

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

VSBC Appeal of:

Murray and Treittel, Incorporated,

Appellant,

SBA No. VSBC-307-A

Decided: September 12, 2023

APPEARANCE

Thomas R. Piazza, President, Murray and Trettel, Incorporated, Palatine, Illinois

DECISION

I. Introduction and Jurisdiction

On July 7, 2023, Murray and Trettel, Incorporated (Appellant) appealed a decision of the U.S. Small Business Administration (SBA), denying Appellant's application for certification as a Veteran-Owned Small Business (VOSB). SBA found that Appellant could not be certified because Appellant's Board consists of one veteran and four non-veterans. 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 VOSB 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 26, 2023. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Case File

Appellant is a corporation established in the state of Delaware. (Case File (CF), Exh. 145.) On June 12, 2023, Appellant applied for certification as a VOSB, and submitted various supporting documents to SBA. Appellant disclosed that Mr. Thomas R. Piazza, who is also Appellant's President, acquired a 52.51% ownership interest in Appellant on May 4, 2023. (CF, Exhs. 41 and 60.) Mr. Piazza is a veteran. (CF, Exh. 58.) Minutes from a Board meeting held on June 22, 2023 indicate that Appellant's Board is comprised of five directors: Mr. Piazza; Mr. John L. Boyle; Mr. Dennis W. Trettel; Mr. Alan S. Williams; and Ms. Barbara L. Diehl. (CF,

Exh. 40.) Except for Mr. Piazza, none of the other directors are veterans. (CF, Exhs. 49, 51, 54, and 56.)

Appellant submitted multiple copies of its Bylaws, all of which are unsigned and undated, and some of which are marked with handwritten notes. (CF, Exhs. 37, 39, 45, 48.) The Bylaws contain the following provisions pertinent to this appeal:

Article III Directors

Section 1. (Amended 6/22/2023) The number of directors which shall constitute the whole Board shall be FIVE (5). The directors shall be elected at the annual meetings of the shareholders in a yearly staggered fashion, whereas two (2) directors are elected in year one (1), two (2) directors are elected in year two (2) and one (1) director is elected in year three (3), each serving for a three (3) year term, except as provided in Section 2 of this Article, and each director shall hold office until his successor is elected and qualified. Directors need not be shareholders.

...

Section 3. The business of the corporation shall be managed by Its board of directors which may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws directed or required to be exercised or done by the stockholders.

...

Section 8. At all meetings of the board a majority of the directors shall constitute a quorum for the transaction of business and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board of directors, except as may be otherwise specifically provided by the statute or by the certificate of incorporation. If a quorum shall not be present at any meeting of the board of directors the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present.

...

Article V Officers

...

THE PRESIDENT

Section 6. The president shall be the chief executive officer of the corporation, shall preside at all meetings of the stockholders and the board of

directors, shall have general and active management of the business of the corporation and shall see that all orders and resolutions of the board of directors are carried into effect.

Section 7. He shall execute bonds, mortgages and other contracts requiring a seal, under the seal of the corporation, except where required or permitted by law to be otherwise signed and executed and except where signing and execution thereof shall be expressly delegated by the board of directors to some other officer or agent of the corporation.

(CF, Exh. 39 at 1-2; Exh. 48 at 9, 13-14.)

B. Denial

On June 26, 2023, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for certification as a VOSB. (CF, Exh. 64.) The D/GC found that Appellant did not demonstrate that Mr. Piazza fully controls Appellant's Board, due to potential interference from non-veteran directors. (*Id.* at 1, citing 13 C.F.R. § 128.203(a) and (e)(2).)

The D/GC observed that, according to the documentation Appellant provided, Appellant's Board consists of five directors. (*Id.* at 2.) Only one of those directors, Mr. Piazza, is a veteran. (*Id.*) Article III, Section 8 of Appellant's Bylaws requires that “a majority of the directors” are needed to establish a quorum of the Board, and further states that “the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the [Board].” (*Id.* at 1-2 (quoting Bylaws).) As a result, Mr. Piazza alone cannot convene a quorum, nor cause the Board to take any action, as the presence or consent of at least two non-veteran directors also would be necessary. (*Id.* at 2.) Non-veteran directors thus have the power to exert negative control over Appellant's Board, in contravention of 13 C.F.R. § 128.203(e)(2). (*Id.*)

C. Appeal

On July 7, 2023, Appellant filed the instant appeal. Appellant contends that Mr. Piazza, as President, controls Appellant's daily business operations. (Appeal at 1.) Under Appellant's Bylaws, the President “shall have general and active management of the business of the corporation and shall see that all orders and resolutions of the board of directors are carried into effect.” (*Id.*, quoting Bylaws, Article V, Section 6.) Furthermore, the President is authorized to “execute bonds, mortgages and other contracts” on Appellant's behalf. (*Id.*, quoting Bylaws, Article V, Section 7.) Since a veteran controls Appellant's day-to-day and long-term decision making, the D/GC should have found Appellant compliant with 13 C.F.R. § 128.203(a). (*Id.*)

Turning to the question of negative control, Appellant maintains that the regulation referenced by the D/GC — 13 C.F.R. § 128.203(e)(2) — “does not apply” in the instant case. (*Id.* at 2.) Appellant highlights that paragraph (e)(2) governs when “an Applicant or concern does not meet the requirements set forth in paragraph (e)(1) of this section.” (*Id.*, quoting 13 C.F.R. § 128.203(e)(2).) Paragraph (e)(1), though, identifies situations in which SBA will deem a veteran

to control a corporation's Board. (*Id.*) One of these situations is when “[a] single veteran or service-disabled veteran individual owns at least 51% of all voting stock of an Applicant or concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions.” (*Id.*, quoting 13 C.F.R. § 128.203(e)(1)(ii).) These circumstances are met here, because Mr. Piazza owns 52.51% of Appellant and is a member of the Board, and there are no supermajority shareholder approval requirements. (*Id.*) Mr. Piazza thus controls Appellant's Board under paragraph (e)(1), and the D/GC erred in invoking paragraph (e)(2). (*Id.*)

Accompanying its appeal, Appellant attached recent revisions to its Bylaws, which are not in the Case File. Appellant claims that Article III, Section 8 of the Bylaws “ha[s] been amended to read, ‘At all meetings of the board, if the member holding majority ownership is present, then a quorum shall be met for the transaction of business.’” (*Id.*) Appellant does not explain why the amendment was not, or could not have been, submitted to the D/GC during the application process.

III. Discussion

A. Standard of Review

When a concern seeks certification as a VOSB, SBA regulations provide that:

An Applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, any independent research conducted by SBA, and any changed circumstances. The Applicant bears the burden of proof to demonstrate its eligibility as a VOSB [].

13 C.F.R. § 128.302(d).

On appeal to OHA, 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. *Id.* § 134.1111.

B. Analysis

I agree with Appellant that the D/GC erred in applying 13 C.F.R. § 128.203(e)(2), without first considering whether Mr. Piazza controls Appellant's Board under paragraph (e)(1). Paragraph (e)(1) identifies three situations in which “SBA will deem qualifying veterans to control [a corporation's] Board of Directors.” 13 C.F.R. § 128.203(e)(1). One of these situations is when “[o]ne qualifying veteran owns at least 51% of all voting stock, the qualifying veteran is on the Board of Directors, and no supermajority voting requirements exist for shareholders to approve corporation actions.” *Id.* § 128.203(e)(1)(ii). Here, Appellant plausibly contends that it meets these conditions, because Mr. Piazza, a veteran, owns 52.51% of Appellant and is a member of Appellant's Board, and there are no supermajority shareholder approval requirements. Sections II.A and II.C, *supra*. Meanwhile, paragraph (e)(2) — the portion of the rule relied upon by the D/GC in denying Appellant's application — by its own terms applies only “[w]here a

concern does not meet the requirements set forth in paragraph (e)(1) of this section.” 13 C.F.R. § 128.203(e)(2). Accordingly, the D/GC should have assessed whether Mr. Piazza is deemed to control Appellant's Board under paragraph (e)(1), prior to applying paragraph (e)(2).

On the other hand, Appellant has not persuasively shown that it otherwise meets all requirements for VOSB certification. Notably, Appellant does not dispute that four of its five directors are not veterans. Sections II.A and II.C, *supra*. Appellant likewise does not dispute that, under the version of its Bylaws presented to the D/GC, the non-veteran directors could exert negative control over Appellant's Board. *Id.* SBA regulations make clear that, in order to obtain VOSB certification, non-veterans must not “[e]xercise actual control or have the power to control the concern.” 13 C.F.R. § 128.203(h)(1)(i). It therefore is possible that Appellant may be ineligible under § 128.203(h)(1)(i), even supposing that Mr. Piazza were deemed to control Appellant's Board under § 128.203(e)(1)(ii). Furthermore, although Appellant maintains, on appeal to OHA, that its Bylaws have recently been amended in an effort to address the D/GC's concerns about negative control, this amendment apparently was not presented to the D/GC for review during the application process. Section II.C, *supra*. Nor is it evident that the amendment comports with Delaware state law, which permits that a corporation's “bylaws may provide that a number less than a majority [of directors] shall constitute a quorum [of the board] which in no case shall be less than 2/3 of the total number of directors.” Delaware Gen. Corp. Law § 141(b). Inconsistency with Delaware law is potentially significant here, because SBA regulations stipulate that “[a]rrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.” 13 C.F.R. § 128.203(e)(4). Accordingly, additional review is warranted.

IV. Conclusion

The D/GC erred by denying Appellant's application under 13 C.F.R. § 128.203(e)(2), without first considering whether Mr. Piazza is deemed to control Appellant's Board under paragraph (e)(1). The appeal is GRANTED to that extent, and the matter is REMANDED to the D/GC for further review.

KENNETH M. HYDE
Administrative Judge