

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

SIZE APPEAL OF:

eSens Inc.,

Appellant,

Appealed From
Size Determination No. 04-2024-016

SBA No. SIZ-6326

Decided: December 13, 2024

APPEARANCES

Manju Gupta, Esq., Tucker Ellis LLP, Cleveland, Ohio, for eSens Inc.

Luis M. Alcalde, Esq., Kegler Brown Hill & Ritter Co., LPA, Columbus, Ohio, for The University of Akron

Lindsay K. Gerdes, Esq., Patrick M. Hagan, Esq., Dinsmore & Shohl LLP, Cincinnati, Ohio, for University of Akron Research Foundation

DECISION¹

I. Introduction and Jurisdiction

On June 21, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2024-016, concluding that eSens Inc. (Appellant) is not a small business due to affiliation with The University of Akron (UA) and The University of Akron Research Foundation (UARF). On appeal, Appellant maintains that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is GRANTED.

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. Appellant filed the instant appeal within 15 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. No redactions were requested, and OHA therefore now issues the entire decision for public release.

II. Background

A. The SBIR/STTR Program

In 2018, the National Science Foundation (NSF) sought proposals for Phase I of its Small Business Innovation Research (SBIR) / Small Business Technology Transfer (STTR) program. (Phase I Solicitation at 1.) The SBIR/STTR program “provides small businesses with equity-free funding to conduct research and development (R&D) work that will lead to the commercialization of innovative new products and services.” (*Id.*) Proposals for a grant were due December 4, 2018. (*Id.*) On June 10, 2019, Appellant was selected for an award.²

In 2020, NSF sought proposals for Phase II of the program. (Phase II Solicitation at 1.) Proposals were due by December 3, 2020. (*Id.*) On August 19, 2021, Appellant was awarded Phase II funding.

B. Protest

On January 22, 2024, NSF's Office of the Inspector General (OIG) requested a size determination of Appellant. Upon conducting an investigation, the NSF OIG became concerned that Appellant was not in compliance with SBIR/STTR program requirements, and was not a small business due to affiliation with UA and UARF. (NSF OIG Request at 1.)

According to 13 C.F.R. § 121.702, an SBIR/STTR awardee must be at least 50% directly owned and controlled by one or more individuals. (*Id.* at 3.) Appellant represented that it is more than 50% owned by Dr. R. Thomas Swiger, and NSF OIG did not question his ownership. (*Id.* at 3-4.) NSF OIG did question, however, whether Dr. Swiger sufficiently controls Appellant. (*Id.* at 4.) Dr. Swiger holds a majority interest in Appellant, but NSF OIG identified several facts suggesting that UARF may actually control Appellant. (*Id.*)

NSF OIG first observed Ms. Elyse Ball's connections with Appellant and UARF. (*Id.*) Ms. Ball is UARF's Executive Director. (*Id.* at 2.) She is also Appellant's CFO and a member of Appellant's Board of Directors. (*Id.* at 4.) NSF OIG contended that Ms. Ball was given her position at Appellant due to her role at UARF and that she “votes on behalf of UARF” at Board meetings. (*Id.*) Ms. Ball is listed as Appellant's Manager on Dr. Swiger's employment agreement, which identified UARF as his employer. (*Id.*) NSF OIG further believed that Ms. Ball was drafting reports and submitting payment requests related to the SBIR/STTR program. (*Id.* at 6.)

NSF OIG found other indicia of UARF's control of Appellant. (*Id.* at 5.) UARF provides Appellant with payroll, accounting, and legal assistance. (*Id.* at 5-6.) UARF also provides Appellant with a license for the technologies used in the SBIR/STTR program, for which UARF will receive royalty payments once Appellant begins selling the technology. (*Id.* at 6.) Additionally, NSF OIG claimed, UARF offered Appellant a no-interest line of credit if Appellant's bank account were to fall below \$10,000. (*Id.*)

² When Appellant was selected for the Phase I award, it was operating under the name Smart 3D Solutions LLC.

Even if it were determined that Appellant adhered to the SBIR/STTR regulations, NSF OIG questioned whether the above could nevertheless show that Appellant was affiliated with UARF. (*Id.* at 7.) NSF OIG estimated UARF's employee count to be between 12-38 employees. (*Id.*) If Appellant only is affiliated with UARF, Appellant would still be considered small. (*Id.*) However, UA may also be affiliated with Appellant and UARF, since it appeared to NSF OIG that UA controls UARF's Board of Directors. (*Id.*)

On January 29, 2024, citing 13 C.F.R. § 121.1001(a)(4)(iii), the Area Director initiated a size protest against Appellant based on NSF OIG's allegations. (Protest at 1.)

C. Protest Response

On March 7, 2024, Appellant responded to the protest. Appellant claimed to be in compliance with SBIR/STTR regulations and denied affiliation with UA and UARF. (Protest Response at 1.)

Appellant, first, provided a stock ownership table. (*Id.* at 2.) SBIR/STTR regulations require that a participating concern be at least 50% owned by individuals. (*Id.* at 1-2, citing 13 C.F.R. § 121.702(a) and (b).) The table identified Dr. Swiger as owning 59.8% of Appellant. (*Id.* at 2.) Appellant further explained that Dr. Swiger is Appellant's CEO and Principal Investigator controlling Appellant's day-to-day functions. (*Id.*) Accordingly, Appellant complies with SBIR/STTR requirements. (*Id.*)

Turning to the affiliation allegations, Appellant denied that it is controlled by UARF. (*Id.* at 9-10.) Even though Ms. Ball is an officer at Appellant and is the Executive Director of UARF, Appellant argued that this is not enough to connect the two entities. (*Id.*) To find affiliation through common management, the overlapping individual must have “critical influence or the ability to exercise substantive control over a concern's operations.” (*Id.*, citing *Size Appeal of Point Blank Enters., Inc.*, SBA No. SIZ-5982 (2019).) Appellant claimed that Ms. Ball lacks any substantial influence or control of Appellant. (*Id.*) Appellant's Board of Directors has three members, and its bylaws necessitate that at least 50% of the members be present to establish a quorum, and a majority of members to pass any vote. (*Id.*) Ms. Ball is only one of the directors and has no equity interest in Appellant. (*Id.*) Furthermore, Ms. Ball lacks expertise in Appellant's line of business, *i.e.*, research and development. (*Id.* at 11.) Her role at Appellant is primarily administrative in nature. (*Id.*)

Appellant addressed the allegations made by NSF OIG. (*Id.*) Appellant disputed that Ms. Ball controls the agenda at Board meetings and instead claimed that Dr. Swinger sets the agenda. (*Id.*) According to Appellant, Ms. Ball does not vote on behalf of UARF and understands that she owes a fiduciary duty to both Appellant and UARF. (*Id.*) Ms. Ball signed Dr. Swiger's employment agreement because she felt it would be inappropriate for Dr. Swiger to sign his own agreement. (*Id.*) Appellant admitted that Ms. Ball filed all governing documents with the state, but claimed that this was merely “an administrative or secretarial act.” (*Id.*) Ms. Ball did assist with drafting reports to NSF due to her background in journalism and law, but Appellant insisted that Dr. Swiger was the substantive “mastermind” of Appellant's proposals. (*Id.* at 11-12.) Ms.

Ball also administers NSF's payment platform, but she is authorized to do so by Dr. Swiger who signs all payment requests. (*Id.* at 12.)

Lastly, Appellant disputed any affiliation with UARF under the totality of circumstances. (*Id.*) UARF cannot control Appellant through Ms. Ball since she is only one of three directors and does not otherwise have critical influence over Appellant's management or operations. (*Id.* at 13.) Appellant claimed that it faces a significant loss without the SBIR/STTR funding and that UARF provided Appellant with a loan only to keep Appellant afloat during suspension of the NSF funds. (*Id.*) The licensing and payroll agreements between Appellant and UARF also note that Appellant would be required to indemnify UARF for any damages caused by Appellant to UARF. (*Id.*)

D. Size Determination

On June 21, 2024, the Area Office issued Size Determination No. 04-2024-016, concluding that Appellant is not a small business under the 500-employee size standard applicable to the SBIR/STTR program.

The Area Office examined whether Appellant complied with the SBIR/STTR requirement that it be at least 50% owned by individuals. (Size Determination at 11.) The Area Office requested that Appellant provide ownership capitalization tables as of the Phase I and II dates of awards, *i.e.*, June 10, 2019 and August 19, 2021. (*Id.* at 11-12.) Based on the response, the Area Office determined that Appellant was majority-owned by an individual, Dr. Swiger, on both dates. (*Id.* at 12-13.)

The Area Office then considered the allegations of affiliation with UA and UARF. The Area Office explained that, under 13 C.F.R. § 121.702(c)(3), affiliation based on common management may arise in two ways: (1) “when officers, managing members, or partners who control the management of the concern of the firm in question also control the management of another firm” or (2) “when an individual, concern, or entity that controls the board of directors of one concern also controls the board of directors or management of one or more other concerns.” (*Id.* at 14.)

With regard to the first of these possibilities, the Area Office observed that Appellant's officers are the following: Dr. Swiger is the Chief Executive Officer (CEO); Ms. Ball is the Chief Operating Officer (COO) and Chief Financial Officer (CFO); and Dr. Jae-Won Choi is the Chief Technology Officer (CTO). (*Id.*) Further, under OHA precedent, those holding senior leadership positions, such as CEO or COO, may be presumed to control a concern absent conflicting evidence. (*Id.* at 14-15, citing *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014).) Appellant informed the Area Office that Ms. Ball is COO and CFO of Appellant as well as Executive Director of UARF. (*Id.*) However, Appellant claimed, Ms. Ball does not have significant control over Appellant. (*Id.*) The Area Office found Appellant's assertion unpersuasive to rebut the presumption of senior leadership control. (*Id.*) As such, the Area Office concluded that UARF and Appellant are affiliated based on common management through Ms. Ball's positions at the time of the Phase I award. (*Id.*) The Area Office used the same reasoning to find affiliation at the time of the Phase II award. (*Id.* at 19-20.)

Turning to the second possibility for common management affiliation, the Area Office considered whether UA controls UARF's Board of Directors and thereby also controls Appellant's Board. (*Id.* at 15.) The Area Office reiterated Ms. Ball's position as the Executive Director of UARF and noted Dr. Choi's employment by UA as a professor. (*Id.*) UARF's Board consists of 11 individuals, five of whom are affiliated with UA and the other six being elected outside directors. (*Id.*) In response to the protest, Appellant claimed that the UARF Board quorum requirement necessitated that a majority of outside Board members be present. (*Id.*)

The Area Office found this immaterial, however, because UA “directly and/or indirectly” controls the election of all 11 Board members. (*Id.* at 16.) In reaching this conclusion, the Area Office highlighted that UARF was established to operate exclusively for the benefit of UA, the licensing agreement between UARF and Appellant describes UARF as a support organization of UA, and UA and UARF are referred to collectively in UA Board Rule 3359-11-18 which concerns the licensing of intellectual property. (*Id.*)

The Area Office next analyzed whether UA controls Appellant through UARF. (*Id.*) The protest alleged that Ms. Ball votes on behalf of UARF during Appellant's Board meetings. (*Id.*) Appellant claimed that Ms. Ball maintains her independence due to the fiduciary duties she owes to Appellant. (*Id.*) The Area Office nevertheless concluded that Ms. Ball's vote was controlled by UARF and, in turn, by UA. (*Id.*) The Area Office also determined that Dr. Choi's vote was controlled by UA due to his employment, since UA Board Rule 3359-11-18 places limits on an employee's ownership and management of outside companies. (*Id.*) The existence of the licensing agreement further supported the Area Office's conclusion — “the control that UA exercises regarding the level of involvement of its employees in a private business sprouting from UA licensed intellectual property . . . means that UA can therefore exercise control of its employee's position on [Appellant's] Board.” (*Id.* at 17.)

The Area Office further reviewed Appellant's bylaws to see if UA could control Appellant through two of its three members of the Board. (*Id.*) Because 50% quorum is required for a meeting, the Area Office found that UA could at least exert negative control by blocking a quorum. (*Id.*) Several actions also only require two-thirds of the members for approval so the Area Office found that UA could directly control Appellant as well. (*Id.*) The Area Office reviewed OHA case law to consider whether UA's control is illusory. (*Id.* at 17-18.) Because the majority shareholder, Dr. Swiger, could not unilaterally take significant actions the Area Office determined that UA's control is not illusory. (*Id.* at 18.) The Area Office used the same reasoning to find affiliation at the time of the Phase II award. (*Id.* at 20-22.)

The Area Office also found that Appellant was affiliated with UARF and UA under the totality of circumstances. (*Id.* at 23.) The protest alleged that UARF was paying Appellant's employees. (*Id.*) Appellant explained that it was common for UARF to assist startups with administrative matters such as payroll. (*Id.*) Other examples in the protest include:

1. U.S. Citizenship and Immigration Services (USCIS) Form I-9 where UARF is identified as Dr. Swiger's employer;

2. Employment agreement where Ms. Ball signed Dr. Swiger's employment agreement;
3. Information regarding a no-interest loan from UARF to Appellant; and
4. License Agreement.

(*Id.* at 24.) The Area Office also requested information concerning Appellant's lease. (*Id.* at 25.) From the response, the Area Office determined that UARF was providing favorable lease terms to Appellant. (*Id.* at 26.) UA's website stated that the space was leasing for \$12.50 per square foot per month. (*Id.*) Appellant, however, only paid \$100 per month for 138 square feet between 2016 to 2019 even though the advertised rate would be \$1,725 per month. (*Id.*) From 2020 to 2022, Appellant had the same lease terms of \$100 per month for an even larger space of 856 square feet. (*Id.*) The Area Office concluded that the normal value would be \$10,700 per month. (*Id.*) Taking all these facts into account, the Area Office determined that affiliation exists under the totality of circumstances. (*Id.* at 26-27.)

Because Appellant conceded that UA has more than 500 employees, the Area Office concluded that Appellant is not small due to its affiliation with UA. (*Id.* at 28.) According to the Area Office files, UARF had fewer than 20 employees at the time of proposal submissions. (UARF Employee Headcount at 1-2.)

E. Appeal

On July 8, 2024, Appellant appealed Size Determination No. 04-2024-016 to OHA. Appellant contends that the Area Office erred in finding affiliation with UA and UARF. (Appeal at 2.) Attached to Appellant's appeal is a declaration from Ms. Ball addressing the arguments on appeal.

In respect to the Phase I award, Appellant argues that the Area Office should not have found affiliation based on common management because Ms. Ball was neither Appellant's COO nor UARF's Executive Director on June 10, 2019. (*Id.* at 14.) Ms. Ball was elected Appellant's COO on April 8, 2022. (*Id.*) She became UARF's Executive Director on April 29, 2021. (*Id.*) At the time of the Phase I award, Ms. Ball only served as Appellant's CFO where her role was administrative and included: “(i) handling bookkeeping issues; (ii) scheduling and recording meeting minutes for [Appellant's] board meetings; (iii) making the appropriate filings with the Ohio Secretary of State to maintain corporate status; (iv) after review and approval from Dr. Swiger, submitting grant requests to the NSF on its ACM\$ platform; and (v) providing grammatical and stylistic changes to the SBIR grant submissions.” (*Id.*) Ms. Ball had no “critical influence” over Appellant. (*Id.*) Ms. Ball also was only a Project Manager and Assistant Counsel at UARF at this time. (*Id.*) Since Ms. Ball did not hold the positions relied upon by the Area Office in its conclusion, Appellant contends that the affiliation determination for Phase I is clearly incorrect. (*Id.* at 15.)

Likewise, at the time of the Phase II award on August 19, 2021, Ms. Ball had recently been appointed UARF's Executive Director and still performed only administrative tasks for

Appellant as CFO. (*Id.* at 18-19.) According to Appellant, Ms. Ball never made important decisions on behalf of Appellant, nor did she have the scientific expertise to do so. (*Id.* at 19.) Additionally, based on Appellant's governing documents, Ms. Ball could not wield significant control over Appellant since she could not override the other two members of the Board and holds no equity interest in Appellant. (*Id.* at 19-20.)

Appellant next argues that UA does not control UARF's Board of Directors. (*Id.* at 15.) UARF's Board consists of two group of directors — those appointed by UA and outside directors elected by the Board. (*Id.*) Six of the 11 directors must be outside directors. (*Id.*) Board votes require a quorum where outside directors outnumber the directors selected by UA. (*Id.*) Furthermore, Ohio law views governing boards as independent “even when some board members are appointed by another governing board . . . or when a minority of board members are interested in a matter voted upon by the board.” (*Id.* at 16, citing *State ex rel. Massie v. Lake Cty. Bd. of Comm'rs*, 2021-Ohio-786 (Ohio Ct. App. 2021) and *Gottlieb v. Mead Corp.*, 137 N.E.2d 178, 186 (Ohio Com. Pl. 1954).) Appellant contends that the Area Office clearly erred in finding that UA directly or indirectly controls the appointments and election of all 11 of UARF's directors. (*Id.*)

Appellant further argues that UA does not control Appellant's Board of Directors. (*Id.*) The Area Office determined that UA controls Appellant's Board due to Ms. Ball's position at UARF and Dr. Choi's employment by UA. (*Id.*) Appellant notes, however, that UA cannot unduly restrict an individual's rights under the Ohio and U.S. Constitutions since it is a state actor. (*Id.* at 16-17.) Furthermore, due to the collective bargaining agreement of Dr. Choi's union, UA may not unreasonably restrict Dr. Choi's outside business activities. (*Id.* at 17.) Additionally, Ohio agent law permits an individual to work for multiple principals without linking the principals. (*Id.*, citing *Wells Fargo Bank, N.A. v. Watson*, 41 N.E.3d 79, at 86 (Ohio Ct. App. 2015).) Ms. Ball and Dr. Choi also owe a fiduciary duty to Appellant irrespective of their positions at UARF and UA. (*Id.* at 18.)

Lastly, Appellant disputes the Area Office's finding of affiliation under the totality of circumstances. (*Id.* at 20.) The Area Office based its conclusion on the fact that Appellant shares payroll services, common management, a favorable loan, a license agreement, and a favorable lease agreement with UA and/or UARF. (*Id.*) Appellant denies any common management affiliation. (*Id.*) Appellant concedes that it uses UARF's payroll services. (*Id.*) The favorable loan, however, was only given to Appellant after NSF suspended Appellant's grant due to the present matter. (*Id.* at 21.) UARF only gave Appellant the loan in order to protect its own value in Appellant. (*Id.*) As for the lease, Appellant explains that the Area Office miscalculated the published rate. (*Id.*) The location's published rate was \$12.50 per square foot per year, not per month. (*Id.*) Appellant also claims that the lease was for a less than desirable space. (*Id.*)

F. UA's Response

On July 8, 2024, UA filed an appeal of Size Determination No. 04-2024-016. In *Size Appeal of The University of Akron*, SBA No. SIZ-6300 (2024), OHA dismissed the appeal because alleged affiliates lack standing to appeal a size determination. OHA agreed, however, to

instead construe UA's appeal as a response in support of Appellant's appeal, pursuant to 13 C.F.R. § 134.309(a). *Id.* at 2.

UA first insists that it does not have the power to control UARF. (UA Response at 3.) According to UARF's governing documents, control rests with UARF's Board of Directors. (*Id.*) The board consists of 11 individuals, five appointed by UA and six elected by the board. (*Id.*) The six elected directors may not be an employee, officer, or trustee of UA. (*Id.*) For a quorum to be established, a majority of the directors present must be elected directors. (*Id.* at 4.) Thus, UA contends, the Area Office clearly erred in finding that UA controls UARF via the Board. (*Id.* at 5.)

UA asserts that the basis of the Area Office's conclusion that UA controls UARF is further flawed. (*Id.* at 6.) The Area Office found that Appellant did not dispute that UA controls UARF. (*Id.*) In actuality, as explained above, the provided governing documents make clear that UA does not control UARF. (*Id.*) In order to have overcome this evidence, UA argues, the Area Office was required to find facts showing that UA does indeed control UARF. (*Id.*) The Area Office also determined that UARF's stated purpose was to operate for the exclusive benefit of UA. (*Id.* at 7.) UA argues, however, that this is UARF's stated purpose merely so that it may operate as a 501(c)(3) nonprofit organization. (*Id.*) Additionally, UA asserts that language in the licensing agreement describing UA and UARF collectively has no bearing on whether one entity controls the other. (*Id.*)

UA lastly denies that it controls Dr. Choi. (*Id.*) Ohio law permits an agent to serve multiple principals without linking those principals to one another. (*Id.* at 8.) In deciding whether a principal controls its agent when serving a different principal, Ohio considers “who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts.” (*Id.*, quoting *Bostic v. Connor*, 37 Ohio 144, 146 (1988).) Here, UA contends that Dr. Choi controls his own work for Appellant, and UA has no involvement or oversight as to what Dr. Choi does for Appellant. (*Id.* at 9.) As holder of an equity interest in Appellant, Dr. Choi has a direct financial stake in Appellant that is completely unrelated to his compensation by UA. (*Id.*) Due to a rule limiting outside employment, Dr. Choi was required to obtain approval and acknowledgment from UA that his work at Appellant was unrelated to his work at UA. (*Id.*)

G. UARF's Response

On July 8, 2024, UARF filed an appeal of Size Determination No. 04-2024-016. In *Size Appeal of The University of Akron Research Foundation*, SBA No. SIZ-6301 (2024), OHA dismissed the appeal because alleged affiliates lack standing to appeal a size determination. However, under 13 C.F.R. § 134.309(a), OHA construed UARF's appeal as a response to the instant appeal. *Id.* at 2.

UARF first argues that UA does not control Appellant because UA controls neither Dr. Choi nor UARF. (UARF Response at 8-9.) The Area Office determined that UA could control Dr. Choi due to his employment by UA and a UA policy limiting employees' outside

employment. (*Id.* at 9.) UARF contends that, since UA is a state actor, the Ohio and U.S. Constitutions prohibit UA from interfering with its employees' outside business endeavors. (*Id.* at 9-10.) Both Constitutions prevent state actors “from infringing upon the property and contract rights of any person, including employees.” (*Id.* at 10, citing Ohio Const., Art. I §§ 1, 19; Ohio Const., Art. II § 28; U.S. Const., Art. I § 10.) UA entered into a licensing agreement with UARF which was subsequently licensed to Appellant. (*Id.* at 11.) Dr. Choi also has a collective bargaining agreement with UA that includes the right to engage in outside business unless doing so conflicts with UA's interests. (*Id.*) UARF contends that UA cannot control Dr. Choi since it would infringe on both of these contracts. (*Id.*) Furthermore, Dr. Choi has a Constitutional right to be free from unreasonable or arbitrary interference by a state actor. (*Id.* at 12, citing *Burger Brewing Co. v. Liquor Control Com., Dep't of Liquor Control*, 34 Ohio 2d 93, 98 (1973).) UARF claims that UA Board Rule 3359-11-18 merely reinforces this right. (*Id.* at 13.)

UARF next rejects the Area Office's conclusion that UA controls UARF. (*Id.* at 14.) In its protest response, Appellant explained that UARF's Board of Directors consists of five directors affiliated with UA and six directors that are elected who do not have any association with UA. (*Id.* at 15.) UARF's bylaws dictate that for there to be a Board quorum, the majority of directors present must be the elected directors. (*Id.*) Furthermore, under the regulations governing UARF's Board, “Elected Directors may not, during a term as an Elected Director, serve in an official capacity with The University of Akron, as an employee, officer, or trustee.” (UARF Response, Exh. 4, at Art. IV § 2.) UARF describes itself as a “support organization” of UA simply for non-profit tax purposes and not as an acknowledgement of control by UA. (UARF Response at 16.) UA Board Rule 3349-11-18 also does not show control since, as explained above, its purpose is to reinforce employees' property rights. (*Id.* at 17.)

Lastly, UARF refutes the Area Office's determination that UARF can control Appellant. (*Id.*) This finding was based on the faulty premise that Ms. Ball was Executive Director of UARF at the time of the Phase I award. (*Id.* at 18.) However, Ms. Ball did not become UARF's Executive Director until after the Phase I period of performance was complete. (*Id.*) The Area Office also found affiliation with UARF under the totality of circumstances, particularly: (1) shared payroll services; (2) common management; (3) a favorable loan instrument; (4) the license agreement; and (5) a favorable lease agreement. (*Id.*) As discussed above, the common management analysis was factually incorrect. (*Id.*) UARF also contends that the Area Office misunderstood the fair market value of Appellant's lease. (*Id.*) The Area Office correctly found that Appellant's lease was \$100 per month, or \$1,200 a year, from 2016 to 2019. (*Id.*) However, the Area Office incorrectly considered the market rate yearly cost as a monthly cost. (*Id.* at 18-19.) The true market monthly rate for the space was \$143.75 per month, not \$1,725. (*Id.* at 19.) Even though the lease rate was somewhat below market rate, it was not unreasonable because the space was not desirable. (*Id.*)

III. Discussion

A. Standard of Review

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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant has persuasively shown that the Area Office erred in finding Appellant affiliated with UA and UARF. As such, this appeal must be granted.

The record reflects that the Area Office made several flawed conclusions. First, for both the Phase I and II awards, the Area Office determined that Appellant was affiliated with UARF through common management, because Ms. Ball was COO and CFO of Appellant as well as Executive Director of UARF. Section II.D, *supra*. For the SBIR/STTR programs, SBA determines the size of a concern “at the time of award for both Phase I and Phase II.” 13 C.F.R. § 121.704(a). Here, Phase I was awarded on June 10, 2019, and Phase II was awarded on August 19, 2021. Section II.A, *supra*. Ms. Ball, though, did not become the Executive Director of UARF until April 29, 2021. Section II.E, *supra*. Before this role, she was merely Assistant Counsel and Project Manager for UARF. *Id.* Accordingly, at the time of the Phase I award on June 10, 2019, Ms. Ball did not, in fact, have a senior leadership position at UARF. The Area Office thus clearly erred in finding affiliation through common management for the Phase I award.

Similarly, at the time of the Phase II award on August 19, 2021, Ms. Ball was Appellant's CFO and had recently become Executive Director of UARF. However, Ms. Ball was not elected as Appellant's COO until April 8, 2022. Section II.E, *supra*. Citing *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014), the Area Office reasoned that Ms. Ball could control both Appellant and UARF due to her senior leadership roles. Section II.D, *supra*. In *Radant MEMS*, OHA opined that persons in senior positions “such as CEO and COO” may be presumed to control a concern, absent evidence to the contrary. *Radant MEMS*, SBA No. SIZ-5600, at 7. Again, though, in the instant case, Ms. Ball was not Appellant's COO at the time of the Phase II award. She was only CFO, a position which does not confer the same degree of control as a CEO or a COO. Moreover, even if a CFO could properly be presumed to exercise control over a concern, Appellant here persuasively rebutted that presumption. Appellant explained that Ms. Ball's work as CFO was largely administrative and ministerial, dealing with routine bookkeeping and filings of the company. Sections II.C and II.E, *supra*. She lacks the scientific expertise needed to control the operations of a research and development company such as Appellant. *Id.* Additionally, she holds no ownership interest in Appellant, and is only one of three members of Appellant's Board. *Id.* In contrast with Ms. Ball, Dr. Swiger exercises almost complete control of the day-to-day management of Appellant. *Id.* Accordingly, the Area Office

erred in its finding of affiliation based on common management at the time of the Phase II award.

The Area Office further determined that Appellant and UA are affiliated because UA controls UARF's Board of Directors. Section II.D, *supra*. The record indicates, however, that UARF's Board consists of 11 directors, and only five of those directors are appointed by UA. Sections II.E-II.G, *supra*. *Id.* The remaining six are elected by the entire Board, and cannot be associated with UA. *Id.* Indeed, "Elected Directors may not, during a term as an Elected Director, serve in an official capacity with [UA], as an employee, officer, or trustee." *Id.* UARF's bylaws also necessitate that a majority of the elected directors are needed to establish a quorum. *Id.* Given this structure, then, the Area Office's conclusion that UA indirectly or directly controls the appointments of all directors was incorrect. The Area Office also observed that UARF purports to operate for the benefit of UA; that the licensing agreement with Appellant describes UARF as a support organization of UA; and that UA and UARF are referred to collectively in UA Board Rule 3359-11-18. Section II.D, *supra*. In response, Appellant, UA, and UARF explain that UA is a public university, and UARF is characterized as a support organization of UA, operating for UA's benefit, in order for UARF to maintain its tax status as a 501(3)(c) nonprofit organization. Sections II.E-II.G, *supra*. Additionally, simply because two concerns are referred to collectively in one context does not establish that they are affiliated. Instead, affiliation exists only "when one controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.702(c). Apart from its erroneous analysis of UARF's Board, the Area Office here identified no mechanism whereby UA could control UARF. As such, the Area Office erred in its conclusion that UA and UARF are affiliated.

Because UA does not control UARF, the Area Office's finding that UA controls Appellant's Board is likewise erroneous. The Area Office reasoned that UA controls Ms. Ball through UARF, and also controls Dr. Choi through his employment at UA. Section II.D, *supra*. As discussed above, though, given the structure of UARF's Board, there is no mechanism for UA to control UARF; it follows that UA could not control Ms. Ball's vote on Appellant's Board. Furthermore, the mere fact that Dr. Choi is employed as a professor by UA does not connote that UA controls his outside endeavors. As the parties have explained, Dr. Choi's union agreement allows him to pursue outside activities so long as those does not conflict with his UA employment. Sections II.E-II.G, *supra*. Employees also have Constitutional rights against state actors infringing on their private property interests, *i.e.*, other businesses. *Id.*

The Area Office lastly found that Appellant is affiliated with UA and UARF under the totality of circumstances. Section II.D, *supra*. In support, the Area Office noted various connections between the concerns, including: the alleged common management by Ms. Ball; UARF handling Appellant's payroll, legal, and other administrative services; Dr. Swiger's employment documents signed by UARF and Ms. Ball; an interest-free loan offered to Appellant by UARF; the license agreement between UARF and Appellant; and a favorable lease given to Appellant by UARF. *Id.*

The Area Office's analysis of this issue was flawed, for two principal reasons. First, several of the alleged connections, which formed the basis for the Area Office's decision, were

not factually accurate. As discussed above, Ms. Ball did not, in fact, hold senior leadership positions with both Appellant and UARF at the time of the Phase I or the Phase II awards. Likewise, Appellant has explained that the loan was not offered until after the suspension of the SBIR/STTR funding, so it could have no bearing on affiliation at the time of the awards. Section II.E, *supra*. The lease agreement was for \$100 per month, or \$1,200 a year, whereas the advertised rate was \$143.75 per month, or \$1,725 a year. Sections II.E and II.G, *supra*. The Area Office, though, apparently misunderstood the market rate as being \$1,725 per month (rather than per year), and thus drastically overstated the extent to which Appellant enjoyed favorable lease terms. Section II.D, *supra*.

Apart from these significant factual errors, the Area Office also did not explain how the connections in question might enable UARF to control Appellant, or *vice versa*. OHA has repeatedly held that “in order to find affiliation through the totality of the circumstances, an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.” *Size Appeal of Crew Training Int'l, Inc.*, SBA No. SIZ-6128, at 23 (2021) (quoting *Size Appeal of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015)); *see also Size Appeal of Nat'l Sec. Assocs., Inc.*, SBA No. SIZ-5907, at 10 (2018); *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807, at 9 (2017). Here, excluding the factually-flawed findings discussed above, the only remaining connections identified by the Area Office were UARF handling Appellant's administrative and legal services, Dr. Swiger's employment documents signed by UARF and Ms. Ball, and the licensing agreement. These circumstances are insufficient to show the requisite control, particularly since licensing arrangements are specifically permissible under the underlying SBIR/STTR regulations. *See* 13 C.F.R. § 121.702(c)(8).

Lastly, it is worth noting that, even if OHA were to uphold the totality of circumstances finding, this would, at most, show affiliation only between Appellant and UARF, but not between Appellant and UA. Section II.D, *supra*. Since UARF had fewer than 20 employees at the time of the Phase I and Phase II awards, affiliation between Appellant and UARF alone would not cause Appellant to exceed the applicable 500-employee size standard. *Id.* Appellant was small at the time of the SBIR/STTR awards.

IV. Conclusion

For the above reasons, the appeal is GRANTED and Size Determination No. 04-2024-016 is REVERSED. Appellant is not affiliated with either UA or UARF, and Appellant is eligible for continued funding of the SBIR/STTR grant. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge