

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

CVE Appeal of:

Victory Solutions, Inc.,

Appellant

SBA No. CVE-219-A

Decided: February 10, 2022

APPEARANCES

Jerome S. Gabig, Esq., Richard J.R. Raleigh, Jr., Esq., Christopher L. Lockwood, Esq., Wilmer & Lee, P.A., Huntsville, Alabama, for Victory Solutions, Inc.

John B. Perkins, Director, Center for Verification and Evaluation, U.S. Department of Veterans Affairs, Washington, D.C.

DECISION

I. Introduction and Jurisdiction

On October 20, 2021, the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) issued a decision cancelling the verified status of Victory Solutions, Inc. (Appellant) as a Service-Disabled Veteran-Owned Small Business (SDVOSB). CVE found that Appellant did not respond to a Notice of Proposed Cancellation (NOPC) that CVE had previously transmitted to Appellant. On October 26, 2021, Appellant appealed the cancellation decision to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). For the reasons discussed *infra*, the appeal is denied.

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 instant appeal within ten business days after receiving the cancellation decision on October 20, 2021. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Document Request and NOPC

Appellant is a corporation based in the state of Alabama. (Case File (CF), Exh. 24.) On March 20, 2015, CVE verified Appellant as an SDVOSB. (CF, Exh. 241.) On April 12, 2019, CVE re-verified Appellant as an SDVOSB. (CF, Exh. 513.)

In August 2021, a CVE examiner contacted Appellant by telephone to again re-verify Appellant's eligibility as an SDVOSB. (CF, Exh. 616.) CVE requested that Appellant produce documentation for purposes of confirming whether Appellant continued to meet SDVOSB eligibility requirements. (CF, Exh. 578.) On August 30, 2021, Appellant provided the requested documentation, including a copy of Appellant's then-current stock ledger. (AR, Exh. 610.) Upon review of the information, CVE found that Appellant apparently had changed its ownership structure without informing CVE. Specifically, Ms. Kristine E. McGuire, Appellant's service-disabled veteran CEO and majority owner, had previously represented to CVE that she owned 80.06% of Appellant. (CF, Exh. 487.) However, according to Appellant's stock ledger dated June 1, 2021, Ms. McGuire owns only 58.8668% of Appellant. (CF, Exhs. 608 and 616.)

On September 14, 2021, CVE issued an NOPC to Appellant. (CF, Exh. 620.) CVE explained that, according to her VA Form 0877, Ms. McGuire owned 80.06% of Appellant as of March 29, 2019. (*Id.* at 2.) Appellant's most current stock ledger, submitted during the re-verification process, showed that Ms. McGuire's ownership interest had declined to 58.8668%. (*Id.*) CVE had no record that Appellant had reported the changes in ownership to CVE. (*Id.*) Moreover, the remaining 41.1332% ownership interest in Appellant is now held by "various individuals," who may not be service-disabled veterans. (*Id.*) CVE instructed that Appellant must, within 30 days, provide documentation identifying all current owners of Appellant, along with an explanation of each owner's role in Appellant's business operations and a copy of each owner's resume. (*Id.*) Absent this information, CVE could not determine whether Appellant had maintained its eligibility as an SDVOSB, or the extent to which non-service-disabled veteran individuals may participate in the management of Appellant. (*Id.*) Such information also was essential in order for CVE to assess whether non-service-disabled veteran individuals may improperly control Appellant. (*Id.* at 2-3.) The NOPC directed that Appellant submit the requested information electronically through CVE's Vendor Information Pages (VIP) computer system. (*Id.* at 3.)

B. Notice of Verified Status Cancellation

Appellant did not respond to the NOPC, and did not submit the requested information prior to the deadline specified in the NOPC. On October 20, 2021, CVE issued a Notice of Verified Status Cancellation (NOVSC), formally cancelling Appellant's status as a verified SDVOSB. (CF, Exh. 641.)

CVE found that, without the information specified in the NOPC, CVE was unable to determine whether Appellant had maintained its verification eligibility pursuant to 38 C.F.R. § 74.21(d)(2), or the extent to which non-service-disabled veteran individuals may participate in the management of the concern pursuant to 38 C.F.R. § 74.21(d)(4). (*Id.* at 2.) Additionally, because Appellant did not provide an updated VA Form 0877 that accurately reflects the current ownership interests in Appellant, CVE could not reasonably conclude that the requirements of 38 C.F.R. § 74.21(d)(7) were satisfied. (*Id.*) Finally, CVE could not determine whether non-service-disabled veteran individuals control Appellant, which would render Appellant ineligible as an SDVOSB under 13 C.F.R. § 125.13(i)(7). (*Id.* at 2-3.)

C. Request for Reconsideration

On October 22, 2021, Appellant requested that CVE reconsider the cancellation decision. (Appeal, Exh. 2.) Appellant argued that CVE is permitted to reconsider an NOVSC under 38 C.F.R. § 74.13(c). (*Id.* at 1.)

Appellant claimed that neither Ms. McGuire, nor any other officer or employee of Appellant, received the NOPC dated September 14, 2021. (*Id.* at 2.) Therefore, under *Size Appeal of Addison Construction & Maintenance Corp.*, SBA No. SIZ-4418 (2000), CVE could not properly draw an adverse inference against Appellant without first demonstrating that Appellant, the intended recipient of the NOPC, actually received the notice in question. (*Id.*) In support, Appellant offered a declaration from Ms. McGuire, attesting that she “never received the notice either by email or by U.S. mail until it was brought to [her] attention on October 20, 2021.” (McGuire Decl. ¶ 3.) Similarly, other officers and owners of Appellant informed Ms. McGuire that they did not receive the NOPC. (*Id.* ¶ 4.) Appellant conducted a review of its internal IT systems, but found “no evidence of [Appellant] receiving the September 14, 2021 notice until October 20, 2021.” (*Id.* ¶ 5.) Accompanying its request for reconsideration, Appellant provided a table identifying Appellant's current owners; an explanation of each owner's role in Appellant's business operations; copies of each owner's resume; and a revised VA Form 0877. (Appeal, Exh. 2 at 3 and Attachs. 2-3.)

On October 25, 2021, CVE declined to reconsider the cancellation, finding that CVE was “not authorized to process [Appellant's] request.” (Appeal, Exh. 3.) CVE indicated that Appellant could pursue an appeal at OHA if Appellant disagrees with CVE's decision. (*Id.*)

D. Appeal

On October 26, 2021, Appellant appealed the NOVSC to OHA. Appellant argues that cancellation was improper because Appellant did not actually receive the NOPC. In support, Appellant points to Ms. McGuire's declaration, submitted to CVE with the request for reconsideration. (Appeal at 4-5.)

Appellant argues that CVE violated Appellant's right to due process by cancelling Appellant's verified status without providing Appellant an opportunity to address the concerns raised in the NOPC. (*Id.* at 6.) In this respect, the instant case is analogous to OHA's decision in *Addison Construction*. (*Id.*) Appellant contends that, under *Addison Construction*, CVE cannot properly draw an adverse inference when it receives no response to a notice, if the intended recipient disputes that the notice was received. (*Id.*, citing *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5704 (2016).) Appellant predicts that, when the Case File is submitted, “CVE will not be able to produce any evidence that [Appellant] ever received the September 14, 2021 notice.” (*Id.*) Appellant urges OHA to remand the matter to CVE, so that CVE may examine the new information provided with Appellant's request for reconsideration. (*Id.* at 7.)

E. Case File

On November 23, 2021, CVE transmitted the Case File to OHA. The Case File contains various communications between CVE and Appellant related to the NOPC. Exhibit 621 is an automated message indicating that a NOPC had been issued and that a response was due within 30 days. (CF, Exh. 621.) Exhibit 622.1 is an e-mail, addressed to Ms. McGuire and twelve other representatives of Appellant, informing them that “a new notification regarding a document request” was available through the VIP system. (CF, Exh. 622.1.) Exhibit 623 is an automated message, dated September 14, 2021, that Appellant had been issued a NOPC. (CF, Exh. 623.) The message instructed that Appellant “may view this notice by logging into your account in the VIP portal.” (*Id.*) Exhibit 624 indicates that the message at Exhibit 623 was e-mailed to Ms. McGuire and twelve other representatives of Appellant on September 14, 2021. (CF, Exh. 624.)

Exhibit 638 is an automated message, dated October 15, 2021, stating that Appellant's 30-day deadline to respond to the NOPC had expired. (CF, Exh. 638.) Exhibit 638.1 indicates that the message at Exhibit 638 was e-mailed to Ms. McGuire and twelve other representatives of Appellant on October 15, 2021. (CF, Exh. 638.1.)

F. CVE's Response

On November 24, 2021, CVE responded to the appeal. CVE explains that, once a NOPC is electronically signed, two notifications of the NOPC are automatically generated and transmitted by e-mail to the concern in question. In the instant case, the NOPC was signed on September 14, 2021, and notifications of the NOPC were then sent by e-mail to Ms. McGuire and twelve other representatives of Appellant (Jerry Cook, David Alan Smith, Michael P. Cavalier, Lee Ann Hunt, Donald A. Hazelwood, Jennifer Elliott, Angela D. Daniel, Michele D. Fleming, Karen K. Owens, Lisa G. Cooper, Pedro I. Rodriguez, and Ashton M. Stafford). (Response at 1, citing CF, Exhs. 621-624.) Later, once the 30-day period referenced in the NOPC had expired but before the NOVSC was issued, these same individuals again were notified that a response to the NOPC was overdue. (*Id.*, citing CF, Exhs. 638 and 638.1.) Appellant failed to respond to any of these notifications. (*Id.* at 1, 3.) Notifications concerning the NOPC were sent to the same e-mail addresses used for the NOVSC, which Appellant acknowledges it did receive. (*Id.*) Further, these same e-mail addresses had recently been used for CVE's document request in August 2021. (*Id.* at 3-4.) CVE observes that Ms. McGuire personally exchanged e-mails with a CVE examiner, using the same e-mail address where the notifications of the NOPC were transmitted. (*Id.* at 4.)

Although CVE “cannot speak to [Appellant's] internal email issues,” the record reflects that CVE provided Appellant “more than adequate notice of the NOPC.” (*Id.*, citing *CVE Appeal of Optimum Low Voltage, LLC d/b/a Optimum Fire & Security*, SBA No. CVE-187-A (2021), *recons. denied*, SBA No. CVE-196-A (2021) (PFR).) The appeal should therefore be denied.

G. Reply

Appellant requested leave to reply to CVE's Response, so as to more fully address the issue of whether Appellant received proper notice of the proposed cancellation. CVE did not oppose Appellant's motion, provided that CVE would be given an opportunity to sur-reply. On November 29, 2021, OHA issued an order granting Appellant leave to reply, and CVE leave to sur-reply.

On December 9, 2021, Appellant filed its Reply. Appellant argues that the preponderance of the evidence shows that Appellant did not receive the NOPC. (Reply at 1.) The exhibits in the Case File show that CVE attempted to transmit “notice of the NOPC” to Appellant by e-mail, but do not demonstrate that those attempts successfully reached Appellant. (*Id.* at 1-2.) While it may be the norm that “a sent email is received,” Ms. McGuire's statements here should rebut any such presumption. (*Id.* at 2-3.) Appellant offers a supplemental declaration from Ms. McGuire in which she states that, in addition to not receiving the NOPC itself, “the investigation that I ordered performed by [Appellant's] IT experts disclosed no evidence of the CVE emails supposedly dispatched on September 14, 2021, ever being received on [Appellant's] server.” (Second McGuire Decl. ¶ 4.)

Appellant argues that CVE should be responsible for proving that Appellant actually received the e-mail notifications. (*Id.* at 3.) OHA's decision in *Size Appeal of Addison Construction & Maintenance Corp.*, SBA No. SIZ-4418 (2000) is dispositive here, and OHA should conclude that CVE could not properly cancel Appellant's verified status under the circumstances presented, because Appellant disputes “receipt of the notice” and CVE “cannot produce evidence that [Appellant] actually received the emails.” (*Id.* at 3-4.) Appellant additionally cites *Miles Construction, LLC v. United States*, 108 Fed. Cl. 792 (2013) for the proposition that Appellant must be given an opportunity to be heard prior to any SDVOSB status cancellation. (*Id.* at 5-6.) Appellant maintains that there was an implied contract between CVE and Appellant that Appellant could retain its verified SDVOSB status, unless proper cancellation procedures were followed. (*Id.* at 6-7.)

H. Sur-Reply

On December 17, 2021, CVE filed its Sur-Reply. CVE reiterates that, although CVE did not transmit the NOPC itself to Appellant, CVE nevertheless did send three sets of e-mails, to Ms. McGuire and twelve other representatives of Appellant, informing Appellant of the NOPC. (Sur-Reply at 1.) Appellant now appears to argue that it did not receive any of the e-mail notifications, but this contention rests entirely on “two hearsay declarations” from Ms. McGuire. (*Id.* at 4.) Appellant has not provided any information to corroborate Ms. McGuire's assertions, such as declarations from the IT staffers who reportedly conducted an investigation of Appellant's servers. (*Id.* at 5.) Further, neither of Ms. McGuire's declarations attempts to address the third set of e-mails that CVE sent to Appellant on October 15, 2021. (*Id.* at 5.) CVE highlights that, since 2018, the electronic system that CVE uses to conduct and manage verification has successfully processed over 21,000 cases. (*Id.* at 4.) Each case involves at least four e-mails, so at least 84,000 e-mail messages have been transmitted to numerous parties

during this time period. (*Id.*) CVE maintains that “[t]here have been no complaints received by CVE that the system has failed to send out the required e-mails.” (*Id.*)

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

CVE acknowledges that it did not send Appellant a copy of the NOPC document itself, either in paper or in electronic form. Sections II.F and II.H, *supra*. Rather, CVE sent Appellant e-mail notifications, informing Appellant that a NOPC had been issued, and instructing that the NOPC document could be viewed and accessed through the VIP system. Section II.E, *supra*. Appellant does not argue that CVE had a duty to transmit Appellant a copy of the actual NOPC, and OHA has previously held that the approach utilized here by CVE is sufficient to constitute adequate notice of a proposed cancellation. *CVE Appeal of Optimum Low Voltage, LLC d/b/a Optimum Fire & Security*, SBA No. CVE-187-A (2021), *recons. denied*, SBA No. CVE-196-A (2021) (PFR).

The sole issue presented in this appeal, therefore, is whether Appellant actually received the e-mail notifications about the NOPC that CVE sent prior to cancellation. Having reviewed the record and the arguments of the parties, I must conclude Appellant has not persuasively shown that the e-mails were not received. As CVE emphasizes in its Response and Sur-Reply, the Case File reflects that CVE sent three sets of e-mails notifying Appellant of the existence of the NOPC. Section II.E, *supra*. All three sets of e-mails were sent to Appellant's CEO and majority owner, Ms. McGuire, and to twelve other representatives of Appellant. *Id.* Furthermore, these e-mails were sent to the same e-mail addresses that previously had been used for CVE's document request in August 2021, and that were later used for the NOVSC in October 2021. Accordingly, there is little reason to doubt that CVE's e-mails would have been received.

In contending that it did not receive the e-mails, Appellant offers two statements from Ms. McGuire. Sections II.C and II.G, *supra*. Ms. McGuire's first statement, though, indicates merely that Appellant did not receive “the notice” of proposed cancellation. Section II.C, *supra*. As discussed above, there is no dispute that CVE never transmitted the NOPC document itself to Appellant; rather, CVE sent e-mails informing Appellant that the NOPC had been issued. Ms. McGuire's first statement, then, does not demonstrate (nor indeed does Ms. McGuire even claim) that Appellant did not receive the e-mail notifications. In her second statement, Ms. McGuire adds that “the investigation that [she] ordered performed by [Appellant's] IT experts disclosed no evidence of the CVE emails supposedly dispatched on September 14, 2021, ever being received on [Appellant's] server.” Section II.G, *supra*. Ms. McGuire's second statement, however, is not corroborated by any supporting evidence, such as, for example, computer records or statements from the experts themselves concerning the investigation that they performed. *Id.* Notably,

Appellant fails to offer any statement from Ms. McGuire, or from any of the other twelve employees to whom the e-mails were directed, addressing whether they did, in fact, receive any of the three sets of e-mails. Further, as CVE observes, even if OHA were to agree that Ms. McGuire's second statement is sufficient to show that Appellant did not receive either of the first two sets of e-mails, Ms. McGuire remains silent with regard to the third set of e-mails, sent by CVE on October 15, 2021. *Id.* Accordingly, Appellant has not persuasively shown that it did not receive e-mail notification of the NOPC.

IV. Conclusion

Appellant has not demonstrated that CVE's e-mails informing Appellant of the NOPC were not actually received by Appellant. As a result, CVE appropriately cancelled Appellant's verified status due to Appellant's failure to respond to the concerns set forth in the NOPC. The appeal therefore is DENIED. 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