

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

CVE Appeal of:

Pro-Sphere Tek, Inc.,

Appellant,

CVE Notice of Verified Status

Cancellation

RISK-T3-LTR-001-REV 20190401

SBA No. CVE-162

Decided: August 1, 2020

APPEARANCES

Jonathan T. Williams, Esq., Peter B. Ford, Esq., Meghan F. Leemon, Esq., Anna R. Wright, Esq., PilieroMazza PLLC, Washington, D.C., for Pro-Sphere Tek, Inc.

DECISION¹

I. Introduction and Jurisdiction

On May 28, 2020, Pro-Sphere Tek, Inc. (Appellant) appealed a decision of the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) cancelling Appellant's verification in VA's Vendor Information Pages (VIP) database of eligible Service-Disabled Veteran-Owned Small Businesses (SDVOSBs). Appellant maintains that the cancellation was clearly erroneous and requests that the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted.

OHA adjudicates CVE appeals pursuant to 38 U.S.C. § 8127(f)(8)(A) and 13 C.F.R. part 134 subpart K. Appellant timely filed the appeal within ten business days after receiving the cancellation notice on May 14, 2020. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to propose redactions if desired. On September 8, 2020, Appellant informed OHA that, although Appellant had no proposed redactions, Appellant requested that OHA correct certain administrative errors that do not substantively affect the decision. OHA issued a separate Notice of Erratum granting Appellant's request, and now publishes the decision, as corrected, for public release.

II. Background

A. Facts

Appellant was founded in 2006 and is incorporated in the state of Maryland. (Case File (CF), Exh. 51, at 1.) Appellant originally was wholly-owned by Mr. Rodger Blevins, a service-disabled veteran. The Case File contains a stock purchase agreement, dated October 1, 2011, purporting to transfer portions of Mr. Blevins' interest to the Joel Rhoades Trust and the Bautista Family Trust.² The 2011 stock purchase agreement stated that Appellant would issue and sell 39 shares (39%) of common stock to Mr. Joel R. Rhoades via the Joel Rhoades Trust, and would issue and sell 21 shares (21%) of common stock to the Bautista Family Trust. (*Id.* at 1-2.) Mr. Blevins would retain 40 shares (40%) of the stock. (*Id.* at 1.)

The 2011 stock purchase agreement stated that Mr. Blevins would be Appellant's President/CEO, while Mr. Rhoades will be Appellant's Chairman and the Chair of Appellant's Board of Directors. (*Id.* at 3.) The Case File contains a shareholder resolution, dated December 29, 2016, electing Mr. Rhoades as Appellant's Chairman. (CF, Exh. 98, at 5.) Mr. Rhoades, like Mr. Blevins, is a service-disabled veteran. (CF, Exhs. 20, 89.) The sole shareholder of the Bautista Family Trust is Ms. Esperanza P. Rhoades, the former spouse of Mr. Rhoades. Ms. Rhoades is neither a veteran nor a service-disabled veteran. (CF, Exh. 16.)

The 2011 stock purchase agreement included provisions relating to Appellant's Board of Directors:

a. [Appellant's] Board of Directors (“the Board”) will consist of two (2) voting members ([Mr.] Rhoades and [Mr.] Blevins). As the Chair, [Mr.] Rhoades will have final decision authority; except that matters significantly effecting the operational structure of the company, or place the company at risk financially or otherwise, will require unanimous decision by the Board. Board meeting[s] will be held once a month or as required and agreed to between the parties; any member may call for a special meeting. On any matter that any member brings to the Board that cannot receive a unanimous decision, the parties shall agree to arbitration by a[n] independent 3rd party advisor.

b. The Board shall have the authority to hire and/or appoint officers of [Appellant].

² Appellant observes that the 2011 stock purchase agreement was signed only by Mr. Blevins and Mr. Rhoades, not by any representative of the Bautista Family Trust. Therefore, Appellant maintains, the 2011 stock purchase agreement is not legally binding, and final stock purchase transactions were not completed until June 2013. Other than the 2011 stock purchase agreement, however, no other stock purchase agreements are included in the Case File. The Case File does contain stock certificates reflecting that, as of June 21, 2013, Mr. Rhoades owned a 39% interest in Appellant, while the Bautista Family Trust owned 21%. (CF, Exhs. 35 and 78.)

c. As President and CEO, [Mr.] Blevins will hire staff, but [Mr.] Rhoades has the right to approval of certain key staff positions.

d. [Mr.] Blevins and [Mr.] Rhoades shall have veto authority for actions that would substantially change the operational structure of [Appellant] or place [Appellant] at risk financially or otherwise. As an example, [Appellant's] participation in a Joint Venture.

(CF, Exh. 51 at 3.) An “Employment Agreement” attached to the 2011 stock purchase agreement stated:

Employment [of Mr. Rhoades or Mr. Blevins] cannot be terminated unless with cause. Cause is defined as illegal or unethical actions that place [Appellant] in grave risk financially or otherwise. Any claim of cause for termination must be upheld by an independent panel consisting of a labor relations attorney and a Human Resources expert.

(*Id.*, Exh. C at 1.)

CVE first verified Appellant as an SDVOSB in 2011, and the Case File indicates that CVE re-verified Appellant on April 26, 2018. (CF, Exh. 1.) The re-verification was valid for a period of three years. (*Id.*)

Mr. Blevins served as Appellant's President/CEO until August 2019. At that time, Mr. Blevins purportedly was removed from his position by action of Appellant's Board. Mr. Blevins disputes the validity of his removal and has filed a lawsuit in the state of Maryland seeking an injunction and declaratory relief. (CF, Exh. 40.) Appellant contends that the position of President/CEO is now vacant following Mr. Blevins' removal. (CF, Exh. 140 at 6.) Appellant and Mr. Blevins agree that, irrespective of whether Mr. Blevins was properly removed from his position of President/CEO, Mr. Blevins remains a member of Appellant's Board of Directors, and retains his 40% ownership of Appellant. (*Id.*)

On November 22, 2019, Mr. Rhoades appointed Mr. Michael Sumrall to serve as Appellant's Chief Operating Officer (COO) and Vice Chairman. (CF, Exh. 22.) CVE has determined that Mr. Sumrall is a service-disabled veteran. (CF, Exh. 140 at 6, n. 4.) In his letter appointing Mr. Sumrall, Mr. Rhoades stated:

This appointment was necessitated by Mr. Rodger Blevins termination, with cause, by [Appellant's] Board of Directors on August 23, 2019. Because [Appellant] is a Service-Disabled Veteran (SDV) company, it is very important that control of the company on a day-to-day basis continues to clearly rest with [service-disabled veteran] leadership. The Chairman exercises final decision authority and control of the company however, Mr. Blevins termination placed/s a substantially increased workload on [Mr. Rhoades] as the Chairman until [Mr. Sumrall] stepped in. As an experienced executive and SDV, the day-today

assistance [Mr. Sumrall] ha[s] provided and continue[s] to provide in the absence of a CEO/President is very important.

(CF, Exh. 22 at 1.) Mr. Rhoades indicated that Mr. Sumrall would serve in this role until a permanent CEO was selected by Appellant's shareholders. (*Id.*)

The Case File includes a letter, dated January 16, 2020, describing the Chairman's duties and responsibilities. (CF, Exh. 91.) The letter stated that Mr. Sumrall is assisting Mr. Rhoades with the duties of the President/CEO until a shareholder meeting can be convened to select a new President/CEO. (*Id.* at 1.) In the interim, "Mr. Rhoades is directly responsible for overseeing the day-to-day administrative and operation functions of [Appellant] without the assistance of a CEO." (*Id.* at 2.) The letter outlined four major duties and responsibilities for Mr. Rhoades as Chairman:

1. The first and most important single function of the Chairman is to serve as the most senior officer and decision maker of the corporation; the Chairman is charged with final decision authority. Unlike most public corporations, [Appellant's] governing documents appoint Chairman and not the Chief Executive Officer as the most senior executive.

2. The Chairman (Mr. Rhoades) has two direct reports but, in the absence of a Chief Executive Officer (CEO), the number of direct reports has increased to four specifically; the Vice Chairman/Chief Operating Officer, two Executive Vice Presidents, and a Vice President of Operations. Another significant function is to "fill in" for absent subordinates and ensure their duties are performed, when absent. Currently Mr. Rhoades performs or ensures that the CEO duties are performed in the absence of an assigned CEO.

3. The Chairman is also charged with supervising and controlling the business affairs of [Appellant]-this requires frequent daily contact with the Executive Leadership Group.

4. The Chairman also chairs the Board of Directors. In between the quarterly board meetings, the role of senior decision-maker takes on increased significance and importance.

(*Id.* at 1.)

B. Bylaws

The Case File contains Appellant's Bylaws dated June 28, 2013. (CF, Exh. 57.) Article II Section 2 of the Bylaws states:

Election and Term of Chairman, Chief Executive Officer, and President. The Chairman, Chief Executive Officer, and President of the corporation shall be certified Service-Disabled Veterans elected by the shareholders and each shall be

an officer of the corporation and hold office until removed or until his successor shall have been elected by the shareholders. With a unanimous vote of the shareholders, these positions may be held by the same Service-Disabled Veteran. If the shareholder vote is not unanimous, one [service-disabled veteran] shall not hold the Chairman position and both President and CEO position. A vacancy because of death, resignation, removal, disqualification or otherwise shall be filled only at a duly called meeting of the shareholders. . . .

(*Id.* at 1.) Article IV of the Bylaws contains several provisions describing the roles and responsibilities of officers:

Section 1. *Officers of the Corporation.* The officers of the corporation shall consist of a Chairman, Chief Executive Officer, President, a Secretary, a Treasurer, and additional officers may be named as Vice President, and Assistant Secretaries, Assistant Treasurers, and other officers by the Board of Directors. Two or more offices may be held by the same person, but no officer may act in more than one capacity where action of two or more officers is required. Special restrictions apply to one person holding more than one position[] as Chairman, CEO, and President-see [Article II section 2].

. . .

Section 3. *Election and Term of Officers other than the Chairman, Chief Executive Officer, and President.* Other officers of the corporation shall be elected or reaffirmed as required by the Board of Directors, and each officer shall hold office until removed or his successor shall have been elected. Vacancies in these positions will be filled by the Board of Directors.

. . .

Section 7. *Chairman.* The Chairman shall be a Certified [service-disabled veteran] and will serve as the most senior officer of the corporation and hold the position of Chairperson for the Board of Directors. He/she shall in general have final decision authority for the corporation, supervise and control the business and affairs of the corporation, [and] make the long-term decisions for the corporation unless an action is reserved for the Shareholders.

Section 8. *Chief Executive Officer (CEO) and President.* The CEO/President shall be a certified Service-Disabled Veteran and will act as a senior manager of the corporation. In this capacity, the CEO/President is responsible for day-to-day management and control of the corporation reporting to the Chairman. The President will hire and terminate staff, but key personnel positions will require approval by the Chairman. Key personnel are generally defined as those personnel reporting directly to the CEO/President.

(*Id.* at 3.) Article III of the Bylaws describes the rules and procedures for Appellant's Board of Directors meetings. The Bylaws state:

Section 8. *Informal Action by Directors.* Action taken by the Directors without a meeting is nevertheless Board action if written consent to the action in question is signed by all Directors and filed with the minutes of the proceedings of the Board, whether done before or after the action so taken.

(*Id.* at 2.) The Bylaws include separate provisions for the quorum requirements for meetings of shareholders and the quorum requirements for meetings of the Board of Directors. With regard to shareholder meetings, Article II Section 3 states:

Section 3. *Quorum.* The presence of at least two shareholders (one if one Shareholder owns 100% of the shares) representing at least fifty-one percent (51%) of the Service-Disabled Veterans (SDV) Shareholders shall constitute a quorum for the transaction of business.

(*Id.* at 1.) For a quorum at Board meetings, Article III Section 5 states:

Section 5. *Quorum for Regular Meeting.* The presence of fifty-one percent (51%) of the then total membership of and 51% of the [service-disabled veteran] directors then serving on the Board of Directors, provided such directors also include the Chairperson, shall constitute a quorum for the transaction of business.

(*Id.* at 2.) Article IX Section 4 of the Bylaws includes a provision for amending the Bylaws:

Section 4. *Amendments.* These bylaws or the corporation's articles of incorporation may be amended or repealed and new bylaws (or amended articles of incorporation) may be adopted by a seventy-five percent (75%) affirmative vote of the Shareholders of which fifty-one percent (51%) of the affirmative vote must also be Certified Service Disabled Veterans Shareholders at any Meeting of the Shareholders at which a quorum is present, provided that at least ten (10) days written notice is given of intention to alter, amend, repeal or adopt new bylaws (or articles of incorporation) at such meeting.

(*Id.* at 6-7.)

C. Procedural History

1. NOPC #1

On November 7, 2019, the Director of the CVE (D/CVE) issued a Notice of Proposed Cancellation (NOPC #1) to Appellant. NOPC #1 stated that CVE had become aware that Mr. Blevins had “left the company,” and that Appellant did not apprise CVE of this change as required by 38 C.F.R. §§ 74.15(b) and 74.21(d)(8). (NOPC #1 at 2.) Nor did Appellant submit a revised VA Form 0877. (*Id.*) CVE therefore concluded that it could not “reasonably determine

whether [Appellant] has maintained its eligibility for program participation or whether [Appellant] has maintained ownership, management, and control by Service-Disabled Veterans.” (*Id.*)

Appellant responded to NOPC #1 on November 13, 2019. (CF, Exh. 34.) Appellant asserted that a new Form 0877 was unnecessary because there had been no changes to Appellant's ownership structure. (*Id.* at 2.) Rather, Appellant “has been owned by Mr. Blevins, [a service-disabled veteran], (40%) and Mr. Rhoades, also [a service-disabled veteran], (39%) for the past six years.” (*Id.*) Moreover, although Mr. Blevins is no longer President/CEO, Appellant is still controlled by service-disabled veterans. Specifically, Mr. Rhoades has been Appellant's Chairman, the most senior officer of the corporation, since 2016. (*Id.*)

On December 3, 2019, CVE issued a determination letter stating that Appellant would remain a verified SDVOSB through April 26, 2021. (Verification Letter, at 1.) CVE stated that it had reviewed and accepted the documentation sent by Appellant in response to the NOPC #1, and had confirmed that Appellant “is in compliance” with applicable regulations. (*Id.*)

2. Mr. Blevins' Letters of Explanation

Independent of Appellant's own response to NOPC #1, Mr. Blevins submitted four Letters of Explanation (LOEs) to CVE.³ In LOE #1, Mr. Blevins contended that his termination was “unlawful” and asserted that “[Mr.] Rhoades actions to push Mr. Blevins out of the company were blatant and orchestrated over a period of 2 years based upon a continuous tumultuous relationship between the two owners. [Mr. Rhoades'] motivation to establish a *Board of Directors* was contrived for the purpose of minimizing Blevins' ability to operate the company.” (CF, Exh. 62, at 1 (emphasis in original).)

In LOE #2, Mr. Blevins alleged that “[Appellant] is not being controlled by a minimum of 51% Shareholders.” (CF, Exh. 74, at 1.) Mr. Blevins argued that Appellant's Bylaws require that at least two service-disabled shareholders, representing at least 51% ownership, be present for a quorum at a shareholder meeting. Because Mr. Rhoades holds only 39% ownership, and because Ms. Rhoades (via the Bautista Family Trust) is not a service-disabled veteran, “there can be no quorum [for a shareholder meeting] if [Mr. Rhoades] meets without [Mr. Blevins].” (*Id.*)

In LOE #3, Mr. Blevins maintained that Appellant's Board of Directors has “no defined legal authorit[y] nor legitimacy to conduct business or commit the company.” (CF, Exh. 31, at 1.) Rather, according to Mr. Blevins, the Board “functions only in an Advisory Capacity.” (*Id.*) Mr. Blevins went on to assert that many Board members “to include Advisory members have offered to provide affidavits regarding their understanding of their advisory services and lack of authority.” (*Id.*)

In LOE #4, Mr. Blevins alleged that Mr. Rhoades improperly appointed Mr. Sumrall to the position of COO, instead of Mr. Sumrall being elected to the position by the Board of Directors as required by Appellant's “official/legal Bylaws dated 2013.” (CF, Exh. 48, at 1.) Mr.

³ The four LOEs were uploaded on January 17, 2020 but are dated January 17, 2017.

Blevins also accused Mr. Rhoades of wrongly creating a joint venture without Board or shareholder approval, and of creating a “new version of [Appellant's] Bylaws (June 2019)” without Mr. Blevins' authorization. (*Id.*)

3. NOPC #2

On March 19, 2020, the D/CVE issued a second Notice of Proposed Cancellation (NOPC #2) to Appellant. (CF Exh. 104.) NOPC #2 stated that Appellant “does not appear to have maintained management and control by the Service-Disabled Veterans upon whom its verification eligibility is based pursuant to 38 CFR § 74.21(d)(3).” (*Id.* at 2.) In particular, CVE had become aware that Appellant's President/CEO, Mr. Blevins, was removed from the company on August 23, 2019. (*Id.*) According to CVE records, Mr. Blevins is also Appellant's 40% owner, with Mr. Rhoades owning 39% and Ms. Rhoades the remaining 21%. (*Id.*) CVE found that, because “Mr. Blevins no longer manages or controls [Appellant],” CVE could not “reasonably conclude that [Appellant] has maintained its eligibility for program participation as required by 38 CFR § 74.15(b) and 38 CFR § 74.21(d)(2). Moreover, [Appellant] does not appear to have maintained management and control by the Service-Disabled Veterans upon whom its verification eligibility is based pursuant to 38 CFR § 74.21(d)(3).” (*Id.*)

CVE asserted that Appellant's Bylaws indicate that the President/CEO is responsible for the day-to-day management and control of the company. In the wake of Mr. Blevins' removal from the position of President/CEO, CVE “cannot determine whether the day-to-day management and control of the concern is performed by [a service-disabled veteran].” (*Id.* at 4.) CVE noted that according to Appellant's Bylaws, “one [service-disabled veteran] shall not hold both the Chairman position and the President and CEO position.” (*Id.* at 3.) Without Mr. Blevins, CVE found, there can be no unanimous vote of the shareholders to change this rule. (*Id.*) Further, Mr. Rhoades is prohibited by the Bylaws from performing the duties of both the Chairman and the President/CEO. Similarly, Appellant is unable to constitute a quorum for the “transaction of business” without Mr. Blevins. (*Id.* at 4.) CVE explained that it had not received information indicating that Appellant's shareholders have elected a replacement for Mr. Blevins, or that Mr. Blevins remains involved in the day-to-day business operations of Appellant. (*Id.*)

Instead, CVE found that the day-to-day management of Appellant has now been delegated to a “non-Veteran or non-CVE verified individual,” Mr. Sumrall, who was unilaterally appointed by Mr. Rhoades to serve as the COO and Vice Chairman. (*Id.* at 4-5.) This appointment appears of questionable validity because Appellant's Bylaws mandate that officers must be elected by the Board. (*Id.* at 4.) Further, Appellant's business relationship with Mr. Sumrall could cause “such dependence that the concern cannot exercise independent business judgement without great economic risk pursuant to 13 CFR § 125.13(i)(7).” (*Id.* at 5.)

Finally, CVE found that it “cannot reasonably determine whether [Appellant] is authorized to conduct business in its city of operation as required by 38 CFR § 74.21(d)(9) and 13 CFR § 125.13(g).” (*Id.*) CVE explained that Appellant had submitted a valid business license valid for the 2019 tax period but did not submit an updated business license for the 2020 tax period. (*Id.*)

NOPC #2 made no mention of the earlier NOPC #1, or of CVE's December 3, 2019 letter stating that Appellant would remain a verified SDVOSB through April 26, 2021.

4. Mr. Blevins' Additional LOEs

In response to NOPC #2, Mr. Blevins submitted four additional LOEs to CVE on April 7, 2020. (CF, Exhs. 123-126.) In LOE #1, Mr. Blevins contested the notion that Mr. Rhoades had acquired an additional 12% ownership interest from Bautista Trust, such that that Mr. Rhoades is now the majority owner of Appellant. According to Mr. Blevins, any sale of ownership interest from Bautista Trust to Mr. Rhoades would have required all shareholders to consent to the price. Further, even if such a sale were valid, Mr. Rhoades still does not control Appellant, because Appellant's "Bylaws dated June 2013 require[] a quorum of 51% of the [service-disabled veteran] shareholders for conducting business." (CF, Exh. 123, at 1 (emphasis in original).)

In LOE #2, Mr. Blevins argued that Appellant is not managed or controlled by service-disabled veterans, reiterating his contentions that he was unlawfully removed from his position as President/CEO. (CF, Exh. 124.) In LOE #3, Mr. Blevins observed that Appellant's shareholders have not appointed a new CEO. (CF, Exh. 125.) He added that Mr. Rhoades "falsely used allegations of sexual harassment against Mr. Blevins to force the board he established to vote to terminate Blevins on August 25, 2019." (*Id.* at 1.)

In LOE #4, Mr. Blevins argued that, while Mr. Rhoades claims to be in control of Appellant, "in fact he has turned the company management and control over to non-certified [service-disabled veterans] (namely Mike Sumrall and Bob Phoebus)." (CF, Exh. 126, at 1.) Mr. Blevins accused Mr. Rhoades of seeking to remove him as a Director, and of planning to involve non-service-disabled veteran employees who have no ownership interest in Appellant in making changes to the Bylaws. (*Id.* at 2.)

5. Appellant's Response to NOPC #2

On April 8, 2020, Appellant responded to NOPC #2. (CF, Exh. 113.) Appellant disputed the concerns expressed in NOPC #2 and asserted, "[Appellant] is more than 51% unconditionally owned by [Mr.] Rhoades and [Mr.] Blevins, service-disabled veterans ('SDVs') - just as it has been for more than six years - and Mr. Rhoades, in his capacity as Chairman, remains in control of [Appellant]." (*Id.* at 1.) Appellant highlighted that CVE "rais[ed] near identical issues" in NOPC #1, which Appellant resolved to CVE's satisfaction, and CVE subsequently confirmed that Appellant remains an eligible SDVOSB. (*Id.* at 1 n.3.) NOPC #2 does not explain why CVE issued another NOPC based on the same operative facts. (*Id.*)

Appellant argued that CVE has long recognized that Appellant is an "SDVOSB with Mr. Blevins owning 40% and Mr. Rhoades owning 39%." (*Id.* at 2.) CVE has expressed concern over the fact that Mr. Blevins was terminated from the President/CEO position, although he retains 40% ownership. (*Id.*) Effective March 15, 2020, Mr. Rhoades purchased an additional 12 shares from the Bautista Trust, which brought his total ownership to 51%. (*Id.*) Thus, Appellant contended, Mr. Rhoades not only owns an absolute majority of Appellant but also controls

Appellant. (*Id.*) Mr. Rhoades and three other service-disabled veteran directors can constitute a quorum of 51% of Appellant's five-member board for the transaction of business. (*Id.*)

Appellant clarified that the removal of Mr. Blevins as the President/CEO does not affect his ability to attend and vote at Board meetings or shareholder meetings. (*Id.* at 3.) In fact, Appellant encourages Mr. Blevins to attend such meetings, and Mr. Blevins recently did attend a Board meeting in March 2020. (*Id.*)

Appellant disputed the notion that Appellant's Bylaws require that the positions of Chairman and President/CEO always be filled. (*Id.* at 4.) The President/CEO position is currently “vacant and will be filled at the next duly called meeting of the shareholders.” (*Id.*) Appellant further averred that CVE was incorrect in asserting that a “non-Veteran or non-CVE verified individual” oversees the day-to-day management of Appellant. (*Id.*) Mr. Sumrall has been appointed COO and Vice Chairman, but he reports directly to Mr. Rhoades, the Chairman, who controls Appellant's day-to-day and long-term operations. (*Id.*) Further, “Mr. Sumrall's status as [a service-disabled veteran] has been previously provided to CVE.” (*Id.*)

Lastly, Appellant denied the allegation that it does not have a current business license. (*Id.*) Appellant attached a copy of its 2020 business license and asserted that “there is no basis for CVE to conclude that [Appellant] is not authorized to conduct business.” (*Id.* at 5.)

6. Mr. Blevins' Response to NOPC #2

On April 17, 2020, Mr. Blevins submitted his own response to NOPC #2 and clarified that Appellant's response does not represent his views. (CF, Exh. 133.) Mr. Blevins declared that he disagrees with “the assertion that Mr. Rhoades now controls the company because [Mr. Rhoades] transferred 12 non-service disabled veteran (‘SDV’) shares to himself” as well as “the belief that [Mr. Rhoades] controls the company because he is Chairman.” (*Id.* at 1.) Mr. Blevins acknowledged that he attended a March 2020 Board meeting, but stipulated that his “attendance at this meeting is not a representation, admission or other act that recognizes that this Board is comprised of voting members other than [Mr. Blevins] and [Mr.] Rhoades.” (*Id.* at 2, n.2.)

Mr. Blevins conceded that Appellant is correct that its Bylaws do not require the positions of Chairman and CEO/President to be filled at all times. (*Id.* at 3.) However, the Bylaws do not permit the Chairman to also perform the duties of the CEO/President while the latter position remains vacant. (*Id.*) Mr. Blevins complained that Mr. Sumrall and/or Mr. Phoebus are running the day-to-day management of the company although neither is a shareholder. (*Id.*)

Mr. Blevins asserted that long-term control of Appellant is still exercised by Mr. Rhoades and Mr. Blevins, both service-disabled veterans. (*Id.*) Mr. Rhoades and Mr. Blevins are the only “voting members” of the Board of Directors and Mr. Blevins has never agreed to appoint additional voting directors. (*Id.* at 4.)

Mr. Blevins argued that, despite his disagreement with Mr. Rhoades regarding composition of the Board, Appellant is compliant with 13 C.F.R. § 125.13(e)(2) because

Appellant's SDVOSB eligibility is based on Mr. Rhoades and Mr. Blevins, the only voting members of the Board. (*Id.* at 5.) Appellant's Bylaws do not permit non-service-disabled veterans to control the Board, and state that 51% of the service-disabled veteran directors then serving on the Board are needed to constitute a quorum. (*Id.*) The dispute between Mr. Rhoades and Mr. Blevins therefore should “not doom [Appellant's] SDVOSB status.” (*Id.*)

D. Notice of Verified Status Cancellation

On May 14, 2020, CVE issued a Notice of Verified Status Cancellation (NOVSC) formally cancelling Appellant's status as a verified SDVOSB. (CF, Exh. 140.) CVE concluded that Appellant overcame one issue identified in NOPC #2, finding that Appellant is compliant with 13 C.F.R. § 125.13(g) because Appellant had maintained the required licensure and had provided a current business license. (*Id.* at 2.) However, CVE was unable to conclude that one or more service-disabled veterans control Appellant's day-to-day operations and have control of the Board of Directors. (*Id.* at 4.) Further, CVE found that it could not determine whether all management and control requirements of 13 C.F.R. § 125.13 are satisfied, nor whether Appellant met the requirements for maintaining eligibility for program participation as set forth at 38 C.F.R. § 74.15(b) and 74.21(d)(2). (*Id.* at 7.)

First, CVE found that Appellant does not satisfy 13 C.F.R. § 125.13(e), because one or more service-disabled veterans do not control the Board of Directors. (*Id.* at 2.) CVE found that “Mr. Blevins was terminated from his position and appeared to have no involvement in the control or management of [Appellant] since August 23, 2019.” (*Id.*) Even though Mr. Blevins is a service-disabled veteran and retains a 40% ownership interest, CVE found that it is unable to conclude that Mr. Blevins “is willing or actively participating as a shareholder.” (*Id.* at 3.)

CVE rejected Appellant's assertion that Mr. Blevins “removal has no impact on his ability to attend and vote at meetings of the [Board] and shareholders.” (*Id.* at 3.) Instead, CVE pointed to Mr. Blevins' April 7, 2020 LOE #3, which stated that he had filed a lawsuit alleging “shareholder oppression” and “illegal termination.” (*Id.*) Mr. Blevins further claimed that “Mr. Rhoades has attempted to utilize what was intended to be an ‘Advisory Board’ to obstruct Mr. Blevins' ability to exert control and participate in the management of the company.” (*Id.*) Therefore, CVE found that it cannot determine whether Mr. Blevins is willingly or actively participating in the management of Appellant, and cannot “reasonably conclude that [Appellant] can constitute a quorum as defined in Article II, Section 3 of [Appellant's] Bylaws.” (*Id.*)

CVE found no merit to Appellant's claim that Mr. Blevins' participation is no longer necessary because Mr. Rhoades, a service-disabled veteran, now owns 51% of Appellant and can by himself convene a quorum of 51% service-disabled veteran shareholders to conduct business. (*Id.* at 3.) CVE observed that Mr. Blevins disputes the validity of the stock sale from the Bautista Trust to the Rhoades Trust on the grounds that the 2011 stock purchase agreement requires unanimous shareholder agreement on price before shares can be sold. (*Id.*) Mr. Blevins maintains that he did not agree to a sale price and asserts that even if the sale were valid, Mr. Rhoades would still not control the company. (*Id.*) CVE concluded that because Mr. Blevins contends that Mr. Rhoades and Mr. Blevins are the only voting members of the Board of Directors in

accordance with the Bylaws, Mr. Rhoades cannot achieve 51% control of the Board of Directors in order to transact business. (*Id.*)

Next, CVE found that “due to the conflicting representations provided by [Mr. Rhoades and Mr. Blevins], and the pending litigation regarding the exercise of control over [Appellant], CVE is unable to reasonably conclude that the day-to-day operations of the concern satisfy the verification requirements and the requirements set forth in [Appellant's] Bylaws.” (*Id.* at 5.) Appellant's Bylaws bifurcate managerial responsibilities, with long-term decision-making made by the Chairman and day-to-day management performed by the President/CEO. (*Id.* at 4.) Thus, the Bylaws contradict the notion that Mr. Rhoades can control both the day-to-day operations and the long-term operations of the company as the Chairman, the most senior officer. (*Id.* at 4-5.)

Third, CVE determined that it cannot “reasonably conclude that the management and control requirements of 13 CFR § 125.13 are satisfied nor can CVE reasonably determine the concern can exercise independent business judgement without great economic risk.” (*Id.* at 6.) CVE explained that there could be “control by non-service-disabled veterans” because of the disputes between Mr. Blevins and Mr. Rhoades over who is managing the day-to-day operations of the concern, how many voting members are on the Board of Directors, and whether Mr. Rhoades is the majority owner with authority to amend the Bylaws and to establish a quorum for the transaction of business. (*Id.* at 5-6.) CVE found that even with the purported increase in Mr. Rhoades' ownership interest, the presence of Mr. Blevins is needed at a meeting of the Board of Directors to constitute a quorum and to amend the Bylaws. (*Id.* at 5.)

CVE stated that Mr. Rhoades attempted to appoint Mr. Sumrall, a service-disabled veteran, to serve as a COO and Vice Chairman “to conduct the day-to-day management of the concern in the absence of a CEO or President,” but that CVE was unable to conclude that Mr. Rhoades had the power to create a new COO position without amending the Bylaws. (*Id.* at 6, n.4.) CVE relied on Mr. Blevins' assertion that Mr. Rhoades does not manage the day-to-day operations and that Mr. Blevins' attendance is necessary at Board of Directors meetings to appoint additional officers. Mr. Blevins contends that he is not always informed about Board of Directors meetings. (*Id.* at 5.) Therefore, CVE could not find Appellant compliant with 13 C.F.R. § 125.13(a) because the President/CEO position remains vacant, and it is uncertain whether the COO can validly conduct the day-to-day operations of the concern. (*Id.* at 6.)

Finally, CVE found that Appellant failed to maintain its eligibility in accordance with 38 C.F.R. §§ 74.15(b) and 74.21(d)(2) because Mr. Blevins has been prevented from performing his duties on the Board of Directors. (*Id.* at 7.) Even if Mr. Rhoades validly acquired majority ownership in Appellant in March 2020, CVE found that there still was a gap in Appellant's CVE eligibility between the date of Mr. Blevins' removal and the date of Mr. Rhoades' acquisition of the additional shares. (*Id.*) Based on these reasons, “CVE was unable to conclude that [Appellant] satisfies the requirements set forth in 38 CFR Part 74, specifically, failure to maintain eligibility and failure to maintain [service-disabled veteran] control.” (*Id.* at 8.)

E. Appeal

On May 28, 2020, Appellant timely appealed the NOVSC to OHA. Appellant argues that CVE lacked proper grounds to cancel Appellant's verification. (Appeal at 1.) Specifically, CVE had no basis to find that a non-service-disabled veteran does, or even could, control the company. (*Id.*) Appellant insists that it is “controlled by its highest officer, the Chairman, and its Board of Directors. Critically, the Chairman is [a service-disabled veteran] and four of the company's five Directors are also [service-disabled veterans] (with the fifth being a veteran).” (*Id.*) Even the “disgruntled” Mr. Blevins merely presents arguments over “*which* [service-disabled veterans] are in control” of Appellant. (*Id.*, emphasis Appellant's.) For these reasons, OHA should reverse the NOVSC.

Appellant argues that CVE could not properly make a determination that a concern is not controlled by service-disabled veterans without also finding that the concern is controlled by one or more non-service-disabled veterans. (*Id.* at 6.) Here, although CVE concluded that service-disabled veterans do not control Appellant's Board of Directors or its day-to-day operations, CVE did not identify any non-service-disabled veterans who conceivably could control Appellant. (*Id.*) Nor did CVE advance any “theory of how [Appellant] is controlled by [non-service-disabled veterans].” (*Id.* at 8.) The NOVSC mentions only three individuals - Mr. Blevins, Mr. Rhoades, and Mr. Sumrall - but all three of these persons are service-disabled veterans. (*Id.* at 9.) In Appellant's view, “[e]ven assuming for argument's sake that there is uncertainty as to who is currently in control of [Appellant], the only individuals who are, or could be, in a position to control [Appellant] are Mr. Rhoades, Mr. Sumrall, and Mr. Blevins, all of whom are [service-disabled veterans].” (*Id.* at 10.)

Appellant renews its arguments that its Board of Directors and day-to-day management are controlled by service-disabled veterans. (*Id.*) Appellant meets the requirements of 13 C.F.R. § 125.13(e)(2) that one or more service-disabled veterans “control the Board of Directors through actual numbers of voting directors” because four of the five directors are service-disabled veterans. (*Id.* at 11-12.) Furthermore, CVE incorrectly determined that Mr. Blevins' attendance at Board meetings was required to meet the quorum provision for the “transaction of business” in Article III, Section 5 of the Bylaws. (*Id.* at 12-13.) Instead, Appellant asserts, “while Mr. Blevins is one of the [service-disabled veteran] owners, he is only one of four [service-disabled veteran] voting directors and his presence at Board meetings, based on quorum requirements for the Board of Directors is not necessary.” (*Id.* at 13.) Appellant observes that, contrary to CVE's apparent assumption that Appellant cannot function without Mr. Blevins, Appellant “has continued to successfully operate since Mr. Blevins' departure as CEO/President in August 2019.” (*Id.*)

Appellant maintains that CVE incorrectly concluded that Mr. Blevins' termination as President/CEO precluded him from attending or casting votes at meetings of the Board of Directors or shareholders. (*Id.*) In fact, Mr. Blevins is encouraged to attend such meetings, and Mr. Blevins did attend a March 31, 2020 meeting of the Board of Directors. (*Id.* at 13 n.6.)

Appellant explains that CVE confused the Bylaws' requirements for a meeting of shareholders, rather than a meeting of the Board, in making its finding pertaining to control

under 13 C.F.R. § 125.13. (*Id.* at 13.) Appellant's Bylaws pertaining to meetings of shareholders are different from the requirements for Board of Directors meetings. (*Id.*) Furthermore, CVE's treatment of Mr. Rhoades' acquisition of an additional 12% of Appellant's stock was misguided in its analysis of service-disabled veteran control under 13 C.F.R. § 125.13(e)(2). (*Id.* at 14.) This stock purchase has no bearing on the makeup of service-disabled veteran control of the Board of Directors. (*Id.*)

Appellant highlights that “the Bylaws make clear that the Chairman position has overall authority, including for the ‘business and affairs of the corporation,’ which is a responsibility listed separately from the Chairman's responsibility for ‘making the long-term decisions for the corporation.’” (*Id.* at 15, quoting Bylaws, Article IV Section 7.) Moreover, Appellant contends, the Bylaws imbue the Chairman with the “ultimate authority for [Appellant's] day-to-day operations and the CEO/President position reports to the Chairman.” (*Id.* at 16.) Mr. Rhoades, the Chairman and a service-disabled veteran, had the authority to delegate a portion of his duties and responsibilities to Mr. Sumrall, also a service-disabled veteran. (*Id.*)

Appellant urges that CVE erred in effectively concluding that “no one is controlling [Appellant's] day-to-day operations because the CEO/President position is vacant.” (*Id.*) This reasoning on the part of CVE also apparently formed the basis for finding that Appellant did not rebut the presumption at 13 C.F.R. § 125.13(i)(7). (*Id.*) Appellant contends that CVE “failed to mention the existence of any business relationship between [Appellant] and any non-veteran entity or individual - and there are none.” (*Id.* at 17.)

Appellant asserts that it has always maintained its eligibility for inclusion in the VIP database. (*Id.* at 18.) Specifically, “[Appellant] is (and always has been) unconditionally owned and controlled by [service-disabled veterans], as required by SBA's regulations.” (*Id.* at 19.) In response to NOPC #1, Appellant informed CVE that “Mr. Blevins left the company only insofar as he was no longer an officer and thus there was no change of ownership to report to CVE.” (*Id.*) On December 3, 2019, CVE determined that Appellant remains an eligible SDVOSB. “CVE cannot fairly punish [Appellant] for failing to report a change that CVE itself had previously found to have no adverse effect on [Appellant's] SDVOSB eligibility.” (*Id.* at 20.)

Appellant addresses the multiple LOEs submitted by Mr. Blevins, which evidently disturbed CVE. (*Id.* at 9-11.) Appellant disagrees with many of Mr. Blevins' remarks as they mirror arguments he is making in his lawsuit against the company. (*Id.* at 9.) But, far from suggesting that service-disabled veterans do not control Appellant, Mr. Blevins' arguments actually confirm that “Mr. Rhoades and Mr. Sumrall are presently controlling [Appellant], as their control and the ouster of Mr. Blevins as President/CEO by the Board of Directors is what Mr. Blevins' lawsuit contests.” (*Id.* at 11.)

III. Discussion

A. Standard of Review

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

B. Analysis

Having reviewed the record and the arguments presented on appeal, I agree with Appellant that CVE clearly erred in cancelling Appellant's status as a verified SDVOSB. As a result, this appeal must be granted.

SBA regulations require that an eligible SDVOSB must be both owned and controlled by service-disabled veterans. 13 C.F.R. §§ 125.12 and 125.13. "Ownership" generally entails that a concern be at least 51% directly and unconditionally owned by one or more service-disabled veterans. *Id.* § 125.12(a). "Control" means that one or more service-disabled veterans must control both the long-term decision-making and the day-to-day management and administration of the business operations of the concern. *Id.* § 125.13(a). Non-service-disabled veteran individuals or entities must not control the concern. *Id.* § 125.13(i). Further, when the concern is a corporation, one or more service-disabled veterans must control the corporation's board of directors. *Id.* § 125.13(e).

In the instant case, it is undisputed that Appellant is majority-owned by service-disabled veterans. Specifically, the record reflects that, at least since 2013, Appellant has been 40% owned by Mr. Blevins and 39% owned by Mr. Rhoades, both of whom are service-disabled veterans. Section II.A, *supra*. Although Mr. Blevins was removed from his position as Appellant's President/CEO in August 2019, he retained his 40% ownership interest. *Id.* Appellant contends that Mr. Rhoades recently acquired an additional 12% ownership interest in Appellant, such that he now holds a 51% majority interest, but Mr. Blevins questions the validity of this transaction. Section II.C.4 and II.C.5, *supra*. Irrespective of this latest transaction, though, it is evident that service-disabled veterans collectively own at least 79% of Appellant, and perhaps as much as 91%. Thus, Appellant is majority-owned by service-disabled veterans, as required by SBA regulations.

Because Appellant's ownership by service-disabled veterans is not in doubt, the central issue presented here is whether Appellant is controlled by service-disabled veterans. CVE found that it was unable to conclude that Appellant is fully controlled by service-disabled veterans, but as Appellant emphasizes in its appeal, the analysis of control set forth in the NOVSC was deficient. In particular, CVE did not identify any non-service-disabled veteran persons or entities that control Appellant, nor articulate any theory as to how any such non-service-disabled veteran persons or entities could potentially control Appellant.

The record establishes that Mr. Rhoades, a service-disabled veteran, has served as Appellant's Chairman since at least 2016. Section II.A, *supra*. Appellant's Bylaws define the Chairman as "the most senior officer of the corporation" with "final decision authority for the corporation" and stipulate that the Chairman will "supervise and control the business and affairs of the corporation." Section II.B, *supra*. The Bylaws also recognize a position of President/CEO, but describe the President/CEO as "a senior manager" who "report[s] to the Chairman," and authorize the President/CEO to hire other senior managers subject to "approval by the Chairman." *Id.* Thus, under Appellant's Bylaws, Appellant's decision-making is controlled by Mr. Rhoades, a service-disabled veteran, in his capacity as Appellant's Chairman.

In the NOVSC, CVE expressed concern over the relationship between Mr. Rhoades and Mr. Blevins, which Mr. Blevins himself characterized as “tumultuous,” as well as the conflicting representations that CVE received from Appellant and Mr. Blevins. Section II.D, *supra*. CVE highlighted in particular that Mr. Blevins disputes whether he was properly removed from his position as President/CEO, and that he has filed a lawsuit challenging his removal. *Id.* Mr. Blevins further disputes whether Mr. Rhoades had authority to appoint Mr. Sumrall as COO/Vice Chairman without the consent of Mr. Blevins. *Id.*

While it is true that such infighting among business partners is atypical, CVE nevertheless appears to have overlooked the fundamental fact that all of the individuals in question here - Mr. Rhoades, Mr. Blevins, and Mr. Sumrall - are service-disabled veterans. Section II.A, *supra*. Logically, Appellant either must be controlled by Mr. Rhoades alone, or must be controlled by Mr. Rhoades in conjunction with Mr. Blevins and/or Mr. Sumrall. In NOPC #2, for example, CVE suggested that although Mr. Rhoades controls Appellant's long-term decision making, he has delegated the day-to-day management of Appellant to Mr. Sumrall, such that Appellant is controlled jointly by Mr. Rhoades and Mr. Sumrall. Section II.C.3, *supra*. Even assuming that Mr. Blevins and/or Mr. Sumrall do have some role in controlling Appellant, though, this would not adversely affect Appellant's eligibility as an SDVOSB, because Mr. Blevins and Mr. Sumrall are both service-disabled veterans. Accordingly, regardless of whether Mr. Blevins was properly removed from his position as President/CEO, or whether Mr. Sumrall's appointment was valid, Appellant is controlled by service-disabled veterans, specifically Mr. Rhoades or some combination of Mr. Rhoades, Mr. Blevins, and/or Mr. Sumrall.

As Appellant correctly observes in its appeal, the concerns voiced by CVE in the NOVSC ultimately pertain to which service-disabled veteran(s) control Appellant, not to whether Appellant is controlled by service-disabled veterans as opposed to non-service-disabled veterans. Again, the NOVSC did not identify any non-service-disabled veteran persons or entities that have any involvement in Appellant's operations, and did not describe any mechanism through which non-service-disabled veteran persons or entities could potentially control Appellant. Section II.D, *supra*. CVE thus lacked a proper basis to find that Appellant may be controlled by non-service-disabled veteran persons or entities, or to find Appellant non-compliant with 13 C.F.R. § 125.13(i)(7), which applies when a concern has business relationships “with non-service-disabled veteran individuals or entities” that create extreme economic risk.

CVE also found that it was unable to determine that service-disabled veterans control Appellant's Board of Directors, as required by 13 C.F.R. § 125.13(e). Section II.D, *supra*. The record, though, does not support CVE's decision. According to the Case File, Appellant's Board originally was comprised of two voting members, Mr. Rhoades and Mr. Blevins, both of whom are service-disabled veterans. Section II.A, *supra*. Appellant informed CVE that it later increased the size of its Board to five members, of which four are service-disabled veterans, although Mr. Blevins disputes whether the three additional members have voting rights. Sections II.C.5 and II.C.6, *supra*. Mr. Blevins further contends that the Board itself is essentially an advisory body, with “no defined legal authorit[y] nor legitimacy to conduct business or commit the company.” Section II.C.2, *supra*.

On these facts, CVE erred in concluding that service-disabled veterans do not wholly control Appellant's Board. If, as Mr. Blevins asserts, Mr. Rhoades and Mr. Blevins are the only voting members of Appellant's Board, they jointly control the Board. Indeed, SBA regulations expressly permit non-voting, advisory, or honorary directors to be appointed without undermining service-disabled veteran control of the board. 13 C.F.R. § 125.13(e)(3). Conversely, if, as Appellant contends, Appellant's Board has five voting members, of which four are service-disabled veterans, service-disabled veterans again are manifestly in control. SBA regulations caution that “[p]rovisions for the establishment of a quorum cannot permit non-service-disabled veteran Directors to control the Board of Directors, directly or indirectly.” 13 C.F.R. § 125.13(e)(2)(i). In this regard, though, CVE did not identify any provisions in Appellant's Bylaws or elsewhere that might enable a non-service-disabled veteran director to block a quorum or to otherwise obstruct the operation of Appellant's Board.

Referring again to the ongoing disagreements between Mr. Rhoades and Mr. Blevins, CVE also expressed concern as to whether Mr. Blevins would be a “willing or active participant” on Appellant's Board, or in Appellant's affairs more generally. Section II.D, *supra*. This line of reasoning, however, is largely speculative, and is not supported by the statements Mr. Blevins provided to CVE. Notably, although Mr. Blevins submitted numerous letters to CVE in response to the two NOPCs, he did not express an intent to refuse to participate in Appellant's affairs. Sections II.C.2, II.C.4, and II.C.6, *supra*. On the contrary, in their respective responses to NOPC #2, Appellant and Mr. Blevins agreed that Mr. Blevins had attended a recent Board meeting on March 31, 2020. Sections II.C.5 and Section II.C.6, *supra*.

Lastly, because Appellant has shown that it has consistently remained owned and controlled by service-disabled veterans, it follows that CVE incorrectly found that Appellant did not maintain its eligibility in accordance with 38 C.F.R. §§ 74.15(b) and 74.21(d)(2). CVE itself reached this same conclusion in its December 3, 2019 determination letter resolving NOPC #1. Section II.C.1, *supra*.

IV. Conclusion

For the above reasons, the appeal is GRANTED. The D/CVE must immediately reinstate Appellant in the CVE database. 13 C.F.R. § 134.1112(f). 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); 38 C.F.R. § 74.22(e).

KENNETH M. HYDE
Administrative Judge