision, this Court must ensure that the decision is supported by legally competent evidence. Id. at 208 (citing Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). The Court must determine whether the agency's determination is supported by substantial evidence.[16] Ctr. for Behavioral Health, R.I., Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998). In evaluating the legal conclusions, the Court should defer to the agency's interpretation of its own regulations. Berkshire Cablevision of R.I., Inc. v. Burke, 488 A.2d 676, 679 (R.I. 1985). The agency's factual conclusions will be upheld if

[16] Our Supreme Court defined substantial evidence "as 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" Barros, 710 A.2d at 684 (quoting Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897 (R.I. 1984)).

they are supported by legally competent evidence in the record, and the final decision will be upheld unless one of the reversible errors from § 42-35-15(g) is met. Id.

III

Analysis

A

Sufficiency of Agency Decision

As a threshold matter, Ace asserts that the CRC erred by failing to make findings of fact and conclusions of law in its written decision denying Ace's application. It contends that proper judicial review is impossible because the CRC ignored relevant evidence and made vague findings of fact without applying those facts to the law.

The APA requires that "[a]ny final order adverse to a party in a contested case shall be in writing . . . " Sec. 42-35-12. Such a written decision must include both findings of fact and conclusions of law, separately stated. Id. The purpose of the requirement for agency decisions to contain both findings of fact and conclusions of law includes (1) to ensure that the regulated entity is aware of the reasons for the agency decision and (2) to aid judicial review. Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986) (citing Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968)).

Although the decision is written in a narrative format rather than specific enumerations of findings of fact and conclusions of law, both elements are present in it. The CRC's written decision provides the facts relied upon by the agency and the conclusions that the agency drew from those facts, sufficient to provide notice to Ace and to allow this Court to review the agency's findings. See Irish P'ship, 518 A.2d at 358. Additionally, in the MBE/WBE context, the CRC's discussion of the application was conducted on the record and open to the applicant.

See Tr. at 3. Therefore, the applicant had the benefit of additional factual findings and reasoning to understand the CRC's decision. See id. Accordingly, Ace's claim that the CRC's decision does not contain proper findings of fact and conclusions of law fails.

B

Ms. Stowik's Knowledge and Experience in Concrete Cutting

Ace here contends that the CRC's evaluation of Ms. Stowik's knowledge and experience as being insufficient to allow her to fully control a concrete cutting company is clearly erroneous. Ace asserts that Ms. Stowik has been working in the concrete cutting business for over twenty years, including office management and time in the field learning the physical operation of the industry. Ace also points to Ms. Stowik's control of all aspects of the company—ranging from deciding job specifics, to hiring and firing, to sales and marketing—as evidence that Ms. Stowik possesses the necessary skills to manage a concrete cutting company and, in fact, does fully manage the company.

The DOA counters that Ms. Stowik's treatment of Ace does not indicate that she has extensive knowledge of concrete cutting or management of the actual performance of jobs. It points to Ms. Stowik's comments that she only goes to the garage site once each day to hand out assignments because her employees know what they are doing and she does not need to oversee the actual work. The DOA additionally notes that Ms. Stowik's resume shows no concrete cutting experience outside her employment with Advanced.

The MBE/WBE regulations require that the applicant owner "[h]ave the capability, knowledge and experience required to make decisions regarding the particular type of work engaged in by the MBE." R.I. Code R. 2-5-2:3.03(A)(d). Courts have held that when the minority or female owner does not possess knowledge of or experience in the company's

industry, particularly if a spouse does possess such knowledge, the lack of knowledge supports a finding that the named owner is not actually the person in control of the business. See Car-Mar Constr. Corp. v. Skinner, 777 F. Supp. 50, 54 (D.D.C. 1991) (affirming an agency holding that a female owner lacked control of the company because she had no experience prior to starting the company, could not read structural drawings or perform estimates, and could not answer technical questions).

The record contains evidence that Ms. Stowik possesses sufficient knowledge and experience in concrete cutting to be able to manage and control a concrete cutting business. Ms. Stowik started working for Advanced in 1991. (Tr. at 7.) Although she worked as the office manager, she also would "go out on the field with [Stanley] to learn how to run the equipment and to assess jobsites" in order to understand the business so that she could evaluate and accept jobs from clients who contacted the office. Id.; contra Lane and Clark Mech. Contractors, Inc. v. Burnley, 1990 WL 50509, at *6 (E.D.Pa. 1990) (affirming an agency denial of certification of a disadvantaged business enterprise partially because the owner lacked experience in the business while her husband possessed expertise to control the business operation).

Additionally, Ms. Stowik's statements at the CRC hearing indicate a sufficient familiarity with the concrete cutting business to undercut the CRC's finding that she lacked sufficient knowledge and experience to run Ace. At the hearing, Ms. Stowik explained certain technical details of concrete cutting. She testified about frequent maintenance of the cutting equipment, explaining that

> "there's a cord on there that you have to put down and—it's called a pointer. You have to make sure that that pointer string is always intact because if it isn't, you know, the pointer goes offline. Then your cut is going to be—instead of like this, your cut is going to be like that." (Tr. at 19.)

Moreover, when discussing a problem with a recent client, she explained in detail where a job can go wrong, recalling her questioning the client, "what's going on out there? You know, every time we go out there you're not ready. You don't have details. You don't have flaggers. I'm sending a guy out there. He's supposed to cut three thousand feet. He cuts a thousand feet. No one has got stuff marked out." Id. at 9. Her use of the vernacular of the saw cutting business combined with over ten years of experience as an office manager for Advanced evidences that she possesses the capability, knowledge, and experience necessary to make management decisions in the concrete cutting industry as required by R.I. Code R. 2-5-2:3.03(A)(d). Contra Car-Mar Constr. Corp., 777 F. Supp. at 54 (affirming an agency holding that a female owner lacked control of the company because she had no experience prior to starting the company, could not read structural drawings or perform estimates, and could not answer technical questions).

There is no evidence in the record to support the CRC's finding that Ms. Stowik "does not appear to have any direct construction related and/or saw cutting experience." (Admin. R. 1, at 5.) That finding is not supported by legally competent evidence. Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138). However, that finding constituted only one of several findings that the CRC made in support of its decision to deny Ace's application. As explained below, the remaining findings were supported by legally competent evidence and were independently sufficient to support the denial of Ace's application. Therefore, this single error does not substantially prejudice Ace and is insufficient to require reversal or remand of the CRC's decision. See Pierce v. Providence Ret. Bd., 15 A.3d 957, 961 (R.I. 2011) (quoting Cullen v. Town Council of Lincoln, 850 A.2d 900, 903 (R.I. 2004)) (holding that an error "must 'so infect[ ] the validity of the proceedings as to warrant reversal'").

C

The Relationship Between Ace and Advanced

Ace additionally asserts that the CRC erred when it found that Ace and Advanced are interrelated, creating an irrefutable presumption that Ms. Stowik did not maintain control of Ace because of Ace's dependence on Advanced. Ace states that contrary to the findings of the CRC, Ace is not dependent upon Advanced, and therefore, no irrefutable presumption of lack of control should have been applied.[17] In support of its argument, Ace notes that Advanced, a non-union firm, handles the basic jobs while Ace, a union firm, handles jobs requiring greater skill. Ace also points to the unique address and phone number of each firm. It also asserts that Ace and Advanced maintain separate office, garage, and storage space, and the CRC erred in relying on the vague answer to a question regarding assistance from other firms of "Advanced- office space, [] garage space." (Admin. R. 14, at 10.) Ace states that the two companies maintain separate garage space, which they lease independently from SDS Investments. It explains that additionally each company maintains an office at each facility where Ms. Stowik conducts a portion of company business, performing another portion at the 156 Colonial Avenue home office. Ace also asserts that the two companies do not share employees. Finally, Ace maintains that the only intercompany financial dealing was for the initial start-up loan for Ace, which was paid in full as of 2009.

The DOA counters that there is substantial overlap and intermingling between Ace and Advanced. The DOA notes that Ms. Stowik manages both businesses from an office in her husband's house. Furthermore, the DOA explains that both businesses use a single email address, and Ms. Stowik stated at the site visit that the two companies shared office and garage

[17] Ace does not argue that Advanced should not be considered a non-minority firm.

space as well as employees.[18] Finally, the DOA added, the two companies also occupy garage space located across the street from each other, both rented from SDS Investments, Stanley's company.

Under the MBE regulations, an applicant is required to demonstrate that a minority, disadvantaged, or woman owner exercises control over the company. R.I. Code R. 2-5-2:3.03(A). However, "an irrefutable presumption that the owners do not have control of the business" is created "[i]f the applicant has an extremely dependent relationship on a non-minority firm or individual." Id. at 2-5-2:3.03(B).

Both at the hearing and in the written decision, the CRC expressed concern about the indistinct relationship of the two companies. The written decision finds that Ace was started by a capital investment in the form of a loan from Advanced. (Admin. R. 1, at 5.) Additionally, the decision notes extensive sharing between the two companies, including office space, garage space, employees, and an email address, as well as inter-company transactions. Id. As Ms. Stowik did not appeal the denial of Advanced's application for certification as an MBE/WBE, a finding that the two companies are intimately related would constitute competent evidence to support the CRC's denial of Ace's application. See R.I. Code R. 2-5-2:3.03(B).

Several of Ace's assertions of error on this point are not supported by the record. Ace's assertion that the two companies maintain separate office space at the garage locations where Ms. Stowik performs some of her managerial responsibilities is unsupported. Ms. Stowik testified that she predominantly runs the two companies from the shared office located in the Stowiks' house. (Tr. at 23.) Ace also asserts that the companies do not share employees.

[18] Although Ace disputes the context of the answers provided in the site visit report, the report is signed by Ms. Stowik, indicating that she reviewed the report and acknowledged its accuracy. (Admin. R. 14, at 13.)

However, in the CRC's context of examining the record for dependence of Ace on Advanced, this Court finds competent evidence does exist to support the CRC's finding of employee sharing. First, both of Ace's employees were originally employees of Advanced, and Ms. Stowik testified that she asked each of them if they would be interested in working for "the union company" instead. Id. at 12. Ms. Stowik also testified that Stanley performs maintenance work for both companies, even though he is only paid by Advanced. Id. at 24. Additionally, the site visit report, which Ms. Stowik signed, contains the following question and answer:

> "Q. Does your firm offer assistance in manpower, equipment or space to other firms? Describe this relationship.
>
> "A. Personnel working on non-union job." (Admin. R. 14, at 10.)

Even though the record demonstrates that the two companies have different garage addresses, Ms. Stowik testified that the two properties are located across the street from each other. (Tr. at 22.) Additionally, although Ms. Stowik did testify that the two companies have distinct telephone numbers, both numbers ring on the same office phone, and both companies share a single email address. Id. at 30; see Hill v. Hoover Co., 2006 WL 2699113, at *1 (N.D.Fla. 2006) (finding that "[t]wo related companies may manifest an 'identity of interest' when they (1) operate out of a single office; (2) share a single telephone line; (3) have overlapping officers and directors; (4) share consolidated financial statements and registration statements; [and] (5) share the same attorney"). Finally, the evidence of inter-company financial dealing does not end in 2009 as Ace asserts. Ace's corporate financial statements reflect "Intercompany payable—Advanced" as recent as 2011. (Admin. R. 32, at 1.) Ace claims that this continuation of the record was an error and the start-up loan was repaid in full in 2009. However, Ace provided no support for its claim that the financial statements were incorrect, and the listing shows generic "intercompany payable," which supports the CRC's finding of evidence

of "inter-company transactions."[19] Id. at 1-3. Accordingly, the CRC did not act in an arbitrary or erroneous manner when it relied upon the evidence that was provided by Ace rather than considering Ace's unsupported statements. See Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138). Nor did the CRC exceed its statutory authority or act in an arbitrary, capricious, or unlawful manner when it concluded that Ace maintains an ongoing relationship and dependency on Advanced, which creates an irrefutable presumption that Ms. Stowik lacked control of Ace. See § 42-35-15(g); R.I. Code R. 2-5-2:3.03(B).

D

Stanley's Involvement with Ace

With respect to Ace's relationship with Stanley, Ace contends that the CRC's finding that Stanley performs maintenance work for Ace and is employed by Ace is not supported by the reliable, probative, and substantial evidence in the record. Rather, Ace asserts that Ms. Stowik's testimony indicated that Stanley is employed solely by Advanced, paid solely by Advanced, and performs maintenance work solely for Advanced. Ace additionally states that there was no factual support in the record for CRC's finding that Stanley is compensated at a significantly higher salary than another individual performing similar maintenance services would be compensated.

The DOA responds that Ace is highly dependent upon Stanley for its continued existence. It notes that the office is located within a house owned solely by Stanley, and no rent is paid. Further, the DOA stresses that the garage is leased from Stanley's company, SDS Investments.

[19] Ace also provided documentation of the start-up loan, but the handwritten balance sheet terminates in December of 2007 with a balance of $17,760 and is accompanied by photocopies of Ace's corporate books showing additional dealings with Advanced. (Admin. R. 33, at 1-4.) The nature of these transactions is unclear because the records are not labeled as accounts receivable or payable, but the transactions include the following notations: 88 ford, 92 compressor. Id. at 3-4.

Additionally, the DOA contends Stanley continues to work for both Ace and Advanced on a daily basis, repairing equipment, even though he is compensated only by Advanced.

If an "applicant has an extremely dependent relationship on a non-minority firm or individual," the dependency "creates an irrefutable presumption that the owners do not have control of the business." R.I. Code R. 2-5-2:3.03(B). The concern for an alleged MBE/WBE company's dependency on a non-minority business is that the non-minority business is essentially using the potential minority status of the dependent company to capitalize on the benefits of the MBE/WBE program. See CS-360, LLC v. U.S. Dep't of Veterans Affairs, --- F. Supp. 3d. ---, 2015 WL 1925996, at *4 (D.D.C. 2015) (affirming a denial of a veteran business certification, similar to an MBE/WBE, because the alleged veteran-owned company's dependence on a single, non-veteran controlled corporation was "a 'classic case of rent-a-veteran'").

The record evinces that Ace's claim that Stanley does not perform maintenance work for Ace is contradicted by Ms. Stowik's own statement at the CRC hearing where she testified that Stanley handles maintenance work for both Advanced and Ace. (Tr. at 24.) Although Ace's assertion—that Stanley is employed and paid solely by Advanced—is supported by the record, the record clearly reflects that Stanley performs maintenance work for Ace. Id.; see Barros, 710 A.2d at 684.

As the CRC observed, Ace receives other benefits from Ms. Stowik's relationship with Stanley. The home office, where Ms. Stowik performs the majority of her work, is located within the couple's home at 156 Colonial Avenue. (Tr. at 23.) However, as Ms. Stowik testified, the house is solely owned by Stanley, and Ace does not pay any rent or other costs for utilizing that office space. Id. at 35, 39-40. Ace does lease the property that houses its

equipment; however, it leases the property from SDS Investments, Stanley's company. Id. at 35; see Huyler's v. C.I.R., 8 B.T.A. 13, 32 (B.T.A. 1927) (finding that Company A "might well be termed the realty-holding company" of Company B because, inter alia, Company A maintained office space in Company B's building and did not pay rent). During the discussion at the end of the CRC hearing, one of the members expressed concern that without Stanley's ownership of the Ryan Avenue properties, Ms. Stowik would "have to look elsewhere, and she probably would be paying more money than what she's paying now." (Tr. at 49.)[20] Accordingly, the CRC did not err, exceed its authority, or act in an arbitrary manner when it made several findings regarding Ace's dependence on Stanley and relied upon those findings to deny MBE/WBE certification. See § 42-35-15(g); R.I. Code R. 2-5-2:3.03(B); Admin. R. 1, at 6.

E

Additional Alleged Errors

Ace generally claims error in several other CRC findings and conclusions. First, Ace disputes the CRC's reliance on the 2007 and 2009 federal tax returns, which list Stanley as Ace's owner. Ace asserts that this listing was an accounting error that was subsequently corrected, and Ms. Stowik had explained this error to the CRC prior to the hearing.[21] Ace claims error in the CRC's reliance on the 2007 and 2009 erroneous tax records. The DOA counters that, although Ms. Stowik's attorney stated that the 2007 and 2009 tax returns were erroneous, no amended tax returns were ever submitted to the committee.

[20] Although the CRC did not make a finding on this point in its written decision, this concern—that Stanley may be charging Ms. Stowik less than fair market value on rent—is supported by Ace's own statement in the May 29, 2014 response letter. In that letter, Ace notes that the rent cannot be considered payments to Stanley because the cost to maintain the property precludes Stanley from netting a profit from the rent. (Admin. R. 5, at 3.)

[21] Ace also contends that the CRC failed to consider that Ms. Stowik and Stanley file joint tax returns. However, Ace failed to explain the significance of the joint tax returns.

The 2009 joint tax return does list Stanley as the sole proprietor of Ace. (Admin. R. 44, at 11.) Although Plaintiff argues that this was an error that was subsequently corrected, DOA correctly asserts that there was no evidence of amended tax returns, or any other supporting evidence, submitted. See Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138) (requiring that an agency decision be supported by legally competent evidence). Therefore, even if the listing of Stanley in 2007 and 2009 was a corrected error, the CRC's reliance on the 2009 tax return was not arbitrary or capricious because Ace did not present that correction to the CRC, and Ace's claim of error fails. See Admin. R. 1, at 5.

Ace additionally contends that the CRC erred when it found that Ms. Stowik had not made a substantial personal investment in the company. It asserts that this need for capital contributions was met because Ms. Stowik borrowed $10,000 to start Ace, and she repaid the loan using funds generated by Ace while she was operating and controlling Ace. The loan was repaid out of the couple's joint bank account, although Ms. Stowik testified that the money was transferred from Ace's accounts to the joint bank account before repayment based on the advice of her accountant. The DOA counters that whether the funds were repaid from Ace directly or through the couple's bank account, the CRC lacked any evidence that Ms. Stowik made a personal, substantial investment in Ace. In particular, the DOA notes that R.I. Code R. 2-5-2:3.04 requires substantial investment beyond contributions of personal or professional services, and therefore, evidence of a tangible investment in the business was both required and lacking. Ace replies that Ms. Stowik has also personally guaranteed several additional loans for new equipment purchased for Ace, demonstrating substantial investment in addition to her guarantee of the initial start-up loan.

In its decision, the CRC found that Ms. Stowik started Ace with a loan from Advanced, which at the time "was solely owned and managed by Stanley Stowik, the non-minority male spouse of the applicant." (Admin. R. 1, at 5.) The CRC additionally noted continuing inter-company transactions between Ace and Advanced well after the 2009 repayment of the start-up loan. Id. The CRC concluded that Ms. Stowik had failed to demonstrate sufficient capital contributions to meet the MBE regulations. Id. at 6; see Berkshire Cablevision of R.I., 488 A.2d at 679 (holding that this Court should defer to an agency's interpretation of its own regulations).

The record does reflect that Ms. Stowik started Ace with a loan that she requested from her husband and was funded through Advanced. (Admin. R. 33, at 1; Tr. at 11.) Additionally, although Ace asserts that no further transactions occurred between Ace and Advanced beyond the start-up loan, the record reflects inter-company transactions both in Ace's books and on Ace's balance sheets through 2011. (Admin. R. 32, at 1-3; 33, at 3-4.) Accordingly, competent evidence in the record does support the CRC's conclusion that Ms. Stowik failed to prove that she has made a substantial investment in the business, particularly in light of R.I. Code R. 2-5-2:3.04, which establishes "an irrefutable presumption" that the woman owner has "not made a substantial investment in the business if a significant portion of the applicant's equity is financed by a loan or gift from a non-minority corporation . . . that has a significant interest in the applicant." See Berkshire Cablevision of R.I., 488 A.2d at 679.

Ace also maintains that a CRC member made an erroneous statement at the hearing that Ms. Stowik did not seem to have full control of Ace, arguing that full or dominant control is not required under Chapter 14.1 of Title 37 of the R.I. General Laws. Ace relies upon V.F. Capaldi Constr. Corp. v. R.I. Dep't. of Econ. Dev., a Superior Court case holding that "[t]here is no requirement in the statute that women or minorities exercise dominant control of the

management and daily business operations" to qualify as an MBE/WBE to support its argument. 1993 WL 853842, at *1 (R.I. Super. 1993).

Even if V.F. Capaldi Constr. possessed precedential value—see D'Arezzo v. D'Arezzo, 107 R.I. 422, 426, 267 A.2d 683, 685 (1970) (holding that it is the Supreme Court which declares the law and must be followed by inferior courts)—the record lacks substantial evidence that the CRC was looking for full control when it considered Ace's application. There was a single reference to full control at the hearing when one of the CRC members observed that "[i]t seems to me like she doesn't really have the full control of that company" because of Stanley's active role and the listing of Mr. Dubois as a signatory on the account. (Tr. at 50.) The two remaining CRC members made no reference to full control, and the written decision shows no such requirement. What the written decision does cite is the MBE/WBE regulations, which require that an owner "must possess control of the business," not full control. R.I. Code R. 2-5-2:3.00(D). The cited regulations further specify that the control "must be real, substantial, and continuing," but again, not full or dominant control. Id. at 2-5-2:3.03(A). None of the factual findings in the written decision states that Ms. Stowik lacked full control or any similar wording. Accordingly, Ace's argument on this point fails because the decision is not in excess of the agency's statutory authority. See § 42-35-15(g); Barros, 710 A.2d at 684 (finding that a Court examines an agency determination for supporting substantial evidence).

Ace additionally asserts that the CRC ignored corporate formalities in finding, based on the W2s submitted, that Ms. Stowik does not receive compensation from Ace but Stanley received $179.55 in 2010 as well as compensation from rental payments. According to Ace, the CRC ignored evidence presented that Ms. Stowik has taken owner's draws on Ace's corporate account, constituting her compensation. Ace asserts that corporate formalities should only be

ignored when piercing the corporate veil is appropriate—when reviewing the corporate entity and not the underlying owner or shareholder would be unjust or inequitable—which Ace asserts is not the case here.

The CRC's finding that Stanley receives funds from Ace is supported by legally competent evidence in the record. The CRC correctly found that Stanley did receive compensation from Ace in 2010 for a one-time job that he performed for the company. (Admin. R. 34, at 1.) Additionally, Stanley's company, SDS Investments, does receive rental payments from Ace. (Tr. at 36-38.) The CRC recognized this in its decision, but one member observed at the hearing that the rental payments were probably lower than they would otherwise be if the landlord were a disinterested party. Id. at 49. Therefore, the CRC demonstrated that it was aware of the value of the income that Stanley received, and their findings are supported by legally competent evidence in the record. See Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138); see also R.I. Higher Educ. Assistance Auth. v. Sec'y, U.S. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991) (holding that courts should defer to an agency decision "when that decision involves a technical question within the field of the agency's expertise").

The CRC's findings in relation to Ms. Stowik's income are also supported by legally competent evidence. The CRC found that there was no evidence in the record that Ms. Stowik was receiving compensation from Ace. No W2 for Ms. Stowik is included in the record, clearly evidencing that Ms. Stowik did not draw a salary from the company. See Admin. R. 34, at 1-11. While Ace points to the corporate financial statements included in the record, evidencing owner draws each year, the CRC did not arbitrarily ignore competent evidence in not giving credence to these records. See Admin. R. 32, at 1-3. First, Ace has admitted in addressing other issues that

these balance sheets contain errors, stating that the inclusion of "Intercompany payable—Advanced" was included in error on both the 2010 and 2011 balance sheets. Therefore, the credibility of the balance sheets is clearly questionable even based on the cold record review performed by this court. See Envtl. Scientific Corp., 621 A.2d at 206 (citing Laganiere, 103 R.I. at 196, 236 A.2d at 259). Additionally, Ms. Stowik testified before the CRC that she used an owner draw in order to pay back the start-up loan to Advanced without any documentation beyond "owner's draw." (Tr. at 14-16.) Therefore, a recording of "owner draw" on the balance sheets does not necessarily equate to compensation for Ms. Stowik. Accordingly, the CRC's findings in regard to compensation of Ms. Stowik and Stanley from Ace's accounts are supported by legally competent evidence and are not clearly erroneous. See Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138).

Ace also asserts that the CRC relied on irrelevant facts in rendering its decision, specifically the alleged sharing of employees between Ace and Advanced and the inclusion of Mr. Dubois as a signatory on Ace's bank accounts. However, as noted above, evidence of employee sharing is relevant because the regulations require that an MBE/WBE not be dependent upon a non-minority firm. R.I. Code R. 2-5-2:3.03(B). Additionally, evidence in the record supports a finding that employees were shared among the companies because the site visit report indicated employee sharing and Ms. Stowik testified that both of Ace's employees transferred to Ace from Advanced. (Admin. R. 14, at 10; Tr. at 11-12.) The record also supports the CRC's finding that a non-minority male, Mr. Dubois, is also a signatory on Ace's bank accounts. (Tr. at 20.) However, the CRC did recognize Ms. Stowik's explanation that Mr. Dubois is included only in case of an emergency, with the CRC chairman actually observing at the hearing that he can see the value of having additional signatories, and that there was no

evidence that Mr. Dubois was actively signing checks on Ace's behalf. Id. at 20, 53-54. Accordingly, both of the contested findings are supported by the record, and the record does not reflect that the CRC decision was arbitrary or capricious.

F

CRC's Decision

Overall, Ace claims that the CRC made erroneous findings and conclusions when it denied Ace's application. It concludes that Ms. Stowik has satisfied all of the requirements for certification as an MBE/WBE.

The CRC reviewed extensive material, several of which, by Ace's own admission, contained errors. Throughout the application process, MBECO engaged in extensive correspondence with Ace to rectify errors and questions, and held a hearing[22] at which Ms. Stowik was permitted to testify about the history and current operation of the company.[23] After weighing this evidence, the CRC concluded that Ace does not meet the requirements of an MBE/WBE.

[22] Ace additionally claimed procedural error in the CRC hearing both Ace and Advanced's applications simultaneously, claiming that this dual-purpose hearing led to confusion. However, the transcript from the CRC hearing reveals that when the CRC chairman expressed concern on how to proceed on the two applications with these related companies, counsel for the applicants stated, "I would motion or move that the Board hear both applications simultaneously and that from the onset that you give us an opportunity to describe for you the ownership of both entities . . . [because] [t]hat will give you an understanding as to the corporate structure." (Tr. at 4.) Accordingly, Ace cannot now claim error in both applications being heard simultaneously. See Iadevaia v. Town of Scituate Zoning Bd. of Review, 80 A.3d 864, 870 (R.I. 2013) (holding that judicial estoppel prohibits a party from putting forth inconsistent positions when doing so would provide the party with an unfair advantage).

[23] The Court notes that the final submission of supplemental material was submitted to the CRC at the May 29, 2014 hearing. (Tr. at 5-6.) These supplemental materials were in response to communication from the CRC dated May 6, 2014. (Admin. R. 5, at 1.) The May 6, 2014 correspondence indicated that any written submissions must be received no later than seven days prior to the hearing. (Admin. R. 8, at 1-2.) Despite the delay, the CRC accepted and considered the May 29, 2014 supplemental response. (Tr. at 5-6.)

The CRC found that Ace demonstrated dependency on Advanced, a non-minority firm, and Stanley, a non-minority individual, creating an irrefutable presumption that Ms. Stowik did not have control of the business. See R.I. Code R. 2-5-2:3.03(B); Berkshire Cablevision of R.I., 488 A.2d at 679 (holding that the Court should defer to an agency's interpretation of its own regulations). Additionally, the CRC concluded that Ms. Stowik did not make a substantial investment in the business, thereby failing to meet the requirements of R.I. Code R. 2-5-2:3.04. As long as the agency's findings and conclusions are supported by substantial evidence and are not in violation of law, excess of agency authority, clearly erroneous, arbitrary, or capricious, the Court must affirm the agency's decision. See § 42-35-15(g); Barros, 710 A.2d at 684. Here, the CRC's decision denying Ace's application for certification as an MBE/WBE was supported by substantial evidence in the record and was not in violation of constitutional or statutory provisions, in excess of the agency's statutory authority, made upon unlawful procedure, affected by error of law, clearly erroneous, arbitrary, or capricious. See § 42-35-15(g).

G

Equal Access to Justice Act

Ace also seeks attorneys' fees and other litigation expenses under the Equal Access to Justice Act for Small Businesses and Individuals (EAJA), §§ 42-92-1 through 42-92-8. In support of its request, Ace asserts that there was no substantial justification for the CRC's denial of Ace's application, and the denial was not based in law or fact. The DOA counters that Ace is not entitled to fees under the EAJA because the CRC's findings of fact were based on the record, and the conclusions of law were justified based on those factual findings.

The purpose of the EAJA is "to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during

adjudicatory proceedings." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988). A prevailing party in an administrative adjudication is entitled to recover litigation expenses unless the hearing officer determines that the agency was substantially justified in its actions during the proceeding. Sec. 42-92-3. Our Supreme Court has held that an agency decision need be only "well founded in law and fact, solid though not necessarily correct" in order to qualify as substantially justified. Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 675 (R.I. 1992). Therefore, in order to recover under the EAJA, a party must demonstrate that it was the prevailing party and that the agency's action was not substantially justified.

As the Court has affirmed the agency denial, finding that the denial was not arbitrary or capricious and therefore was substantially justified, Ace is not entitled to recover fees under the EAJA. See id.; Taft, 536 A.2d at 892. Ace is not eligible for recovery of litigation expenses because the Court has affirmed the agency determination and Ace is therefore not a prevailing party. See § 42-92-3.

IV

Conclusion

After review of the entire record, this Court finds that DOA's denial of Ace's application for certification as an MBE/WBE was supported by legally competent evidence and was not in violation of law, in excess of the agency's authority, clearly erroneous, arbitrary, or capricious. Consequently, Ace's substantial rights have not been prejudiced. For the reasons set forth above, this Court affirms the denial. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Ace Concrete Cutting, LLC v. Rhode Island Department of Administration, et al.**
CASE NO:	**PC-2014-3460**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 9, 2015**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Nicholas J. Goodier, Esq.**
For Defendant:	**Daniel W. Majcher, Esq.** **Jennifer S. Sternick, Esq.**