

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MARY BETH SBARAGLIA,

Complainant,

v.

**UPSTATE NEW YORK REGIONAL MINORITY
PURCHASING COUNCIL, INC., and NATIONAL
MINORITY DEVELOPMENT COUNCIL,**
Respondents.

**NOTICE AND
FINAL ORDER**

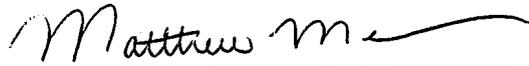
Case No. 5750126

PLEASE TAKE NOTICE that the attached is a true copy of an Order issued by Matthew Menes, Adjudication Counsel, as designated by Kumiki Gibson, Commissioner of the New York State Division of Human Rights ("Division"), after a hearing held before Christine Marbach Kellett, an Administrative Law Judge of the Division. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human

Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

DATED: August 30, 2007
Bronx, New York



MATTHEW MENES
Adjudication Counsel

TO:

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Administrative Law Judge

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FINAL ORDER

Case No. **5750126**

SUMMARY

Complainant charged Respondent Upstate New York Regional Minority Purchasing Council, Inc. ("Upstate") and Respondent National Minority Development Council ("National") with violating N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.13, when she was denied display privileges in an Opportunity Fair for Minority Business Enterprises ("MBE"). Respondents denied unlawful discrimination. Complainant failed to establish that Respondents refused to buy, sell or trade with, or boycotted or blacklisted Complainant's business. The complaint is, therefore, dismissed.

PROCEEDINGS IN THE CASE

On July 13, 1994, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Upstate with an unlawful discriminatory practice in violation of the Human Rights Law.

After investigation, the Division found that it had jurisdiction over the complaint, and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division, thereupon, referred the case to public hearing.

On August 9, 2006, the Division amended the complaint by adding National as a Respondent. (ALJ's Exhibit 2)

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 20, 21, May 15, 16, and 17, 2007.

Complainant appeared at the hearing. The Division was represented by Richard J. Van Coevering, Senior Attorney. National was represented by Jeremy B. Lewin, Esq. of Barnes and Thornburg, LLP. Upstate was represented by Jeffrey J. Weiss, Esq. of Hodgson Russ LLP.

Counsel sought and received permission to file post-hearing briefs. A post-hearing brief submitted on behalf of both Respondents was received on July 9, 2007. The Division's post-hearing brief was received on July 12, 2007.

On July 25, 2007, ALJ Kellett issued a recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order"). No objections to the Recommended Order were received by the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Complainant is white. (ALJ's Exhibit 1)
2. Complainant is the sole owner of MS UNLIMITED, a New York corporation organized for the sale of industrial safety products. (ALJ's Exhibit 1; Complainant's Exhibit 2)

3. MS UNLIMITED is qualified with federal and state contracting authorities as a Women Business Enterprise (“WBE”) and a Disadvantaged Business Enterprise (“DBE”). (Tr. 89; Complainant’s Exhibit 2)

4. National is a not-for-profit corporation incorporated in the State of Illinois. (Upstate’s Exhibit 23)

5. National’s mission is the promotion of MBEs in order to redress racial discrimination in the marketplace by providing a direct link between “corporate America” and minority-owned businesses. (Tr. 1165-66; ALJ’s Exhibit 4; Upstate’s Exhibits 18, 22)

6. National fulfills its mission by offering a variety of services, including marketing assistance, educational programs, and networking opportunities to qualified MBEs through its local affiliates. (Tr. 1167-69; ALJ’s Exhibit 6; Upstate’s Exhibit 18)

7. Upstate is a not-for-profit New York corporation and a regional affiliate of National. (ALJ’s Exhibit 2; Upstate’s Exhibits 3, 16, 20)

8. The target beneficiaries under National’s charter and Upstate’s not-for-profit incorporation are its qualified MBE members. (Upstate’s Exhibit 18)

9. In order to qualify for membership, minority-owned businesses must meet certain criteria found under the Small Business Administration Act’s “8-a program.” (Tr. 931-33, 941, 946-47, 952-53, 963-65)

10. Not all minority-owned businesses qualify for participation in the MBE program, and some enterprises qualify for MBE status for reasons other than race. (Tr. 1111-14; Upstate’s Exhibit 20)

11. At the time of the hearing, National and Upstate were funded through the membership fees of 3,600 corporate, government, and participating MBE members. (Tr. 1181-85)

12. As a regional affiliate of National, Upstate is required to hold one Opportunity Fair per year, at which MBEs exhibit and its corporate members network with the exhibitors. (Tr. 1205; Upstate's Exhibits 3, 17)

13. At the Opportunity Fairs, businesses set up booths at which their goods and services could be displayed. (Tr. 1181-83, 1205)

14. The Opportunity Fairs neither provided specific contracts, nor guaranteed any business to qualified MBE displayers; the Fairs' purpose was networking only. (Tr. 1122-24, 1257)

15. From 1987 through 1993, MS UNLIMITED, as well as other WBEs, participated in Upstate's Opportunity Fairs. (Tr. 100-01; Upstate's Exhibit 4)

16. In 1993, National notified Upstate that display booths at its Opportunity Fairs should be limited to its qualified MBEs. This decision was due in part to Respondents' limited resources and the undue burden that would be placed on those limited resources by continuing to open the display booths to all small business enterprises. (Tr. 695-96, 1230-34; Upstate's Exhibits 8, 9, 11, 14)

17. As a result of this decision, beginning in 1994, MS UNLIMITED, and other non-MBEs, were no longer able to obtain display booths at the Opportunity Fairs. (Complainant's Exhibit 1; Upstate's Exhibits 13, 14)

18. The Opportunity Fair in 1994, however, remained open to the general public. (Tr. 698, 744, 1213)

19. In response to being denied display privileges at Upstate's 1994 Opportunity Fair, Complainant, together with other WBEs, organized and participated in a WBE Opportunity Fair concurrently at the same hotel site as Upstate's MBE Opportunity Fair. (Tr. 129-31)

20. Corporate and government members of Upstate, as well as members of the general public, attended both Complainant's 1994 WBE Opportunity Fair and Upstate's 1994 Opportunity Fair. (Tr. 618, 700-01, 750-51)

21. Complainant charged Respondents with violating the Human Rights Law's provision against illegal boycotts and blacklisting when she was denied display privileges at the Upstate-sponsored Opportunity Fair in June 1994. (ALJ's Exhibits 1, 2; Upstate's Exhibit 1)

22. Upstate admitted Complainant was denied display privileges at its June 1994 Opportunity Fair, but denied unlawful discrimination occurred. Specifically, it denied preventing Complainant from attending the 1994 Opportunities Fair, and asserted that its conduct did not constitute a boycott or blacklisting, as defined and contemplated by the Human Rights Law. Upstate asserted that its conduct was consistent with a federal scheme to stimulate and encourage MBEs, and, therefore, was entitled to an exemption of the New York law. (ALJ's Exhibit 4; Upstate's Exhibit 4)

23. National also denied unlawful discrimination, denied it violated the Human Rights Law, denied any business commerce with Complainant, and asserted federal exemption and affirmative action defenses to the complaint. (ALJ's Exhibit 5)

OPINION AND DECISION

Respondents argue that the Division is barred from applying the Human Rights Law to their conduct in this matter, but have failed to show that that is the case. The mere fact that MBEs are federally-mandated programs is insufficient to preempt the Human Rights Law or to impact in any way the Division's mandate and authority under this law. Thus, the Division had jurisdiction to investigate and hear this case, and has jurisdiction to decide this case.

This case turns on § 296.13 of the Human Rights Law, which provides, in pertinent part, that “[i]t shall be an unlawful discriminatory practice for any person to discriminate against, boycott or blacklist, or refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person.” Although this language is very broad, the court in *Scott v. Mass. Mutual Life Ins. Co.*, made clear that § 296.13 “is directed at curbing, in particular, types of business practices that involve the concerted use of economic means to disadvantage the trade or commercial activities of a member of a targeted group.” *Scott v. Mass. Mutual Life Ins. Co.*, 86 N.Y.2d 429, 435, 633 N.Y.S.2d 754, 757, 657 N.E.2d 769, 772 (1995). No such unlawful activity occurred here.

Here, Respondents admit that they limit their focus to their qualified MBEs and justify the limitation as a voluntary program supporting the federal scheme contained in the Small Business Administration’s 8-a program, which had been upheld as constitutional and endorsed as our national policy in this area. *See Fullilove v. Klutznick*, 448 U.S. 488 (1980) (approving the MBE provisions of the Public Works Employment Act of 1977); *see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F. 2d 50 (2d Cir. 1992) (approving New York State’s Department of Transportation programs for MBEs). Respondents’ purpose and mission is to maximize business opportunities for their beneficiaries, not to destroy or hinder the business opportunities of other businesses, such as MS UNLIMITED. Moreover, Respondents’ witnesses testified, without contradiction, that the decision to restrict the Fair in 1994 was based solely on financial considerations – specifically, Respondents’ limited resources and the undue burden that opening the display booths to all small businesses would place on their ability to meet their mission, goals and objectives. Complainant proffered nothing to show otherwise.

In short, there is no evidence whatsoever that Respondents acted “to disadvantage [Complainant’s business in her] trade or commercial activities,” as required by § 296.13. *Scott*, 86 N.Y.2d at 435, 633 N.Y.S.2d at 757, 657 N.E.2d at 772. And, thus, Complainant’s case must be dismissed.

ORDER

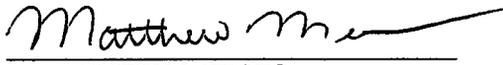
Pursuant to 9 NYCRR § 465.17(c)(3), Adjudication Counsel Matthew Menes has been designated by Commissioner Kumiki Gibson to issue this Final Order. The Adjudication Counsel has not taken part in any of the prior proceedings with respect to this case.

On the basis of the foregoing Findings of Fact, Opinion and Decision, and the laws applicable to this case, it is hereby

ORDERED, that the complaint be, and the same hereby is, DISMISSED.

DATED: August 30, 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



MATTHEW MENES
Adjudication Counsel