



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

February 13, 2019

Reference Number 18–0021

Leotis Sanders
Chief Civil Rights and Diversity Officer
DBE/Title VI/ADA/Public Agency Compliance/Diversity & Inclusion
Office of Civil Rights and Diversity Programs
New Jersey Transit Corporation
One Penn Plaza East
Newark, NJ 07105–2246

Dear Mr. Sanders:

This refers to the October 21, 2017 appeal filed by Local Food Concepts, LLC (Local Food) contesting the New Jersey Transit Corporation’s (NJT) August 9, 2017, decision to decertify the firm as a Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) under the rules of 49 C.F.R. Parts 23 and 26 (DBE and ACDBE Regulations). After considering the full administrative record, we reverse and remand the matter for additional proceedings.

Factual and Procedural Background

Local Food operates restaurants at airports. (Uniform Certification Application (UCA) at 5). Mr. Altaf Isani founded the firm in 2009 under the name Peppers Mexican Grill, LLC; but changed the name to Local Food in 2013.¹ Mr. Isani then transferred ownership of the firm to his daughter, Saniya Dhala (née Isani), and loaned her **REDACTED** to acquire ownership of the firm.²

In 2015, Ms. Dhala applied for and was granted certification as a DBE and ACDBE by the Port Authority of New York & New Jersey (PANYNJ). (Appeal Letter, Oct. 21, 2017, at 2; UCA at 7). On March 6, 2016, the PANYNJ received a complaint alleging that the firm was ineligible. On August 31, 2016, PANYNJ notified Local Food that it would be conducting an eligibility review due to new information that it had received regarding Local Food’s affiliation with other firms owned by Mr. Isani.

¹ See: New Jersey Department of Treasury, Division of Revenue Certificate of Formation for Peppers Mexican Grill, LLC (Aug. 14, 2009); Letter to the Port Authority of New York & New Jersey, (Aug. 28, 2013).

² Mr. Isani owns several other businesses in a similar line of work. See: ACDBE Participation Sheet on Local Food for Creative Food Group, LLC; UCA at 7, and Maryland Department of Transportation Notice of Review of Interstate Certification Application (June 23, 2015) at 4-8.

On May 3, 2017, PANYNJ issued a Notice of Intent (NOI) to decertify Local Food as a DBE and ACDBE based on the firm's failure to meet the continuing ownership requirements of the DBE and ACDBE Regulations and its alleged "affiliation" with non DBE/ACDBE firms. After a June 15, 2017, hearing before a panel comprising New Jersey Department of Transportation (NJDOT) and NJT personnel, on August 9, 2017, Local Food was decertified as a DBE/ACDBE (Removal Letter, Aug. 9, 2017 at 2). On August 9, 2017, NJT sent Local Food a notice of its decision to remove DBE and ACDBE certifications. *Id.*

Local Food filed an appeal of NJT's decision to remove its DBE and ACDBE certifications on October 21, 2017. After receiving the firm's appeal, the Department per §26.89(d) of the DBE and ACDBE Regulations, requested NJT's complete administrative record on November 27, 2017. The record we received, however, did not contain a hearing transcript. The Department contacted PANYNJ via email on June 26, 2018, to request a hearing transcript; but on that same day, PANYNJ responded that there was no transcript of the decertification hearing. (Emails to PANYNJ, June 26, 2018).

Decision

1. In a decertification proceeding to remove a certified DBE's eligibility, the DBE is afforded the procedural protections set forth in §§26.87(b), (d), (e), (f), and (g). These requirements include, among others, that the certifier: send the firm a written notice as described in §26.87(b), explaining the grounds for its proposal to decertify and citing specific evidence in support; apprise the firm in that notice of its §26.87(d) right to a state-level hearing to respond to the stated reasons; ensure that the decision maker in such a proceeding is both knowledgeable about the program and independent of the office proposing to decertify as stated in §26.87(e); base the decision to decertify on at least one of the grounds set forth in §26.87(f); and provide the firm with a notice of decision pursuant to §26.87(g) after reaching a decision regarding the firm's eligibility for DBE and ACDBE certification.

The notice procedures of §26.87(b) and (d) were followed in this instance and it appears a state-level hearing was held by an independent agency (NJ Transit). However, §26.87(d)(2) of the DBE and ACDBE Regulations requires a certifier to maintain a complete record of a decertification hearing, and, if there is an appeal of a decertification decision, to provide a transcript of the hearing to the Department. The §26.87(d)(2) transcript requirement is mandatory; here, NJT failed to provide a transcript. NJT specifically states in its August 9, 2017, decertification letter that it reviewed the certification record *and the information provided during and after the hearing*. Without a transcript of the hearing (and the information provided "after the hearing,") we do not have a sufficient and complete record to enable us to properly determine whether PANYNJ (a certifying partner of the New Jersey UCP), met its burden of proof to decertify Local Food.³ Because NJT's decision to decertify Local Food was inconsistent with the procedural requirements of the DBE and ACDBE Regulations, we reverse that decision and remand the matter to the NJ UCP to augment the record and to conduct a proceeding that is

³ The UCP failed to produce a timely transcript of the hearing that is required to create a *complete* administrative record. We remind the UCP that it is obliged under the DBE and ACDBE Regulations to produce a *written transcript* within 20 days of its notice of a firm's decertification appeal. See §26.87(d)(2) (transcript requirement).

consistent with the substantive and procedural requirements of the DBE and ACDBE Regulations.

2. Based on the record, incomplete as it is, it appears the UCP had reasonable cause to believe that Local Food is not eligible for continued certification. However, without a complete record, we decline to make a final determination at this time. Upon remand, the UCP shall reinitiate and conduct a removal process that conforms with all applicable procedural requirements for removal of a certified firm's DBE eligibility under all applicable DBE and ACDBE Regulations, including the §26.87 provisions identified above.

a. The UCP argues, in both the NOI and final removal decision, that Ms. Dhala does not meet the ownership requirements of §26.69(c) and (h) because in its view, she received her ownership interests as a gift from Mr. Isani, who is involved in the same or similar line of business and is no longer considered economically disadvantaged per the DBE and ACDBE Regulations. Without a hearing transcript and complete record, we do not opine now whether the circumstances of the firm's transfer require a presumption that Ms. Dhala does not own the firm. Nevertheless, it is apparent at least in the UCP's NOI and final decision that §26.69(h)(2) may not have been considered. Both the NOI and final decision only partially quote §26.69(h), and do not mention in any way whether Ms. Dhala failed to overcome the presumption that the gift should not be counted.⁴ This part of the analysis is not optional. If a certifier determines that there is a presumption, under §26.69(h)(1), that the socially and economically disadvantaged owner does not own the firm, it must also consider whether or not a firm's owner has rebutted the presumption that he or she does not own the firm. This aspect of the case may have been explored at the hearing; however, without a transcript, this cannot be determined.⁵

b. Similarly, the UCP alleges that Local Food is affiliated with Creative Foods Group, LLC, based on an "identify of interest" theory; however, it does not allege, explain, or make any determination that the firm exceeded the small business size standard. Affiliation, by itself, is not a cause for denying or removing DBE or ACDBE certification; the concept is a business size

⁴ The full text of §26.69(h), the provision that addresses this aspect of ownership, states:

(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is— (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm; (ii) Involved in the same or a similar line of business; or (iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) *To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and (ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.* (Emphasis added)

⁵ There are other aspects of this appeal that are unclear on the ownership issue. The UCP states that Ms. Dhala "provided proof" that her father's loan to her was repaid and that she stated in a June 19, 2017 letter that it was paid using business profits. Yet, the UCP quotes Ms. Dhala's earlier statement from September 2016 that there were no payments and the monies were a gift. This issue needs to be reconciled.

concern—meaning the analysis regarding whether the alleged affiliation is proper must be based on Local Food’s gross receipts aggregated with those of its affiliates.⁶ There is a vague reference in the NOI that the UCP removed the ACDBE certification of Mr. Isani’s other firms, Five Brothers and Sister Farmer’s Market, Inc. but it is unclear if this was due to Mr. Isani exceeding the personal net worth cap or because his firms exceeded the size standard. The NOI and final decisions do not address Local Food’s gross receipts and it is impossible to tell whether this was explored in detail at the hearing because of the absence of a transcript.

Conclusion

In summary, we reverse the UCP’s decision as inconsistent with the procedural requirements of the DBE and ACDBE Regulations and remand the matter to the UCP per §26.89(f)(4) to re-initiate decertification proceedings, consistent with § 26.87 and all other applicable provisions of the DBE and ACDBE Regulations, if it continues to believe Local Food is no longer eligible for certification. Within **45 days** of this letter, the UCP is directed to consider Ms. Dhala’s arguments on appeal, the UCP’s previous findings and the record as a whole, and properly calculate the firm’s gross receipts (and its affiliates, if appropriate). The UCP is permitted during this timeframe to supplement its record, make reasonable requests to the firm for information directly relevant to the issues raised, and provide a reasonable time for the firm to respond.

If the UCP determines that Local Foods should retain its certification, then no further action is necessary. If not, the UCP must issue a new Notice of Intent to decertify letter that conforms with the guidance above, and properly follows all §26.87 decertification requirements, which are summarized on page 2 of this decision.⁷

This determination is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: Local Food Concepts, LLC

⁶ The term affiliation is defined in §§23.3 and 26.5, in the ACDBE and DBE programs, respectively. Recipients are to make business size determinations using the rules found in §§23.3, 23.33, and 26.65.

⁷ Under §26.87(d)(1) and (2), at any hearing in which a firm responds to the reasons proffered by the recipient to remove its eligibility, the recipient bears the burden of proof and must provide a transcript of the proceedings in the event of an appeal to the Department.