STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 3, 2018]

E.G. FISHER CONSTRUCTION, INC. and EDWARD G. FISHER	:	
v.	:	
RHODE ISLAND DEPARTMENT OF ADMINISTRATION, MICHAEL DIBIASE, IN HIS CAPACITY AS THE DIRECTOR OF RHODE ISLAND DEPARTMENT OF ADMINISTRATION and OFFICE OF DIVERSITY, EQUITY AND OPPORTUNITY MINORITY BUSINESS ENTERPRISE COMPLIANCE OFFICE	:	**C.A. No. PC-2017-2651**

DECISION

CARNES, J. Before this Court is the appeal of E.G. Fisher Construction, Inc. and Edward G. Fisher[1] from a final decision of the Office of Diversity, Equity and Opportunity Minority Business Enterprise Compliance Officer's Certification Review Committee (CRC), denying Appellant's certification as a Minority Business Enterprise. The CRC denied certification based on findings that Appellant's application contained sworn statements that were inconsistent with supporting documentation, and that Appellant failed to adequately demonstrate that it was properly equipped to perform the scope of work for which it sought certification. Jurisdiction is pursuant to G.L. 1956 §§ 42-35-15, *et seq*.

[1] Hereafter, this Court will refer to Mr. Fisher and E.G. Fisher Company, Inc. collectively as "Appellant."

I

Facts and Travel

Mr. Fisher—a fifty-seven year old African-American male—is the sole owner of E.G. Fisher Construction, Inc., a construction company established by Mr. Fisher in 2012. On July 20, 2016, Appellant submitted an application to the Minority Business Enterprise Compliance Office (MBECO) for certification as a Minority Business Enterprise (MBE certification or certification).[2] (Admin. R. at Ex. 1.) The Appellant sought a MBE certification as a minority-owned business, offering construction services, which include "demolition vertical and horizontal, sitework, concrete work, trucking acquisition for hazardous and non-hazardous construction materials." The application required that Appellant provide written responses to questions presented on the application form as well as submit the documents listed on the "Supporting Documentation Checklist."

After Appellant filed the application, Dorinda Keene (Ms. Keene), an Assistant Administrator from MBECO, contacted Appellant to request supplemental information and documentation, via email correspondence dated August 1, 2016 and October 2, 2016. *Id.* at Ex. 15, 29. The Appellant responded to Ms. Keene's requests on August 30, 2016, and October 12, 2016, respectively. *Id.* at Ex. 16, 30.

Thereafter, on November 22, 2016, MBECO issued a decision denying Appellant's application for MBE certification. The denial letter indicated that MBECO denied Appellant's application because of apparent inconsistencies between Appellant's responses to questions in the application, and several documents Appellant provided regarding its relationship with Fisher

[2] Although Appellant submitted the application on July 20, 2016, MBECO did not consider the application complete until October 12, 2016.

Construction Corporation (FCC).[3] The denial letter also found that Appellant was not adequately equipped to perform the scope of work specified on the application.

The Appellant subsequently appealed MBECO's decision to the CRC.[4] On April 18, 2017, the CRC conducted a hearing in this matter. The CRC board members, Ms. Keene, and Appellant, represented by counsel, all attended the hearing. On May 5, 2017, after reviewing Appellant's application and considering the testimony provided at the hearing, the CRC issued its decision (CRC decision) affirming MBECO's findings, and upholding the denial of Appellant's application for MBE certification. Thereafter, Appellant timely appealed the CRC's decision to this Court.[5]

II

Standard of Review

This Court's review of the CRC's decision is governed by § 42-35-15 of the Administrative Procedures Act. *See Town of Burrillville v. R.I. State Labor Relations Bd.*, 921 A.2d 113, 118 (R.I. 2007). Section 42-35-15 provides:

> "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 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:

[3] The Appellant's wife, Charon Fisher, is the owner of Fisher Construction Corporation.

[4] The CRC's role, as it relates to MBE certification appeals, is to "determine the appeal of the applicant at the hearing based on its review of application, the report of the caseworker and/or representative of [DOA] and any evidence which may be presented by the applicant at the hearing." *See* Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises 11.

[5] On October 2, 2017, Appellees moved to correct the administrative record; specifically, Appellees sought to correct stenographic errors in the administrative hearing transcript. *See* Mot. Correct Admin. Record 1. On March 5, 2018, the parties stipulated to a list of corrections of the record. *See* Stipulation, Mar. 5, 2018.

> "(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." Sec. 42-35-15(g).

When reviewing a decision pursuant to the Administrative Procedures Act, "[q]uestions of law determined by the administrative agency are not binding upon [the court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record." *Dep't of Envtl. Mgmt. v. State Labor Relations Bd.*, 799 A.2d 274, 277 (R.I. 2002) (citing *Carmody v. R.I. Conflict of Interest Comm'n*, 509 A.2d 453, 458 (R.I. 1986)). "'Although th[e] [c]ourt affords the factual findings of an administrative agency great deference, questions of law . . . are reviewed *de novo*.'" *Heritage Healthcare Servs., Inc., v. Marques*, 14 A.3d 932, 936 (R.I. 2011) (quoting *Iselin v. Ret. Bd. of the Emps.' Ret. Sys. of R.I.*, 943 A.2d 1045, 1049 (R.I. 2008)).

However, when reviewing questions of fact, this Court "may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.'" *Guarino v. Dep't of Soc. Welfare*, 122 R.I. 583, 410 A.2d 524 (1980). The Court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977). Accordingly, this Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." *Barrington Sch. Comm. v. R.I. State Labor Relations Bd.*, 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is considered as "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." *Town of Burrillville,* 921 A.2d at 118.

III

Analysis

At issue is whether the record contains legally competent or substantial evidence to support the CRC's decision. The Appellant argues that the CRC's decision is clearly erroneous because it (1) arbitrarily dismisses the veracity of Appellant's sworn statements; (2) disregards substantial evidence demonstrating that Appellant maintains control over its day-to-day business; and (3) fails to recognize Appellant's use of rented or leased equipment as being adequately equipped to perform the scope of work described in Appellant's application.

Alternatively, Appellees contend that the record contains substantial evidence supporting each of the findings set forth in the CRC's decision. Specifically, Appellant provided sworn statements in its application that were inconsistent with other information in the application and supporting documents, and failed to demonstrate that the business was adequately equipped to perform the scope of work for which it sought MBE certification.

Certification as a MBE is governed by regulations issued pursuant to the authority established in the Minority Business Enterprise Act (MBEA). *See* G.L. 1956 §§ 37-14.1-1, *et seq*. The Legislature enacted the MBEA for the purpose of "carry[ing] out the state's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women (MBE's) in state funded and state directed public construction programs and projects and in state purchases of goods and services." Sec. 37-14.1-1.

A "minority business enterprise" or "MBE," as defined by the MBEA, 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). The statute further defines "owned and controlled" as a business that is "at least fifty-one percent (51%) owned by one or more minorities or women . . ." and "[w]hose management and daily business operations are controlled by one or more such individuals." *Id.* The MBEA, along with the Administrative Procedures Act, grants the authority to establish rules and regulations governing MBE certifications to the Department of Administration (DOA). *See* § 37-14.1-7.

Accordingly, the DOA issued the Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises (MBE Certification Regulations). Set forth in the MBE Certification Regulations are the requirements that a minority-owned business must meet to become certified: "To qualify as a Minority Business Enterprise (MBE), a firm must meet eligibility standards established in Sections 3.00 through 3.05 of th[e] [MBE Certification Regulations]." *MBE Certification Regulations* § 1.00. For further guidance, MBE Certification Regulations § 14.00 permits the consideration of regulations established by Title 49 of the Code of Federal Regulations (CFR) as it relates to MBE certification.

A

Inconsistencies Between Appellant's Statements and Other Application Materials

After conducting a review of MBECO's decision to deny Appellant's MBE certification, the CRC concluded that "the [Appellant] provided sworn statements that were inconsistent with other information as submitted within the application and supporting documentation." (CRC Decision 1.) The CRC referred to two specific assertions made in Appellant's application to support its finding.

First, the CRC referenced Appellant's response to Question 22 of the application, which indicated that "no owner, officer, director or key employee of the applicant firm had an ownership interest in any other business entity, and that no owner, office[r], director or key employee of the firm was employed by any other firm." *Id.* The CRC found Appellant's denial of any such involvement with other firms to be inconsistent with the fact that Appellant "received W2s from and were employed by Fisher Contracting Corporation, the firm owned by [Appellant's] spouse." *Id.*

Second, Appellees argue that Appellant provided inconsistent information regarding its involvement with FCC when it was discovered that Appellant had an outstanding 2014 loan from FCC in the amount of $11,556. (Admin. R. at Ex. 16.) In an effort to clarify the inaccuracy, Ms. Keene requested an explanation of the transaction in her August 1, 2016 email. *Id.* at Ex. 15. In response, Appellant stated: "I borrowed money in the amount of $11,556 from my wife which I have since paid back in full. The firm is not an affiliate and I do not have any ownership interests whatsoever." *Id.* at Ex. 16.

In opposition, Appellant suggests that the October 12, 2016 email correspondence with Ms. Keene adequately explained the nature of Appellant's business relationship with FCC. In that email, Appellant responded to Ms. Keene's inquiry related to the firms' business relationship stating,

> "[t]here is no working relationship between E.G. Fisher Construction, Inc. and Fisher Contracting Corporation. Fisher Constructing Corporation is my wife's company and she is the sole owner. There have been no subcontracting relationships between the firms. Fisher Contracting Corporation is a union company. E.G. Fisher Construction, Inc. is a non-union company. We do not share equipment, personnel or space between the firms." *Id.* at Ex. 30.

Additionally, Appellant argues that he did not list the limited assistance that he provided to FCC, because it is itself a minority-owned business.[6]

Even though, Appellant answered that "no owner, office[r], director or key employee of the firm was employed by any other firm," a review of the record reveals that Mr. Fisher reported income from FCC in his 2013 and 2014 personal federal tax returns. *Id.* at Ex. 22, 23. Despite Ms. Keene's October 2, 2016 email requesting that Appellant "provide a detailed breakdown of all relationships between E.G. Fisher Construction, Inc. and Fisher Contracting Corporation for the last three (3) years," Appellant did not mention the income earned during 2013 and 2014 from FCC. *Id.* at 29 (emphasis added). Rather, Appellant's October 12, 2016 response stated that "[t]here [was] no working relationship" between the two firms. *Id.* at Ex. 30. In fact, at the CRC hearing, Appellant admitted that he worked for FCC between 2012 and 2015, and that the resume submitted as part of Appellant's application listed Mr. Fisher as a "Vice President" of FCC. (Tr. at 53-54) (Emphasis added).

In addition, Appellant indicated in both the August 30, 2016 email correspondence with Ms. Keene and in the CRC hearing testimony that the $11,556 loan from FCC had been repaid. Aside from Appellant's statements, however, there is no other evidence, tangible or otherwise, to support Appellant's assertion. The trail of documentary evidence ends with Appellant's 2015 tax return—submitted to MBECO on April 18, 2017—which indicated that the loan had a remaining balance of $4574, as of December 31, 2015. *See MBE Certification Regulation* § 5.00 ("It is only proper and procedurally correct that a determination by the C.R.C. regarding the appeal be made on the same information and documentation" as the information submitted by the applicant

[6] The Appellant's suggestion that Question 22 is only relevant to relationships with firms that are not certified as disadvantaged is without merit. The language of Question 22 does not make any such distinction; therefore, there is no basis for assuming that the application intended for such distinctions to be made.

"covering the period between initial submission of the certification package and the final determination").

Nevertheless, prior to MBECO's November 22, 2016 decision, MBECO only possessed Appellant's personal tax return up through 2014, which showed that the loan's full balance remained outstanding. *See* Admin. R. at Ex. 22. Even if MBECO had Appellant's 2015 personal tax return before it issued its decision, Appellant submitted nothing more than testimonial evidence during the CRC hearing to show repayment of the loan's $4571 remaining balance. Thus, the CRC's determination that Appellant's statements were inconsistent with other information provided in its application is one of credibility, which the Court cannot disturb on appeal. *See E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501 (restating that a court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level"); *R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd.*, 650 A.2d 479, 485 (R.I. 1994) (explaining that the court's "limitation obtains even in situations in which the court might be inclined to view the evidence differently and draw inferences different from those of the agency under review").

Based on the evidence of record, this Court finds the CRC's determination that Appellant provided inconsistent statements related to Appellant's business relationship with FCC is not clearly erroneous. *Barrington Sch. Comm.* 608 A.2d at 1138 (recognizing that the Court's authority is limited to a review of the "record to determine if there is any legally competent evidence therein to support the agency's decision"); *see also* § 42-35-15(g). The application clearly advises that all information provided by Appellant in addition to the application is considered part of the application and given under oath.[7] Accordingly, the CRC's decision that

[7] *See infra* n.8.

the inaccuracies within the application supported MBECO's denial of Appellant's MBE certification was not affected by error of law.[8] *See* Admin. R. at 18. Therefore, this Court finds that the CRC's decision to uphold MBECO's denial of Appellant's application is supported by legally competent or substantial evidence "that a reasonable mind might accept as adequate." *See Town of Burrillville*, 921 A.2d at 118.

B

Failure to Adequately Demonstrate that E.G. Fisher Construction Was Properly Equipped

Furthermore, in its decision to uphold MBECO's denial of Appellant's MBE certification, the CRC found that Appellant "failed to adequately demonstrate that it was properly equipped to perform the scopes of work for which the firm was seeking certification." (Admin. R. at Ex. 33.) The CRC reasoned that Appellant indicated it owned two vehicles—a 1995 Ford F350 van and a 1995 International dump truck—and that Appellant did not have any rented or leased equipment. Alternatively, Appellant argues that the CRC's finding is clearly erroneous based on the fact that Appellant rents and leases additional equipment as needed.

The significance of an applicant demonstrating that it is properly equipped to perform the services it seeks certification for can be gleaned from MBE Certification Regulations § 3.03, "Control Requirements." Pursuant to that provision, applicants "must demonstrate that they have

[8] To submit an application for MBE certification, an applicant must acknowledge its terms by completing a signatory page that must be notarized. Included in the terms for submission is a provision stating that:

> "[T]his application form, the supporting documents, and any other information provided in support of the application are considered part of the application. It is recognized and acknowledged that the information contained in this application is given under oath, and that any misrepresentation may be grounds for denial of certification . . . ." (Admin. R. at Ex. 1.)

control over: (1) The day-to-day management of the business . . .” and “[t]he ownership and control by the Minority . . . owners must be real, substantial, and continuing . . . .” Similarly, 49 CFR § 26.71(b) states: “[A]n independent business is one the viability of which does not depend on its relationship with another firm or firms.” However, 49 CFR § 26.71(m) provides that it must not be determined that

> “a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.” *See* 49 CFR § 26.71(m).

Such an evaluation must be made “on the basis of present circumstances,” 49 CFR § 26.73(b)(1), and it is impermissible to “refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm . . . if the firm currently meets the ownership and control standards . . . .” *Id.*

In this case, Appellant provided no evidence detailing its utilization of rented and leased equipment until Appellant testified at the CRC hearing. Question 23 on the application form asked: “Does the applicant firm share . . . vehicles, equipment (including rentals) . . . with any other business?” (Admin. R. at Ex. 1.) In response, Appellant circled “No.” *Id.* Likewise, Appellant did not provide a response to Question 25, which requested that Appellant “[l]ist all major vehicles, equipment, or machinery owned or leased by the firm.” *Id.* Further, Appellant did not submit the requested relevant materials listed on the “Application Supporting Documentation Checklist,” including “[c]opies of signed lease agreements, including equipment leases . . .” and “[v]ehicle registrations, titles, and proof of ownership for all vehicles and equipment.” *Id.*

As Appellant did not disclose ownership of any equipment, Ms. Keene, in the August 1, 2016 email, asked Appellant to provide a "detailed listing of all equipment and vehicles owned by the firm." *Id.* at Ex. 15. In the reply correspondence sent August 30, 2016, Appellant listed that it owned the two aforementioned trucks and attached copies of the vehicles' registrations. *Id.* at 16.

Once again, on October 2, 2016, Ms. Keene emailed Appellant asking whether "E.G. Fisher Construction, Inc. currently has any rental or lease agreements for any and all other vehicles or equipment." *Id.* at Ex. 29. Appellant's October 12, 2016 email followed, stating "E.G. Fisher does NOT have any rental or lease agreements for any other vehicles or equipment." *Id.* at Ex. 30.

Unlike in previous responses, at the CRC hearing, Appellant testified that it used rented and leased equipment as needed to service individual construction jobs. (Tr. at 8-9.) At that time, Appellant explained that its business strategy is to rent equipment as such equipment is needed for a particular construction job, and that it rents equipment from two equipment rental companies. *Id.* at 9. In his testimony, Mr. Fisher explained that he did not list any equipment on the application because when he completed the application, E.G. Fisher Construction, Inc. did not possess any rented or leased equipment. *Id.* at 11, 14, 17.

A review of the evidence in the record reveals that there is legally competent evidence to support the CRC's finding that Appellant failed to adequately demonstrate that it was properly equipped to perform the services listed on its application. The role of the CRC is to "determine the appeal of the applicant at the hearing based on its review of application, the report of the caseworker and/or representative of D.O.A. and any evidence which may be presented by the applicant at the hearing." *MBE Certification Regulation* § 5.00(I). Thus, the CRC's only

considering the information Appellant submitted to MBECO, and Appellant's testimony given at the hearing, was not in excess of its statutory authority. *See* §§ 37-14.1-1, *et seq.*; *Barrington Sch. Comm.*, 608 A.2d at 1138.

Having considered those sources of information, it is clear that the CRC afforded greater weight to the evidence provided in Appellant's application and supplemental information.[9] This Court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level." *E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501. As a result, this Court finds that there is substantial or legally competent evidence in the record, which "a reasonable mind might accept as adequate," to support the CRC's decision to affirm MBECO's finding that Appellant did not adequately demonstrate that it was properly equipped. *See Town of Burrillville*, 921 A.2d at 118.

IV

Conclusion

For the reasons stated herein, this Court finds that the CRC's decision to affirm MBECO's denial of Appellant's MBE certification was not clearly erroneous as it was supported by substantial evidence in the record. As a result, the substantial rights of Appellant have not been prejudiced. Accordingly, this Court denies Appellant's appeal and affirms the CRC's decision to deny E.G. Fisher Construction, Inc.'s MBE certification. Counsel shall submit an appropriate judgment for entry.

[9] Had the CRC determined that it should afford greater weight to Appellant's hearing testimony, Appellant's business decision to lease and rent equipment would not alone preclude Appellant's certification as a MBE. *See* 49 CFR § 26.71(m). However, even if that were the case, it would not be dispositive for this Court's decision due to the CRC's findings pertaining to Appellant's inconsistent statement.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	E.G. Fisher Construction, Inc., et al. v. Rhode Island Department of Administration, et al.
CASE NO:	PC-2017-2651
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 3, 2018
JUSTICE/MAGISTRATE:	Carnes, J.
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