

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

VSBC Appeal of:

Verndari, Inc.,

Appellant

SBA No. VSBC-302-A

Decided: September 6, 2023

APPEARANCE

Jan A. Van Prooyen, Chairman, Verndari, Inc., Sacramento, California

DECISION¹

I. Introduction and Jurisdiction

On July 5, 2023, Verndari, Inc. (Appellant) appealed a decision of the U.S. Small Business Administration (SBA), denying Appellant's application for certification as a Service-Disabled Veteran-Owned Small Business (SDVOSB). SBA found that Appellant could not be certified because one or more non-service-disabled veterans have the power to exert negative control over Appellant's Board. On appeal, Appellant maintains that the denial decision was erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted in part and the matter is remanded to SBA for further review.

OHA adjudicates SDVOSB status appeals pursuant to the Small Business Act of 1958, 15 U.S.C. §§ 631 *et seq.*, and 13 C.F.R. parts 128 and 134 subpart K. Appellant timely filed the appeal within 10 business days after receiving the denial notice on June 28, 2023. 13 C.F.R. § 134.1104(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. OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

II. Background

A. The Case File

Appellant is a corporation established in the state of Delaware. (Case File (CF), Exh. 49, at 2, 7.) On April 6, 2023, Appellant applied for certification as an SDVOSB, and submitted various supporting documents to SBA. Mr. Jan A. Van Prooyen, a service-disabled veteran, owns 56.5% of Appellant and is Chairman of Appellant's Board. (CF, Exhs. 37 and 54.) Appellant's Board is comprised of three directors: Mr. Van Prooyen; Mr. John H. Brown; and Mr. Paul Sartori. (CF, Exh. 36, 37, and 42.) Messrs. Brown and Sartori are neither veterans nor service-disabled veterans. (CF, Exh. 54.)

Appellant informed SBA that Ms. Amy A. Van Prooyen, daughter of Mr. Van Prooyen, is Appellant's Chief Executive Officer. (CF, Exhs. 36, 37, and 42.) Ms. Van Prooyen is neither a veteran nor a service-disabled veteran. (CF, Exh. 54.) Mr. Brown is Appellant's President, and Mr. Van Prooyen is Chief Operating Officer. (CF, Exh. 42, at 2.) In its communications with SBA during the review process, Appellant did not respond to questions about whether Appellant “require[s] licenses or technical expertise to operate,” or whether “[Mr.] Van Prooyen ha[s] ultimate authority and supervisory control over any employees or contractors who hold these licenses.” (CF, Exh. 129, at 2-3.)

Appellant provided a copy of its current Bylaws, as revised June 23, 2023. (CF, Exh. 34.) The Bylaws contain the following provisions pertinent to this appeal:

Article I

Meetings of Stockholders

...

1.3 *Special Meeting.*

***2** A special meeting of the stockholders may be called at any time by the Board, Chairperson of the Board, Chief Executive Officer or President (in the absence of a Chief Executive Officer) or by one of more stockholders holding shares in the aggregate entitled to cast not less than 10% of the votes at the meeting.

...

1.5 *Quorum.*

Except as otherwise provided by law, the certificate of incorporation or these bylaws, at each meeting of stockholders the presence in person or by proxy of the holders of shares of stock having a majority of the votes which could cast by the holders of all outstanding shares of stock entitled to vote at the meeting shall be necessary and sufficient to constitute a quorum. Where a separate vote by a class

or series or classes or series is required, a majority of the outstanding shares of such class or series or classes or series, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter, except as otherwise provided by law, the certificate of incorporation or these bylaws.

...

1.7 Conduct of Business.

Meetings of stockholders shall be presided over by the Chairperson of the Board, if any, or in his or her absence by the Vice Chairperson of the Board, if any, or in the absence of the foregoing persons by the Chief Executive Officer, or in the absence of the foregoing persons by the President, or in the absence of the foregoing persons by a Vice President, or in the absence of the foregoing persons by a chairperson designated by the Board, or in the absence of such designation by a chairperson chosen at the meeting. The Secretary shall act as secretary of the meeting, but in his or her absence the chairperson of the meeting may appoint any person to act as secretary of the meeting. The chairperson of any meeting of stockholders shall determine the order of business and the procedure at the meeting, including such regulation of the matter of voting and the conduct of business.

...

Article II

Directors

2.1 Powers.

The business and affairs of the Company shall be managed by or under the direction of the Board, except as may be otherwise provided in [Delaware state law] or the certificate of incorporation. The Chief Executive Officer shall report to the Chairman of the Board of Directors.

...

2.3 Election, Qualification and Term of Office of Directors.

Except as provided in **section 2.4** of these bylaws, and subject to **sections 1.2** and **1.9** of these bylaws, directors shall be elected at each annual meeting of stockholders. Directors need not be stockholders unless so required by the certificate of incorporation or these bylaws. The certificate of incorporation or these bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier death, resignation or removal.

...

2.9 Quorum; Voting.

At all meetings of the Board, a majority of the total authorized number of directors shall constitute a quorum for the transaction of business, with the presence of the Chairman of the Board also required for to constitute a quorum. If a quorum is not present at any meeting of the Board, then the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, with the Chairman of the Board present.

The vote of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board, except as may be otherwise specifically provided by statute, the certificate of incorporation or these bylaws.

If the certificate of incorporation provides that one or more directors shall have more or less than one vote per director on any matter, every reference in these bylaws to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors. In the event there is a non-unanimous vote, the vote will be weighted by the Chairman of the Board of Directors. The Chairman of the Board carries the vote.

2.10 Board Action by Written Consent Without a Meeting.

Unless otherwise restricted by the certificate of incorporation or these bylaws, any action required or permitted to be taken at any meeting of the Board, or of any committee thereof, may be taken without a meeting if all members of the Board or committee, as the case may be, consent thereto in writing or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the Board or committee. For a meeting by Written Consent, the Chairman of the Board of Directors must take part to provide a quorum. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

...

2.12 Removal of Directors.

Unless otherwise restricted by statute, the certificate of incorporation or these bylaws, any director or the entire Board may be removed, with or without

cause, by the holders of a majority of the shares then entitled to vote at an election of directors.

No reduction of the authorized number of directors shall have the effect of removing any director prior to the expiration of such director's term of office.

(*Id.* at 1-2, 5, 7-8.)

B. Denial

On June 28, 2023, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for certification as an SDVOSB. (CF, Exh. 32.) The D/GC found that Appellant did not demonstrate that one or more service-disabled veterans fully controls Appellant's Board, due to potential interference from non-service-disabled veterans. (*Id.* at 1, citing 13 C.F.R. § 128.203(a) and (e)(2).)

The D/GC observed that, according to the information Appellant provided, Appellant has three directors. (*Id.* at 1-2.) Only one of those directors, Mr. Van Prooyen, is a service-disabled veteran. (*Id.*) Section 2.9 of Appellant's Bylaws requires that “a majority” of the directors are needed to establish a quorum. (*Id.*) As a result, Mr. Van Prooyen alone could not convene a quorum, as the presence of at least one non-service-disabled veteran director also would be necessary. (*Id.* at 1.) Non-service-disabled veteran directors thus have the power to exert negative control over Appellant's Board. (*Id.* at 2, citing 13 C.F.R. § 128.203(e)(2)(iii).)

Appellant's Bylaws further provide that, in lieu of an in-person meeting, the Board may act through the unanimous written agreement of all directors. (*Id.*) Again, though, non-service-disabled veteran directors could thwart this approach by withholding their written consent. (*Id.*)

C. Appeal

On July 5, 2023, Appellant appealed the D/GC's decision to OHA. Appellant contends that Mr. Van Prooyen, a service-disabled veteran, does fully control Appellant. (Appeal at 2.) Mr. Van Prooyen is Chairman of the Board and the majority owner of Appellant. (*Id.* at 1.) Although the D/GC expressed concern that non-service-disabled veteran directors could block a quorum of Appellant's Board, this concern is unwarranted because, under Section 2.12 of the Bylaws, Mr. Van Prooyen, as Appellant's majority owner, could remove any director, with or without cause. (*Id.* at 2-3.) A special shareholder meeting to conduct such a vote may be called by the Chairman of the Board “at any time.” (*Id.* at 3, citing Bylaws, Section 1.3.) Furthermore, the Chairman presides over shareholder meetings and determines the order of business. (*Id.*, citing Bylaws, Section 1.7.) Appellant argues that Mr. Van Prooyen, therefore, can surmount any effort by non-service-disabled veteran directors to prevent a quorum of the Board. (*Id.*)

As further evidence of Mr. Van Prooyen's control, Appellant highlights that, according to Section 2.1 of the Bylaws, Appellant's Chief Executive Officer reports to the Chairman of the Board. (*Id.*) Appellant maintains that Mr. Van Prooyen thus, in effect, holds “the highest-ranking position in the company.” (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, that the denial decision was based upon clear error of fact or law. 13 C.F.R. § 134.1111.

B. Analysis

I agree with Appellant that the D/GC's analysis of the issue of negative control was flawed. As a result, it is appropriate to remand this matter for further review.

In prior decisions, OHA has explained that an appearance of negative control may be illusory, if a majority shareholder has the power to overcome such efforts. In *Matter of Alpha Terra Engineering, Inc.*, SBA No. VET-238 (2013), for example, the D/GC found that the challenged concern was not an eligible SDVOSB, because the concern's bylaws required that “a majority” of the directors be present to establish a quorum of the board, and only two of the four directors were service-disabled veterans. *Alpha Terra*, SBA No. VET-238, at 2. The majority shareholder was a service-disabled veteran, however, and the concern's bylaws stipulated that “[a] director may be removed from office, with or without cause, at a special meeting of the shareholders called for that purpose.” *Id.* at 5. On these facts, OHA concluded that the appearance of negative control was illusory, because the service-disabled veteran, “as majority owner, can remove any directors seeking to thwart his control.” *Id.*

Here, like in *Alpha Terra*, Mr. Van Prooyen is a service-disabled veteran and holds a majority ownership interest in Appellant. Section II.A, *supra*. Mr. Van Prooyen also is Chairman of the Board, and Appellant's Bylaws authorize the Chairman to convene a special meeting of the shareholders. *Id.* At such a meeting, shareholders may vote to remove any or all directors, with or without cause, and as Mr. Van Prooyen is Appellant's majority shareholder, his vote would determine the outcome. *Id.* Like in *Alpha Terra*, then, the appearance of negative control is illusory, because Mr. Van Prooyen may remove and replace any directors attempting to block a quorum of the Board.

Nevertheless, although Appellant has demonstrated that the D/GC erred in analyzing the question of negative control, Appellant has not persuasively shown that Appellant otherwise meets all requirements for SDVOSB certification. It is unclear, for example, whether a service-disabled veteran holds Appellant's highest officer position, as is required by 13 C.F.R. § 128.203(b). Section II.A, *supra*. Furthermore, during the application process, Appellant did not address the extent to which it may be dependent upon one or more non-service-disabled veterans for a critical license. *Id.* Additional review therefore is warranted.

IV. Conclusion

The D/GC incorrectly concluded that non-service-disabled veterans have the power to exert negative control over Appellant's Board, and the appeal is GRANTED to that extent. The

D/GC's decision of June 28, 2023 is VACATED and the matter is REMANDED to the D/GC for further review.

KENNETH M. HYDE
Administrative Judge