

**United States Small Business Administration
Office of Hearings and Appeals**

CVE Appeal of:

Next Dimension Training,

Appellant,

SBA No. CVE-108

Decided: April 11, 2019

APPEARANCE

Ron Jensen, President, Next Dimension Training, Selma, North Carolina, for Appellant

DECISION

I. Introduction and Jurisdiction

On March 6, 2019, the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) issued a letter denying Next Dimension Training (Appellant) inclusion as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB) in the CVE Vendor Information Pages (VIP). On March 19, 2019, Appellant appealed the denial to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA).

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB appeals under the authority of 38 U.S.C. § 8127, and 13 C.F.R. 4.102(u).¹

II. Background

A. Appellant's Application and CVE's Review

Appellant began its application process with CVE in December of 2018. (Case File (CF), Ex. 2.) Appellant submitted required documents including Articles of Organization, tax returns for the two owners, Ron Jensen the Service-Disabled Veteran (SDV) and Ridge King a non-Service-Disabled Veteran (non-SDV), along with requested documents. CVE's initial research showed Appellant company's address of record was in Parker, Colorado. (CF, Ex. 19.)

¹ On October 1, 2018, 13 C.F.R. § 134.102(u) took effect, establishing OHA's jurisdiction over protests of eligibility for inclusion in the Department of Veterans Affairs Center for Verification and Evaluation (CVE) database. 83 Fed. Reg. 13626, 13628 (Mar. 30, 2018).

Appellant elected to participate in CVE's Post-Review Findings (PRF) Program. (CF, Ex. 41.) As part of this process, CVE will reach out to applicants for more information regarding eligibility.² CVE requested additional documentation from Appellant, including a signed Operating Agreement for Appellant, and a Transfer Agreement/Proof of Transfer showing membership interest in Appellant was transferred establishing that Ron Jensen, rather than Ridge King, was the majority owner. (CF, Ex. 20.) CVE also requested a resume for all owners and key personnel, a letter of explanation regarding Ron Jensen's employment outside of Appellant and a schedule of typical work hours for Mr. Jensen, the SDV. (*Id.*)

Appellant's Operating Agreement identifies Ron Jensen as the 51% owner, member since 2017, "effective Head of Sales," and CEO. (CF, Ex. 21.) Ridge King is listed as the 49% owner, original founder, CTO/COO, and as being responsible for all "IT related business." (*Id.*) Appellant's letter of explanation sent on December 26, 2018, did not give typical work hours for the SDV but explained he did not have other employment. (CF, Ex. 22.) Further, it noted Appellant is organized in Colorado, which does not require a transfer agreement. The Operating Agreement takes the place of any transfer agreement. (*Id.*) Appellant submitted its Operating Agreement to CVE on January 3, 2019. That agreement stated no changes could be made "without written notification of said changes delivered electronically or by certified mail to each and all of the members, as well as a majority consensus having been reached, in the event of a majority consensus being impossible, the majority owner(s) vote will stand." (CF, Ex. 25.)

On January 6, 2019, Appellant submitted to CVE a letter of explanation detailing Appellant's hours of operation, (6 a.m. to 6 p.m. daily), and Mr. Jensen's daily schedule. (CF, Ex. 28.) Mr. Jensen's schedule set forth hours worked for every day of the week, but not a detailed statement of his responsibilities or of the work he performs. (*Id.*) CVE requested a more detailed list of duties, to which Appellant responded, explaining, Appellant does not maintain a business facility as the members work from home-offices, and that communications come via phone or email, and that Mr. Jensen, the SDV, is "in control of the company at all times." (CF, Ex. 29, 30.) CVE requested additional documentation from Appellant to explain how the SDV, a former employee, would now be able to control his former employer, a non-SDV. (CF, Ex. 31.) Appellant explained Mr. Jensen began working as a Director of Sales, and stated he was an "independent contractor." Appellant stated Mr. Jensen was hired for his leadership and organizational development experience. His responsibilities and the weight given his opinions exceeded those of an ordinary sales employee. (CF, Ex. 32.) After years of being unprofitable, Appellant's direction changed with Mr. Jensen's participation. Appellant went on to explain Mr. Jensen was better suited to run the company, and the transfer of ownership interest was made with an understanding Jensen's decisions would drive the company. (*Id.*)

² CVE implements the PRF program to reduce denials. PRF allows applicants to address and correct issues with their application before the decision is made. When an issue is identified during an assessment, CVE reaches out to the applicant and allows the applicant five days to address the issue. The applicant can then withdraw and reapply or accept an official denial letter and submit a Request for Reconsideration.

(https://www.va.gov/osdbu/verification/you_asked_we_listened.asp)

On February 14, 2019, CVE sent Appellant an email with the PRF findings. (CF, Ex. 42). CVE indicated there were some issues regarding Mr. Jensen's control of daily business operations (13 C.F.R. § 125.13 (a)), Mr. Jensen's managerial experience of the SDV (13 C.F.R. § 125.13(b)), his control of decision-making (13 C.F.R. § 125.13(c)-(f)), Mr. King's (non-veteran minority owner) ability to control (13 C.F.R. § 125.13(i)-(j)), and close proximity (the distance from Mr. Jensen's residence to the business) (13 C.F.R. § 125.13(l)). (CF, Ex. 53.) Appellant elected to receive the findings and attempt to correct them in the given period. (CF, Ex. 43.)

On February 25, 2019, Appellant submitted a letter of explanation in response to the PRF findings. (CF, Ex. 45.) Appellant argued it was a “non-standard business” which did not produce forms and so there was no “daily business paperwork” to submit to CVE. Appellant maintained the SDV drives the direction of the company, and Appellant included emails to show that activity. (*Id.*) Appellant asserted the SDV was qualified to manage the concern. (*Id.*) Appellant also insisted the former owner and non-SDV knowingly gave up decision making and in the “very unlikely event” the non-SDV did not abide by the agreement or chose “to hinder the activities of the majority owners, the ownership of the company would change to 100% [SDV] and 0% [non-SDV].” (*Id.*) Appellant contends the SDV was never an “employee under” the non-SDV, but rather was a Director of Sales and independent contractor who acted as a partner. (*Id.*) Finally, Appellant argued there was no firm headquarters or storefront and that phone and email are used to oversee the other member and independent contractors. (*Id.*)

B. PRF Notice and Appellant's Response to Notice

On February 26, 2019, Appellant was sent the Final PRF notice, identifying the issues it found in Appellant's application. The PRF stated the Appellant could not be verified and included in the system based on CVE's findings related to daily business operations (13 C.F.R. § 125.13 (a)), control of decision-making (13 C.F.R. § 125.13(c)-(f)), non-veteran control (13 C.F.R. § 125.13(i)-(j)), and close proximity (13 C.F.R. § 125.13(l)). (CF, Ex. 53.) Appellant was instructed it could either withdraw with the opportunity to reapply at any time or accept a determination letter based on the findings and either reapply in six months or appeal the decision to OHA. (*Id.*) Appellant did not withdraw the application and elected to accept the determination letter. (CF, Ex. 53a.)

C. CVE Determination Letter

On March 6, 2019, the Director of CVE (D/CVE) issued a Determination Letter informing Appellant that he was denying its application for inclusion. He informed Appellant he had confirmed it met the definition of a Service-disabled Veteran (SDV) as defined in 38 C.F.R. § 74.1 and 13 C.F.R. Part 125. (CVE Denial Letter, at 1.) The D/CVE, however, was “unable to conclude” Appellant met the requirements in 38 C.F.R. Part 74 and 13 C.F.R. Part 125. The D/CVE identified four areas of non-compliance, all concerning control.

First, D/CVE held he could not “reasonably conclude that the [SDV] controls the management and daily business operations of the applicant as required by 13 C.F.R. § 125.13(a).” (*Id.*, at 2.) 13 C.F.R. § 125.13(a) requires the management and daily business operation of a concern be controlled by one or more SDV's, and control for purposes of the

regulation means long-term decision making and day-to-day management and administration of the business operations. D/CVE pointed out there was conflicting information regarding Appellant's business activity because Appellant's website indicates Appellant works with the VA, and trains military organizations and the Department of Defense, while Appellant's VIP profile indicates Appellant does not write checks and has never had a contract. (*Id.*, at 1-2.) D/CVE found it lacked documentation demonstrating the SDV was actually managing, participating and conducting Appellant's daily business operations. Appellant had failed to provide signed business documentation or business paperwork which would establish the SDV's involvement and control of Appellant's daily business activities, in light of the conflicting information Appellant provided. (*Id.*, at 2.)

Next, D/CVE stated he could not “reasonably conclude that the requirements of 13 C.F.R. § 125.13(d) have been satisfied.” (*Id.*, at 2.) 13 C.F.R. § 125.13(d) requires in limited liability companies, “one or more service-disabled veterans . . . must serve as managing members with control over all decisions of the limited liability company.” D/CVE explains Appellant's January 2, 2019 Operating Agreement lists the members as Ron R. Jensen, an SDV, and Ridge T. King, a non-SDV. (*Id.*) Ron Jensen is the majority owner and seemingly has the ability to amend the Operating Agreement, but, D/CVE points out, the Operating Agreement does not have a further assurances clause, providing that Mr. King shall provide cooperation and assistance to Mr. Jensen executing duties under the contract. (*Id.*) D/CVE concluded that even if the SDV has the unilateral ability to make changes to the Operating Agreement, the non-SDV still has avenues to block the adoption of an amendment. (*Id.*)

The D/CVE also could not, based on the submitted documents, find that Appellant was not controlled by its non-SDV minority owner. (*Id.*, at 3.) The D/CVE pointed out there is a rebuttable presumption that non-SDV individuals or entities control a firm when a non-SDV involved in management or ownership of the concern is a current or former employer or principal of a current or former employer of any SDV upon whom the firm's eligibility is based, citing 13 C.F.R. § 125.13(i)(1). The D/CVE explained that according to Mr. Jensen's resume he was employed by Appellant from April 2018 to November 2018 as the Director of Sales, while Ridge King, the non-SDV, is the founder of Appellant, which he started in August 2009. (*Id.*) It appeared to the D/CVE that Mr. Jensen, the SDV, was previously Appellant's employee and under the supervision of the non-SDV. (*Id.*) Appellant sent a letter of explanation to CVE noting the SDV was made a 51% owner and that his decisions would drive the company. D/CVE found this letter was vague and did not clearly specify how the SDV actually controls the company. (*Id.*) The D/CVE also emphasized Appellant's primary office is also the residence of the non-SDV, which is 1,700 miles from the SDV's residence. (*Id.*)

The D/CVE also found Appellant did not demonstrate the SDV could effectively manage and control Appellant remotely without delegating management responsibilities because the SDV resides a 26-hour drive from Appellant's address in Colorado. (*Id.*) The D/CVE pointed out there is a rebuttable presumption that an SDV does not control a firm if that individual is not located within a reasonable commute to the firm's headquarters or job-sites, regardless of the industry, citing 13 C.F.R. § 125.13(l). Further, the regulation provides the SDV's ability to answer emails or communicate by phone while delegating to others is not considered a reasonable rebuttal. D/CVE sent clarifying questions to Appellant on January 22, 2019,

requesting documentation to rebut the presumption but none were provided by Appellant. D/CVE presumed the SDV did not control Appellant under 13 C.F.R. § 125.13(l). (*Id.*, at 4.)

The D/CVE thus denied Appellant's application based on the totality of circumstances on the date of application, in accordance with 38 C.F.R. § 74.11(d).

D. Appeal

On March 19, 2019, Appellant filed with OHA a timely appeal of D/CVE's decision. Appellant disagrees with the denial that was based on 13 C.F.R. Part 125.13 (a), (d), (i)(1) and (l) and requests OHA overturn the decision. (*Appeal*, at 1.)

Appellant explained it is a small business with two owners and four independent contractors who conduct sales and instruct courses, and that Appellant does not have a storefront, office building, or commercial facility for business. (*Id.*) Appellant explained the operation is run from home-offices and the team travels to the location of work including military installations, hotel conference rooms, and other centers. (*Id.*)

Appellant argues the D/CVE's conclusion the SDV does not control the business as required by 13 C.F.R. § 125.13(a) is in error. (*Id.*) Appellant insists it provided documentation to CVE multiple times, and explains its business is generally conducted via phone, email, video teleconferencing, and document sharing online. (*Id.*) Appellant states it provided CVE an example of the SDV conducting daily operations via email and noted there is no “normal” documentation because Appellant does not have a commercial facility or typical employees. (*Id.*)

Appellant also insists the SDV controls business decisions, despite the D/CVE's conclusion. (*Id.*, at 2.) Appellant argues if the non-SDV were to try “underhanded actions” to prevent a decision an “attorney would then be brought in to enforce the action and the non-veterans would soon after not be a part of the company.” (*Id.*) Appellant contends the clauses in the Operating Agreement comply with 13 C.F.R. § 125.13(d).

Appellant further maintains the SDV controls the concern rather than the non-SDV, in accordance with 125.13(i)(1). (*Id.*) Appellant explained the SDV was not just a Director of Sales, but that the SDV was a partner to the sole proprietor “in all but paperwork” prior to taking an ownership position with Appellant. The SDV took ownership after years of non-profitability of the concern, and Mr. Jensen was better suited to provide the required new direction. (*Id.*) Appellant insists its letter of explanation, the fact that it only has two members, and the lack of a “brick and mortar” business” should have been a sufficient rebuttal to show that the SDV does have actual control over the non-veteran. (*Id.*) Appellant also argues the CVE erred in determining the business relationship was not in the best interest of the applicant, as required by 13 C.F.R. § 125.13(i)(1). (*Id.*) Appellant argues “[t]hat was the sole reason for me taking over the company, as stated, so I consider that point rebutted.” (*Id.*)

Finally, Appellant disagreed with D/CVE's conclusion that the SDV did not control the company because the SDV was located 26 hours away from Appellant's primary address in Colorado. (*Id.*, at 2-3.) Appellant insists the company does not maintain a headquarters as

anticipated by 13 C.F.R. § 125.13(l) and as such the SDV cannot commute. (*Id.*) The mailing address of the company, explains Appellant, is the same as the non-SDV's residence because he was once the sole proprietor and it did not make sense to change the address on all documentation. (*Id.*) Appellant contends the business is conducted via technology and there is no storefront. (*Id.*)

III. Discussion

A. Burden of Proof

Appellant has the burden of proving CVE's denial or cancellation was based on a clear error of fact or law by a preponderance of the evidence. 13 C.F.R. § 134.1111. OHA's decision is generally based on evidence in the CVE case file, arguments made on appeal, and any responses thereto. 13 C.F.R. § 134.1112(c).

B. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more service-disabled veterans. 38 C.F.R. § 74.2(a); 13 C.F.R. §§ 125.12 and 125.13; *CVE Protest of Alpha4 Solutions, LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019); *CVE Protest of Blue Cord Design and Constr., LLC*, SBA No. CVE-100-P (2018).

CVE analyzes control based on SBA's SDBVO SBC regulations found at 13 C.F.R. Part 125. (Determinations on eligibility prior to October 1, 2018 are based upon the VA's regulations at 38 C.F.R. § 74.4.)

I conclude that the D/CVE did not err in finding Appellant failed to meet the requirements of 13 C.F.R. § 125.13(l). Appellant's headquarters is in Parker, Colorado. Mr. Jensen, the SDV, lives in La Grange, North Carolina, a considerable distance. The applicable regulation states:

There is rebuttable presumption that a service-disabled veteran does not control the firm if that individual is not located within a reasonable commute to firm's headquarters and/or job-sites locations, regardless of the firm's industry. The service-disabled veteran's ability to answer emails, communicate by telephone, or to communicate at a distance by other technological means, while delegating the responsibility of managing the concern to others is not by itself a reasonable rebuttal.

13 C.F.R. § 125.13(l).

The regulation therefore explicitly rules out as a ground for rebuttal Appellant's explanation that the concern is run completely online. Appellant's argument that Mr. Jensen is located where he can better access its job sites is unsupported by enough concrete examples to

overcome the presumption in the regulation that Mr. Jensen's location half-way across the country from firm headquarters precludes his actually controlling the concern.

Further, I find the D/CVE's conclusion, that he did not have enough information to find that the SDV controls the management and daily business operations of Appellant as required by 13 C.F.R. § 125.13(a), was reasonable. Appellant did not submit detailed information regarding the SDV's daily tasks, nor did Appellant submit information regarding Appellant's business activities and how responsibilities are delegated. Appellant merely submitted a list of Mr. Jensen's hours worked, without any more detail than that. D/CVE was reasonable in inferring the SDV did not control the day to day management and decision-making, and the decision was not an error of fact or law.

Under 13 C.F.R. § 125.13(d), the SDV must serve as managing member of a limited liability company, with control over all decisions of the company. The D/CVE found the Operating Agreement did not indicate the majority owner and SDV could overcome a non-SDV's attempt to block adoption of an amendment. Appellant indicated the majority owner would not permit any attempts to block the adoption of an amendment and in the event of any dispute would revoke the minority owner's (a non-SDV) ownership. However, the record does not support Appellant's claim. The Operating Agreement is terse in the extreme, without many of the provisions customarily included, such as a further assurances clause, provisions relating to equity structure (contributions, capital accounts, allocations of profits, losses and distributions), management, voting, limitation on liability and indemnification, books and records, anti-dilution protections, restriction on transfer, buyouts dissolution and liquidation, confidentiality and governing law and dispute resolution. Contrary to Appellant's assertion, there is no provision whatever providing for transfer of all ownership to the SDV in the event of a dispute with the non-SDV. Further, contrary to regulation, there is no designation of the SDV as the managing member, giving him control over the company's decisions. Accordingly, I find that the D/CVE did not err in finding Appellant's Operating Agreement did not comply with the regulation, the SDV was not the managing member with control over all decisions of the company.

Finally, I find D/CVE did not err in concluding a non-SDV had the power to control the firm. The regulation provides that where a non-SDV involved in the management or ownership of the applicant concern is a principal of a former employer of the SDV upon whom the claim of eligibility is based, the non-SDV may be found to control the firm. The firm may provide evidence to demonstrate that the relationship does not give the non-SDV actual control. 13 C.F.R. § 125.13(i)(1). Here, Mr. Jensen was employed by Appellant when Mr. King was its sole owner. Appellant has offered assurances that the former owner, who now only owns 49% of the concern, does not have control over the company. There was no additional evidence to show the non-SDV and former sole proprietor was under the SDV's control. Appellant also claimed the SDV had acted as a partner for years, but then indicated he was the Director of Sales, yet indicated in another paragraph the SDV was merely an independent contractor. There is no consistency to his claims, which robs them of credibility. Further, being a partner "in all but paperwork" means you are not a partner. Regardless of the classification or label given to the Director of Sales position, the SDV formerly worked for the non-SDV when the non-SDV was the founder and sole proprietor, and Appellant has not established the relationship does not give the non-SDV actual control over the concern, or is in the concern's best interests. Accordingly,

the D/CVE did not err in finding the non-SDV had the power to control Appellant under 13 C.F.R. § 121.13(i)(1).

Appellant has failed to prove the D/CVE made clear errors of fact or law in concluding Appellant was ineligible for inclusion in the CVE database.

IV. Conclusion

Appellant has not proven CVE's denial was based on a clear error of fact or law. 13 C.F.R. § 134.1111. I must therefore **DENY** the Appeal. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(A); 13 C.F.R. § 134.1112(d).

CHRISTOPHER HOLLEMAN
Administrative Judge