

(iv) The certifier has the burden of proving its case by a preponderance of the evidence. It must issue an NOD within 30 days of the suspension notice or lift the suspension. Any NOD must rely only on the reason given in the summary suspension notice.

(v) The DBE's failure to provide information contesting the suspension does not impair the certifier's ability to prove its case. That is, the uncontested evidence upon which the certifier relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.

(5) *Duration.* The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the certifier has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it must lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

(e) *Recourse—(1) Appeal.* The DBE may appeal a final decision under paragraph (d)(4)(iv) of this section, as provided in § 26.89(a), but may *not* appeal the suspension itself, unless paragraph (e)(2) of this section applies.

(2) *Enforcement.* (i) The DBE may immediately petition the Department for an order to vacate a certifier's action if:

(A) The certifier sends a second elective SSN within 12 months, or

(B) Cites multiple reasons in an elective SSN contrary to paragraph (d)(1)(i) of this section.

(ii) The DBE may also petition to the Department for an order to compel if the certifier fails to act within the time specified in paragraph (d)(5) of this section.

(3) In either case, the DBE must:

(i) Email the request under the subject line, "REQUEST FOR ENFORCEMENT ORDER" in all caps;

(ii) Limit the request to a one-page explanation that includes:

(A) The certifier's name and the suspension dates;

(B) Contact information for the certifier, the DBE, and the DBE's SEDO(s); and

(C) The general nature and date of the firm's response, if any, to the second suspension notice; and

(D) The suspension notice(s).

[89 FR 24977, Apr. 9, 2024; 89 FR 55090, July 3, 2024]

§ 26.89 Appeals to the Department.

(a)(1) Applicants and decertified firms may appeal adverse NODs to the Department.

(2) An ineligibility complainant or applicable Operating Administration (the latter by the terms of § 26.87(c)) may appeal to the Department if the certifier does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.

(3) Appellants must email appeals as directed in the certifier's decision letter within 45 days of the date of the letter. The appeal must at a minimum include a narrative that explains fully and specifically why the firm believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions the certifier misapplied.

(4) The certifier's decision remains in effect until the Department resolves the appeal or the certifier reverses itself.

(b) When it receives an appeal, the Department requests a copy of the certifier's complete administrative record including a video, audio, or transcript of any hearing, which the certifier must provide within 20 days of the Department's request. The Department may extend this time period when the certifier demonstrates good cause. The certifier must ensure that the administrative record is well organized, indexed, and paginated and the certifier must provide the appellant a copy of any supplemental information it provides to DOT.

(c)(1) The Department may accept an untimely or incomplete appeal if it determines, in its sole discretion, that doing so is in the interest of justice.

(2) The Department may dismiss non-compliant or frivolous appeals without further proceedings.

(d) The Department will avail itself of whatever remedies for noncompliance it considers appropriate.

(e) The Department decides only the issue(s) presented on appeal. It does not conduct a *de novo* review of the

§ 26.91

matter, assess all eligibility requirements, or hold hearings. It considers the administrative record and any additional information that it considers relevant.

(f)(1) The Department affirms the certifier's decision if it determines that the decision is consistent with applicable rules and supported by substantial evidence.

(2) The Department reverses decisions that do not meet the standard in paragraph (f)(1) of this section.

(3) The Department need not reverse if an error or omission did not result in fundamental unfairness or undue prejudice.

(4) The Department may remand the case with instructions for further action. When the Department specifies further actions, the certifier must take them without delay.

(5) The Department generally does not uphold the certifier's decision based on grounds not specified in its decision.

(6) The Department resolves appeals on the basis of facts demonstrated, and evidence presented, at the time of the certifier's decision.

(7) The Department may summarily dismiss an appeal. Reasons for doing so include, but are not limited to, non-compliance, abuse of process, appellant or certifier request, and failure to state a claim upon which relief can be granted.

(g) The Department does not issue advisory opinions.

(h) All decisions described in paragraph (f) of this section are administratively final unless they say otherwise.

(i) DOCR posts final decisions to its website, available at <https://www.transportation.gov/DBEDecisions>.

[89 FR 24978, Apr. 9, 2024]

§ 26.91 What actions do certifiers take following DOT certification appeal decisions?

(a) If you are the certifier from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other certifiers.

(b) If you are a certifier to which a DOT determination under § 26.89 is ap-

49 CFR Subtitle A (10–1–24 Edition)

plicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(j) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other certifiers with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such certifiers must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other certifiers must take the DOT action into account in any certification action involving the firm. However, other certifiers are not required to certify the firm based on the DOT decision.

[64 FR 5126, Feb. 2, 1999, as amended at 89 FR 24979, Apr. 9, 2024]