

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Human Learning Systems, LLC

Appellant,

Appealed From
Size Determination No. 03-2016-058

SBA No. SIZ-5769

Decided: August 17, 2016

APPEARANCES

Benjie Williams, President, Human Learning Systems, LLC, for Appellant

Nicole L. Carter, Esq., Meghan F. Leemon, Esq., Watson & Associates, LLC, for Serrato Corporation

DECISION¹

I. Introduction and Jurisdiction

On May 24, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2016-058, concluding that Human Learning Systems, LLC (Appellant), is not an eligible small business under the \$35.5 million annual receipts size standard. Appellant timely filed this appeal on June 7, 2016.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, the appeal is

¹ I originally issued this Decision under a Protective Order. *See* 13 C.F.R. § 134.205. After reviewing the original Decision, Appellant informed OHA they had no requested redactions. Therefore, I now issue the entire Decision for public release.

GRANTED, the size determination is VACATED, and the case is REMANDED to the Area Office for a new size determination.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134.

II. Background

A. Solicitation and Protest

On June 6, 2014, the Contracting Officer (CO) for the U.S. Department of Labor issued Solicitation No. DOLJ14SA00005 (RFP) for the administration of the Fred G. Acosta Job Corps Center in Tucson, Arizona. The CO set aside the RFP for small business and designated North American Industry Classification System (NAICS) code 611519, Job Corps Centers, with a corresponding \$35.5 million annual receipts size standard, as the appropriate code. Amendment No. 3, issued August 15, 2014, set the deadline for initial offers as September 4, 2014.

On May 26, 2015, the CO sent notice that Appellant was the apparent successful offeror. Serrato Corporation (Serrato) filed both a size protest and a GAO bid protest. On July 2, 2015, the CO announced that corrective action would be taken. On April 20, 2016, the CO re-awarded the contract to Appellant. On April 26, 2016, Serrato filed another size protest. Serrato alleged Appellant is affiliated with the large businesses ResCare, Inc. (ResCare), Onex Partners, and Onex Corporation (Onex) under the identity of interest rule, the newly organized concern rule, and the ostensible subcontractor rule.

Among the documents Serrato filed as part of its size protest was ResCare's Securities and Exchange Commission Form 10-Q for the quarterly period ended September 30, 2014. This document contains an overview of ResCare's business, which includes five reportable segments: Residential Services, ResCare HomeCare, Education and Training Services, Workforce Services, and Pharmacy Services. (Form 10-Q at 22.) The Education and Training Services segment includes not only the Job Corps centers that ResCare operates, but also its alternative education programs, charter schools, training for professionals working with children, training for potential foster and adoptive parents, and other individual and family counseling and instruction. (*Id.*) The Form 10-Q contains ResCare's receipts for the nine months ended September 30, 2014 and 2013. For these 9-month periods, ResCare's total receipts were \$1,290,724,000 and \$1,195,621,000 respectively; and receipts from the Education & Training Services segment were \$100,165,000 and \$100,492,000 respectively. (*Id.* at 24.) The percentages of ResCare's total receipts from the segment that includes Job Corps centers are 7.7% and 8.4%, respectively.

On May 3, 2016, the Area Office notified Appellant that its size had been protested, and requested it to submit a response to the protest, together with a completed SBA Form 355, its proposal, and certain other information. On May 6, 2016, Appellant filed its response to the protest, together with its supporting documentation. Included in this documentation are two organization charts for ResCare. One chart, "ResCare Executive," shows the Chief Operating Officer (COO), eight other C-level officers, and one Executive Vice President all reporting to the Chief Executive Officer. (Appellant's Submission, Tab 6.) The other chart, "ResCare

Operations,” shows four Executive Vice Presidents, six Senior Vice Presidents, and two Vice Presidents in the chain of command reporting to the COO. (*Id.*, Tab 5.)

B. The Size Determination

On May 24, 2016, the Area Office issued the size determination. The Area Office found Mr. Benjie Williams is Appellant's President/CEO, sole owner, and officer. Appellant has been in business since April 10, 2011. Mr. Williams has no ownership in any other concerns. (Size Determination at 3.)

The Area Office first concluded that Appellant and ResCare are not affiliated under the identity of interest rule. Serrato had alleged the two concerns are in the same line of business, share management and key employees, and Appellant relies upon ResCare for a large percentage of its revenue. However, the Area Office found that merely being in the same line of business is not sufficient to support an identity of interest finding. Mr. Williams and the owners of ResCare have no common investments. The concerns have no common employees and they do not combine resources in any capacity. ResCare accounts for only 24.33% of Appellant's total receipts. Accordingly, the Area Office found no affiliation based upon identity of interest. (*Id.*)

Nevertheless, the Area Office found Appellant and ResCare affiliated under the newly organized concern rule. (*Id.* at 4.) The Area Office noted Mr. Williams had stated that he was never a corporate officer, director, principal stockholder, managing member, or key employee at ResCare. Mr. Williams did state that he was Center Director of the Treasure Island Job Corps Center in San Francisco for ResCare, and was one of six Job Corps Operations Vice Presidents who answered to ResCare's Executive Vice President. Further, despite the “vice president” in his title, he was never a ResCare corporate officer. Mr. Williams maintained his role was to support Job Corps Center operations. He was not in a position to make substantive decisions for ResCare. He had no authority to make contracts for ResCare, to make employment decisions, or to control revenue. He did not supervise any staff, and was not privy to contract negotiations. (*Id.*)

The Area Office noted that, according to Mr. Williams' resume, he was ResCare's Vice President for Job Corps Operations from 2009 to 2011, responsible for oversight of four Job Corps Centers. He provided support to Center Directors in Dallas, San Francisco, and Atlanta. He provided technical assistance and training to Center Directors and senior managers regarding center operations and performance. He participated in the annual reviews of all centers and assisted in developing the annual work plan. Mr. Williams was Director of the Treasure Island Job Corps Center for ResCare from 2006 to 2009, where he was responsible for overall operation of that Center. Mr. Williams established Appellant on April 10, 2011, and did not resign from ResCare until January 2, 2012. (*Id.* at 5.)

The Area Office concluded that Mr. Williams was a key employee of ResCare because, “based on his resume, he obviously had significant influence and control of a Job Corps Center and later of Job Corps Operations. At minimum, he was a key employee at ResCare. These titles are not given to employees with little to no authority.” (*Id.* at 5.) Further, Mr. Williams “claims not to have supervised any employees, but does not explain how this can be if he was the Center

Director.” (*Id.*) Mr. Williams “clearly had influence and control of the Job Corps department.” (*Id.*)

The Area Office further found that, even though Job Corps Operations was only part of ResCare's business, Appellant and ResCare are in the same line of business. The Area Office also found that in 2011, while Mr. Williams was still employed at ResCare, Appellant competed for and received a subcontract on a ResCare Job Corps contract, on which performance began January 3, 2012. Appellant received another subcontract from ResCare in 2013. ResCare will be Appellant's subcontractor on the instant procurement. Accordingly, ResCare is providing Appellant with assistance through subcontracts, and Appellant and ResCare “are clearly doing business together”. (*Id.*)

The Area Office thus concluded, “[g]iven all of the facts described above” that Appellant and ResCare are affiliated under the newly organized concern rule. (*Id.* at 5.)

The Area Office also determined that even if Appellant and ResCare are not affiliated under the newly organized concern rule, “these facts would support a finding of affiliation based on the totality of the circumstances”. (*Id.* at 5-6.) Having made these findings, the Area Office determined it did not need to examine whether Appellant and ResCare are affiliated under the ostensible subcontractor rule. The Area Office then determined that, because Appellant is affiliated with ResCare, a large business, Appellant is other than small. (*Id.* at 6.)

C. The Appeal

On June 7, 2016, Appellant filed the instant appeal. Appellant asserts the Area Office erred by failing to discuss all the evidence submitted, which evidence included more than the resume discussed in the size determination. Appellant also asserts the Area Office erred by failing to apply properly the newly organized concern and totality of the circumstances rules. (Appeal at 2.) Appellant submits new evidence with its appeal, characterizing it as “additional information” and “argument based on the existing record”, citing *Size Appeal of Diverse Construction Group*, SBA No. SIZ-5112 (2010). (*Id.* at 3.) Appellant's three pages of new evidence include a June 6, 2016 letter from ResCare and a list of ResCare's 46 vice presidents.²

Appellant maintains the Area Office erred in describing Appellant as a “new” business, because Appellant had incorporated in 2011, and has been active since then. Appellant argues that once a concern has been an active business for a number of years, it cannot be considered “new”, citing *Size Appeal of ACI Mechanical Corp.*, SBA No. SIZ-3030 (1988); *Size Appeal of Avedon Corp.*, SBA No. SIZ-2042 (1984) and *Size Appeal of Neal R. Gross & Co., Inc.* SBA No. SIZ-3888 (1984), where OHA found six-year-old concerns were not “new”. (*Id.*) A new concern is a “nascent concern”, citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), and this does not describe Appellant, which has been actively pursuing contracts for five years and has generated revenue since 2012. (*Id.* at 3-4.)

² Appellant also submitted two ResCare organization charts, but because these were in Appellant's Area Office submission at Tabs 5 and 6, they are not new evidence on appeal.

Appellant argues the Area Office erred in finding Mr. Williams a key employee of ResCare, because a Job Corps Center Director and a Vice President of Operations do not have substantive control over ResCare. (*Id.* at 5.) The Area Office erred by basing its finding on what it believed Mr. Williams's former job titles meant, rather than who ResCare's key employees actually were, and whether Mr. Williams actually had the ability to control ResCare as a whole. In support, Appellant points to *Size Appeal of Metis Technology Solutions, Inc.*, SB A No. SIZ-5538 (2014), where OHA overturned a size determination that incorrectly relied on a position title to determine whether a particular individual was a key employee. (*Id.* at 5-6.)

Appellant asserts the Area Office erred in finding that Mr. Williams was in charge of the Job Corps Department of ResCare because there is no Job Corps Department in ResCare's organizational structure (which Appellant had submitted to the Area Office) and, further, he was never in charge of any department of ResCare. (*Id.* at 6-8.) Mr. Williams managed the Treasure Island Job Corps Center contract as Center Director from 2007 to 2009. This one contract was a very small percentage of ResCare's revenue. (*Id.* at 6.)

Appellant also takes issue with the Area Office's statement that Mr. Williams claimed not to have supervised employees. Appellant denies making such a claim. (*Id.* at 6-7.) Appellant asserts Job Corps Center Directors are not part of ResCare's hierarchy and are not key staff. Further, Job Corps Operations VPs are not key staff at ResCare. Mr. Williams did not supervise anyone in this position. He had no ability to make substantive decisions for ResCare, such as selecting projects on which to bid, determining staff requirements, pricing decisions, or borrowing money. He had no authority to contract on ResCare's behalf. He did not hire, fire, or evaluate ResCare employees. (*Id.* at 7.)

Appellant asserts that, out of his 27 years in the Job Corps industry, Mr. Williams has worked for ResCare for less than four years. (*Id.* at 10.) Further, that some of Mr. Williams' time at ResCare overlapped with his launch of Appellant does not mean Appellant is a spin-off of ResCare.

Appellant disputes the Area Office's finding that it is in the same line of business as ResCare. All of Appellant's revenue is from Job Corps Center contracts, while 92% of ResCare's business is from other sources, such as pharmacies, schools and home health care. (*Id.* at 8-9.)

Appellant also disputes the Area Office's finding that ResCare is providing it with assistance through subcontracts. (*Id.* at 10-11.) Appellant argues this finding can only be made where the challenged concern receives several types of financial assistance from the other concern, citing *Size Appeal of Caddell Construction Co., Inc.*, SBA No. SIZ-1990 (1984). (*Id.* at 11.) Appellant has only one ResCare subcontract besides the instant procurement, and no financial or other assistance from ResCare. (*Id.*) Appellant notes its submission to the Area Office included documentation that it has bid on six procurements, and proposed ResCare as a subcontractor only once. Appellant has been proposed as a subcontractor by two other concerns, neither of which was ResCare. ResCare has been involved in only two procurements with Appellant. (*Id.* at 4-5.)

Appellant disputes the relevance of the Area Office's finding that ResCare and Appellant “are doing business together”. The regulations speak to whether one concern controls or has power to control the other, not whether the concerns do business with each other. (*Id.* at 13.) Appellant further asserts *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466 (2001), relied on by the Area Office, is inapposite here because there were many more ties between the concerns in that case than exist here. (*Id.* at 13-14.)

Appellant further disputes the Area Office's finding that Appellant is affiliated with ResCare under the totality of the circumstances rule. The Area Office jumped to this conclusion without engaging in a discussion of the test for finding affiliation under that rule. (*Id.* at 14.)

Appellant also alleges the Area Office erred by not analyzing Serrato's allegation that Appellant was affiliated with ResCare under the ostensible subcontractor rule. Appellant asserts it is not, because ResCare will perform only 18% of the work under this contract and will not be performing the primary and vital functions. (*Id.* at 15.)

D. Serrato's Motion to Dismiss and Response in Opposition to the Appeal

On June 24, 2016, the day the record in this matter was to close, Serrato filed a Motion to Dismiss and Response in Opposition (Response). Serrato argues the instant appeal should be dismissed for failure to specifically allege any facts or law which would support a finding of clear error. (Response at 7.) Alternatively, Serrato requests the appeal be denied and the size determination affirmed.

Serrato asserts Appellant's main assignment of error, that the Area Office did not discuss all the evidence Appellant had submitted, is meritless because the Area Office had no obligation to do so. (Response at 1-2, 6.) In Serrato's view, Appellant has pointed to no clear error in the size determination, and Appellant's appeal amounts to “mere disagreement” with the size determination. (*Id.* at 2.)

Serrato contends that all of the new evidence Appellant presented on appeal must be stricken from the record, including opinions presented as to Mr. Williams' role at ResCare, and tables breaking out ResCare's receipts by NAICS code and its percentage of receipts from Job Corps contracts and from the Treasure Island Center. (*Id.* at 3-4.) Serrato notes Appellant filed no motion to admit this evidence. In contrast, the evidence in *Diverse Construction* was admitted with a proper motion, and was argument based on the record. (*Id.* at 5-6.)

Serrato asserts the OHA decisions Appellant cites do not support its argument that Appellant is not a new concern, because Appellant's size must be determined as of the date of its self-certification, and that was September 14, 2014,³ when Appellant “had its doors open less than three (3) years”. (*Id.* at 8.) Serrato asserts Appellant and ResCare share employees, contracts, and customers. Serrato also asserts it had submitted information identifying three of Appellant's employees who are or were ResCare employees. (*Id.* at 7-9.)

³ Serrato probably means September 4, 2014.

Serrato asserts Appellant's contention that Mr. Williams was not a key employee is “mere disagreement” with the Area Office. (*Id.* at 10.) Serrato argues Appellant fails to point to one piece of evidence that contradicts the Area Office's conclusion. Serrato argues Appellant attempts to submit on appeal “non-expert opinion” that a vice president of operations within the workforce division would not have substantive control over the entire company. Serrato argues this statement should be struck as unsubstantiated opinion. (*Id.* at 11.) Serrato asserts Mr. Williams' resume shows he was a vice president who oversaw four Job Corps Center contracts and “provided support” to Center Directors in three regions. Appellant's decision to submit Mr. Williams's resume with no contradictory information on key employee status led the Area Office to the reasonable conclusion he was a key employee. (*Id.* at 11-12.) Serrato argues the Area Office could reasonably infer that, under the common understanding of leadership positions, Mr. Williams had substantive control or critical influence over both companies, citing *Size Appeal of AudioEye, Inc.*, SB A No. SIZ-5477 (2013), *recons. denied*, SB A No. SIZ-5493 (2013) (PFR) (*AudioEye*); *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014) (*Radant*); *Size Appeal of Alterity Management and Technology Solutions, Inc.*, SB A No. SIZ-5514 (2013). (*Id.* at 10-12.)

Further, Serrato asserts that Appellant's cited decision, *Size Appeal of Metis Technology Solutions*, SBA No. SIZ-5538 (2014) does not support Appellant's argument, because there the individual challenged as a key employee was fifth tier lower level manager with hundreds of officials above her, while Mr. Williams' resume confirmed his control over three regions of Center Directors. The record before the Area Office only discussed six vice presidents for ResCare. Appellant's attempt to “slide in” new evidence there may actually be 46 vice presidents is an unsupported assertion, insufficient to establish error in the size determination. (*Id.* at 13.)

Serrato maintains the ResCare Job Corps “arena” was a “department worth regulating” because a vice president was assigned over the department, and Appellant submitted no rebuttal evidence to show Mr. Williams's control was limited. (*Id.* at 14.) Serrato maintains its protest made clear that Mr. Williams's role as Center Director was in question, and thus Appellant had notice that this issue had to be addressed. Serrato maintains Appellant's assertion that ResCare gave Mr. Williams control over Job Corps Centers and contracts, but that he had no substantive control over the company and its contracts, is not credible. (*Id.* at 14-15.)

Serrato further argues the Area Office's finding that Appellant and ResCare are in the same line of business is supported by the record. Appellant admits the two concerns operate in NAICS code 611519, ResCare is the incumbent on the instant contract, and ResCare has historically issued contracts to Appellant. (*Id.* at 16.)

Serrato further maintains the record is clear that ResCare furnished Appellant with contracts, financial and technical assistance and employees. Serrato asserts the two concerns share employees.⁴ ResCare has historically issued subcontracts to Appellant, and is the incumbent on this contract. The Area Office considered Appellant's other subcontracts. Serrato maintains Appellant and ResCare were under signed contracts until a year after the initial receipt

⁴ Although Serrato makes this assertion, the Area Office found the two concerns share no employees.

of proposals. (*Id.* at 17-18.) All of these facts also support the Area Office finding that Appellant and ResCare are affiliated under the totality of the circumstances. (*Id.* at 9.)

E. Further Pleadings

On July 25, 2016, Appellant filed a response in opposition to Serrato's Motion to Dismiss. Appellant, appearing *pro se*, asserts it was not aware that it had the opportunity to respond to Serrato's motion. That same day, Serrato moved to strike Appellant's untimely response. Also that same day, Appellant responded that it was not represented by counsel, and requested leave to file its response out of time, because it did not understand the rules.

III. Discussion

A. Standard of Review, New Evidence, and Motion to Dismiss

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

Appellant submits new evidence with its appeal. This new evidence includes a letter from ResCare, a list of ResCare Vice Presidents, a list of ResCare's NAICS codes, and ResCare receipts breakouts (but only to the extent inconsistent with evidence in the Area Office file). New evidence on appeal is not considered unless it is ordered by the Judge or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308. Here, I find Appellant has not established good cause for the submission of its new evidence, and so I EXCLUDE it. Serrato's motion to strike is GRANTED.

Serrato moved to dismiss the appeal on June 24, 2016. Appellant had 15 days to respond to the motion. 13 C.F.R. § 134.211(c). Thus Appellant's response was due on July 11th. Appellant filed its response to the motion, along with a motion for leave to file it out of time, on July 25th, two weeks after the deadline. As good cause for its motion for leave to file out of time, Appellant stated it was unaware of OHA's rules. Unawareness of OHA's rules is not good cause for missing a deadline. *Size Appeal of A-Top Security Company*, SBA No. SIZ-5227, at 3 (2011). OHA's rules are available on its website for any person to examine. Therefore, Appellant's motion for leave to file out of time its response to Serrato's motion to dismiss is DENIED and the response itself is EXCLUDED.

Under OHA's rules, a non-moving party that does not file a response to a motion is deemed to have consented to the relief sought. 13 C.F.R. § 134.211(c). Here, however, Serrato's motion to dismiss is based on its allegation that Appellant had failed to specifically assert any error of fact or law by the Area Office. I find that this allegation is not true. Appellant did assert on appeal that the Area Office had erred in finding Mr. Williams to have been a key employee of ResCare. Accordingly, I DENY Serrato's motion to dismiss.

B. Newly Organized Concern

The Area Office found Appellant affiliated with ResCare under the newly organized concern rule. The purpose of this rule is to prevent circumvention of the size standards by the creation of spin-off firms that appear to be small but are really the affiliates of large firms. *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466, at 11 (2001).

The newly organized concern rule provides that concerns are affiliated when four necessary conditions are met: (a) Former officers, directors, principal stockholders, managing members or key employees of one concern organize a new concern; and (b) The new concern is in the same or related industry or field of operation; and (c) The individuals who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members or key employees; and (d) The one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and or other facilities, whether for a fee or otherwise. 13 C.F.R. § 121.103(g).

The first condition is that the challenged concern must be founded by an officer, director, principal stockholder, managing member or key employee of the alleged affiliate. Because this is a necessary condition for a finding of affiliation, if the founder of the new concern is not one of these categories, there cannot be a violation of the newly organized concern rule. *See Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507, at 9 (2013) (*Carwell*). Mr. Williams was clearly not an officer, director, principal stockholder, or managing member of ResCare. The issue is, was he a “key employee” of ResCare?

A key employee is one who, because of his position in the concern, has a critical influence or substantive control over the operations or management of the concern. 13 C.F.R. § 121.103(g). Key employees are those who have influence or control over the operations of a concern as a whole, such as a Director of Operations. *Size Appeal of Alterity Management & Technology Solutions, Inc.*, SBA No. SIZ-5514, at 6 (2013) (*Alterity*). An employee who is not an owner, officer or executive of a concern and who supervises only 4% of its business is not a key employee. *Size Appeal of J.W. Mills Management*, SBA No. SIZ-4909, at 4 (2008) (*J.W. Mills*). A Government Services Manager with no authority over substantive decision-making is not a key employee. *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403, at 6 (2012) (*Willow*). A Human Resources Manager is not a key employee. *Carwell*, at 9. An employee with no authority to hire and fire or to enter into contracts is not likely to be a key employee. *Id.* Conversely, an employee who is critical to a concern's control of day-to-day operations is a key employee. *Alterity*, at 6. A key employee then, is not merely an employee with a responsible position or a particular title. A key employee is one who actually has influence or control over the operations of the concern as a whole.

Mr. Williams could not have had influence or control over ResCare as a whole. ResCare's Form 10-Q shows that for two nine-month periods in 2013 and 2014, only 8.4% and 7.7% of ResCare's total receipts were from the segment that included Job Corps centers. *Supra*, II.A. These percentages give much credibility to Appellant's claim that 92% of ResCare's receipts came from its other lines of business. *See Appeal* at 8-9. Mr. Williams's resume, submitted with

Appellant's proposal, establishes that he was ResCare's Vice President for Job Corps Operations from 2009 until January 2, 2012. He oversaw four Job Corps Centers, and participated in the annual review of all centers. Prior to this position, Mr. Williams was Director for one ResCare Job Corps Center from 2006 to 2009. These were the only positions Mr. Williams held at ResCare, and both were in ResCare's Job Corps segment. Given that ResCare's Job Corps receipts were only about 8% of its total receipts, and Mr. Williams worked only within that very small Job Corps segment, Mr. Williams simply could not have influenced or controlled ResCare as a whole.

The Area Office put great emphasis on Mr. Williams's title of Vice President for Job Corps Operations; however, evidence in Appellant's submission to the Area Office in the form of two ResCare organization charts show that Mr. Williams could not have been higher than the fifth tier of authority at ResCare, similar to the individual in *Size Appeal of Metis Technology Solutions*, SBA No. SIZ-5538 (2014) (*Metis*), whom OHA ruled was not a key employee. As a Vice President, Mr. Williams was outranked by at least six Senior Vice Presidents, four Executive Vice Presidents, the COO and eight other C-level officers, and the CEO. This total of 19 does not include individuals on the "Vice President" tier, only those who clearly outranked Mr. Williams. In this situation, as in *Metis*, Mr. Williams could not have influenced or controlled the whole of ResCare sufficiently that it would be fair to say he was a key employee there.

Even within the Job Corps segment, Mr. Williams's role was hardly controlling. His resume states that he "provided support" to Center Directors in three regions and participated in their annual reviews; contrary to Serrato's assertion, it does not say he supervised them. Mr. Williams's earlier work as Director of one Job Corps Center may have been comprehensive, but this was only one Center, which in turn was in a small segment of ResCare's operations. He in no way had influence over the operations of the company as a whole when he held this position. Similarly, oversight of four Job Corps Center contracts does not rise to the level of influence over the company as a whole, but only over part of one small segment of its business. Regarding the other regions, he provided support. This is not supervision. Further, the fact that he "participated" in their annual reviews, rather than conduct them himself, establishes that he did not have supervisory authority over those regions of ResCare's Job Corps program. Accordingly, I conclude that Mr. Williams was not a key employee of ResCare, and the Area Office's finding that he was is a clear error of fact.

Serrato's reliance upon *Alterity*, *AudioEye*, and *Radant* is misplaced. In *Alterity*, the key employee was a Director of Operations with authority over all the concern's operations, unlike Mr. Williams's more limited portfolio here. *AudioEye* is unavailing because there was no evidence the founders of the new concern in *AudioEye* were ever employees of the other concern. *AudioEye*, at 7. *Radant* dealt with affiliation under the common management rule (13 C.F.R. § 121.103(e)) and so is inapposite here.

Thus, the first condition of the newly organized concern rule fails because Appellant was not founded by former officers, shareholders, or key employees of ResCare. In particular, the record shows that Appellant's founder, Mr. Williams, was not a key employee of ResCare. Because the first condition of the newly organized concern rule has failed, there can be no violation of the newly organized concern rule, irrespective of whether the remaining conditions

of the rule are met. *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403, at 6 (2012) (reversing size determination where the first condition of the newly organized concern rule failed); *see also J.W. Mills*, at 5 (“If the challenged firm was not formed by shareholders, officers, or key employees of the large firm, it is unnecessary to examine the other requirements of 13 C.F.R. § 121.103(g).”).

I therefore conclude the Area Office clearly erred in concluding that Appellant is affiliated with ResCare under the newly organized concern rule.

C. Totality of the Circumstances

Appellant also contends that the Area Office clearly erred in its determination that Appellant is affiliated with ResCare under the totality of the circumstances rule. Again, I agree with Appellant.

The Area Office's finding of affiliation between Appellant and ResCare under the totality of the circumstances rule was based upon “all of the facts described above” in its newly organized concern rule discussion. *See* Size Determination at 5-6. The Area Office undertook no separate analysis under the totality of circumstances rule to determine whether Appellant and ResCare were affiliated, but simply made a conclusory statement that they were affiliated. Because of this lack of separate analysis, and because an important part of the “facts described above” was the clearly erroneous finding that Mr. Williams was a key employee of ResCare, I also conclude the Area Office's determination that Appellant and ResCare are affiliated under the totality of the circumstances to be based upon clear error.

I conclude that the Area Office's determination that Appellant and large concern ResCare are affiliated under the newly organized concern and totality of circumstances rules was based on clear error. I therefore GRANT the appeal and VACATE the size determination. However, the Area Office has not considered Serrato's protest allegation that Appellant and ResCare were affiliated for this procurement under the ostensible subcontractor rule. Therefore, I must REMAND the case to the Area Office for a new size determination addressing this allegation.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is VACATED. The case is REMANDED to the Area Office for a new size determination addressing Serrato's allegation that Appellant and ResCare are affiliated under the ostensible subcontractor rule.

CHRISTOPHER HOLLEMAN
Administrative Judge