

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

IN THE MATTER OF:

Partners In Energy, L.L.C.,

Appellant,

SBA No. CVE-253-A

Decided: January 18, 2023

APPEARANCE

Micki J. Dubuis, for Partners In Energy, L.L.C., Baton Rouge, Louisiana

DECISION¹

I. Introduction and Jurisdiction

On September 9, 2022, the U. S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) denied the application of Partners In Energy, L.L.C. (Appellant) for inclusion as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB) in the CVE Vendor Information Pages (VIP). On September 16, 2022, Appellant appealed the denial to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA).

OHA adjudicates SDVOSB appeals under the authority of 38 U.S.C. § 8127, and 13 C.F.R. § 134.102(v). Appellant timely filed the appeal within 10 business days after receiving the denial notice. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. CVE's Final Determination

On September 9, 2022, CVE informed Mr. Micki J. Dubuis, Appellant's President, that it denied Appellant's application for inclusion in the VIP. (Final Determination, at 1.) Although CVE concluded Mr. Dubuis met the regulatory definition of a service-disabled veteran (SDV), CVE was unable to conclude one or more service-disabled veterans control Appellant's day-to-

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

day operations. (*Id.*) Further, CVE found that it could not determine whether all management and control requirements of 13 C.F.R. § 125.14² are satisfied, nor whether Appellant can overcome the presumption that a non-SDV individual has the power to control Appellant. (*Id.*)

First, quoting from its August 18, 2022, Notice of Post Review Findings (PRF) (not included in the Case File (CF)), CVE found that Appellant does not satisfy the requirements of 13 C.F.R. § 125.14(a) and § 125.12, because CVE was unable to reasonably conclude an SDV controls all aspects of the business and thus controls Appellant. (*Id.*, at 2.) In the PRF, CVE observed that Appellant's job site locations are “everywhere” with administrative and accounting functions conducted in Baton Rouge, Louisiana. This is the same location at which Appellant conducts administrative activities for its franchise business, PatchMaster (the PatchMaster franchise). Because three of the eight contracts were for the PatchMaster franchise, CVE concluded that part of Appellant's daily operations and administration included conducting its franchise, and thus Appellant is subject to the Franchise Agreement. (*Id.*)

CVE reviewed Appellant's Franchise Agreement (CF, Exh. 308), dated July 30, 2020, between Appellant and PM Franchising, LLC (non-Veteran) (Franchisor). CVE determined that the provisions of the Franchise Agreement allowed the non-Veteran Franchisor to control aspects of Appellant's daily business operations, including marketing, production, sales, and administrative functions. (*Id.*, at 2-3.)

CVE determined Article 2 of the Franchise Agreement allows the non-Veteran Franchisor to control Appellant's business operations. Specifically, Subsection 2.1.1 limits Appellant's franchised business operations, including marketing; Subsection 2.1.1(2) requires approval from the Franchisor for Appellant to service customers outside the territory and controls sales; Subsection 2.1.1(3), (4), & (5) determines sales, marketing, and service policies regarding customers outside the assigned territory; and Subsection 2.3.3 places restrictions on what, where, and how Appellant may sell products or services sold in operation of the PatchMaster franchise. (*Id.*, at 3-4.)

CVE determined Article 4 of the Franchise Agreement allows the non-Veteran Franchisor to control Appellant's business operations. Specifically, Section 4.3 requires Appellant to pay a fee to the Franchisor to support a marketing fund, giving the Franchisor exclusive control over market funding, thus allowing a non-Veteran Franchisor to control marketing aspects in daily business operations; Section 4.5 requires Appellant pay Franchisor a monthly fee, and also allows Franchisor to control what technology, tools, software, and programs are required to operate the PatchMaster franchise. (*Id.*, at 4-5.)

CVE determined Article 5 of the Franchise Agreement allows the non-Veteran Franchisor to control Appellant's business operations. Specifically, Section 5.1, 5.2, and 5.3 permit Franchisor to determine the content and form of financial reports and accounting software

² The citations are to the regulations in effect at the time CVE issued its final determination and Appellant filed this instant appeal. Sections 13 C.F.R. §§ 125.12 through 125.1000 were removed, effective January 1, 2023. See 87 FR 73400, 73412 (Nov. 29, 2022).

used to operate the franchised business; and Section 5.4 and 5.5 permit Franchisor to review the content and form of financial reports used to operate the PatchMaster franchise. (*Id.*, at 5-6.)

CVE determined Article 6 of the Franchise Agreement allows the non-Veteran Franchisor to control Appellant's business operations. Specifically, Subsection 6.1.1 requires Appellant's new employees to participate in Franchisor's training programs, with the grant of the franchise conditioned on the successful completion of the program; Subsection 6.1.2 requires additional training programs for Appellant to continue operating the PatchMaster franchise; Section 6.2 and Subsection 6.2.2 require Appellant to operate the franchise business in compliance with the Franchisor's manual, subject to revisions or modifications; and Subsections 6.3.3 and 6.3.6 require Appellant to use Franchisor's phone numbers and to attend any meetings and conferences for the PatchMaster franchise. (*Id.*, at 6-7.)

CVE determined Article 7 of the Franchise Agreement allows the non-Veteran Franchisor to control Appellant's business operations. Specifically, Sections 7.1, 7.2 and Subsections 7.2.1 and 7.2.4 require Appellant complete training to Franchisor's satisfaction, operate during normal business hours, and purchase promotional products and services directly from the Franchisor; Subsection 7.3.1 requires Appellant obtain approval from the Franchisor to engage in third-party management; Subsections 7.3.3 and 7.3.5 require that Appellant operate the franchise in compliance with Franchisor's system standards; Subsection 7.3.7 permits Franchisor to determine the manner of identification when operating the franchise; Subsection 7.3.9 requires Appellant attend any annual regional meetings related to operating the franchise; Subsection 7.3.10 requires Appellant to use the national toll-free number on advertising as selected by the Franchisor; Subsection 7.3.11 requires Appellant receive approval to use a supplier when operating the franchise; Subsection 7.3.12 permits Franchisor to determine the type of vehicle Appellant may use to operate the franchise; Subsections 7.3.13 and 7.3.14 permits Franchisor to determine the computer hardware, and software used by the Appellant, including contract management software; Subsection 7.3.15 permits Franchisor to inspect and observe Appellant's operations and promotions used for the franchise; and Subsections 7.4.1, 7.4.2, and 7.4.4 required that Franchisor be co-insured, and also determines the insurance policy and insurance amount. (*Id.*, at 7-11.)

CVE determined Article 8 of the Franchise Agreement allows the non-Veteran Franchisor to control Appellant's business operations. Specifically, Subsections 8.6.1 and 8.6.2 permit Franchisor to control Appellant's use of the internet regarding Franchisor's Marks; and Subsection 8.6.3 also restricts Appellant's use of Franchisor's Marks in association with certain philosophies or positions related to PatchMaster. (*Id.*, at 11-13.)

Considering the provisions in the Franchise Agreement, CVE concluded in the PRF “the Franchisor controls aspects of the daily business operations which include, but are not limited to, the marketing, production, sales, and administrative functions of the firm, as well as the supervision of the executive team, and the implementation of policies.” (*Id.*, at 13.)

CVE cites to Appellant's August 26, 2022 letter of explanation (LOE) (Case File (CF), Exh. 315.), in which Appellant asserted that the Franchise Agreement is a 5-year contract, where the Franchisor will launch a PatchMaster presence in Appellant's territory and allow Appellant to

utilize techniques to grow the PatchMaster franchise. (*Id.*) Appellant further asserts PatchMaster conducts repairs on drywall/sheetrock under NAICS Code 238310, the only code associated with this franchise, while Appellant conducts other business under 50 remaining NAICS codes. (*Id.*, at 14.) Appellant notes that operations under the remaining 50 NAICS codes are not governed by the Franchise Agreement. Specifically, the sections and subsections previously identified by CVE “only pertain to a very small slice of [Appellant's] overall capabilities. . . .” (*Id.*, at 15.)

CVE acknowledges that operations under the remaining 50 NAICS codes are not subject to terms of the Franchise Agreement; however, the non-Veteran Franchisor still controls an aspect of daily business operations. CVE notes that Appellant concedes to Franchisor's control over NAICS code 238310, but maintains the SDV is required to demonstrate its exercise of day-to-day management and administration over Appellant's daily business operations. The PatchMaster franchise is part of daily business operations, which is controlled by a non-Veteran Franchisor; therefore Mr. Dubuis, the SDV, cannot control all aspects of daily business operations. (*Id.*, at 15.)

Second, CVE found that Appellant does not meet the requirements of 13 C.F.R. § 125.14(i)(7) because CVE was unable to reasonably conclude that Appellant is able to rebut the presumption that a non-SDV individual or entity has control or power to control Appellant in instances where a business relationship exists with a non-SDV that causes such dependence that Appellant cannot exercise independent business judgment without great economic risk. (*Id.*, at 16.) Citing previously discussed subsections in Articles 2, 4, 6, 7, and 8 of the Franchise Agreement, CVE determined that “[s]ince the franchise controls aspects of the daily business operations, the applicant depends on the non-Veteran to operate.” (*Id.*, at 16-17).

CVE further determined additional subsections in Article 8, 9, 10, and 11 of the Franchise Agreement allow the non-Veteran Franchisor to control Appellant. Specifically, Subsections 8.4.1 and 8.4.2 require that Appellant only use the Franchisor's marks in a manner prescribed by the Franchisor in operation of the PatchMaster franchise. (*Id.*, at 18.) Section 9.2 restricts Appellant from transferring rights in the PatchMaster franchise without approval from the Franchisor, thus controlling Appellant's long-term decision making. (*Id.*) Section 10.1 and Subsection 10.1.3 grant the Franchisor control over when Appellant may stop operating the franchised business, and thus control whether Appellant can pursue other lines of business related to the franchise. (*Id.*, at 18-19.) Sections 10.2, 10.3 and specific defaults identified in Subsections 10.2.1 to 10.2.15 (failure to conduct professionally, unauthorized use of marks, failure to operate business for 7 consecutive days, etc.) allow the franchisor to terminate the business if Appellant does not operate in compliance with the Franchise Agreement or manual. (*Id.*) CVE reasoned that losing the franchise means losing a majority of business revenue which is a great economic risk. Subsection 11.8.2 limits the ability of Appellant and Mr. Dubuis to engage in another competitive business, and CVE determined the limitation imposes a great economic risk. (*Id.*, at 19-20.)

Considering the provisions in the Franchise Agreement, CVE concluded that the Franchisor is presumed to control the Appellant because a relationship exist that creates

dependence on the Franchisor and Appellant cannot exercise independent business judgment without great economic risk. (*Id.*)

CVE cites to Appellant's LOEs submitted on July 20, 2020 (CF, Exhs. 309, 312, and 311.), where Appellant asserts that its PatchMaster franchise “exceeded the national first year franchise owners' revenue by over 40%,” (apparently exceeding average revenue for first year franchisees by 40%) and to accomplish that Appellant “had to absorb some opportunity cost,” meaning Appellant did not pursue as many federal or State contracts in the past 24 months as normal. (*Id.*, at 20.) Appellant noted that this decision impacted its 2021 revenue.

Considering this letter, CVE concluded that focus on the Franchise led to Appellant pursuing and procuring less revenue from other sources such as Federal or state contracts. The PatchMaster franchise generated 71.37% of Appellant's total revenue since August 1, 2020; while Appellant's other accounts generated 16.32 % of its revenue. (*Id.*) Based on the July 20 LOE, CVE concluded Appellant depends on the Franchisor, and breaching provisions in the Franchise Agreement may lead to termination, causing Appellant to lose approximately 71% of its business, which restricts Mr. Dubuis's ability to generate revenue. (*Id.*, at 20-21.)

CVE referred to Appellant's August 26, 2022 LOE (CF, Exh. 315.), where Appellant asserts receiving 71.37% of its revenue from the PatchMaster franchise was a result of the opportunity cost absorbed to launch the line, meaning “the loss of potential gain from other alternatives when one alternative is chosen.” (*Id.*, at 21.) Appellant asserts that CVE should not only consider its 18 months as a franchisee out of the several years Appellant has operated-since 2009. Appellant notes it is negotiating for a potential \$1.7 million contract with the US Army Reserve. (*Id.*) Considering this letter, CVE asserts that it may only consider the totality of the circumstances existing at the time of the application and cannot consider a potential Federal contract. (*Id.* at 21, citing 38 C.F.R. § 74.11(d).)

CVE concludes that Appellant's franchise business relationship permits a non-Veteran Franchisor to conduct business operations relating to the PatchMaster franchise, and thus Appellant is dependent on a non-Veteran to operate this line of business. (*Id.*, at 22-23.) Further, CVE determined that when considering the totality of the circumstances existing at the time of the application, the majority of business revenue came from the franchise since its purchase in 2020. Also, the Franchisor has the ability to terminate the Franchise Agreement, creating a great economic risk. Therefore, CVE is unable to reasonably conclude that Appellant meets control requirements under 13 C.F.R. § 125.14(i)(7) because Appellant cannot rebut the non-Veteran Franchisor's presumed control over Appellant. (*Id.*, at 23-24.)

B. Case File

Appellant is a business incorporated in the State of Louisiana since 2009. (CF, Exhs. 1, 2, 3, and 4.) Appellant is 100% owned by Mr. Dubuis, an SDV. (CF, Exh. 94.) On June 20, 2022, Appellant applied for verification as an SDVOSB and provided various requested documentation. (CF, Exhs. 253-273.) On July 20, 2022, Appellant submitted additional documents, including a copy of a Franchise Agreement between PM Franchising LLC, who owns a right to license PatchMaster, and Appellant. (CF, Exh. 308.) The Franchise Agreement

became effective August 1, 2020 for an initial term of 5 years; and identifies Appellant as “Franchisee,” Mr. Dubuis as “Owners,” and PM Franchising LLC as “Franchisor.” (*Id.* at 8, 44-46.)

C. The Appeal

On September 16, 2022, Appellant filed an appeal and asserts that CVE erred in its final determination. (Appeal, at 1.) First, Appellant argues the Franchise Agreement pertains only to the PatchMaster franchise, and not to other businesses under Appellant. The Franchisor has no control over 50 out of the 51 NAICS codes that apply to its business. Second, Appellant argues that CVE erred when it only considered “a small window of revenue (the last 18 months)” without considering prior years. (*Id.*) Appellant notes the PatchMaster franchise is a 5-year contract, and “should simply be treated as just another contract”; and Mr. Dubuis, with 100% ownership, can sell, terminate or quit the franchise at any time. (*Id.*, at 2.) Third, Mr. Dubuis asserts that he meets the regulation requirements at 13 C.F.R. § 125.13, as he owns 100% of Appellant as an SDV. He also contends that CVE's interpretation of 13 C.F.R. § 125.14 would mean no other person or entity may have “ANY” influence over daily operations. (*Id.*, at 2.) Appellant rejects this interpretation and argues that control “only applies to the franchise agreement and not to anything else,” and there no other limits in the concern. (*Id.*) Lastly, Appellant notes that 75% of its total revenue stems from the PatchMaster franchise in the past 18 months because Appellant chose to incur opportunity cost, “revenue [Appellant] would have generated by doing something else.” Appellant reiterates that it is seeking a large contract from the Army, which if awarded, would represent a large amount of business outside of the franchise. (*Id.*, at 3.) Appellant request that the Final Determination be reversed. In support of its appeal, Appellant provided a copy of its LOE submitted to CVE on August 26, 2022 (CF, Exh. 315.)

On October 18, 2022, Appellant filed an objection to the case file via email and reiterates that the PatchMaster franchise is one line of business. Appellant further notes that all employees are employed by Appellant, and none of Appellant's employees are employed by the PatchMaster franchise. Appellant clarifies that outside of the work performed under NAICS code 238310, PatchMaster has zero supervision of the executive team and does not “have any control even over some facets of the franchise.” (Email from M. Dubuis (Oct. 18, 2022).)

III. Discussion

A. Burden of Proof

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

B. Analysis

Appellant has not shown that CVE clearly erred in law by denying Appellant's application for verified SDVOSB status. I must therefore deny this appeal.

SBA regulations require that an eligible SDVOSB be unconditionally owned and controlled by one or more service-disabled veterans. “Control” means that both the concern's daily business operations, and its long-term decision-making, are conducted by one or more SDVs. 13 C.F.R. § 125.14(a). The regulations define “daily business operations” as including, but not limited to, “the marketing, production, sales, and administrative functions of the firm, as well as the supervision of the executive team, and the implementation of policies.” *Id.* § 125.12. Non-SDV individuals or entities must not control the concern. *Id.* § 125.14(i). There is a rebuttable presumption that a concern is not controlled by an SDV if “[b]usiness relationships exist with non-service-disabled veteran individuals or entities which cause such dependence that the applicant or concern cannot exercise independent business judgment without great economic risk.” *Id.* § 125.14(i)(7).

Here, CVE determined the Franchise Agreement between Appellant and Franchisor, a non-SDVOSB, imposes numerous restraints that interfere with Mr. Dubuis's ability to control Appellant's daily business operations, and restricts Mr. Dubuis's ability to perform independent business judgment without great economic risk. Section II.A, *supra*. Specifically, CVE is concerned provisions in the agreement allow Franchisor to control aspects of Appellant's marketing, production, sales, and administrative functions including, but not limited to, sections and subsections 2.1.1, 4.3, 4.5, 5.1, 5.2, 5.3, 5.4, 5.5, 6.1.1, 6.2, 7.1, 7.2, and 7.3 of the Franchise Agreement. *Id.* A review of the agreement confirms CVE's findings that provisions fundamentally restrict Mr. Dubuis's ability to independently operate Appellant. Section II.B, *supra*. Among the restrictive provisions was Article 7, which requires Appellant to obtain Franchisor approval prior to engaging in third-party management, requires Appellant to attend annual regional meetings, and requires Appellant obtain Franchisor approval prior to using a supplier when operating the franchise. *Id.* Article 7 further allows Franchisor to determine which vehicles, computer hardware/software Appellant will utilize, and observe Appellant's operations and promotions for the franchise. Section II.A, *supra*. Based on these provisions, I find that CVE reasonably determined that the Franchise Agreement restricts Mr. Dubuis's control or business judgment over Appellant.

On appeal, Appellant highlights the limitations of the Franchise Agreement. Sections II.A, and II. C, *supra*. Specifically, the Franchise Agreement is a contract with an initial term of 5 years, which allows Appellant to establish a PatchMaster franchise with Franchisor. Appellant rejects CVE's determination and asserts that this franchise is limited to NAICS Code 238310, Drywall and Insulation Contractors, one out of the 51 NAICS code classifications in which Appellant operates. Section II.C, *supra*. I find this argument unconvincing. Although, the remaining 50 NAICS codes are not subject to terms of the Franchise Agreement, the mere existence of the agreement creates a restriction that limits Mr. Dubuis's overall control over Appellant. Further, while it only accounts for one NAICS code, the franchise accounts for over 70% of Appellant's revenue, and thus it controls most of Appellant's business. The franchise is part of daily business operations, and thus Appellant must adhere to its provisions, which limit Mr. Dubuis's ability to perform day to day management and administration of business operations independent of the Franchisor.

Further, this case is analogous to OHA's decision in *CVE Appeal of The Hope Cos, LLC*, SBA No. CVE-204 (2021). In *The Hope Cos* the SDV applied for verification with CVE and included a copy of its franchise agreement in its application. *The Hope Cos, LLC*, SBA No. CVE-204, at 1. CVE reviewed numerous provisions in the agreement and determined that it could not conclude an SDV had full control over appellant's daily operations and an SDV exercised independent business judgment to conduct aspects of the daily business operations. *Id.*, at 11. OHA determined the provisions related specifically to that appellant's marketing, production, sales, and administrative functions; the supervision of appellant's executives; and the implementation of business policies also restricted full control of daily business operations. *Id.*, at 15-16.

Here, Appellant's Franchise Agreement contains provisions similar to those found to be problematic in *The Hope Cos, LLC*, SBA No. CVE-204-A (2021). For instance, the Franchise Agreement also contain provisions which restrict, for example, the training of personnel programs, sales, marketing and service policies; and restricts administrative functions, such as Appellant's hours of operation, and use of a toll-free number for advertising. Section II.A, *supra*. Thus, CVE could not reasonably conclude that an SDV controlled Appellant's daily business operations.

CVE also determined that Appellant is not an eligible SDVOSB under 13 C.F.R. § 125.13(i), which mandates that “[n]on-service-disabled veteran individuals or entities may not control” an SDVOSB. The same regulation further creates a rebuttable presumption that a firm is not controlled by SDVs if “[b]usiness relationships exist with non-service-disabled veteran individuals or entities which cause such dependence that the applicant or concern cannot exercise independent business judgment without great economic risk.” 13 C.F.R. § 125.13(i)(7).

Here, CVE reviewed the Franchise Agreement and identified numerous provisions within that agreement which permit Franchisor, a non-SDVOSB, to control important aspects of Appellant's long-term decisions and day-to-day management. Section II.A, *supra*. Specifically, CVE found provisions restrictive including, but not limited to, sections and subsections 8.4.1, 8.4.2, 9.2, 10.1.3, 10.2, 10.3, 10.2.1, 11.8.2 of the Franchise Agreement, which enable Franchisor to exert control. *Id.* CVE notes that approximately 71% of Appellant's revenue stems from the PatchMaster franchise; and CVE reasonably concluded provisions in the Franchise Agreement that grant the Franchisor the ability to terminate the agreement may cause a financial loss that restricts Mr. Dubuis's ability to generate revenue, creating great economic risk.

On appeal, Appellant contends that CVE unreasonably considered a small window of its revenue to the launch of the franchise in 2020; CVE failed to consider Appellant's revenue over several years since Appellant's inception in 2009; and the influx in revenue was due to Appellant's decision to incur opportunity cost during the launch of the franchise. Section II.C, *supra*. Further, Appellant asserts that it is in the process of negotiating a large contract from the U.S. Army Reserve that will represent a large amount of the business outside of the franchise. *Id.* However, Appellant's eligibility is based on “the totality of circumstances existing on the date of application,” and I cannot take into account Appellant's speculation as to a contract it may or may not receive. 38 CFR § 74.11(d). The franchise line of business represented the great majority of Appellant's revenue at the time Appellant submitted its application, despite the

business strategy. Sections II.A and II.B, *supra*. Further, a review of the Franchise Agreement confirms CVE's findings that the agreement fundamentally restricts Appellant's ability to transfer rights of the franchise, terminate the franchise, and engage in competitive business. *Id.* Accordingly, I find that CVE reasonably determined that provisions in the Franchise Agreement restrict Appellant's ability to exercise independent business judgment without great economic loss.

Based on the foregoing, Appellant's PatchMaster franchise restricts Mr. Dubuis's control over Appellant's business operations and restricts Appellant from exercising independent business judgment. I thus find that CVE did not err in law when it determined Appellant failed to meet control requirements per 13 C.F.R. § 125.14(a); § 125.12. Nor did CVE err in law when it determined Appellant failed to rebut the presumption of control per 13 C.F.R. § 125.14(i)(7).

It is important to note, SBA's regulations dealing with veteran-owned and service-disabled veteran-owned small businesses do not address the question of businesses which are franchises. Many small businesses are franchises of large national concerns, which impose many requirements and restraints on the operation of the business, such as those included in the franchise agreement at issue here. Finding that standard franchise agreements divest control of a firm from its SDV owner would mean that no firm could be a franchise and an SDVO SBC.

SBA has addressed the issue of franchises in another context, that of eligibility for SBA's financial assistance programs. In considering whether a franchisor controls or has the power to control, and is thus affiliated with its franchisee, the SBA's regulations stipulate that “[t]he restraints imposed on a franchisee or licensee by its franchise or license agreement generally will not be considered in determining whether the franchisor or licensor is affiliated with an applicant franchisee or licensee provided the applicant franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.” 13 C.F.R. § 121.301(f)(5). Previously, this regulation was included in the general rules on affiliation. Now it is included in the regulations establishing size standards and affiliation principles applicable to financial assistance programs. See 13 C.F.R. § 121.301. SBA has thus limited the firms covered by this regulation to those applying for financial assistance. It is not applicable to SBA's general rules of affiliation (13 C.F.R. § 121.103) or to the rules establishing ownership and control of SDVO SBCs (13 C.F.R. § 125.14³). SBA has, by not extending the coverage of § 121.302(f)(5) to the Veteran Small Business Certification program, made it extremely difficult for any franchise business to qualify as a VOSB or an SDVO SBC. Nevertheless, the plain meaning of the regulations is clear, that the SDV must control a concern and must be able to exercise independent business judgment without great economic risk. Under the current regulations and given the restrictions which the Franchise Agreement places upon the Appellant, I cannot say that it was clear error for CVE to find that Mr. Dubuis lacked control over Appellant, or that he could not exercise independent business judgement without great economic risk.

³ This section was removed, effective Jan. 1, 2023. See 87 FR 73400, 73412 (Nov. 29, 2022).

IV. Conclusion

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

CHRISTOPHER HOLLEMAN
Administrative Judge