

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

IN THE MATTER OF:

JLS Medical Products, LLC,

Appellant,

Solicitation No.

U.S.

SBA No. CVE-147-A

Decided: April 2, 2020

APPEARANCES

Joy Strum, Esq., Ryan Harrigan, Esq., Hogan Lovells, US LLP, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On December 11, 2019, the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) issued a Notice of Proposed Cancellation (NOPC) to JLS Medical Products, LLC (Appellant). On February 10, 2020, CVE issued a letter cancelling Appellant's inclusion as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB) in the CVE Vendor Information Pages (VIP). On February 24, 2020, Appellant appealed the denial to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA).

The SBA OHA adjudicates SDVOSB appeals under the authority of 38 U.S.C. § 8127, and 13 C.F.R. § 134.102(u).

II. Background

A. CVE's Notice of Verified Status Cancellation

On November 19, 2019, an examiner for CVE arrived at Appellant's address to conduct an unannounced quality control site visit. (Case File (CF), Ex. 25, at 1.) The examiner found that Mr. Terry Smith, a Service-Disabled Veteran (SDV) was Appellant's 100% owner, according to a VA Form 0877 dated January 20, 2017. (CF, Ex. 9.) Upon examination, Mr. Smith's wife, Jacqueline Smith, has since been granted 40% ownership, leaving Mr. Smith with a 60% ownership interest. (CF, Ex. 25, at 1-2.) The examiner noted that a Consent in Lieu of Special Meeting of the Members and Managers of JLS Medical Products Group, LLC (Consent) (CF, Ex. 19) had been executed, which granted Ms. Smith a 40% interest in Appellant and made her a Manager of the concern. (CF, Ex. 25, at 4.) The examiner referred to Appellant's Company

Agreement (CF, Ex. 8) (Designated as Appellant's Operating Agreement (CF, Ex. 7.)). The examiner found a quorum requirement of a simple majority, requiring both Managers to be present in order to transact any business. (CF, Ex. 25, at 5.) The Operating Agreement provides that the Manager shall have sole and exclusive control of the management, business and affairs of Appellant, and shall make all decisions. (*Id.*) Further, the vote of a supermajority of Members shall be required for Appellant to enter into a Fundamental Business Transaction. (*Id.*) The examiner found that with two Managers, it was unclear whether Mr. Smith, the SDV, had unencumbered control of the company. (*Id.*)

Subsequently, on December 11, 2019, CVE sent Appellant a Proposed Notice of Verified Status Cancellation (NOPC). (CF, Ex. 28.) The NOPC stated that on November 19, 2019, CVE made a verification examination visit to Appellant's address. (*Id.*) Appellant provided the CVE examiner with the Consent, dated September 1, 2019. (*Id.*, at 2; CF, Ex. 19.) The Consent designates Ms. Smith as a Manager of the company and issues her a 40% ownership interest. (*Id.*) CVE, however, noted that the verification eligibility of the concern is based upon Mr. Smith's 100% ownership and control as sole Manager. (*Id.*) Appellant did not inform CVE of this change prior to the verification examination. (*Id.*) CVE stated that based upon the addition of a new Manager and minority owner, it could not reasonably determine that Appellant had maintained its eligibility for the program, under 38 C.F.R. § 74.21(d)(2), or whether it has disclosed to CVE the extent to which a non-Veteran participates in the management of the company in accordance with 38 C.F.R. § 74.21(d)(7). (*Id.*, at 1-2.)

CVE further noted that to be an eligible SDVO SBC, the management and daily business operations of a concern must be controlled by one or more SDVs. (*Id.*, at 2-3.) In the case of a limited liability company, one or more SDVs must serve as Managing Members, with control over all decisions of the concern. (*Id.*) Because both Mr. and Ms. Smith have been designated Managers of the concern, CVE could not determine whether Mr. Smith was the Managing Member, with control over all decisions of the company. (*Id.*, at 2-3.) Further, Appellant's Operating Agreement (CF, Ex. 8) provides that the Manager shall have sole and exclusive control of the management of the concern, and that a supermajority of the Members shall be required for the concern to enter into a "Fundamental Business Transaction." (*Id.*, at 9-10.) Thus, Mr. Smith's 60% interest was insufficient to conduct business, without the participation of Ms. Smith's 40% interest. (CF, Ex. 28, at 2-3.)

Accordingly, CVE informed Appellant it was being considered for cancellation. (*Id.*, at 3.) CVE gave Appellant 30 days to respond to the NOPC and explain why the cancellation was not justified. (*Id.*)

On December 13, 2019, Appellant uploaded a letter of explanation to CVE via its VIP Database Profile. (CF, Ex. 33.) Appellant stated that Mr. Smith had held 100% ownership of the company. (*Id.*, at 1.) Appellant explained that "[i]n September 2019, the owner allocated 40% of the ownership to his wife, so that she might assist in the management and operation of the company." (*Id.*) Appellant noted that this caused CVE to question whether Appellant was veteran-owned and controlled. (*Id.*) Accordingly, Appellant informed CVE it had restated its Operating Agreement to require only a majority vote to make decisions, eliminating the question

of veteran ownership and control. (*Id.*) Appellant submitted the Restated Operating Agreement through the VIP Database Profile (CF, Ex. 34.) (*Id.*)

At that point, CVE documented its interaction with Appellant and Mr. Smith calling for information on the NOPC on December 11, 2019 and being advised to review the letter. (CF, Ex. 38.) Mr. Smith called again on January 7, 2020, and February 7, 2020, inquiring as to the status of his case. (*Id.*)

On February 10, 2020, CVE issued a Notice of Verified Status Cancellation to Appellant. (CF, Ex. 35.) CVE stated that Appellant either did not respond to the NOPC or its response was not adequate to justify overturning the findings of the NOPC. (*Id.*, at 1.) Therefore, CVE cancelled Appellant's status in the VIP Database. (*Id.*) CVE discussed its Verification Examination and the Consent document. (*Id.*) CVE could not conclude Appellant had disclosed the involvement of an apparent non-veteran Manager of Appellant, as required by 38 C.F.R. § 74.21(d)(4), nor had Appellant provided an updated VA Form 0877 within 30 days of a change in ownership as required by 38 C.F.R. § 74.21(d)(7). (*Id.*, at 1-2.) Thus, Appellant's failures to disclose were grounds for removal. (*Id.*, at 2.)

Further, CVE determined that Appellant's addition of a non-veteran Manager who owns 40% of the company when the Operating Agreement required a supermajority to enter into Fundamental Business Transactions meant that Appellant was not controlled by an SDV. (*Id.*, at 3.) CVE noted that Appellant responded to the NOPC by identifying an amendment to its Operating Agreement to require only a majority of voted shares to make decisions and enter into contracts. (*Id.*) However, it was CVE's policy not to accept changes to business documents in response to an NOPC and an updated submission could not be accepted as part of the cancellation process. (*Id.*) In addition, the fact that both Mr. and Ms. Smith are Managers meant CVE could not determine Mr. Smith, the SDV upon whom Appellant's claim of eligibility is based, is Appellant's Managing Member as required by 13 C.F.R. § 125.13(d). (*Id.*, at 3.)

B. The Appeal

On February 24, 2020, Appellant filed its Appeal with OHA. Appellant maintains it is in full compliance with the regulations and has been since its inception in 2013. (Appeal, at 1.) Mr. Smith has retained his 100% ownership of Appellant and has been in full control of Appellant throughout. (*Id.*)

Appellant first addresses the issue of the Consent. Appellant asserts the Consent evidenced an initial intent to transfer 40% ownership to Ms. Smith, a non-veteran, in September 2019. (*Id.*) Appellant did this because Mr. Smith had developed an extremely serious health condition.¹ According to Appellant, Mr. and Ms. Smith considered involving Ms. Smith in the concern in a limited capacity, so she could assist in the operation of the concern. (*Id.*, at 1-2.) Eventually, it was decided that Ms. Smith would not become involved in the business. (*Id.*, at 2.)

¹ Appellant discusses Mr. Smith's health condition at length. I will not discuss the specifics here in order to protect his privacy, and because they are not relevant to the issues here, other than to note that they were serious indeed.

Ms. Smith did not submit the required capital contribution, and her ownership interest in Appellant was never perfected. (*Id.*)

Appellant maintains that CVE, in its verification examination and subsequent review, had incorrectly assumed that the Consent had been perfected. (*Id.*) Once CVE made that assumption, it concluded that Appellant had violated the regulation, and therefore was no longer eligible. (*Id.*)

Appellant firmly maintains that upon receipt of the NOPC, it attempted on multiple occasions to communicate with CVE to address the agency's concern and to clarify the pertinent facts. (*Id.*, at 3.) Appellant asserts CVE would not engage with it. (*Id.*) Consequently, Appellant amended its Operating Agreement to adjust the voting requirement to address CVE's concerns about control, requiring only a simple majority for important actions. (*Id.*) Appellant then submitted the Restated Operating Agreement to CVE via its VIP Database Profile. (*Id.*)

Appellant argues there is no basis for delisting the firm. Even if Ms. Smith's minority ownership had been perfected, which it was not, veteran control of the firm would have been maintained. (*Id.*, at 4.)

Appellant argues that CVE erred in assuming ownership of the company had changed under the Consent. Under Texas corporate law, letters of intent to effect changes in corporate ownership do not impact ownership unless any contemplated capital contributions are made. (*Id.*, citing Tex. Bus. Orgs. Code Ann. § 101.153.) Appellant asserts that the Operating Agreement specifically requires the capital contribution to be made and allows for no exceptions to this requirement. (*Id.*, citing CF. Ex. at ¶ 4.01.) Appellant then argues it never transferred ownership to Ms. Smith because she never made the necessary capital contribution. (*Id.*)

Appellant continues to argue that even if its ownership had changed based upon the Consent, CVE would not have a reasonable basis to delist it from the Database. (*Id.*) Appellant acknowledges CVE may remove a firm from the VIP list for good cause. (*Id.*, at 4-5, citing 38 C.F.R. § 74.21.) Appellant argues that while the actions enumerated at 38 C.F.R. § 74.21 could constitute good cause to support cancellation, they do not require it. (*Id.*) Appellant argues the regulation shows a clear intent to allow CVE to make the correct decision under the circumstances. (*Id.*) Appellant argues that under the permissive authority granted by the regulation, CVE has the discretion to keep companies in the program where there has been no intention to relinquish veteran ownership and control. (*Id.*, at 5.) CVE also has the authority to retain businesses whose compliance with the program lapses, especially in a case such as Appellant's, where there are extenuating health circumstances, and Appellant has not intentionally acted in any way contrary to the program. (*Id.*)

Appellant further asserts that it worked diligently and under difficult circumstances to cure the oversight and make a conforming change to its Operating Agreement that reduced the majority requirement to a simple majority from a super majority. (*Id.*) This is a full cure of the lapse in veteran control CVE found in the firm. (*Id.*) Appellant claims that CVE is refusing to examine the updated documentation, not because the regulations will not allow it, but because of its internal policy disallowing acceptance of updated business documents. (*Id.*)

Appellant also maintains that CVE's position results in a situation where firms are unable to cure an unintentional lapse in documentation. (*Id.*) This is at odds with the point of veterans' assistance programs, and that CVE is not bound to follow a policy that yields such harsh results. (*Id.*) Appellant argues that CVE has the authority to accept additional documents regardless of such a policy. (*Id.*) Appellant asserts it is well-settled that policy statements are binding on neither the public nor the agency, and an agency has the discretion to change its position in any specific case. (*Id.*, at 5-6, citing *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 71 (D.C. Cir. 2015).) CVE's policy deprives the veteran-owned business of its ability to cure. (*Id.*, at 6.) Appellant maintains that in analogous contexts, where contractor performance is incomplete or unsatisfactory, the Government is required to act in good faith and provide the contractor the opportunity to cure. (*Id.* at 6, citing *Cibinic, Nash & Nagle, Administration of Government Contracts*, 296-311 (4th ed. 2006).) Thus, holding veterans to this type of strict liability standard cannot be the approach Congress and the Department had in mind when setting up this program for veteran small business owners. (*Id.*)

Appellant contends that Mr. Smith's medical condition constituted an extenuating circumstance which the regulation recognizes CVE should consider in making a removal decision. (*Id.*, at 6, citing 13 C.F.R. § 125.11.)

In summary, Appellant argues that CVE had no basis to remove it from the program. First, Appellant has retained full veteran control and ownership throughout, because Ms. Smith's ownership interest was not perfected. (*Id.*) Second, even if Ms. Smith's ownership had been perfected, CVE retains full discretion to permit Appellant to remain in the program. (*Id.*) CVE has no good cause to remove Appellant because there was no intent to undermine veteran ownership and control, and the Operating Agreement was immediately amended once CVE identified the deficiency. (*Id.*) Appellant again asserts program regulations recognize that CVE should consider extenuating circumstances in making removal decisions, and Mr. Smith's significant health issues constitute such a circumstance. (*Id.*)

C. The Record

The Consent is dated September 1, 2019 and is signed by Mr. Smith as Manager and Member of Appellant. Its text:

The undersigned being the Manager and Member of JLS Medical Products Group, LLC (the "Company"), acting pursuant to the applicable provisions of the Texas Business Organizations Code and the Company's Company Agreement does hereby unanimously consent to the following resolutions and actions of the Company as if the same were presented to and voted on ay (sic) a formal meeting of the Members and Mangers (sic) of the Company properly noticed and held.

WHEREAS, the Member and Manager has decided it is in the best interest of the Company to issue a forty percent (40%) ownership interest in the Company to Jacqueline Smith and to appoint Jacqueline Smith as a Manager of the Company, effective as of September 1, 2019.

After discussion and approval it is RESOLVED, that Jacqueline Smith is hereby admitted as a Member and Manager of the Company, effective September 1, 2019 and the officers of the Company are hereby authorized to issue a membership certificate to Jacqueline Smith representing a forty percent (40%) ownership interest in the Company and to take all actions as shall be necessary to accomplish the directives of this resolution.

(CF, Ex. 19.)

Appellant's Operating Agreement (CF, Ex. 8) dated December 4 (no year) defines the "Capital Contribution" of each Member as the amount of money and property the Member will contribute to the company. (*Id.*, at 1-2.) A Fundamental Business Transaction has the meaning assigned by the Texas Business Organizations Code, and includes mergers, interest exchanges, conversions and sales of all or substantially all of a firm's assets. (*Id.*, at 2.) A simple majority is one or more Members having among them more than 50% of the interests of the Members. (*Id.*, at 3.) A super majority is one or more Members having among them more than 66.67% of the interests of the Members. (*Id.*)

The Operating Agreement requires a super majority for a number of actions. These include the addition of new members (§ 3.02), the removal of a Manager (§ 6.05), the entering into a Fundamental Business Transaction (§ 8.01(b)), the power to adjourn meetings of Members and to set a date for a new meeting (§ 8.01(d)), the consent to the transfer of a Member's interest (§ 13.01), the approval of the purchase of a deceased or bankrupt Member's interest (§§ 14.02, 14.03), the compromise of a debt due by a defaulting Member (§ 15.03), the termination of the company (§ 16.01(a)), and the amendment of the Operating Agreement itself (§ 17.01).

The Operating Agreement further provides the company will be managed by the individual(s) designated as Manager(s). The Operating Agreement grants the Managers broad discretion and authority. (§ 6.12.) The Managers will have the sole and exclusive control of the management, business and affairs of the company, and the Managers shall make all decisions and take all actions for the company, including making and performing contracts. (§ 6.01.) The Operating Agreement lists Mr. Smith as the sole Member, with a \$1,000.00 capital contribution (Apx. A.) (*Id.*, at 36.)

Appellant uploaded and submitted the Restated Operating Agreement, dated September 1, 2019, on December 13, 2019. (CF, Ex. 34.) This Restated Agreement is largely identical to the original Operating Agreement, except that it greatly curtails the need for action by a super majority, requiring it only for the adjourning a meeting of the Members (§ 8.01) (which adjournment may also be performed by the Chair), the approval of the purchase of a deceased or bankrupt Member's interest (§§ 14.02, 14.03), and the compromise of a debt due by a defaulting Member (§ 15.03). The Agreement lists two Members, Mr. Smith with a 60% interest and a capital contribution of \$600, and Ms. Smith with a 40% interest and a capital contribution of \$400 (Apx. A.) (*Id.*, at 36.)

Appellant also provided a copy of 12 business checks numbered 2944 through 2955, dated between September 29, 2019, and October 18, 2019, signed by Jacqueline Smith. (CF, Ex. 18.)

D. Appellant's Objection to the Case File

On March 19, 2020, Appellant filed an Objection to the Case File. Appellant maintains that the Case File is missing two documents. First, a copy of the appeal itself. Appellant argues the appeal filing is relevant and should be included in the Case File.

Second, a copy of Exhibit 5 to the Appeal, Signed Consent to Take Part in Research Study. Appellant seeks to admit this document to confirm that Mr. Smith was enrolled in a clinical trial, the intensity of which contributed to his decision to consider transferring partial ownership to his wife, which transfer, Appellant maintains, was never perfected. Appellant maintains that this document supports a central argument of the appeal and should be included in the Case File.

E. CVE's Response to Appellant's Objection to the Case File

On March 27, 2020, CVE filed a response to Appellant's objection to the Case File. CVE maintains that in accordance with 13 C.F.R. § 134.1107, the Case File is to include the entire Case File relating to the cancellation. The Case File Index, i.e., Exhibits 1 through 38, lists all documents relating to the Verified Status Cancellation at issue in this appeal. CVE states that neither Appellant's appeal filing, nor Appellant's Exhibit 5 were submitted to CVE in response to the NOPC. Furthermore, neither document, prior to the filing of this appeal, had been uploaded to JLS' VIP Database profile. Accordingly, since neither the Appellant's appeal filing nor Appellant's Exhibit 5 relate to CVE's cancellation, neither document should be included in the Case File.

CVE contends that Appellant has not shown good cause to include the two documents in the Case File. With respect to Appellant's Exhibit 5, it is being offered in support of an argument offered for the first time on appeal. CVE asserts that in response to the NOPC, Appellant admitted that there had been an ownership of transfer, referring to Exhibits 33 and 34 in the Case File. However, Appellant now claims that no transfer occurred.

Finally, CVE asserts the standard on appeal is whether the Director, CVE's decision was based on clear error of fact or law. Thus, CVE notes that Appellant is essentially requesting that additional evidence be admitted into the record. In view of the foregoing, CVE requests that Appellant's Objection to the Case File be denied.

III. Discussion

B. Burden of Proof and Objection to the Record

Appellant has the burden of proving, by a preponderance of the evidence, that CVE's cancellation of Appellant was based on a clear error of fact or law. 13 C.F.R. § 134.1111. OHA's

decision is based on evidence in the CVE Case File, arguments made on appeal, and any responses thereto. 13 C.F.R. § 134.1112(c).

Appellant makes two objections to the record. The first is that the appeal itself should be included. However, the appeal is not part of the Case File, but it is included in the arguments made on appeal (13 C.F.R. § 134.1112(c)), and thus is part of the record upon which OHA's decision will be based. Therefore, there is no need for me to rule whether it should be included in the Case File.

As to Appellant's Exhibit 5, I cannot admit it into the record. It is not part of the Case File, there is no record that it was submitted to CVE, and Appellant offers no evidence that it was submitted to CVE. Accordingly, I must conclude that it was not included in the Case File. I must therefore exclude it from the record, as new evidence submitted on appeal is admissible only if good cause is shown. 13 C.F.R. § 134.1110; *CVE Appeal of GCBO Sourcing Partners, LLC*, SBA No. CVE-112, at 5 (2019). Appellant has not established good cause for the submission of this document, because CVE did not remove Appellant from the Database due to a medical condition.

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 SDVs. 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 SDVO SBC regulations found at 13 C.F.R. Part 125. The regulations are clear that CVE may remove a participant from the public listing in the VIP Database for good cause. 38 C.F.R. § 74.21(d).

One of CVE's reasons for removing Appellant is that it failed to maintain ownership and control of the firm by SDVs. 38 C.F.R. § 74.21(d). Under the Consent, Ms. Smith had a 40% interest in the firm, and was one of the Managers. Section II.C, *supra*. The regulations provide that a limited liability company, such as Appellant, is owned by an SDV if at least 51% of each class of member interest is unconditionally owned by one or more SDVs. 13 C.F.R. § 125.12(c). Appellant remained 60% owned by Mr. Smith after the Consent, and therefore it met the requirement of the regulation as to ownership. Accordingly, CVE erred in finding that Appellant did not meet the ownership requirements of the regulation.

Nevertheless, I must conclude that CVE did not err in finding that Appellant no longer met the requirement of the regulation that it be controlled by one or more SDVs. 13 C.F.R. § 125.13(a). In the case of a limited liability company, one or more SDVs must serve as Managing Members, with control over all decisions of the company. 13 C.F.R. § 125.13(d). Here, Appellant had installed Ms. Smith, a non-veteran, as a Manager with broad powers to run the concern. Appellant's Operating Agreement grants the Managers broad discretion and authority. Managers have the sole and exclusive control of Appellant's management. They make all decisions and take all actions for the company. There is nothing in the Operating Agreement which, in the case of multiple Managers, gives one precedence over the other. Therefore, Ms.

Smith, a non-veteran, as a Manager, had the power to control Appellant equal to Mr. Smith. While the Restated Operating Agreement curtailed the number of actions requiring a supermajority, Ms. Smith continue to retain the same powers of the company's Managers. Accordingly, CVE did not err in finding that Appellant was not controlled by an SDV, because Appellant, a limited liability company, had a non-veteran as a Manager. Section II.C, *supra*.

Further, for a concern to be considered controlled by an SDV, one or more SDVs must meet all super-majority voting requirements. 13 C.F.R. § 125.13(f). Appellant's Operating Agreement included several super-majority voting requirements for Fundamental Business Transactions, such as the mergers and sales of all or substantially all the firm's assets, the adding or removing of Members, and the termination of the firm. In effect, Mr. Smith would require the consent of Ms. Smith to undertake any of these important actions, because he has only a 60% interest himself. Accordingly, the Consent took control of the firm away from Mr. Smith, by making Ms. Smith a Manager, which gave her broad powers to control the company, and negative control over the firm, since she held an interest sufficient to block any of the many important actions requiring a super-majority vote. Section II.C, *supra*.

Appellant argues the Consent should not have been considered, because Ms. Smith's interest was not perfected and she never submitted the required capital contribution, and therefore, the transfer of the 40% interest to Ms. Smith never took place. Appellant relies upon Tex. Bus. Orgs. Code Ann. § 101.153, which provides that the operating agreement of a limited liability company may require that the interest of a member who fails to perform a promise to pay cash to the company may have their interest redeemed or made the subject of another penalty.

Appellant's argument is unsupported by the record. Appellant does not point to any provision of the Operating Agreement requiring a Member to forfeit their interest if he or she fails to make a capital contribution. Section II.B-C, *supra*. Further, the Consent does not mention or require any capital contribution to be made by Ms. Smith. It is a straightforward unconditional grant of a 40% interest in Appellant to Ms. Smith, and a straightforward unconditional appointment of Ms. Smith as a Manager. In clear language, the Consent makes no mention of any capital contribution and requires no payment whatsoever by Ms. Smith. Conversely, there is nothing in the record to show that Ms. Smith failed to make a required capital contribution.

Further, Appellant's own response to the NOPC (CF, Ex. 33) stated flatly that in September 2019, Mr. Smith gave a 40% interest in Appellant to Ms. Smith. There was no statement regarding a capital contribution, or an unperfected transfer to Ms. Smith. Appellant submitted the Restated Operating Agreement (CF, Ex. 34) with its response to the NOPC. The Restated Operating Agreement includes an Appendix recording a \$400.00 capital contribution by Ms. Smith. Additionally, CVE records show that Appellant made disbursement checks between September 29, 2019, and October 18, 2019, signed by Ms. Smith. This makes clear that Ms. Smith was participating in the management of Appellant. Section II.C, *supra*. Therefore, I cannot credit Appellant's mere *post hoc* assertion in its appeal that Ms. Smith's interest was never perfected, and that she was never a Member or a Manager of Appellant. I therefore conclude that Ms. Smith was a Member and Manager of Appellant at the time of CVE's site visit.

Appellant's argument that Mr. Smith attempted to communicate the unperfected Consent's grant to CVE or that Ms. Smith was not a Member or Manager, is not supported by the record. In fact, CVE records show that Appellant only inquired as to the status of its case. Section II.A, *supra*. There is nothing in the record to support this argument on appeal.

Further, Appellant's argument that CVE erred in declining to accept the Restated Operating Agreement as Appellant's effective operating agreement is a policy concern. On one hand, CVE states that its policy is not to accept documents prepared after the NOPC is issued. On the other hand, Appellant argues that I should discard this policy. However, my task is to determine whether CVE's decision is based upon a clear error of fact or law. Appellant cannot show how CVE's policy was based on a clear error of fact or law. Therefore, I cannot hold that CVE was in error to establish this policy and to follow it.

Next, I find that CVE was not in error to remove Appellant upon its failure to disclose to CVE the involvement of a non-veteran Manager of the firm and its failure to submit an updated VA Form 0877 within 30 days of a change of ownership, pursuant to 38 C.F.R. §§ 74.21(d)(4) & 74.21(d)(7). The record clearly reflects the involvement of a non-veteran Manager, and no new VA Form 0877 filed within 30 days of the transfer to Ms. Smith. Appellant had failed to comply with the regulation, and CVE's action was supported by the record.

Finally, Appellant argues that I should use my discretion to overturn CVE's decision. Appellant supports its argument based upon Mr. Smith's medical condition, which led to the decision to grant Ms. Smith an interest in the firm and to make her a Manager. Section II.B, *supra*. Appellant points to the regulation that states, CVE “may remove a participant” under the 38 C.F.R. § 74.21(d) for the enumerated reasons, which constitute good cause. Appellant argues that CVE is not required to remove Appellant, that its policy allows a firm no ability to cure a mistake, and that there are extenuating circumstances, i.e., Mr. Smith's medical condition, which justify reversing CVE's decision.

Again, I must reiterate that my task is to determine whether CVE's decision was based upon an error of fact or law, not whether CVE made appropriate use of its discretionary authority. Nor am I granted the power to use my discretion to compel a different result. While CVE may have had the power to decide not to remove Appellant, its action was based upon reasons for removal set out in 38 C.F.R. § 74.21(d), reflected in the evidence of record, and in accordance with the procedures under 38 C.F.R. § 74.22. I cannot find that CVE's decision was based upon clear error. Furthermore, extenuating circumstances are not a factor the regulations require CVE to consider in making removal decisions. Contrary to Appellant's argument, there is nothing in 13 C.F.R. § 125.11 or any other applicable regulation that requires such consideration. Notably, as an argument against exercising discretion, Appellant's arguments on appeal were not supported by the record. The Consent was not conditioned upon any capital contribution, Appellant's own Restated Operating Agreement recorded Ms. Smith's capital contribution had been made, and Appellant's Response to the NOPC stated without condition that Ms. Smith held a 40% ownership of the company and was assisting in its management. Section II.C, *supra*.

It is clear that Appellant failed to meet the requirement that it maintain control by an SDV, failed to disclose to CVE the extent to which non-veterans participated in its management,

and failed to file an updated VA Form 0877 within 30 days of a change in ownership. Accordingly, Appellant has failed to meet its burden of establishing that CVE's decision to remove Appellant was based upon a clear error of fact or law. I therefore must deny the appeal.

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