

February 2, 2017

Reference Number: 16-0147

Raj Patel  
Healthy Food Concepts LLC  
**REDACTED**  
Matwan, NJ 07747

Dear Mr. Patel:

Healthy Food Concepts LLC (HFC) appeals the New Jersey Uniform Certification Program's (NJUCP) removal of the firm's Airport Concession Disadvantaged Business Enterprise (ACDBE) certification. NJUCP decertified HFC for failure to provide information pursuant to the requirements of the Department of Transportation's ACDBE and DBE Regulation, 49 C.F.R. Parts 23 and 26 (the Regulation), and because the firm's owner exceeded the personal net worth cap of §26.67(a).

After careful review of the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) finds that the decertification is supported by substantial evidence and that is consistent with the Regulation's substantive and procedural provisions concerning decertification. We affirm under §26.89(f)(1).<sup>1</sup> Specifically, we affirm because HFC's appeal fails to state a claim on which the Department can reverse NJUCP's determination. *See generally* §26.89(c) (requirements for making an appeal to the Department).

I. Facts

The pertinent facts are uncontroverted in the administrative record. On August 20, 2015, NJUCP proposed to decertify HFC because its review of documentation that you, the owner, provided showed that your personal net worth exceeded **REDACTED**, the personal net worth cap under §26.67(a). On August 27, 2015, you requested a hearing in order to document that your personal net worth was in fact no greater than **REDACTED**. You later requested additional time to compile your documentation prior to the scheduled hearing. On November 9, 2015, you submitted information concerning your net worth for the years 2011 through 2013 (the last being the year under review). Your 2013 calculation showed personal net worth of **REDACTED**,

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<sup>1</sup> §26.89(f)(1) states, "The Department affirms [the certifier's] decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

which exceeds the Regulation's limit. According to NJUCP, you mistakenly believed that your personal net worth was computed based on a three-year average. Decertification Letter at 1-2.

In further conversation with NJUCP, you stated that you were out of the country but intended to provide additional information for the appeal hearing not later than January 20, 2016. When you failed to contact NJUCP with such additional information by the stated date, NJUCP removed the firm's ACDBE certification by letter dated January 22, 2016. That letter notified you of your right to appeal the decertification decision to the Department.

On April 6, 2016, you sent a letter to the Department indicating your intent to appeal. The body of that letter states, in its entirety:

I have received the mail copy of the removal of [HFC] on January 29<sup>th</sup>. Respectfully I am appealing the removal of [HFC] and the associated findings. Counsel is preparing a formal response. After completion we shall forward to your attention. If you require additional information prior to the formal appeal document, please don't hesitate to contact me. Please acknowledge receipt. Thank you.

The Department received no further communication from you or HFC counsel.

## II. Applicable Authority

§23.31(a) states:

As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (*see* part 26, §26.81).

§26.73(c) states:

DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

§26.87 states in pertinent part:

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, *you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination.* The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based. (Emphasis added.)

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(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, *you must give the firm an opportunity for an informal hearing*, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. (Emphasis added.)

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(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) *Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;*

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) *The firm has failed to cooperate with you* (see §26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program.

The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

(Emphasis added.)

§26.89(c) states:

If you want to file an appeal, you *must* send a letter to the Department within 90 days of the date of the recipient's final decision, *including information and setting forth a full and*

*specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply.” (Emphasis added.)*

### III. Decision

Under §23.31(a), the certification provisions of Part 26 apply to ACDBE certification decisions and appeals of those decisions. The Department’s role on appeal is limited to determining whether substantial evidence in the administrative record supports the certifier’s decision and whether the decision was consistent with the substantive or procedural rules concerning certification. §§26.89(e) & (f). HFC’s appeal fails to argue that NJUCP made any reversible procedural or substantive errors when it decertified the firm. Accordingly, it fails to state a claim upon which relief can be granted under §26.89(c).

There being no “full and specific” allegation of error in fact or law under §26.89(c), we conclude that substantial evidence supports NJUCP’s decision to remove the firm’s DBE certification for failure to cooperate and for excess personal net worth. We affirm under §26.89(f)(1).

### IV. Conclusion

We affirm the decertification under §26.89(f)(1) because substantial evidence supports it and because the decision is consistent with applicable substantive or procedural provisions of the Regulation. *See, e.g.*, §26.87 (compliance with removal procedures where notice of intent issued specifying the reason for the proposed action, offer of a hearing, and, finally, removing certification when the required affidavit is not forthcoming).

HFC may reapply for certification after the requisite waiting period.

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: NJUCP