

COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA, CIVIL DIVISION

CSSS.NET,
3906 Raynor Parkway
Bellevue, NE 68123,

Plaintiff,

v.

CIVIL ACTION NO. _____

ERIK K. SHINSEKI, SECRETARY OF THE
U.S. DEPARTMENT OF VETERANS AFFAIRS,
810 Vermont Ave., NW, Washington, DC 20420;
AND THOMAS J. LENEY, EXECUTIVE
DIRECTOR, SMALL AND VETERAN BUSINESS
PROGRAMS, U.S. DEPARTMENT OF VETERAN
AFFAIRS CENTER FOR VETERAN ENTERPRISE,
810 Vermont Ave., NW, Washington, DC 20420.

Defendants.

Comes now, CSSS.NET, hereafter "Plaintiff" and submit the following in support of its
Complaint:

The Parties

1. CSSS.NET is a corporation organized under the laws of Nebraska, which during all times relevant to this proceeding has maintained and continues to maintain its principal place of business in Nebraska.

2. Defendant Erik K. Shinseki, Secretary of the Department of Veterans Affairs, (hereafter "Defendant Shinseki"), is the chief administrative officer of the U.S. Governmental Agency of the Department of Veterans Affairs (hereafter "the VA") with its principal place of business in Washington, D.C.

3. Thomas J. Leney, Director of Small and Veteran Business Programs, Department of Veterans Affairs, Center of Veterans Enterprise (hereafter "CVE") is the chief administrative officer of the the CVE, a department of the VA, a U. S. Government agency, with its principal place of business in Washington, D. C.

Jurisdiction and Venue

4. This action involves interpretation of federal statutes and regulations, therefore, this Court has federal question subject matter jurisdiction pursuant to 28 United States Code Sec. 1331.

5. All of the Defendants' actions as set forth below having taken place within Washington, D.C. and all of the Defendants' principal places of business are within Washington, D. C.; consequently, the venue of this action in the Civil Division of the U. S. District Court for the District of Columbia, is lawful pursuant to 28 United States Code Sec. 1391.

The Facts

6. Public Law (P.L.) 109-461 created a new contracting program within the Department of Veterans Affairs for Veteran-owned small businesses and expanded the service disabled Veteran contracting program for VA procurements. The thrust of the program is to create set-asides for small businesses owned and operated by service disabled Veterans to assist their obtaining federal contracts. This program, called "VETBIZ," has been implemented in two regulations:

a. 48 CFR Parts 802, 804, 808, 809, 810,813, 815, 817, 819, 828, and 852 of the VA Acquisition Regulations regarding supporting Veteran-owned and service-disabled Veteran-owned small businesses; and

b. 38 CFR Part 74 VA Veteran-Owned Small Business Verification Guidelines that was published on February 8, 2010, and clarified on January 19, 2011. This regulation defines the

requirements for verification as a Veteran-owned small business or a service-disabled Veteran-owned small business. It is the implementation of this regulation that forms the basis of Plaintiffs' Complaint against Defendants.

7. Lisa Wolford (hereafter "Wolford") is a Service Disabled Veteran, whose business, CSSS.NET, has provided technical computer consulting services to federal contracting agencies since 2002. CSSS.NET has been listed on the VETBIZ registry since the inception of the registry.

8. In March, 2011, Wolford sent in CSSS.NET's original package containing sufficient documentation to verify that CSSS.NET complied with all requirements of 38 C.F. R. Part 74 to continue qualifying as a Service Disabled Veteran Owned Small Business (hereafter "SDVOSB").

9. Wolford received no reply or confirmation from the VA that her documentation was complete. On August 22, 2011, she checked the VETBIZ website and discovered that CSSS.NET was no longer listed in the VETBIZ registry. She attempted to contact the VA by telephone and email, her usual methods of communicating with the VA, in order to learn why her business had been de-listed.

10. On August 23, 2011 CSSS.NET received its first denial letter from the VA stating that, because Wolford was a trustee of her own revocable trust, it could not be determined whether she remained the majority owner of CSSS.NET.

11. On September 6, 2011, Plaintiff filed a Request for Reconsideration with additional explanations of how the revocable trust did not function to remove Wolford's ability to direct CSSS.NET. Wolford sent emails to CVE to follow up on the status of the reconsideration on September 1, 2011 without reply.

12. Wolford attended a Vet-force meeting on September 13, 2011 at which Defendant Leney made a presentation regarding VETBIZ. During the question and answer period, Wolford related her difficulties with VETBIZ to Defendant Leney. He agreed that there was a substantive error on the part of the CVE in processing CSSS.NET's application and promised to assure that a thorough review of CSSS.NET's application to ensure that there were no further issues.

13. On September 15, 2011 Defendant Leney replied to Wolford's email that there were other issues and that CSSS.NET would receive a communication on September 16, 2011, regarding those issues. Wolford replied to this email on September 16, 2011 thanking Defendant Leney for his reply, and offering any further information needed to address any remaining issues.

14. Wolford sent further emails requesting a status and offering any additional amplifying information on September 22, 2011 and September 26, 2011. On September 26, 2011, Defendant Leney replied that Plaintiff would see a letter on September 27, 2011 addressing the status of CSSS.NET. However, no letter from CVE was forthcoming. Wolford sent another set of follow up emails on October 5, 2011 and October 11, 2011.

15. October 24, 2011 Wolford finally received a letter from CVE, once again denying CSSS.NET's status as a SDVOSB. Even though the letter stated that "CVE has confirmed that you have valid service-disabled Veteran status from VA and own at least 51% of CSSS.NET, as required by the regulations," the letter went on to say that "CVE is unable to conclude that you satisfy the control requirements set forth in 38 CFR § 74.4" based on the following:

1. You failed to provide a resume, which raises an issue of whether you have management expertise to run this concern. The applicant is an information technology-consulting firm. You have failed to provide any information to CVE as to your experience or expertise in this field. As such, CVE cannot reasonably determine that you have "managerial experience of the extent and complexity needed to run the concern," as required by 38 CFR § 74.4(b).

2. Additionally, you provided three years of tax returns for a real estate company called FOF&N, L.L.C., for years 2007, 2008, and 2009. You are the 99% owner of this partnership, and your daughter Natalie O'Barr is the 1% owner. According to the tax forms, this company is a real estate company, and it shares the same address as the applicant. You did not provide a resume and that company does not have a website, so your role in that company cannot be determined. Without more information, it is unreasonable to assume that you can interrupt your present workday to address problems that might arise, in the performance of your duties in the applicant concern. Even though 38 CFR § 74.4(c)(1), as amended, requires that "[o]wners need not work full-time but must show sustained and significant time invested in the business," the regulations still require that "[o]ne or more veterans or service-disabled veteran owners who manage the applicant or participant must devote full-time to the business during normal working hours of firms in the same or similar line of business." 38 CFR §74.4(c)(3). While other outside employment is not necessarily a bar to establishing control of the applicant, you have to demonstrate that employment in another business will not interfere with control of the applicant business, per 38 C.F.R. § 74 4(c)(1). The Government Accountability Office has flagged this issue, and it issued a report, which found that a Veteran cannot control a business when he concurrently has a separate full-time job, which operates during the same normal business hours as the applicant firm. See *U.S. Gov't Accountability Office, Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts*, GA0-10- 108 (Oct. 2009) The determination as to whether outside employment will bar establishing control is decided on a case-by- case basis, evaluating the particular facts and circumstances presented. You failed to provide a written explanation as to your role in FOF&N, L.L.C., as required by 38 CFR §74.4(c)(1). Additionally, that company is located at the same address of the applicant company. Without an explanation as to what role you have in that other company, if you have one other than owner, CVE cannot reasonably determine that you satisfy the "full-time" control requirements.

3. Finally, the applicant failed to provide enough information for CVE to determine if you are the highest paid person of the applicant, as required by 38 CFR § 74.4(g)(3).The applicant provided a Payroll report for 2009, but you were not listed on that payroll report. You also provided your 2010 W2 but did not provide the W2s of any other employees. Therefore, CVE cannot determine if you are the highest paid person in the applicant, because CVE does not have a way of comparing you to the other employees. Additionally, even if you are not the highest paid, the regulations permit this as long as you provide a written explanation as to how that helps the applicant. However, you also failed to do this. Therefore, CVE finds that you do not satisfy this element of control. (*paragraph numbers added.*)

16. Wolford had provided CVE with an exhaustive resume fully documenting her skills and abilities when she filed her original package in March, 2011, and again on November 3, 2011. Nevertheless, the October 24 2011 denial letter states that this was not provided.

17. Further, complete payroll records and timesheets for CSSS.NET were also provided to CVE. A cursory review of those records would have revealed that Wolford is the highest paid employee.

18. The packages provided to CVE contained an affidavit from Jeffrey Hamernik, Wolford's accountant for 14 years, verifying that she spends very little time on FOF&N, LLC, and that the real estate venture is merely a passive investment. The affidavit further attests that Wolford spends the majority of her time on CSSS.NET. Wolford also included an affidavit attesting that she spends no more than 5 minutes per month on the real estate company, whereas the majority of her efforts are spent on CSSS.NET.

19. On November 3, 2011 Wolford sent CVE a second request for reconsideration. CVE has yet to issue any final determination regarding this second request.

Count 1: CVE Failed to Issue a Final Ruling as Required by Regulation.

20. The governing regulation, 38 CFR §74.14(b), states that "the Director, CVE, *will* issue a written decision within 60 days, when practicable, of receipt of the applicant's request." Further, 38 CFR §74.14(c) states that if "the Director, CVE, denies the application solely on issues not raised in the initial denial, the applicant may ask for reconsideration as if it were an initial denial." The statement of facts above details a process that Plaintiffs began in March, 2011, and which has yet to produce a final determination, ten months later. The Director first issued a denial on August 23, 2011, and following a request for reconsideration, issued a second denial on completely different grounds on October 24, 2011. CVE has yet to issue any response

to Plaintiff's second request for reconsideration filed on November 3, 2011. Consequently, CVE has twice failed to meet its own requirements of a 60-day turnaround contained in 38 CFR §74.14(b).

Count II: CVE has Failed to Follow its own Regulations in evaluating CSSS.NET.

21. CVE de-listed CSSS.NET from the VETBIZ website without the proper prior notice as required by 38 CFR §74.21(c) and §74.22(c). Although CSSS.NET had previously enjoyed SDVOSB status, Wolford discovered that CSSS.NET had been de-listed, without any of the required written notice from CVE.

22. Further, prior to de-listing any business, CVE is required to conduct an examination of all relevant documents supporting the business' application. 38 CFR §74.20(b). It is blatantly apparent from the two denial letters that Plaintiff has received that CVE failed to provide a consistent review of all documents provided to it. For example, Wolford has twice provided a copy of her extensive resume detailing her experience to CVE, and yet, the second denial states plainly that she never submitted such information. Further, the second denial makes it clear that the CVE examiner either failed to review the documents provided by CSSS.NET or failed to understand them and request clarification prior to issuing the denials.

Count III: CVE's Denials of SDVOSB Status to CSSS.NET is Arbitrary, Capricious, and Contrary to Law.

23. As detailed above, CVE has failed to follow its own regulations in reviewing the application of CSSS.NET to remain on the BIZNET listing, and in removing CSSS.NET from such listing without the proper notice.

24. Further, it is apparent that the examiner reviewing Plaintiff's application either completely disregarded, or failed to comprehend the documentation provided, and came to unreasonable "conclusions" resulting in continuing to deny CSSS.NET SDVOSB status. For

example, the second denial letter states that CVE was unable to determine whether Wolford spends the appropriate amount of time conducting the business of CSSS.NET because she has an ownership interest in a second business, regardless of the payroll information and two affidavits provided, which clearly explain that the real estate business was merely a passive investment for Wolford, and that she in fact does work full time for CSSS.NET. The two denial letters already provided to Plaintiff rest on conclusions unsupported by the facts, and are therefore unreasonable, arbitrary and capricious.

Count IV: The Court Should Compel Agency Action Unlawfully Withheld and Unreasonably Delayed Pursuant to 5 USC §706.

25. This Court is authorized by 5 USC §706(1) to “compel agency action unlawfully withheld or unreasonably delayed.” Based on the facts recited above, Plaintiff has tried valiantly to comply with the Defendant’s regulations in order to maintain SDVOSB rating and listing on the VETBIZ website. What Plaintiff has received in response from the VA and CVE is a complete lack of recognition of the VA’s own regulations with regard to notice of de-listing and administrative foot dragging that has resulted in an extremely protracted process, whereby Plaintiff still has not been able to regain a position on the VETBIZ website, regardless of being qualified to do so.

Relief Requested

26. Accordingly, Plaintiff respectfully requests a judgment to include the following relief (and any further relief which the Court may find to be justified by the evidence):

a. De novo review under 5 USC §706 of the administrative record and a determination as to whether CSSS.NET should have been reinstated to the VETBIZ website.


b. A mandatory injunction, pursuant to 5 United States Code Sec. 702 and otherwise, temporarily and permanently mandating that Defendants find CSSS.NET meets the criteria of a SDVOSB and restoring the company's listing on the VETBIZ website; and

c. An award of reasonable attorneys' fees, court costs, and litigation expenses in a further amount determined by the Court after the return of any verdict in this proceeding.

This 17th day of January, 2012.

Respectfully submitted,
CSSS.NET, Plaintiff

By its Attorneys, PUCKETT & FARAJ, PLLC

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