United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF: Precise Systems, Inc., Appellant, Solicitation No. SAQMMA13R0044	SBA No. VET-243 Decided: November 6, 2014

APPEARANCES

Kevin P. Mullen, Esq., Damien C. Specht, Esq., Charles L. Capito, Esq., Jenner & Block, LLP, Washington, D.C., for Appellant

Thomas K. David, Esq., David, Brody & Dondershine, LLP, Reston, Virginia, for all Points Logistics, LLC.

Pamela J. Mazza, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, D.C., for B3 Solutions, LLC.

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business, Administration, Washington, D.C., for the Agency

DECISION[1]

I. Introduction and Jurisdiction

This is an appeal of a decision by the Acting Director of Government Contracting (AD/GC) of the U.S. Small Business Administration (SBA) finding that Precise Systems, Inc. (Appellant) does not meet Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements. On September 23, 2014, Appellant filed this appeal with the SBA Office of Hearings and Appeals (OHA). For the reasons discussed *infra*, the appeal is denied and the AD/GC's determination is affirmed in part.

[1] This decision was initially 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. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

OHA decides appeals of SDVO SBC eligibility determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Appellant filed the appeal within 10 business days of receiving the AD/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

Appellant is a Maryland corporation, and Mr. John Thomas Curtis, a service-disabled veteran, owns [more than 51%] of Appellant's total outstanding shares. The remaining [XX]% of the outstanding shares is held by Appellant's Employee Stock Ownership Plan (ESOP). The outstanding shares are divided into two categories. The shares owned by Mr. Curtis are Series A Common Stock, whereas the shares owned by the ESOP are Series B Convertible Preferred Stock. Series A Common Stock is limited to 1,200,000 shares, [XXXX] of which have been issued. Series B Convertible Preferred Stock is limited to 300,000 shares, all of which have been issued.

II. Background

A. Solicitation and Protests

On November 22, 2013, the U.S. Department of State issued Request for Proposals (RFP) No. SAQMMA13R0044 for aviation program support services. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs. Appellant submitted a timely proposal on January 16, 2014, self-certifying as an SDVO SBC.

On July 9, 2014, the CO announced that Appellant was the apparent awardee. The CO then received timely protests from four unsuccessful offerors: All Points Logistics, LLC (All Points); AMPS, LLC (AMPS); B3 Solutions, LLC (B3); and Downrange Operations and Training, LLC (Downrange). The protesters alleged that Appellant is not an eligible SDVO SBC because Appellant is not unconditionally and directly owned by a service-disabled veteran due to its ESOP.[2] The CO forwarded the protests to the AD/GC for review. (Protest File (PF), Tab 8.)

B. AD/GC Determination

On September 10, 2014, the AD/GC issued his determination[3] sustaining the protests. (PF, Tab 1.) The AD/GC concluded that Appellant is not directly and unconditionally owned by one or more service-disabled veterans, as 13 C.F.R. § 125.9 requires. The AD/GC also stated that Appellant does not meet 13 C.F.R. § 125.10, which mandates that a service-disabled veteran control the SDVO SBC.

The AD/GC explained that, in order for a corporation to qualify as an SDVO SBC, "at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock

[2] Downrange alleged that Mr. Curtis, Appellant's majority owner, is not a service-disabled veteran. The AD/GC determined that he is, and this finding is not challenged on appeal.

[3] The AD/GC issued four separate determination letters, each sustaining one of the four protests. The letters are substantively identical and therefore are treated as a single determination for purposes of this decision.

outstanding must be unconditionally owned by one or more service-disabled veterans." (Determination at 3, quoting 13 C.F.R. § 125.9(d).) The AD/GC noted that in response to the protests, Appellant argued that it has only one class of outstanding stock because all outstanding stock is entitled to one vote per share. The AD/GC rejected this argument, stating that "SBA regulations are focused on the treatment of the various classes/series/collections/sets/groups of shares themselves, and how those various classes/series/collections/sets/groups function. What is important is not the form of the structure, but the function of the structure." (*Id*. at 4.)

In considering the functions of the groups of shares, the AD/GC found that Appellant's two groups of shares have "separate voting rights on at least one issue." (*Id*.) According to Appellant's Articles of Incorporation, "[Appellant] may declare and pay a dividend on any class or series of stock without declaring and paying a dividend on any other class or series of stock if stockholders of a majority of the shares of each of the classes or series of stock not receiving a dividend consent...." (*Id*., quoting Am. Articles, Art. III(b)(ii).) The AD/GC concluded from this language that Mr. Curtis's rights as a shareholder were restricted, because Mr. Curtis "is precluded from using his share of Series A Common Stock to vote on dividends related to Series B Convertible Preferred." (*Id*.) The AD/GC also highlighted that Series B Convertible Preferred is "granted a preferred dividend right," but Series A Common Stock is not. Based on these factors, the AD/GC concluded that the two groups of shares are not functionally equivalent, so they must be treated as separate classes of stock for purposes of assessing SDVO SBC eligibility. (*Id*.)

The AD/GC applied 13 C.F.R. § 125.9(d) to his finding that Appellant has two different classes of stock. Although Mr. Curtis holds all of the Series A Common Stock, as well as [the majority] of the total outstanding stock, he owns none of the Series B Convertible Preferred stock. Therefore, he does not own at least 51% of each class of voting stock, as the regulation requires. (*Id*.)

The AD/GC then turned to the next element of SDVO SBC eligibility-whether a service-disabled veteran controls Appellant. The AD/GC determined that each of this element's criteria are met: Mr. Curtis holds the highest officer position and possesses the managerial experience necessary to run Appellant. He is also a member of Appellant's board of directors and has necessary ownership interest to overcome any supermajority voting requirement. Nevertheless, although no defects in Appellant's eligibility were identified, the AD/GC stated, "for all the foregoing reasons, I must conclude that a service-disabled veteran does not control [Appellant] as required by 13 C.F.R. § 125.10. As such, [Appellant] has not met this required element of eligibility." (*Id*. at 5.)

C. Appeal

On September 23, 2014, Appellant appealed the AD/GC's decision to OHA. Appellant insists that the determination is clearly erroneous and should be reversed.

Appellant contends that the AD/GC erred in determining that Appellant has two classes of stock. The corporate documents, Appellant argues, establish only one class of voting stock,

although that class is arranged into two series. Appellant's Articles of Incorporation indicate that both series vote together as a voting class. Specifically, they provide:

> Each holder of Series A Common and Series B Convertible Preferred shall be entitled to one vote for each share thereof held. Except as otherwise provided herein, the Series A Common and the Series B Convertible Preferred, and the powers, preferences, and rights in respect thereof, and the qualifications, restrictions and limitations thereon, shall be identical.

(Appeal at 7, quoting Am. Articles Art III(a) (emphasis Appellant's).) Appellant's Bylaws confirm that each shareholder is entitled to one vote. (*Id*. at 8, citing Bylaws § 8.) They also provide that holders "of a majority of the outstanding shares," without regard to series, are required to constitute a quorum. (*Id*. at 7, citing Bylaws § 6.). According to Appellant's corporate documents, then, because all stock is treated as a single group for voting purposes, there is only one class of stock. (*Id*. at 7-8.) Appellant argues that there is support for this conclusion in a treatise on corporate forms, which states: "As a general rule, each share of common stock is entitled to one vote. However, some publicly held companies have created classes of stock with greater voting rights than any of the other classes." (*Id*. at 8, quoting 2 Marvin Hyman, Corporation Forms § 22:4 (2014).)

Appellant argues that the AD/GC contravened SBA regulations by focusing on whether the series were "functionally equivalent." The regulation requires that "at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more service- disabled veterans." (*Id*. at 9, quoting 13 C.F.R. § 125.9(d) (emphasis added by Appellant).) The regulation does not state, however, that each "class/series/collection/set/group" must be 51% owned by service-disabled veterans. (*Id*.) Appellant argues that the AD/GC improperly expanded the definition of a "class" of stock, without any legal authority to do so. (*Id*.)

Expanding the definition of class creates tension with Maryland state law, which, Appellant argues, provides that stock may be classified as either a class or a series. (*Id*., quoting Md. Code Corps. & Ass'ns § 2-105(a)(1) (a "corporation may provide by its charter: (1) [F]or one or more classes or series of stock, the voting rights of each class or series, and any restriction on or denial of these rights.") (emphasis added by Appellant).) It also creates tension with Delaware state law, which permits a corporation to "issue 1 or more classes of stock or 1 or more series of stock within any class thereof . . . as shall be stated and expressed in the certificate of incorporation." (*Id*. at 10, quoting Del. Code title 8, § 151(a) (emphasis added by Appellant).) Appellant highlights, too, the American Bar Association (ABA) Model Business Corporation Act, which notes that a corporation "must set forth any classes of shares and series of shares within a class." (*Id*. quoting ABA Model Bus. Corp. Act, § 6.01(a) (emphasis Appellant's).) Class and series, therefore, are not synonymous terms. (*Id*. at 9-10.)

Appellant calls attention to OHA case law, which addresses a similar provision in the context of the 8(a) Business Development (BD) program. The 8(a) BD regulation requires that a disadvantaged individual hold "at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding." (*Id*. at 10, quoting 13 C.F.R. § 124.105(d).) Appellant argues that a class of stock that cannot bear on the control of the concern is not voting

stock. (*Id*. at 10-11, citing *Matter of Precision Analytical Lab., Inc*., SBA No. 384 (1991).) Applying that rationale here, Appellant argues that the Series B stock can never deprive Mr. Curtis of the financial benefits of majority ownership, because Series B is limited to a total issuance of 300,000 shares, [XXXXXXXXXXXXXXX]. (*Id*. at 11.)

Appellant maintains that Mr. Curtis alone has the power to control Appellant because he owns [the majority] of the total outstanding shares, is the controlling member of the board of directors, and can establish a quorum based on his shares alone. (*Id*.) He also has control over Appellant's day-to-day operations and long-term management. As CEO, he can remove officers. Consequently, even if Series A and B are treated as separate classes, Series B has "no possible bearing upon the deprivation of the intended rights of" Mr. Curtis, so Series B is irrelevant for purposes of ownership and control under *Precision Analytical* and 13 C.F.R. § 125.9. (*Id*. at 11-12.)

Appellant warns against affirming the AD/GC's determination, arguing it would create inconsistency between SBA's regulations and those of the U.S. Department of Veterans Affairs (VA). Under VA's rule, stock held by an ESOP is excluded for purposes of determining ownership by a service disabled veteran. (*Id*. at 12, citing 38 C.F.R. § 74.3(a).)

Appellant then attacks the AD/GC's rationale for viewing Series A and B as functionally distinct. According to Appellant, the AD/GC was incorrect in finding that Mr. Curtis's voting rights are restricted. To the contrary, Appellant argues, the provision quoted by the AD/GC requires Mr. Curtis's consent as the holder of the stock not receiving the dividend. Thus, it is an additional right, not a limitation. Further, Appellant contends, Series B does not enjoy a reciprocal right to object to additional dividends paid to Series A that are not also paid to Series B. (*Id*. at 13-16.)

Appellant argues that it is irrelevant whether Series B shareholders enjoy a preferred dividend that Series A shareholders do not when determining if the series are voting classes of stock. Besides, the fact that Mr. Curtis's consent is required before any such dividends can be issued suggests that, if anything, Mr. Curtis has superior voting rights on the issue of dividends. (*Id*. at 16-17.)

Appellant turns to the issue of control under 13 C.F.R. § 125.10. Appellant reiterates all the findings the AD/GC made and argues that "[t]he basis for [[the AD/GC's] conclusion that Mr. Curtis does not control [Appellant] is difficult to identify." (*Id*. at 18.) Appellant infers that the AD/GC may have reached this determination on the belief that Mr. Curtis does not own at least 51% of the firm's outstanding voting stock. Appellant then argues that such a finding is "factually and legally flawed." (*Id*. at 18-20.)

D. SBA Response

On October 14, 2014, SBA responded to the appeal and submitted the Protest File. SBA argues that OHA should affirm the AD/GC's determination in part. In particular, SBA contends that the AD/GC correctly found that Appellant does not meet the ownership requirements of 13 C.F.R. § 125.9(d), so OHA should affirm this aspect of the determination.

SBA argues that the AD/GC's interpretation of 13 C.F.R. § 125.9(d) is reasonable. SBA recites a definition of "class" from the *Oxford English Dictionary* and asserts that Appellant has not offered a method for distinguishing, based on substance rather than name, a class from a series. (Response at 4-5.)

SBA rejects Appellant's contention that SBA's regulations should be construed to be in harmony with VA's regulations. SBA emphasizes that SBA's program is different, and SBA is not bound by VA regulations. (*Id*. at 5, citing *Matter of Savant Servs. Corp*., SBA No. VET-154, at 4 (2009).)

SBA disagrees that the AD/GC misinterpreted Appellant's bylaws. According to SBA, the bylaws demonstrate that Series A and B shares are "fundamentally different; with different rights, obligations, and responsibilities." (*Id*. at 5.)

SBA concedes that the AD/GC's conclusion that Mr. Curtis does not control Appellant "is unsupported by the clear language of the decision letter," and maintains that this may have been a typographical error. (*Id*. at 6.) SBA therefore "recommend[s] that OHA reverse this portion of the decision." (*Id*.)

E. All Points Response

On October 20, 2014, All Points responded to the appeal. All Points argues that Appellant's insistence that the two stock series are within one class lacks support in the Articles of Incorporation. Nowhere, All Points asserts, do the Articles indicate that Series A Common Stock and Series B Convertible Preferred Stock are within a single class of voting stock. In fact, the Articles suggest the opposite by stating that "[Appellant] shall be entitled to redeem the Convertible Preferred, in whole or in part, at the election of a majority of the shareholders of Series A Common voting as a single class." (All Points Response at 3, quoting Am. Articles, Art. III (c)(3)(A) (emphasis added by All Points).) Accordingly, the AD/GC's decision to treat the two groups of stock as different classes was not a clear error of fact or law.

All Points argues that Appellant is a Maryland corporation governed by Maryland law, and Maryland law uses the terms series and class interchangeably. Maryland law stipulates that "a corporation may provide by its charter: (1) For one or more classes or series of stock, the voting rights of each class or series, and any restriction on or denial of these rights." (*Id*., quoting Md. Code Corps. & Ass'ns § 2-105(a)(1) (emphasis added by All Points).) This language, All Points argues, implies that the word class or series may be used to describe a type of voting stock. OHA precedent likewise supports the notion that series and class are interchangeable terms. (*Id*. at 4, quoting *Size Appeal of Nat'l Welders Supply Co*., SBA No. SIZ-4315 (1998) ("The Agreement required [the] shareholders to create a new class of voting stock, Series A Preferred . . . an act of shareholders required a majority of both classes of stock.") (emphasis added by All Points). All Points concludes from these provisions that placing the word "series" before a designation of stock does not establish that it is a subset of a class.

Instead, "series" may be used to designate a separate class of stock. All Points dismisses

Appellant's citations to Delaware law, on the basis that Maryland law is controlling for Appellant, a Maryland corporation. (*Id*. at 3-4.)

All Points challenges the notion that two groups of stock comprise the same voting class merely because their shareholders have the same amount of votes per share. This argument is fallacious, All Points maintains, because voting rights do not necessarily distinguish one class of stock from another. Indeed, in the *Precision Analytical* case, referenced by Appellant in its appeal, Class B Common Stock was not voting stock, but was still regarded as a separate class of stock. (*Id*. at 5.) Furthermore, under Maryland law, classes of stock may be distinguished by things like preferential dividends, redemption abilities, and conversion rights. (*Id*. citing Md. Code Corps. & Ass'ns § 2-104(a)(7) ("If the stock is divided into classes . . . , a description of each class including any preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends, qualifications and terms and conditions of redemption" should be included in the articles of incorporation.).) Here, Appellant's Articles of Incorporation provide, "No dividends shall be paid on the Series A Common during any fiscal year of the Corporation until the Preferred Dividend has been paid or declared and set apart." (*Id*. at 6, quoting Am. Articles, Art. III (c)(1)(C).) Therefore, Series B shareholders are entitled to receive cumulative preferential dividends before Series A shareholders. Further, because "each issued share of Convertible Preferred shall be convertible into one share of fully paid and non-assessable Series A Common," Series B shareholders have conversion rights unavailable to Series A holders. (*Id*., quoting Am. Articles, Art. III(c)(2).) The Articles also provide different redemption rights for shareholders of Series A and B. Accordingly, these differences in the rights to dividends, redemption, and conversion distinguish the groups of stock such that they are separate classes. (*Id*.)

F. B3 Response

On October 20, 2014, B3 responded to the appeal. B3 supports the AD/GC's determination that the Series A and B shares are not identical or functionally equivalent. Their shareholders have different voting rights, and Series B has a preferred dividend right. The AD/GC therefore correctly concluded that Series A and B were different classes of stock and that Mr. Curtis does not own at least 51% of both classes.

G. Reply

On October 20, 2014, Appellant replied to SBA's response.[4] Appellant argues that SBA admits that the AD/GC's determination contains clear errors, and that SBA fails to defend the AD/GC's rationale or address Appellant's substantive arguments.

Appellant repeats its contention that the plain language of 13 C.F.R. § 125.9(d) expressly limits the ownership requirement to majority ownership in each class of voting stock. Thus, the AD/GC should have focused on voting rights, not on whether the series are identical in every respect. In Appellant's view, the AD/GC's interpretation of this requirement is irreconcilable with

[4] OHA granted Appellant leave to reply in a scheduling order issued October 7, 2014. *See* 13 C.F.R. § 134.206(e).

the regulation's plain language. (Reply at 2.)

Appellant addresses SBA's charge that, apart from the label, Appellant has offered no way to distinguish a series from a class. Appellant retorts that it is merely asking OHA to apply SBA regulations according to their plain meaning. Requiring that a service-disabled veteran own a majority of each group of stock erases the language limiting the requirement to each class of voting stock.

Appellant emphasizes that it is not arguing that label alone is why Series A and B are not separate classes. Rather, Appellant is arguing that Series B is in the same class as Series A because Series B does not vote as a separate class of stock. The shareholders vote together on all matters.

Appellant asserts that SBA did not address its arguments that the groups of stock are functionally equivalent. Appellant repeats that dividend rights are irrelevant to distinguishing voting classes, and argues that focusing on this right eviscerates the regulation's plain language.

Appellant contends further that SBA turns a blind eye to the problematic consequences of the AD/GC's determination. Affirming the determination, Appellant argues, would create tension with similar regulations in SBA's 8(a) BD program and the VA's program for service- disabled veterans. It would also discourage ESOPs, which are supported by the VA, the Internal Revenue Service, and the U.S. Department of Labor. Appellant points out that the Internal Revenue Code precludes owners with more than 25% of the firm's outstanding shares from participating in an ESOP.

III. Discussion

A. Jurisdiction and Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq*., and 13 C.F.R. Parts 125 and 134. OHA reviews the AD/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the AD/GC's determination only if Appellant proves that the AD/GC made a patent error based on the record before him.

B. Analysis

The principal issue in this case is whether the AD/GC clearly erred in determining that Series A Common Stock and Series B Convertible Preferred Stock are different "classes" of stock for purposes of 13 C.F.R § 125.9(d). The issue is significant because Mr. Curtis, a service-disabled veteran, owns all of Appellant's Series A Common Stock, but none of the Series B Convertible Preferred Stock. For the reasons discussed below, I find that Appellant has not met its burden of proving error in the AD/GC's determination.

> SBA regulations for the SDVO SBC program require that:
>
> A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:
> . . .
> (d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more service-disabled veterans.

13 C.F.R § 125.9.

SBA regulations are silent as to what constitutes a "class" of stock, nor do they distinguish a "class" from a "series." In the absence of such definitions, Appellant argues emphatically that, because the regulation refers to "voting" stock, different groups of stock are different classes only if they have dissimilar voting rights. The problem for Appellant, though, is that Appellant seeks to substitute its own interpretation of the regulation for that of the AD/GC, without citing to clear statements of law or clear provisions in the corporate documents to support this proffered interpretation. Appellant points to a treatise on corporate forms in an effort to bolster its arguments. However, not only does a treatise lack the force of law, but the language in the treatise is qualified and does not support Appellant's proposition. The treatise indicates that "[a]s a general rule, each share of common stock is entitled to one vote. However, some publicly held companies have created classes of stock with greater voting rights than any of the other classes." 2 Marvin Hyman, Corporation Forms § 22:4 (2014). Significantly, then, the treatise does not state that voting rights are the only factor that may define and distinguish "classes" of stock.

Although not explicit, Maryland corporate law suggests that criteria besides voting rights can distinguish classes of stock. Specifically, Maryland's Corporations and Associations Code provides that "[i]f the stock is divided into classes," the corporation's articles of incorporation must include "a description of each class including any preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends, qualifications, and terms and conditions of redemption." Md. Code Corps. & Ass'ns § 2-104(a)(7). It follows from this provision that, although voting rights are a relevant consideration, the boundaries of a "class" may also be defined by factors such as preferential dividends, redemption abilities, and conversion rights. Accordingly, I find that the AD/GC did not err in considering factors other than voting rights in assessing whether Appellant has one or two classes of stock.

I also find no clear error in the AD/GC's determination that Appellant's two groups of stock are sufficiently dissimilar such that they should be treated as two classes. Here, Appellant's Articles of Incorporation provide: "No dividends . . . shall be paid on the Series A Common during any fiscal year of the Corporation until the Preferred Dividend has been paid or declared and set apart. . . ." Am. Articles, Art. III(c)(1)(C). The Articles also state that, at the option of the shareholder, "each issued share of [Series B] Convertible Preferred shall be convertible into one share of fully paid and nonassessable Series A Common. . . ." *Id.* Art. III(c)(2). According to

these provisions, Series B shareholders may receive cumulative preferential dividends before Series A shareholders do, and have conversion rights unavailable to Series A holders. In addition, Series A and B shareholders also have different redemption rights. *Id*. Art. III(c)(3). Therefore, because Maryland corporate law requires these respective rights and restrictions to be enumerated for each class of stock, and Appellant's groups of stock have different rights and restrictions, I find no clear error in the AD/GC's decision to treat the two groups of stock as separate classes for purposes of 13 C.F.R. § 125.9(d).

Appellant urges OHA to reverse AD/GC's determination as inconsistent with rules pertaining to the 8(a) BD program and to VA's program for SDVO SBCs. The VA program, however, is a separate program from that of SBA, and it specifically exempts ESOPs. 38 C.F.R. § 74.3(a). SBA's program contains no such exemption, and there is no legal basis for OHA to read in such an exception. Appellant's warning against creating inconsistencies with SBA's 8(a) BD program is also meritless, as it is based on the flawed premise that voting rights are the only possible distinguishing characteristic of a class of stock. Notably, the corresponding rule for the 8(a) BD program, 13 C.F.R. § 124.105(d), is worded very similarly to 13 C.F.R. § 125.9(d).

Appellant also argues that the AD/GC's determination is poor policy, as it will discourage other, would-be SDVO SBCs from creating ESOPs. Such criticisms are beyond the scope of OHA's review, and instead should be directed to SBA policy officials. It is well-settled that OHA has no authority to determine the propriety of the regulations themselves. *E.g., Size Appeal of Rich Chicks, LLC,* SBA No. SIZ-5556, at 7 (2014).

I agree with Appellant that the AD/GC concluded, without support, that a service-disabled veteran does not control Appellant. Indeed, the AD/GC's conclusion is a complete *non sequitur* based on the findings preceding it. *See* Section II.B, *supra*. SBA maintains that the AD/GC may have committed typographical errors and requests that OHA reverse this portion of the decision. Because the AD/GC's conclusion that Appellant fails 13 C.F.R § 125.10 cannot be supported by the record or by the AD/GC's findings, I reverse this portion of the determination.

Nevertheless, as the AD/GC did not err in determining Appellant does not meet the eligibility criteria in 13 C.F.R. § 125.9(d), the determination is otherwise affirmed. Appellant has two classes of stock, and one of those classes is not at least 51% owned by service disabled veterans.

IV. Conclusion

For these reasons, I DENY the appeal and AFFIRM the AD/GC's determination to the extent discussed above. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge