

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

VSBC Appeal of:

BCP Mechanical, LLC,

Appellant

SBA No. VSBC-392-A

Decided: September 20, 2024

APPEARANCE

Betsey S. Paul, Member/Manager, BCP Mechanical, LLC, Fallbrook, California.

DECISION

I. Introduction and Jurisdiction

On July 23, 2024, BCP Mechanical, LLC (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 did not demonstrate that it is fully controlled by one or more service-disabled veterans. On appeal, Appellant maintains that the denial was erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied.

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 July 17, 2024. 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 limited liability company (LLC) established in the state of California. (Case File (CF), Exh. 57.) In its Articles of Organization, Appellant stated that it would be managed by “[m]ore than [o]ne [m]anager.” (*Id.*) In May 2024, Appellant applied for certification as an SDVOSB, and submitted various supporting documents to SBA. (CF, Exh. 64.) Appellant is 51% owned by Mrs. Betsey S. Paul, a service-disabled veteran. (CF, Exh. 60.) Mr. Chester A. Paul, Sr. owns the remaining 49% of Appellant. (*Id.*) Mr. Paul is neither a veteran nor a service-disabled veteran. (*Id.*) According to the minutes of a meeting of Appellant's Members held on July 8, 2024, both Mrs. Paul and Mr. Paul have the title “Member/Manager.” (CF, Exh. 54.)

Appellant submitted multiple versions and amendments to its Operating Agreement. (CF, Exh. 56.) The most recent version, dated July 8, 2024, reflects that Mr. and Mrs. Paul are Appellant's two Members. (CF, Exh. 53, at 1, 14-15.) Article 4 of the Operating Agreement, entitled "Management," states that "the business and affairs of the Company will be managed by the M[]ajority S[]hareholder," and that "all activities or transactions must be approved by [] the M[]ajority S[]hareholder, to constitute the act of the Company or serve to bind the Company." (*Id.* at 6.) Mrs. Paul is identified as the "Majority Shareholder." (*Id.* at 3, 14-15.) The Operating Agreement specifies, however, that certain types of decisions require the unanimous agreement of all the Members:

C. Certain Decisions Requiring Greater Authorization. Notwithstanding clause B above, the following matters require unanimous approval of the controlling Members in consent in writing to constitute an act of the Company:

(i) With the exception of a transfer of interest governed by Article 7 of this Agreement, the admission of a new Member o[r] a change in any Member's Membership Interest, Ownership Interest, Percentage Interest, or Voting Interest in any manner other than in accordance with the Agreement;

(ii) A merger or conversion under the California Revised Uniform Limited Liability Company Act; [and]

(iii) The sale, lease, exchange, or other disposition of all, or substantially all, of the Company's assets [], with or without goodwill, outside the ordinary course of the Company's activities[.]

(*Id.* at 6-7.) The Operating Agreement indicates that Mrs. Paul, as Majority Shareholder, may "delegate" authority to "manage aspects of the business and affairs of the Company" to one or more Managers. (*Id.* at 3.) An attachment to the Operating Agreement states that Mrs. Paul has "appointed" herself and Mr. Paul as "Managers" of Appellant. (*Id.* at 16.)

As part of its application, Appellant disclosed that it requires licensure from California's Contractors State License Board (CSLB) to operate. (CF, Exhs. 33 and 69.) Mr. Paul is identified in Appellant's Operating Agreement as the "Responsible Managing Employee [(RME)] for the purpose of CSLB qualification." (CF, Exh. 53, at 16.) In response to an inquiry from SBA, Appellant asserted that "[t]his license is in the process of being moved to being held by [Appellant] itself with no need to the RME." (CF, Exh. 55.)

B. Denial

On July 17, 2024, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for SDVOSB certification. (CF, Exhs. 51 and 52.) The D/GC found that the documentation Appellant provided did not demonstrate that the Mrs. Paul (1) holds Appellant's highest officer position; (2) possesses ultimate managerial and supervisory control over those who possess required licenses or technical expertise; (3) has

full control over Appellant's ordinary decision-making, including over Members, Managers, and any other governing body; and (4) is able to overcome supermajority or unanimous voting requirements (with the exception of the five extraordinary circumstances outlined at 13 C.F.R. § 128.203(j)). (*Id.*)

The D/GC noted that, under the latest version of Appellant's Operating Agreement, Mrs. Paul, as Appellant's 51% owner, is considered the “controlling member.” (CF, Exh. 51 at 1.) Appellant, however, identifies both Mrs. Paul and Mr. Paul as Appellant's “Managers,” who are delegated authority to manage the company by Mrs. Paul. (*Id.*) Thus, “while [Mrs. Paul] is necessary and sufficient to control ordinary member decision-making. . . , it cannot be determined that [she] is necessary and sufficient to control Manager decision-making.” (*Id.* at 1-2.) The D/GC found that Mrs. Paul also cannot unilaterally overcome all supermajority voting requirements, as section 4.1.C of the Operating Agreement requires unanimous agreement of the Members for certain types of decisions. (*Id.* at 2.) Furthermore, Mrs. Paul is not named as Appellant's Managing Member, nor can she be determined to hold the highest job title. (*Id.*)

The D/GC observed that, according to its application, Appellant requires licenses and/or technical expertise to operate. (*Id.*) Appellant further disclosed that Mr. Paul holds the license in question as the RME for Appellant, although Appellant asserted that it is “in the process” of attempting to transfer the license to Appellant itself. The D/GC could not conclude that Mrs. Paul holds the required licenses and technical expertise needed to operate Appellant, or that she exercises ultimate supervisory control over those who do. (*Id.*)

C. Appeal

On July 22, 2024, Appellant filed the instant appeal. Appellant argues that the D/GC erred in determining that Mrs. Paul does not hold Appellant's highest officer position or exercise ultimate managerial and supervisory control over those who possess the required license. (Appeal at 1.) Appellant contends that, although the terms “President or Chief Executive Officer” are not used in the current version of its Operating Agreement, “as the Majority Shareholder owning 51% of the concern, where no voting supermajority exists, Mrs. Paul exercises unilateral control over of the concern and its employees to include the licenses held by those employees.” (*Id.*) Furthermore, most, if not all, of the supermajority voting requirements set forth in section 4.1.C of the amended Operating Agreement fall within the exceptions for “extraordinary circumstances.” (*Id.*)

In Appellant's view, the denial decision “was a simple oversight in good faith made by the [D/GC] and although we believe it is in error, after reviewing the denial letter and our Operating Agreement we found there exists in our [Operating Agreement] a lack of clarity and use of language that has made items therein unnecessarily complicated.” (*Id.* at 2.) Appellant expresses its intent to further revise the Operating Agreement, irrespective of the outcome of this appeal. (*Id.*)

III. Discussion

A. Standard of Review

When a concern seeks certification as an SDVOSB, 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 or SDVOSB.

13 C.F.R. § 128.302(d). Furthermore, “[i]f a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.” *Id.* § 128.302(d)(1).

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

B. Analysis

Appellant has not demonstrated any error of fact or law in the D/GC's decision. As a result, this appeal must be denied.

The principal problem for Appellant is that, although Appellant's revised Operating Agreement indicates that “the business and affairs of the Company will be managed by the [] M[]ajority S[]hareholder” (*i.e.*, by Mrs. Paul), the Operating Agreement also provides that Mrs. Paul may “delegate” managerial authority to one or more Managers. Section II.A, *supra*. An attachment to the Operating Agreement states that Mrs. Paul has, in fact, “appointed” both herself and Mr. Paul, who is not a service-disabled veteran, as “Managers” of Appellant. *Id.* The D/GC thus could reasonably conclude that Appellant is not fully controlled by service-disabled veterans, since one of Appellant's two Managers is not a service-disabled veteran. *E.g.*, *VSBC Appeal of One Veteran LLC*, SBA No. VSBC-289-A (2023) (D/GC correctly denied SDVOSB certification when authority to manage an LLC had been delegated to a non-service-disabled veteran). Furthermore, the minutes of Appellant's most recent meeting of its Members reflect that both Mr. and Mrs. Paul hold the identical title of “Member/Manager.” Accordingly, the D/GC could reasonably find that Mrs. Paul does not serve as Appellant's managing member, and does not hold Appellant's highest officer position, as required by 13 C.F.R. § 128.203(b) and (d). *E.g.*, *VSBC Appeal of Facekay LLC*, SBA No. VSBC-388-A (2024) (D/GC correctly found that a veteran did not hold a concern's highest officer position, when applicable records named both a veteran and a non-veteran as the concern's “President”).

The D/GC also found that Mr. Paul holds a critical license for Appellant, because he is the Responsible Managing Employee (RME) for purposes of Appellant's Contractors State License Board (CSLB) license. SBA regulations stipulate that a non-service-disabled veteran

must not provide “a critical license to the Applicant or Participant, which directly or indirectly allows the non-qualifying-veteran significantly to influence business decisions of the qualifying veteran.” 13 C.F.R. § 128.203(h)(1)(iv). Although Appellant informed the D/GC that it is “in the process” of attempting to transfer the license from Mr. Paul to Appellant itself, Appellant does not dispute the importance of the license or that Mr. Paul controlled it at the time of the D/GC's decision. Sections II.A and II.C, *supra*. Thus, the D/GC could properly have denied Appellant's application for certification on this basis.

IV. Conclusion

Appellant has not established that the D/GC committed any error of fact or law in denying Appellant's application for certification. The appeal therefore is DENIED. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(A); 13 C.F.R. § 134.1112(d).

KENNETH M. HYDE
Administrative Judge