

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-245
Appeal GO 156 2009-11
Administrative Law Judge Division
March 11, 2010

R E S O L U T I O N

RESOLUTION ALJ-245. Denying the Appeal of Evans Industrial, Inc. Pursuant to Clearinghouse Determination of Status Under General Order 156.

Summary

This Resolution denies the appeal of Evans Industrial, Inc. (EII) from the denial of its application for verification as a woman-owned business entity by the Supplier Clearinghouse and finds that EII does not qualify for verification as a woman-owned business entity under General Order 156. Administrative Law Judge Melanie M. Darling determined the appeal based on briefs, and documentary evidence and testimony presented at an evidentiary hearing held December 15, 2009 in Orange, California.

Background

General Order (GO) 156, adopted in 1988,¹ implements Sections 8281-8286,² which require the Commission to establish a procedure to require gas, electric, and telephone utilities that have gross annual revenues over \$25 million, as well as their Commission-regulated affiliates and subsidiaries, to adopt programs and submit annual plans to the Commission for increasing the participation of woman-, minority-, and disabled veteran-owned business enterprises (WMDVBEs) in contracts for the provision of products or services to the utilities. This requirement was recently extended to water

¹ The Commission has subsequently amended GO 156 on several occasions, including most recently in August 2006.

² All Code references are to the Public Utilities Code, unless otherwise stated.

corporations that have gross annual revenues over \$25 million.³ When adopting the WMDVBE program, the Legislature declared that the preservation and expansion of competition is “basic to the economic well-being of the state” and could not be realized without the development of these underutilized business enterprises. The Legislature also found that encouraging expansion of the number of suppliers for utility procurement provides benefits to ratepayers and utilities by encouraging competition and promoting economic efficiency.⁴

Under GO 156, the utilities must set short-term (one-year), mid-term (three-year), and long-term (five-year) goals for the utilization of WMDVBEs in procurement contracts. These goals must be set annually for each major product and service category that provides opportunities for procurement,⁵ and must demonstrate the utility’s commitment to encourage the participation of WMDVBEs in utility purchases and contracts as either prime contractors or subcontractors. If minimum long-term goals are not met, the utility’s annual report to the Commission must discuss its efforts to find or recruit WMDVBE suppliers of products or services,⁶ or state that its inability to meet goals resulted from the unavailability of WMDVBEs to provide certain products or services, or occurred because sole source procurement was the only available procurement method for certain contracts.

However, GO 156 does not authorize or require utilities to utilize set-asides, preferences, or quotas in the administration of its WMDVBE program. The utility retains its authority to use its legitimate business judgment in selecting the supplier for a particular contract.

Under GO 156, the Commission utilizes a Supplier Clearinghouse (Clearinghouse) to audit and verify that business entities qualify as woman-owned or minority-owned businesses (WMBEs) and to establish and maintain a database of WMBEs for the Commission and utilities. A business that wishes to contract with utilities as a WMBE under GO 156 must apply for verification by the Clearinghouse.⁷ The Clearinghouse has developed guidelines (Guidelines) to provide consistency to its evaluation of the

³ Stats. 2008 ch 316 § 2.

⁴ Pub. Util. Code § 8281(a), (b)(1)(F).

⁵ As an exception, the utility’s subcontracting program need not apply to contracts for products manufactured for general consumption, such as pens or paper.

⁶ Each utility must offer the same assistance to non-WMDVBEs upon request.

⁷ The Disabled Veteran Business Enterprise Participation Program, a unit of the State Department of General Services, certifies businesses that wish to contract as Disabled Veteran-Owned Business Entities (DVBEs) under GO 156.

nature of an applicant's ownership, management, and control. One purpose of the verification process is to ensure that business enterprises that do not satisfy the WMBE qualifications do not wrongfully receive the benefits and advantages accorded to WMBEs. At the time of appellant's application for verification, Asian Inc. served as the Clearinghouse.⁸

If the Clearinghouse denies an application for verification as a WMBE, the business may appeal the Clearinghouse's final decision to the Commission by filing a Notice of Appeal with the Clearinghouse, with copies to the Chief Administrative Law Judge (ALJ) and the applicable Division Director within 20 days of service of the Clearinghouse's final decision.⁹ The Chief ALJ then assigns an ALJ to hear the appeal and to conduct a hearing, if needed. After the case is submitted, the assigned ALJ shall issue an order resolving the appeal for consideration by the Commission. The Commission may approve, reject, or modify the ALJ's order on the appeal.

Statement of Facts and Procedural History

Evans Industrial, Inc. (EII) was incorporated in California on February 28, 2008 by Lyudmila Evans (Mila) and her husband Herschel Evans (Herschel). Mila owns 51% of the company and Herschel owns 49%. The company is a welding and mechanical industrial construction company working largely within the petrochemical and energy industries, including provision of welding and piping for power plants and oil refineries.

A. Mila Evans

Prior to forming EII, Mila, a former Ukrainian schoolteacher, graduated from California State University at Long Beach with a bachelor's degree in Community Health Education, taught school, sold real estate, and jointly operated a real estate firm with Herschel and her brother, Joseph Shmurak, called HJM Properties, Inc. (HJM). Mila says she developed HJM in 2002 as a means of support for the family after Herschel was injured and required months of recuperation at home. She encouraged Herschel to get a real estate broker's license for HJM. Mila's real estate agent's license is currently active. After Herschel recovered and the real estate market began to cool, Mila approached him about starting EII using her business skills and his experience in the industry. They decided the company would be jointly owned and Mila would be the majority owner.

⁸ In 2009, PRWT Services, Inc. became the designated Clearinghouse.

⁹ The business entity must exhaust any available internal appeal processes with the Clearinghouse before appealing to the Commission.

B. Herschel Evans

Herschel, a non-minority male, holds a bachelor's degree in Civil Engineering from the University of California at Los Angeles and has nearly 20 years of experience in the oil refinery industry holding both supervisory and non-supervisory positions. His duties have included inspection, engineering, and management of major construction projects in the oil and chemical industries, contract negotiations with international suppliers, project scheduling, supervision of large work crews and contractors, and operations manager of an engineering equipment company. He was previously employed by some of EII's current clients, and is a member of the Western States Petroleum Association and the Los Angeles Refinery Safety Overview Council. Herschel has a contractor's license which is currently inactive because he serves as the Responsible Managing Officer for EII's contractor's license. His real estate broker's license is currently active with HJM.

C. Evans Industrial, Inc.

EII adopted Bylaws on March 5, 2008 which provide in Paragraph 2.02 there will be two directors and in Paragraph 2.10 that a majority of the directors constitutes a quorum. Paragraph 2.12 requires a majority vote of the directors for every action by the Board of Directors. On March 5, 2008 Mila and Herschel were elected as the two Directors of the company. The Board elected Mila as Chairman and President, and elected Herschel as Chief Financial Officer (CFO) and Secretary. Their titles are not always consistent between documents and not necessarily reflective of their respective corporate duties. It is not clear what salaries EII paid to Mila and Herschel.

The amount of initial capitalization of the company is unknown, but Mila stated that start-up funds came from her joint account with Herschel. The company was primarily funded by a \$540,000 loan from the Small Business Administration (SBA) received in June 2008. Both Mila and Herschel signed the loan agreement issued through Pacific Enterprise Bank. Mila said the SBA loan was primarily collateralized by her separate property, in addition to the couple's home, because it had much more equity. This fact was neither documented nor disputed.

The company was issued a California Class A, General Engineering Contractor's License on June 10, 2008. Herschel is listed as the Responsible Managing Officer (RMO), a required supervisory officer for a company with such a license. Leo Cumlat, known by Herschel from prior work, was EII's first hire on June 18, 2008, after Mila and Herschel solicited him for Quality Control Manager. In addition to Herschel and Mr. Cumlat, other supervisors, or "superintendents," each oversee field projects in the various industries.

In June 2008, Mila and Herschel both signed a sublease with an acquaintance for premises in which the company could operate. During the summer of 2008, Mila worked with insurance agents to acquire the appropriate insurance policies for the business, established bank accounts, developed marketing and safety programs, created new employee packages, and tended to other start-up activities for the company. EII's marketing plan emphasized Herschel's broad experience in the field and Mila personally focused on developing safety programs which she claimed are the underpinning of the company's success, capsulized in her company motto: "Productivity through Safety."

D. Officer Responsibilities

In August 2008, EII got its first contract with Southern California Edison and it has been in operation since then. Responsibilities for day-to-day management and operations of EII, pursuant to the Program's requirements, are at issue. Some responsibilities are clearly Mila's and some are clearly Herschel's; others are shared or disputed.

Mila's responsibilities are as follows:

- Health and Safety: developed and implemented company's internal safety programs based on state and federal law; trains supervisors and employees on safety, conducts daily safety briefings, and offers her specific confined space safety program to third parties at jobsite.
- Financial: primary contact for banks, manages business accounts, and handles accounts receivable/accounts payable; reviews project bids for "financial capability," has check signing authority.
- Legal: primary contact with attorneys for formation of the corporate entity.
- Insurance: primary contact for insurance agents for broad spectrum of company's insurance needs.
- Personnel: manages new employee orientation, including new employee packets, benefits and safety training.
- Marketing: developed marketing plan including brochures, business cards, vehicle door magnets, brochures, etc.

Herschel's responsibilities are as follows:

- Client contact: meets with prospective clients to solicit business.
- Cost Estimates & Bids: developed rate sheets; prepares cost estimates and project bids including manpower assessment, equipment needs, risk assessments.

- Field Operations: exercises duties as RMO for company; supervises and manages field crews and superintendents; conducts employee training; responds to budgetary and time constraints.
- Financial: prepared company's budget and projections, has check signing authority, signs payroll checks.

Mila and Herschel make some major decisions jointly, e.g., large supply and equipment purchases, hiring or firing of key employees. Mila says they often trade off some duties, including check-signing, safety training, and vendor contact, based on who is available when something is needed. Although Mila says she supervises all key employees and assures the management teams have necessary resources, this is disputed by the Clearinghouse on the ground she lacks the technical expertise to adequately manage and supervise these positions. The Clearinghouse also disputes the extent to which Mila controls "cash flow" given that Herschel writes most of the checks.

E. Procedural History

On February 12, 2009, EII submitted an application to the Clearinghouse requesting certification as a woman-owned business enterprise (WBE). On March 6, 2009, Beverly Popek from the Clearinghouse conducted a site visit of EII and met with Mila. Ms. Popek reported that she found Mila was significantly involved in the business primarily managing administrative matters and found Herschel managed the field employees in day-to-day operations, was RMO under the company's contractor's license, was the company's contact for clients, and signed the majority of company checks provided. EII provided supplemental information to the Clearinghouse before and after the site visit.

The Clearinghouse denied EII's application on the grounds that Herschel, rather than Mila, had the essential combination of managerial or technical and/or educational experience and competency consistent with industry standards to make daily and major decisions about management policy and operations of EII. Further, the Clearinghouse concluded that EII would not be viable in Herschel's absence. The Clearinghouse found no evidence that EII was attempting to abuse the verification system by intentionally masking actual control by a non-minority male.

EII protested and argued the Clearinghouse undervalued Mila's experience and her role at the company, misunderstood her marketing strategy highlighting Herschel's experience, and failed to recognize that a CEO need not have technical knowledge of a company's product or service in order to control the company. EII also provided some additional evidence including letter and email correspondence from EII's attorney, bank, insurance brokers, a vendor, and a customer which show that Mila was the company contact for their inquiries.

The Clearinghouse rejected the protest on May 26, 2009 and concluded EII had not met its burden of proof to establish it met the WBE eligibility standards, citing, *inter alia*, Mila's lack of technical certification in safety or any industrial field, the lack of relevance of her real estate sales experience, and a distinction between the required technical experience and knowledge for the chief executive of a small start-up and one running a large Fortune 500-type company.

On June 16, 2009, EII appealed the denial of verification as a WBE, essentially making the same arguments offered on protest, and provided an employee list and additional checks, many signed by Mila. ALJ Melanie M. Darling was assigned to resolve the appeal. A prehearing conference was held by conference call on August 27, 2009 and the ALJ determined that a hearing would be held on the appeal.

On appeal, the Clearinghouse stated its grounds for denial as:

1. Ms. Evans lacks the technical and educational expertise, consistent with industry standards, to oversee and control the applicant concern;
2. Mr. Evans exercises the actual control of the firm's daily operations;
3. Mr. Evans holds a license critical for the existence of the company; and
4. Mr. Evans maintains negative control of the company.

The hearing was originally scheduled for October 23, 2009 but, at appellant's request, it was re-scheduled and held on December 15, 2009 in Orange, California. At the hearing, EII offered witnesses from its bank, insurance agencies, and a customer who testified as to their contacts with Mila and Herschel. EII submitted a copy of minutes from a recent Board of Directors meeting which made changes to the company's Bylaws. The Clearinghouse submitted its multi-part case file and a printout of the HJM website pages, in addition to testimony from its Project Director who conducted the site visit at EII.

Standard of Review

Although the Commission has delegated decision-making authority to the Clearinghouse for verification of businesses as WMBEs, it has specifically retained jurisdiction to review Clearinghouse determinations to ensure that applicants are

afforded due process and that the decisions of the Clearinghouse are supported by substantial evidence in light of the whole record.¹⁰

The Commission said in RWI that in reviewing a Clearinghouse decision in light of the whole record, the Commission must consider all relevant evidence, even if it detracts from the decision. Substantial evidence has been defined as evidence having “ponderable legal significance...reasonable in nature, credible, and of solid value.”¹¹ Therefore, if the Clearinghouse findings lack evidentiary support or are based on arbitrary inferences and without reasonable foundation, the decision may be reversed. Additionally, the Commission must independently review the legal conclusions of the Clearinghouse to ensure the decision is not based on legal error.

The Commission has said it does not want the criteria for verification to be mechanically applied. “Like most prescribed standards, those by which eligibility for verification as a WMBE are to be judged must be interpreted in light of reason with the goal of satisfying the spirit of the underlying legislation.”¹² That spirit is to facilitate the participation of traditionally underutilized women, minority, and disabled veteran-owned business enterprises in public utility procurement.¹³ Therefore, the Commission provides an opportunity for an applicant to appeal a Clearinghouse decision and, if needed, seek a hearing to submit evidence showing the decision was incorrect. The point of such a hearing is for an applicant to demonstrate the Clearinghouse made legal error or misunderstood the evidence presented, including bringing forward evidence that could have, and should have, been provided to the Clearinghouse at the time of the application, but was not due to the inexperience of the applicant.

The Commission has previously rejected exercise of *de novo* review¹⁴ and does so again here, in the context of an evidentiary hearing.

Discussion

EII requested and received an evidentiary hearing in order to submit additional

¹⁰ Residential Weatherization, Inc. (RWI), Resolution ALJ-226 (12/29/08); Scott Engineering Inc. v. Cordoba Corporation (Scott), 42 CPUC2d 421.

¹¹ RWI at 5, citing Lucas Valley Homeowner’s Association v. County of Marin, 233 Cal.App.3d 130, 141-42 (1991).

¹² Scott 42 CPUC2d at 431.

¹³ Pub. Util. Code § 8281.

¹⁴ Scott, 42 CPUC2d at 426.

evidence supporting the claim that it was in fact a qualified WBE. There was no claim that the Clearinghouse failed to follow its established procedures which became part of the record at the evidentiary hearing. In the absence of evidence of a breach of the established procedures, we find that EII has been afforded due process in view of the “elaborate procedures enacted to discover the true status of an applicant for verification and the procedural safeguards in place.”¹⁵

The crux of this appeal is whether the Clearinghouse erred in concluding that Mila does not control the management and daily operations of EII in conformance with the requirements of GO 156. In particular, EII asks whether she can be deemed to control a business by managing portions of the business, other than the direct provision of the company’s primary services, especially in a highly technical and regulated arena.

Under GO 156, a woman-owned business is defined as a business enterprise that:

- (1) Is at least 51% owned by a woman or women or, if a publicly owned business, at least 50% of the stock is owned by one or more women; and
- (2) Whose management and daily business operations are controlled by one or more of those individuals.¹⁶

The Clearinghouse does not dispute that Mila owns 51% of the company’s stock. However, it contends that Mila does not control the management and daily operations of the company because 1) her husband controls the primary core of the business’ daily operations through his expertise, duties, and being RMO for EII’s contractor’s license, and 2) her husband has negative control of the Board of Directors because, with only two Directors on the Board, he can block any action by voting against it.

Establishing control requires an applicant owner to show that she both possesses the skills necessary to operate the particular business and that she, in fact, manages and operates the business. The Guidelines state in paragraph 4:

In order for a minority or woman individual to demonstrate control of the concern, **that individual must have a combination of managerial or technical and/or educational experience and competency consistent with industry standards** in which the applicant concern operates which supports the conclusion that this individual can make daily as well as

¹⁵ Scott, 42 CPUC2d at 431.

¹⁶ GO 156 at § 1.3.2.

major decisions on matters of management, policy, and operations for the applicant concern (emphasis added.)

To establish control, an applicant must first demonstrate, at a minimum, that she has managerial, technical, or educational experience and competency consistent with industry standards. The more types of relevant experience an applicant possesses, the stronger the case for ability to control a business enterprise. EII is a welding and mechanical industrial construction company working primarily in the petrochemical and energy industries. It is undisputed that Mila has no educational or work experience in these technical areas prior to forming EII in February 2008. Therefore, she relies on her managerial and other educational experiences in her appeal and cites the Commission's decision in Scott¹⁷ which granted WBE verification to a woman owner who lacked technical experience related to the company's specialty electrical products.

Mila was primarily educated and worked in three areas: community health, teaching, and real estate sales. Her education is in community health rather than industrial safety, even if it gave her the tools to research occupational safety requirements. She also has some general business experience arising mostly from her joint development and operation of a real estate business for more than five years. She argued that EII was her idea and she pulled all the components of the business together, including her "brilliant" choice of a business partner, her husband Herschel. Yet they both developed the business plan, capitalized EII, signed the SBA loan and provided collateral, signed the premises lease, have check signing authority, are available to outside vendors, conduct safety training, and share important decisions.

Furthermore, Mila's description of her managerial role at EII is overstated. She doesn't do "everything except sell to clients." Her supervision of key employees in the field is limited to safety matters, confirming invoices for payment, applying cash flow criteria to project bids prepared by Herschel and his field supervisors, and getting new employees started. She does not meet with clients, do cost estimates, prepare bids, assess risks, evaluate materials, or supervise field workers because she lacks the technical knowledge to do so. Despite her claim to the contrary, the business would be better situated to survive if she left, rather than Herschel, because general business skills are easier to replace than a RMO with specialized experience in the petrochemical and energy industries.

Even in combination, the above-described education and managerial experience do not rise to the level of competency within the standards of complex construction projects in the highly technical and regulated petrochemical and energy industries. Moreover, EII's reliance on the Scott decision is misplaced because the factual circumstances are

¹⁷ 42 CPUC2d 421 (1991).

significantly different. In Scott, the Commission found the company qualified as a woman-owned business even though the woman owner lacked technical expertise in the field of engineering and was previously a housewife. When the woman's husband started the business twenty years earlier, she began working as an employee responsible for office management and finances. When the business incorporated years later, she became Secretary and Chief Financial Officer. As a result of her husband's disability and death, she acquired 97.5% of the company's stock, continued on the Board of Directors and as CFO, worked full-time managing the business, and had the final say on all business affairs. The Clearinghouse denied the application because her son, who had technical expertise, became President, CEO and Chairman of the Board.

The Commission found the Clearinghouse had misapplied the control criteria because she, in fact, had absolute and total control over the company. She owned 97.5% of the company stock, was Chief Financial Officer, and had worked for more than twenty years in the business founded by her husband who had since died. Although her son became President and Chairman of the Board and possessed the technical experience to control the company's operations, the woman owner had veto authority over any action taken by any officer or employee, had final authority over all aspects of the company's affairs, she regularly participated in management of the company, owned the company's premises and collected rent, and received a salary larger than her son's. These facts contrast significantly from those presented by EII. Mila is a newcomer to a very technical business that provides complex construction projects rather than products, her husband provides professional expertise and shares both authority and risk, and there is a corporate structure in which her husband has the power to block her management and policy decisions. Moreover, the Scott case represents the Commission's emphasis on the actual facts of control, including cross-performance of duties by officers, rather than pure reliance on corporate titles and formally assigned duties.

Mila is also unable to demonstrate she has actual control of the day-to-day management and core operations of EII. Paragraph 2 of the Guidelines states:

The minority or woman owners shall possess and exercise power to direct or cause the direction of the management and policies of the applicant concern and **to make the day-to-day as well as major decisions on matters of management, policy, and operations**, and not merely act as officers or directors. The minority or woman owner(s) must be responsible for the operation of the applicant concern consistent with industry practices (emphasis added).

Herschel exercises more control over the day-to-day operations of EII than Mila based on his expertise, his experience, his professional reputation, his client contacts, his field supervision, and his position as RMO for EII's contractor's license. Mila admitted this

at the Clearinghouse site visit, although she later recanted and explained she was confused about what she was being asked and why. In any event, the facts do not support that Herschel is merely a subservient employee to Mila when the record shows that all technical questions ultimately go to Herschel and he is in charge of the projects in the field. EII's "product" is a construction project in a regulated environment with on-going variables requiring constant supervision. Herschel is in charge of those projects by virtue of his RMO status and his designated management responsibilities.

EII attempts to refute Herschel's dominance in the company's core operations by reference to singular elements of other Commission decisions under the GO 156 program. For example, EII notes that in Beci Electric Company v. Asian, Inc. (Beci),¹⁸ the woman business owner personally guaranteed the company's credit obligations. However, the evidence here is that both Mila and Herschel are obligated on the SBA loan. EII also cited as comparable the finding in S&S Tool Supply, Inc., (S&S Tool)¹⁹ that the woman owner was paid a salary, shared in the risks and profits of the company commensurate with ownership, and was not subordinate to her husband. In contrast, the evidence here was inconclusive as to the salaries of Mila and Herschel and the question of whether she, or any woman or minority owner, is subordinate is a fact to be determined in light of all the circumstances.

EII's use of language drawn from the decisions in Beci and S&S Tool is illustrative of the limits of pulling a singular fact or conclusion from any other GO 156 case. Each case is driven by the particular facts of the applicant company and the decisions are most useful for the larger view of what things cumulatively can add up to "control." For example, in Beci, the Commission overturned the Clearinghouse denial of WBE status which had been based on the woman's lack of technical expertise and administrative duties, along with a perceived disproportionate role of the owner's husband. He was the original founder of the business, had technical expertise, was the original RMO, and acted as project manager for the company. Based on all the facts, the Commission determined that, instead, the woman's role had increased over time while her husband had become only a part-time estimator. She had been the company's RMO and President for 12 years, actively managed the daily operations, and had the power to make major policy decisions. She alone had assumed financial responsibility for the company.

Similarly, in S&S Tool, the Commission granted the appeal after the Clearinghouse determined the woman owner's role was administrative and supportive, and she didn't share in the risks and profits commensurate with her ownership interest because her

¹⁸ Resolution ALJ-214 (4/10/08).

¹⁹ Resolution ALJ-213 (4/24/08).

husband, the company's President and CEO, had earned more. The Commission rejected the Clearinghouse view that presenting a male leader was conclusive as to his role because S&S Tool credibly argued he had withdrawn from management into simply a sales role and kept the title of President to allow him to sign contracts with apparent authority. Although the Clearinghouse had cited the fact she was not President or CEO as enough to deny verification, the Commission examined all of the facts and found that she had an important management role. She had made a substantial contribution to the financial turnaround and growth of the business over many years after which she was appointed Chief Operating Officer with principal responsibility for all operations and had clear authority to make major commitments. Her husband had withdrawn from management and his gift of stock to her followed her successful management and financial support of the company. Following the change in their roles, her salary exceeded that of her husband.

Additionally, EII objected to the Clearinghouse's emphasis on the fact that Herschel was the RMO for the company's contractor's license based on the RWI decision. In RWI, the Clearinghouse had denied verification solely on the fact that the primary woman-owner's husband, who held 30% of the company's stock, held a critical license and was RMO. The Commission reminded the Clearinghouse that the woman owner need not necessarily hold a technical license or have technical expertise herself for the company to qualify as a WBE. In fact, the Commission determined that, based on the entire record, it was clear that the mother and daughter controlled the operations, the husband was employed only part-time handling billing and complaints, and that the women owners had sufficient hands-on training and experience in the energy efficiency field (including specialist certifications, bid preparation, contract administration), to manage the work of field employees.

At EII, the facts are different. Not only is Herschel RMO for the company's license, he is fully engaged in managing the core operations of the company. Mila has no other experience in the industry, has no experience in contracts, and doesn't contend that she is able to make a technical analysis of a bid or contract performance. It is simply too soon for her to claim she has acquired the requisite technical knowledge to manage EII's operations, or that she has sufficient managerial or educational experience to meet industry standards.

The broad lesson from these previously decided cases is that qualification of a WMBE depends on the unique facts and totality of circumstances for each and every applicant. In this case, Mila is clearly an intelligent and motivated businesswoman who understands the elements of operating a business and was an able advocate for EII at the hearing. She argues that if one has executive knowledge then one can control any type of business without having technical knowledge of the product or service. We agree that based on an individual's education, executive training, experience, the size of

the company, and the product or service provided, it is theoretically possible to delegate some technical matters and still have control over daily operations. However, pursuant to GO 156, this proposition does not end the Commission's inquiry as to Mila's control over EII, a small start-up company providing very technical services to highly regulated industries in which her husband is educated, experienced and conversant.

We conclude, in light of all the circumstances, that Mila does not control the day-to-day and major policy decisions on matters of the primary business of EII.

Negative Control of the Company

The Clearinghouse also raised on appeal the issue that Herschel controlled EII's Board of Directors because, pursuant to the Bylaws, he could block any action by Mila. Mila disputed this argument, but displayed a lack of understanding about the provisions of EII's Bylaws and was unable to support her contrary contentions.

Paragraph 7 of the Clearinghouse Guidelines states:

The minority or women upon whom WMBE eligibility is based shall control the Board of Directors of the applicant concern, either in actual numbers of voting directors or through weighted voting. . . .

Paragraph 9(a) states:

Non-minority male individuals or entities owned by such individuals shall be deemed to control or have the power to control the applicant concern in any of the following circumstances.

a. Non-minority male individuals control the voting of the Board of Directors of the applicant concern, either directly through majority voting membership, or indirectly, if the Bylaws allow non-minority male individuals to block any action proposed by the minority/women individuals through negative control.

Here, the EII Bylaws provide for only two directors, Mila and Herschel, and do not provide for weighted voting based on shares of stock owned, regardless of Mila's belief to the contrary. At the time of the application, the Bylaws also provided that a majority must be present to constitute a quorum and all actions by the Board are by majority vote. Therefore, Herschel could defeat any matter Mila brought to the Board.

As the appeal progressed, EII attempted to remedy this problem by adopting an amendment to the Bylaws on November 16, 2009 which struck Article 2.10, eliminating

the requirement of a quorum to act.²⁰ However, each Director could still block an action proposed by the other and each would still have equal power to conduct a meeting of the Board of Directors without the other one and enact policy decisions. Therefore, under the provisions of the Bylaws, as amended, Herschel still has negative control. EII could remedy this by altering its structure, e.g., adding a director, providing for weighted voting, etc. and, if it chooses to do so, may wish to consult an attorney to assure the desired results are achieved.

In light of all the circumstances, we conclude that Herschel has primary management responsibility for, and control of, the core operations of EII including day-to-day decisions. Mila's contributions to EII are substantial and we do not doubt her testimony that she has a better head for business than Herschel and has diligently attended to the basic and necessary business functions required for any business. She has also been instrumental in developing employee safety programs that are tailored to EII's business operations. Yet, it is too big a leap to conclude that she controls EII's operations of welding, piping, and construction activities through mere hiring of a key employee when that employee is her husband, a co-owner, a co-Director, an officer, and the only officer qualified to oversee the technical aspects of EII's operations. Over time, as evidenced by the women owners in Beci, S&S Tool, and RWI, Mila could acquire sufficient hands-on experience or become an RMO herself, such that she is qualified to supervise and manage the company's primary activities.

Public Review and Comment

The proposed Resolution was mailed to the parties on February 3, 2010 for review and comment pursuant to Section 311(g)(1). Under Rule 14.3(c) of the Commission's Rules of Practice and Procedure, comments must "focus on factual, legal, or technical errors in the proposed . . . decision and in citing such errors shall make specific references to the record." No comments were submitted.

Findings of Fact

1. Applicant, Evans Industrial, Inc. (EII) was afforded due process in connection with its application for verification as a woman-owned business enterprise.
2. Applicant became an active California corporation in February 2008 and is engaged in the business of providing welding, piping, and construction services primarily in the petrochemical and energy industries.

²⁰ Ordinarily, evidence created after the application period would not be relevant to the appeal, however, the Clearinghouse first raised this issue on appeal and applicant was permitted an opportunity to rebut the argument.

3. Mila Evans is Chairman and President of EII and owns 51% of the company's stock. Her background is in teaching, community health, and real estate. She has a real estate agent's license and is co-owner of a real estate business, HJM Properties, Inc. (HJM), but is not currently active with it.
4. Herschel Evans is Secretary and Chief Financial Officer of EII and owns 49% of the company's stock. He is a civil engineer working with nearly twenty years of experience working in the oil refinery industry holding both supervisory and non-supervisory positions. He has worked for some of EII's clients. He is also a co-owner of HJM and has a real estate broker's license.
5. Mila and Herschel are the two Directors authorized by the Bylaws for EII's Board. The Bylaws provide for action by a majority of the Directors and do not provide for voting weighted by shareholder interest.
6. Mila's responsibilities primarily involve safety programs and training, new employee orientation, accounting, insurance, entity formation, and marketing aids and strategy.
7. Herschel's responsibilities primarily involve supervision of the field operations on a day-to-day basis, employee training, preparing bids, estimating costs, meeting with new clients, and payroll.
8. Mila and Herschel share many responsibilities, including liability for the premises lease and Small Business Administration loan, making decisions about large supply and equipment purchases, and hiring or firing of key employees. They also trade off some duties, including check-signing, safety training, and vendor contact, based on who is available when something is needed.
9. On March 20, 2009, the Clearinghouse issued a letter that denied EII's application for verification as a woman-owned business enterprise.
10. EII subsequently protested the denial to the Clearinghouse.
11. On May 26, 2009, the Clearinghouse denied the protest by EII.
12. On June 16, 2009, EII submitted an appeal to the Commission of the Clearinghouse's final determination.
13. At the duly noticed hearing on the appeal, testimony and evidence was submitted by both parties for Commission review and, together with briefs from the parties, constitutes the record upon which this appeal is decided.

Conclusions of Law

1. All jurisdictional requirements for this appeal have been met.
2. Mila owns 51% of Evans Industrial, Inc.

