

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

CVE Appeal of:

Gruene Shredding, LLC,

Appellant,

Re: Notice of Verified Status Cancellation

U.S. Department of Veterans Affairs

SBA No. CVE-220-A

Decided: February 17, 2022

APPEARANCES

Damon A. Goff, Esq., Goff Law Firm, Austin, Texas, for Appellant

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

DECISION

I. Introduction and Jurisdiction

On September 17, 2021, Gruene Shredding, LLC (Appellant) appealed a decision of the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) cancelling Appellant's status as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB). On appeal, 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 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 appeal within ten business days after receiving the cancellation notice on September 3, 2021. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Verification

Appellant is a limited liability company based in New Braunfels, Texas. On October 30, 2019, CVE verified Appellant as an SDVOSB and included Appellant in the Vendor Information

Pages (VIP) database of eligible concerns. (Case File (CF), Exh. 76.) The verification was valid for a period of three years. (*Id.*)

B. The First NOPC

On May 18, 2021, CVE issued a Notice of Proposed Cancellation (“the First NOPC”) to Appellant, proposing to cancel Appellant's verified status and registration in the VIP database. (CF, Exh. 111.) CVE observed that, under 38 C.F.R. § 74.21(d), CVE may cancel a participant's verification for “good cause,” which may include:

(2) Failure by the participant to maintain its eligibility for program participation . . . (4) Failure by the concern to disclose to CVE the extent to which non-veteran persons or firms participate in the management of the participant . . . (7) Failure by the concern to provide an updated VA Form 0877 within 30 days of any change in ownership, except as provided in § 74.3(f)(3) [or] (8) Failure to inform CVE of any such changed circumstances, as outlined in paragraphs (c) and (d) of this section.

(*Id.* at 1-2, quoting 38 C.F.R. § 74.21(d).)

In the instant case, CVE found that Appellant apparently had changed its ownership structure without informing CVE. Specifically, Mr. Colton J. Read, Appellant's President and a service-disabled veteran, previously had represented to CVE that he owned 100% of Appellant. (*Id.* at 2.) As part of a re-verification review of Appellant's status, however, CVE learned that Mr. Read's ownership interest had declined to 53%. (*Id.*) CVE had no record that Appellant had reported the change in ownership to CVE. (*Id.*) Moreover, the remaining 47% ownership interest in Appellant is now held by two individuals, Messrs. Mathews J. Metyko and Neftali Rodriguez III, who may not be service-disabled veterans. (*Id.*) CVE instructed that Appellant must, within 30 days, provide an explanation of each owner's role in Appellant's business operations; an amended Operating Agreement signed by all members; a copy of each owner's resume; and an updated VA Form 0877 that “accurately reflects the current ownership interests held in [Appellant].” (*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.)

C. Response to the First NOPC

In response to the First NOPC, Appellant uploaded a revised VA Form 0877, showing that Mr. Read holds a 53% ownership interest in Appellant while Mr. Metyko, who is also a service-disabled veteran, owns 37%. (CF, Exh. 117.) The remaining 10% is held by an entity identified as “NR3 Holdings, LLC.” (*Id.*) Appellant provided a Letter of Explanation stating that, in late 2020, Mr. Read “sold part of [Appellant] right before the Christmas and New Years holidays.” (CF, Exh. 115.) Appellant conceded that it did not promptly inform CVE of the change in ownership, asserting that Mr. Read “had to catch the company up on some bills” and

that adverse weather conditions “prevented work from being completed for nearly a week and a half.” (*Id.*) In addition, Appellant was awaiting a revised version of its operating agreement from its attorney. (*Id.*) In a separate letter dated June 29, 2021, Appellant again acknowledged that it had “simply erred” by failing to timely submit an updated VA Form 0877 to CVE. (CF, Exh. 130, at 1.) Appellant observed that “the VA Form 0877 was replaced by the VA this March [2021], and upon learning of this intended replacement in February, it seemed best to file once the new version was promulgated.” (*Id.*)

Appellant provided CVE resumes for Messrs. Metyko and Rodriguez, and a copy of Appellant's First Amended Operating Agreement, dated June 11, 2021. (CF, Exhs. 118, 120, and 121.) According to Appellant, the First Amended Operating Agreement “place[s] [Mr.] Read as the Managing member,” but Appellant offered no further explanation or support for this assertion. (CF, Exh. 125.)

D. The Second NOPC

On July 30, 2021, CVE issued Appellant a second Notice of Proposed Cancellation (“the Second NOPC”). (CF, Exh. 133.) CVE stated that information gleaned from Appellant's response to the First NOPC had revealed additional potential areas of non-compliance. (*Id.* at 1.)

CVE observed that Appellant's First Amended Operating Agreement, dated June 11, 2021, identified Mr. Read, Mr. Metyko, and NR3 Holdings, LLC as Appellant's three Members. (*Id.* at 2.) Because Appellant is a limited liability company, one or more service-disabled veterans also must serve as Appellant's managing members, with control over all decisions. (*Id.*, citing 13 C.F.R. § 125.13(d).) CVE therefore “requires documentation designating Mr. Read, the [service-disabled veteran] upon whom the verification eligibility for [Appellant] is based, as the managing member with control over all decisions of the limited liability company.” (*Id.*)

CVE also proposed to cancel Appellant's verified status because Appellant did not timely report changes of ownership to CVE through the VA Form 0877. (*Id.*) When Appellant originally was verified, Mr. Read was Appellant's sole owner. (*Id.*) In response to the First NOPC, though, Appellant submitted a revised VA Form 0877, dated May 24, 2021, which identified Mr. Read as 53% owner of Appellant; Mr. Metyko as 37% owner; and NR3 Holdings, LLC (an entity apparently owned by Mr. Rodriguez) as 10% owner. (*Id.*) In correspondence with CVE, Appellant acknowledged that the changes in ownership had occurred several months earlier, prior to Christmas of 2020. (*Id.*) CVE concluded that Appellant had “failed to provide an updated VA Form 0877 within 30 days of any change in ownership as required by 38 CFR § 74.21(d)(7).” (*Id.*)

The Second NOPC stated that Appellant would have 30 days from the date of the Second NOPC to demonstrate why cancellation was not warranted. (*Id.* at 3, citing 38 C.F.R. § 74.22.)

E. Notice of Verified Status Cancellation

Appellant did not respond to the Second NOPC. On September 2, 2021, CVE issued a Notice of Verified Status Cancellation (NOVSC) formally cancelling Appellant's status as a

verified SDVOSB. (CF, Exh. 140.) CVE explained that, in light of Appellant's failure to respond to the Second NOPC, CVE could not determine that Appellant is fully controlled by one or more service-disabled veterans in accordance with 13 C.F.R. § 125.13(d). (*Id.* at 2.) Further, by its own admission, Appellant failed to provide an updated VA Form 0877 within 30 days of its change in ownership. (*Id.*)

CVE first explained that, according to Appellant's First Amended Operating Agreement, dated June 11, 2021, Mr. Read, Mr. Metyko, and NR3 Holdings, LLC are Appellant's three Members. (*Id.*) Appellant did not provide documentation designating Mr. Read, the service-disabled veteran upon whom Appellant's verification was based, as Appellant's managing member with control over all decisions of the limited liability company. (*Id.*) As a result, CVE could not conclude that the requirements of 13 C.F.R. § 125.13(d) were satisfied. (*Id.*)

CVE found that Appellant also did not timely submit an updated VA Form 0877, reporting changes in Appellant's ownership structure. (*Id.* at 2-3.) In response to the First NOPC, Appellant submitted an updated VA Form 0877, dated May 24, 2021. (*Id.*) This filing, however, was grossly overdue, as Appellant itself acknowledged that the changes of ownership occurred in late 2020. As a result, there is good cause for CVE to cancel Appellant's verified status pursuant to 38 C.F.R. § 74.21(d)(7). (*Id.* at 3.)

F. Appeal

On September 17, 2021, Appellant timely appealed the NOVSC to OHA. Appellant contends that CVE erred in cancelling Appellant's verified status, because Appellant is managed entirely by two service-disabled veterans, Messrs. Read and Metyko. (Appeal at 8.) Further, Appellant was unable to promptly provide CVE an updated VA Form 0877 due to inclement weather and expiration of the VA Form 0877. (*Id.* at 4.)

Appellant explains, first, that in mid-December 2020, Mr. Read reached an agreement with “Mr. Metyko to purchase a 37% membership interest in [Appellant] and take some part in the management of the company, with Mr. Read remaining [Appellant's] daily manager, highest paid member, and majority interest holder.” (*Id.* at 3.) At the same time, Mr. Read agreed to sell Mr. Rodriguez a “right to distribution of 10% of net profits but with no management, control, or decision-making authority of any kind.” (*Id.*) These agreements became effective at a meeting called by Mr. Read in January 2021. (*Id.*) Mr. Metyko and Mr. Rodriguez are “full-time attorneys who work in San Antonio, Texas.” (*Id.*)

Appellant highlights that both Mr. Read and Mr. Metyko are service-disabled veterans. (*Id.* at 2.) As a result, since Appellant's formation, “no less than 90% of the management and control of [Appellant] was within the power of one or two service-connected disabled veterans.” (*Id.* at 3-4.) Mr. Rodriguez is neither a veteran nor a service-disabled veteran, but he has never taken part in a Member vote or received more than 10% of net profit distributions. (*Id.* at 3, 7.)

Article III of Appellant's First Amended Operating Agreement, submitted to CVE in response to the First NOPC, confirms that Mr. Read and Mr. Metyko are service-disabled

veterans. (*Id.* at 5.) Further, under Article VI of the First Amended Operating Agreement, Mr. Read and Mr. Metyko “shall have the sole and exclusive control of the management, business and affairs of [Appellant], and the Members shall make all decisions and take all actions for [Appellant] not otherwise provided for in this Agreement.” (*Id.* at 5-6, quoting First Amended Operating Agreement § 6.01.)

Appellant disputes the notion that Appellant failed to provide evidence showing that Mr. Read is “the managing member of [Appellant] with control over all the decisions of the company” as required by 13 C.F.R. § 125.13(d). (*Id.* at 7.) Rather, Appellant's First Amended Operating Agreement explicitly indicates that Mr. Read and Mr. Metyko together have “the sole and exclusive control of the management, business and affairs of [Appellant].” (*Id.* at 7, quoting First Amended Operating Agreement § 6.01.) The First Amended Operating Agreement further stipulates that certain types of transactions may only occur with the 67% approval of Members who are service-disabled veterans. (*Id.* at 8, citing First Amended Operating Agreement § 6.02.) Thus, Appellant reasons, Article VI of the First Amended Operating Agreement establishes that Mr. Read is, in effect, Appellant's “Managing Member,” and that Appellant is managed and controlled solely by service-disabled veterans. (*Id.*)

Appellant asserts that the CVE also erred in cancelling Appellant's verified status due to tardy submission of the VA Form 0877. (*Id.*) During December 2020 and January 2021, Mr. Read consulted with legal counsel about completing the form. (*Id.* at 4.) However, the form itself indicated that it would expire in March of 2021. (*Id.*) This raised issues for Appellant because the VA Form 0877 “bore directly on language to be used in [Appellant's First Amended] Operating Agreement.” (*Id.*) In February 2021, Mr. Read and other employees of Appellant lost power for several days after a winter storm hit the state of Texas, thus further contributing to Appellant's delay in filing the VA Form 0877 with CVE. (*Id.*) Even though Appellant described these mitigating circumstances to the CVE examiner and in a letter of explanation to CVE itself, CVE nevertheless proceeded to cancel Appellant's verification. (*Id.* at 10.)

Appellant maintains that, after CVE permitted the VA Form 0877 to expire in March 2021, no new version of the form replaced it until August 10, 2021. (*Id.* at 8.) CVE therefore knew, or should have known, that CVE was demanding that Appellant utilize an expired form when CVE issued the two NOPCs. CVE improperly cited the “claimed late filing of an expired form as a basis to cancel [Appellant's] verified status.” (*Id.* at 9.) As such, Appellant contends, CVE's mismanagement of the VA Form 0877 amounts to an abuse of discretion and violation of the VA's own regulations. (*Id.* at 8-9.)

Appellant also argues that, even if OHA were to find that Appellant's delay in submitting an updated VA Form 0877 was not excusable, this does not change the fact that Appellant is managed and controlled by service-disabled veterans. (*Id.* at 9.) Appellant points to *CVE Appeal of Pro-Sphere Tek, Inc.*, SBA No. CVE-162-A (2020) for the proposition that CVE cannot fairly punish Appellant for failing to timely report an ownership change that had no adverse effect on Appellant's SDVOSB eligibility. (*Id.*)

Accompanying the appeal, Appellant submitted a copy of the NOVSC; affidavits from Mr. Read and Mr. Rodriguez; and a blank version of the VA Form 0877 showing an expiration

date of July 31, 2024. (Appeal, Exhs. A-D.) In his affidavit, Mr. Read attests that service-disabled veterans hold “super majority (90%)” ownership and control of Appellant, and that neither Mr. Rodriguez nor NR3 Holdings, LLC has provided any critical financing to Appellant. (Read Aff. ¶¶ 2-3.) Further, when Mr. Read completed the VA Form 0877 in May 2021, the only version available on VA's website stated that the form had expired in March 2021. (*Id.* ¶ 4.) In his affidavit, Mr. Rodriguez states that he is the sole owner of NR3 Holdings, LLC, which holds a 10% interest in Appellant. (Rodriguez Aff. ¶ 2.) He adds that he “take[s] no part in the management or control of [Appellant].” (*Id.* ¶ 4.)

G. Case File

The Case File indicates that Appellant was established as a “Single-member LLC” on June 17, 2019. (CF, Exh. 11, at 1.) At the time of its formation, Appellant was wholly-owned by Mr. Read, a service-disabled veteran. (CF, Exh. 12.)

According to Appellant's First Amended Operating Agreement, dated June 11, 2021, Appellant currently has three Members: Mr. Read, Mr. Metyko, and NR3 Holdings, LLC. (CF, Exh. 120, at 7, 36-37, and Exh. A.) Mr. Read owns 53% of Appellant; Mr. Metyko, 37%; and NR3 Holdings, LLC, the remaining 10%. (*Id.* at Exh. A.) The First Amended Operating Agreement contains the following provisions relevant to this appeal:

ARTICLE III MEMBERSHIP

3.01 Initial Members, Capital Commitments, and Percentage Interests. The persons listed on Exhibit A are hereby admitted to the Company as a Member, effective contemporaneously with the Effective Date of formation of the Company. Colton Read (the “Read Member”) and Mathews Metyko (the “Metyko Member,” and together with the Read Member, the “SCDV Members”) are understood and acknowledged to be service connected disabled veterans within the meaning of 38 CFR § 74.21(d)(2)

. . .

ARTICLE VI MANAGEMENT

6.1 Management by Members. The management of the Company is fully reserved to its Members in proportion to the Members' respective Percentage Interests. The Company has designated a President who is identified as Colton James Read. The Read Member and Metyko Member (Service Connected Disabled Veteran) shall have the sole and exclusive control of the management, business and affairs of the Company, and the Members shall make all decisions and take all actions for the Company not otherwise provided for in this Agreement, including, without limitation, the following:

- (a) entering into, making, and performing contracts . . .

(b) opening and maintaining bank and investment accounts and arrangements, drawing checks and other orders for the payment of money, and designating individuals with authority to sign or give instructions with respect to those accounts and arrangements;

(c) maintaining the assets of the Company in good order;

(d) collecting sums due the Company;

(e) to the extent that funds of the Company are available therefore, paying debts and obligations of the Company . . .

(f) acquiring, utilizing for Company purposes, and disposing of any asset of the Company;

(g) borrowing money or otherwise committing the credit of the Company for Company activities and voluntary prepayments of extensions of debt; . . .

6.2 Restrictions. Notwithstanding the provisions of paragraph 6.01 of this Agreement, the Members may not cause the Company to do any of the following without complying with the applicable requirements set forth below:

(a) Without 67% approval of the SCDV Members, no member of the Company has the authority to authorize the expenditure or in any way bind the Company of more than a total \$1,000 per month in contracts that fall outside of the normal course of business . . .

(b) Without 67% approval of the SCDV Members, no member of the Company has the authority to authorize the expenditure of more than \$1,000 per month in employee wages in excess of \$11,750 . . .

(*Id.* at 7, 11-12.)

H. CVE's Response

On November 9, 2021, CVE timely responded to the appeal.¹ CVE argues that Appellant has not shown that CVE committed any error of fact or law in cancelling Appellant's verified status. The appeal should therefore be denied. (Response at 3.)

CVE maintains, first, that Appellant has not established that it is controlled solely by service-disabled veterans. (*Id.* at 2.) Pursuant to 13 C.F.R. § 125.13(d), when a participant is a limited liability company, one or more service-disabled veterans must “serve as managing members, with control over all decisions of the limited liability company.” (*Id.*) Here,

¹ By separate order, OHA granted CVE's request for an extension of time within which to file its Response.

Appellant's First Amended Operating Agreement does not designate a Managing Member. (*Id.*, citing CF, Exh. 120.) Further, the First Amended Operating Agreement allows certain actions and decisions to be made by any Member, to include NR3 Holdings, LLC, which is a Member of Appellant but not an SDVOSB. (*Id.*)

CVE argues that it also properly found that Appellant failed to file an updated VA Form 0877 within 30 days of its ownership change in December 2020, contravening 38 C.F.R. § 74.3(b)(1). (*Id.*) Applicable regulations further state that CVE:

may remove a participant from public listing in the VIP database for good cause upon formal notice to the participant in accordance with § 74.22. Examples of good cause include . . . [f]ailure by the concern to provide an updated VA Form 0877 within 30 days of any change in ownership, except as provided in § 74.3(f)(3).

(*Id.*, quoting 38 C.F.R. § 74.21(d)(7).) Because Appellant was required to file an updated VA Form 0877 with CVE in January 2021, but did not do so, the issue of whether the VA Form 0877 subsequently expired in March 2021 has no bearing on this case. (*Id.* at 3.)

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 in this case cancelled Appellant's verified status for two reasons. First, Appellant did not provide documentation designating Mr. Read, the service-disabled veteran upon whom Appellant's verification was based, as Appellant's Managing Member with control over all decisions of the limited liability company, as required by 13 C.F.R. § 125.13(d). Section II.E, *supra*. Second, Appellant underwent a change of ownership in December 2020, but did not file a revised VA Form 0877 within 30 days, as required by 38 C.F.R. § 74.3(b)(1). *Id.* Indeed, Appellant did not submit a revised VA Form 0877 until late May 2021, by which time the form was months overdue. *Id.*

In challenging CVE's cancellation decision, Appellant does not dispute that it failed to respond to the Second NOPC, which ultimately resulted in the instant cancellation. Sections II.D and II.E, *supra*. Appellant maintains, however, that CVE should have determined, based on Appellant's First Amended Operating Agreement submitted in response to the First NOPC, that Appellant did, in effect, designate Mr. Read as Appellant's Managing Member. Section II.F, *supra*. The terms of Appellant's First Amended Operating Agreement, though, do not support this conclusion. Rather, the First Amended Operating Agreement indicates that Appellant has three Members — Mr. Read, Mr. Metyko, and NR3 Holdings, LLC — but does not expressly designate any of them as Managing Member. Section II.G, *supra*. Further, while Appellant points to language in the First Amended Operating Agreement stating that Mr. Read

and Mr. Metyko together “have the sole and exclusive control of the management, business and affairs of the Company,” this provision is undermined by language elsewhere in the First Amended Operating Agreement, which delegates decision-making authority to all of the Members. *Id.* The First Amended Operating Agreement states, for example, that “[t]he management of the Company is fully reserved to its Members” in proportion to their ownership interests, and that “the Members shall make all decisions and take all actions for the Company not otherwise provided for in this Agreement.” *Id.* Appellant does not dispute that one of its three Members — NR3 Holdings, LLC — is not an SDVOSB. Sections II.F and II.G, *supra*. Given this record, then, CVE could reasonably conclude that Appellant did not explicitly designate Mr. Read as Managing Member, nor is it clear that service-disabled veterans control all aspects of Appellant's decision-making.

Appellant also argues that the cancellation decision is inconsistent with OHA's decision in *CVE Appeal of Pro-Sphere Tek, Inc.*, SBA No. CVE-162-A (2020). This argument fails because, in *Pro-Sphere*, the challenged firm was controlled by three individuals, all of whom were service-disabled veterans. *Pro-Sphere*, SBA No. CVE-162-A, at 15. Conversely, in the instant case, Appellant appears to be controlled by its three Members, one of which is not an SDVOSB.

CVE also had valid grounds to cancel Appellant's verified status based on Appellant's failure to timely submit an updated VA Form 0877 within 30 days of the change of ownership, as required by 38 C.F.R. § 74.3(b)(1). Appellant admits that it did not timely submit the VA Form 0877. Section II.C, *supra*. As a result, CVE could appropriately cancel Appellant's verified status pursuant to 38 C.F.R. § 74.21(d)(7). *See, e.g., CVE Appeal of Warrior Serv. Co., LLC*, SBA No. CVE-214-A (2021); *CVE Appeal of Lachin Architects, APC*, SBA No. CVE-133-A (2019). On appeal, Appellant highlights that CVE ignored various mitigating circumstances (such as a winter storm, the holiday season, and the need to settle bills) which contributed to Appellant's delays. Section II.F, *supra*. While it is true that CVE apparently gave little weight to these considerations, OHA has held that “extenuating circumstances are not a factor the regulations require CVE to consider in making removal decisions.” *CVE Appeal of JLS Med. Prods., LLC*, SBA No. CVE-147-A, at 10 (2020). I therefore cannot conclude that CVE erred by failing to more thoroughly address Appellant's mitigating circumstances. Appellant also suggests that it would not have been possible for Appellant to submit an updated VA Form 0877, because the form expired in March 2021 and was not renewed until August 2021. As CVE observes in its Response, however, since Appellant's change of ownership occurred in December 2020, Appellant was legally obligated to file a revised VA Form 0877 in January 2021. Expiration of the VA Form 0877 in March 2021, then, would not have prevented Appellant from meeting this requirement.

IV. Conclusion

Appellant has not established that CVE committed error of fact or law in cancelling Appellant's verified status. The appeal therefore is DENIED. 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