

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
STATE OF VERMONT, DEPARTMENT)
FOR CHILDREN AND FAMILIES,) FNS Docket No. 18-0060
)
Petitioner.)

REC'D - USDA/OALJ/OHC
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DECISION AND ORDER DISMISSING CASE

Appearances:

Heidi Morea, Esq., Legal and Policy Advisor, Vermont Department for Children and Families, for Petitioner, State of Vermont, Department for Children and Families (“DCF”); and

Michael Gurwitz, Esq., Office of the General Counsel, United States Department of Agriculture, Washington D.C., for Respondent, Food and Nutrition Service (“FNS”).

Before Chief Administrative Law Judge, Channing D. Strother.

BACKGROUND AND SUMMARY OF DECISION

This case was initiated by Petitioner,¹ State of Vermont, Department for Children and Families (“DCF”) by a Notice of Appeal filed on July 9, 2018, and Appeal of Assigned Payment Error Rate for Federal Fiscal Year 2017 (“Appeal Petition”) along with the Declaration of Heidi Moreau in Support of Appeal of Assigned Payment Error Rate (“Declaration of Moreau”) filed on August 27, 2018. Specifically, Petitioner DCF filed the Appeal Petition pursuant to 7 C.F.R. § 275.23(b)(2)(ii) requesting “relief from the assignment of a quality control payment error rate of 7.68 percent control imposed by” Respondent Food and Nutrition Service (“FNS”) under the

¹ Precedent indicates “Petitioner” and “Respondent” are the more proper designations of the respective parties in this type of proceeding, rather than “Appellant” and “Appellee.” See *Dep’t of Public Health and Social Service, Guam*, 75 Agric. Dec. 163, 163 n. 1 (U.S.D.A. 2016) (stating that the “terms ‘Appellant’ and ‘Appellee’ refer to appeals of initial decisions and orders by USDA Administrative Law Judges to the Judicial Officer for the Secretary of the United States Department of Agriculture.”).

Supplemental Nutrition Assistance Program (“SNAP”) “by letter dated June 28, 2018 and received by DCF on June 28, 2018.” Appeal Petition at 3.

In response, Respondent FNS filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Motion to Dismiss”) on October 17, 2018. In summary, Respondent FNS moved to dismiss for lack of subject matter jurisdiction, contending that FNS “did not establish a liability amount for Vermont” and therefore, pursuant to the Food and Nutrition Act of 2008 (“FNA”), as amended (7 U.S.C. 2011-2036), specifically 7 U.S.C. § 2025(c)(7)(B), “the Secretary lacks subject matter jurisdiction to hear this appeal.” *See* Motion to Dismiss, 7-9.

Petitioner DCF filed a Memorandum of Law in Opposition to Appellee’s Motion to Dismiss (“Response”) on October 29, 2018, contending, at 2, that the “SNAP statute and regulations do not prohibit appeals of either the USDA’s decision that a state has failed to meet quality control reporting requirements, or the methodology used to calculate the assigned payment error rate” and that “[e]ven if there were no statutory or regulatory basis to appeal the methodology used to calculate the assigned payment error rate, the USDA is equitably estopped from asserting lack of subject matter jurisdiction on this issue.” As discussed herein, Petitioner DCF’s contention is based on certain communications from FNS to DCF that included statements that DCF had certain rights to appeal FNS’s determinations below. FNS now states those statements were incorrect statements of the law.

Based on careful review of the statutes and regulations governing administrative and judicial review of quality control payment error rates under the SNAP, as well as the undisputed facts before me, I find that subject matter jurisdiction for USDA administrative law judge review of 1) determination of the payment error rate of a state agency, 2) whether the payment error rate exceeds 105 percent of the national performance measure for payment error rates (i.e. whether the payment error rate is “excessive”), and 3) the assessment of an error rate by FNS

assigning a payment error rate to a state under 7 C.F.R. § 275.23(b)(2)(ii), **is not triggered** unless and until a claim or liability amount for the fiscal year has been established in accordance with 7 U.S.C. § 2025(c)(1)(C). Here, FY 2017 is the first year that an excessive payment error rate has been assigned to Petitioner DCF. As a result, there has not been a liability amount established against Petitioner DCF for FY 2017. In these circumstances, as Respondent FNS contends, the applicable statutes and regulations are clear and express that I have no authority to review this case. The FNS earlier misstatements of DCF's rights to appeal FNS's determinations cannot create review authority where none exists. This case is therefore DISMISSED, as discussed herein.

BACKGROUND OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM AND QUALITY CONTROL MEASURES

The instant matter falls under the Food and Nutrition Act of 2008 ("FNA") (7 U.S.C. §§ 2011 *et seq.*) and involves the Respondent FNS's, administration of the Supplemental Nutrition Assistance Program ("SNAP"). SNAP is a federal aid program that provides nutrition benefits with the mission "[t]o alleviate . . . hunger and malnutrition" among Americans by allowing "low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. § 2011. The FNA authorizes the Secretary of Agriculture to pay each State² fifty percent

² Throughout the FNA and the regulations promulgated thereunder, "State," "State Agency," and "State or territory" are used interchangeably. Hereafter, references to "State" will be deemed to include "State Agency" and "territory" or "territories." *See* 7 U.S.C. § 2012(r)-(s).

(50%) of all administrative costs associated with the administration of the program, while the federal government funds one-hundred percent (100%) of the cost of the SNAP benefits.³

In administering the SNAP, the Secretary, through FNS, is charged with carrying out a quality control (“QC”) system that “enhances payment accuracy and improves administration by establishing fiscal incentives that require State agencies with high payment error rates to share in the cost of payment error.”⁴ The SNAP QC system entails FNS review of data reported by the State, and/or data compiled by FNS where State reporting is found to be insufficient, in order to make determinations as to the accuracy of State eligibility and benefit determinations, and where improper payments (underpayment or overpayment)⁵ to households occurred. The SNAP QC system also establishes a process for the establishment and payment of a “liability amount” for a State with high payment error rates to share in the cost of those payment errors.⁶

The review process begins when FNS conducts an annual validation review of the State’s monthly collection of sample cases in which the State identified payment errors.⁷ After identifying cases in which FNS disagrees with the State’s conclusions about specific cases, FNS

³ 7 U.S.C. § 2025(a).

⁴ 7 U.S.C. § 2025(c)(1)(A)(i).

⁵ Improper payments can occur in three ways: an over- or under-payment to an eligible recipient, a payment made to a recipient incorrectly determined to be eligible, and a payment that is insufficiently (including not at all) documented. *See* 7 U.S.C. § 2025(c)(2)(B).

⁶ *See Quality Control Error Rates*, <https://www.fns.usda.gov/snap/quality-control> (last visited May 8, 2019).

⁷ 7 C.F.R. § 275.2.

is to share the results of its review with the State and provide it an opportunity to contest FNS's findings.⁸

States may request binding arbitration of such an FNS quality control validation review if the State contests FNS findings.⁹

Thereafter, FNS is to determine the State's payment error rates based on "(1) Reports submitted to FNS by the State; (2) FNS reviews of State agency operations; (3) State performance reporting systems and corrective action efforts; and (4) Other available information such as Federal audits and investigations, civil rights reviews, administrative cost data, complaints, and any pending litigation."¹⁰ FNS will typically "validate each State agency's estimated payment error rate by re-reviewing the State agency's active case sample and ensuring that its sampling, estimation, and data management procedures are correct" according to the regulatory formula.¹¹

However, where FNS determines that a State has provided inadequate or inaccurate data, or has a deficient QC data management system, and where FNS cannot correct the State's deficiency, FNS may assign the State a payment error rate based on "the best information available."¹²

A State is deemed to have an "excessive payment error rate" for the first full fiscal year ("FFY") in which FNS determines that a 95 percent (95%) statistical probability exists that the State's payment error rate exceeds 105 percent (105%) of the national performance measure

⁸ 7 C.F.R. §§ 275.3(c); 275.14(b).

⁹ 7 C.F.R. § 275.3(c)(4).

¹⁰ 7 C.F.R. § 275.23(a).

¹¹ *See* 7 C.F.R. § 275.23(b)(2).

¹² 7 C.F.R. § 275.23(b)(2)(ii).

(“NPM”). When FNS determines an excessive payment error rate for a first FFY, whether the payment error rate is assigned or based on the State’s QC review reports, no liability amount is assigned. Rather the State is put on notice that if its performance error rate exceeds the NPM in the immediately subsequent FFY, FNS will establish a liability amount against the state for the subsequent FFY.¹³ A liability amount is to be established when, for the second or subsequent FFY, FNS determines there is an excessive payment error rate.¹⁴ In the current situation, FNS assigned Vermont DCF an excessive payment error rate for FFY 2017 and determined that the assigned excessive payment error rate was the first year that “places the State in a position of potential future liability.”¹⁵ Thus, under the FNA and implementing regulations, FNS did not and could not establish a liability amount for FFY 2017.

APPLICABLE STATUTORY PROVISIONS

The FNA, and the regulations promulgated by the Secretary thereunder, provide the following authority for administrative and judicial review of State appeals regarding financial claim or liability amounts assessed against a State:

(7) Administrative and judicial review

(A) In general

Except as provided in subparagraphs (B) and (C), **if the Secretary asserts a financial claim against or establishes a liability amount with respect to a State agency under paragraph (1), the State may seek administrative and judicial review** of the action pursuant to section 2023 of this title.

(B) Determination of payment error rate

With respect to any fiscal year, a determination of the payment error rate of a State agency or a determination whether the

¹³ 7 U.S.C. § 2025(c)(1)(C); 7 C.F.R. 275.23(c).

¹⁴ 7 U.S.C. §§ 2025(c)(1)(C)-(D).

¹⁵ June 28, 2018 FNS Letter at 2 (Notice of Appeal at 4).

payment error rate exceeds 105 percent of the national performance measure for payment error rates **shall be subject to administrative or judicial review only if the Secretary establishes a liability amount with respect to the fiscal year under paragraph (1)(C).**

(C) Authority of Secretary with respect to liability amount

An action by the Secretary under subparagraph (D) or (F)(iii) of paragraph (1) **shall not be subject to administrative or judicial review.**

7 U.S.C. § 2025(c)(7) (emphasis added).

Right to appeal payment error rate liability. Determination of a State agency's **payment error rate** or whether that payment error rate exceeds 105 percent of the national performance measure **shall be subject to administrative or judicial review only if a liability amount is established for that fiscal year.** Procedures for good cause appeals of excessive payment error rates are addressed in paragraph (f) of this section. **The established national performance measure is not subject to administrative or judicial appeal, nor is any prior fiscal year payment error rate subject to appeal as part of the appeal of a later fiscal year's liability amount.** However, **State agencies may address matters related to good cause in an immediately prior fiscal year that impacted the fiscal year for which a liability amount has been established. The State agency will need to address how year 2 was impacted by the event(s) in the prior year.**

7 C.F.R. § 275.23(d)(3) (emphasis added).

If FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system, FNS will correct the State agency's payment and negative case error rates based upon a correction to that aspect of the State agency's QC system which is deficient. **If FNS cannot accurately correct the State agency's deficiency, FNS will assign the State agency a payment error rate or negative case error rate based upon the best information available.** After consultation with the State agency, the assigned payment error rate will then be used in the liability determination. After consultation with the State agency, the assigned negative case error rate will be the official State negative case error rate for any purpose. **State agencies shall have the right to appeal assessment of an error rate in this situation in accordance with the procedures of Part 283 of this chapter.**

7 C.F.R. § 275.23(b)(2)(ii) (emphasis added).

Good cause. When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, **the State agency may seek relief from liability claims that would otherwise be levied** under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. **State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ)** in accordance with the procedures established **under part 283** of this chapter.

7 C.F.R. § 275.23(f) (emphasis added).

The scope of the rules of practice for proceedings concerning “Appeals of Quality Control (“QC”) Claims”, 7 C.F.R. part 283, is:

Scope and applicability.

The rules of practice in this part, shall be applicable to appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year (“FY”) 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).

7 C.F.R. §283.2.

The FNA also provides the following standard of review:

(8) The Secretary may not limit the authority of such judges presiding over determinations regarding claims made pursuant to section 2025(c) of this title.

7 U.S.C. 2023(a)(8).

(H) In considering a claim or liability amount under this paragraph, the administrative law judge shall consider all grounds for denying the claim or liability amount, in whole or in part, including the contention of a State agency that the claim or liability amount should be waived, in whole or in part, for good cause.

7 U.S.C. 2025(c)(8)(H).

The FNA provides a “two-year rule” for establishing a liability amount for States whose payment error rate has exceeded the NPM:

With respect to fiscal year 2004 and any fiscal year thereafter **for which the Secretary determines that, for the second or subsequent consecutive fiscal year**, a 95 percent statistical probability exists that the payment error rate of a State agency exceeds 105 percent of the national performance measure for payment error rates announced under paragraph (6), **the Secretary shall establish an amount for which the State agency may be liable** (referred to in this paragraph as the “liability amount”).

7 U.S.C. § 2025(c)(1)(C) (emphasis added).

DISCUSSION

Petitioner DCF’s Notice of Appeal stated, at 1, that DCF was “appealing the assignment of a 7.68 percent payment error rate as calculated by FNS . . . assigned . . . after a Quality Control Integrity Review cited findings of . . . noncompliance.” In the Notice of Appeal, at 1, Petitioner DCF also stated that the letter from FNS, attached to the Notice of Appeal, notified DCF of the assigned payment error rate and “was signed by a designee of the appellant [FNS] on June 28, 2018 and received by the appellant via email on June 28, 2018.”

The June 28, 2018 FNS Letter, attached to Petitioner DCF’s Notice of Appeal at 4, stated in pertinent part (emphasis added):

FNCS has determined that there is a 95 percent statistical probability that Vermont’s assigned payment error rate of 7.68 percent exceeds the 105 percent of the national performance measure for FY 2017. Therefore, **FY 2017 is the first year that Vermont’s excessive payment error rate places the State in a position of potential future liability**. No liability amount is being established for this FY. However, if there is also a 95 percent statistical probability that Vermont’s payment error rate exceeds 105 percent of the national performance measure for FY 2018 and exceeds 6 percent, a liability amount may be established for your State for FY 2018. In such an event, Vermont will be able to appeal the FY 2018 determination and its associated liability amount. **FNS’ assignment of a FY 2017 error rate can be administratively appealed. Such an appeal is limited to the issue of whether a rational basis exists for the methodology**

used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate.

Respondent FNS's Motion to Dismiss, at 6, states that the language in the June 28, 2018 FNS Letter, which states that the "FY 2017 error can be administratively appealed," was "standard boilerplate for all states receiving an assigned payment error rate" and "was an incorrect statement of applicable law." Respondent FNS contends, *id.* at 11, that although FNS "concedes that the letter of June 28, 2018, contained a statement erroneously advising all states receiving notices of assigned payment error rates . . . that they could file an appeal limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate" the statement in the June 28, 2018 FNS Letter was "contrary to the statute and regulation on administrative appeals of quality control claims" and the "statement does not—cannot—waive the statutory and regulatory authority."

In the Motion to Dismiss, Respondent FNS contends that 1) there is no statutory authority for this appeal, 2) there is no regulatory authority for this appeal, and 3) there can be no waiver of, nor consent to, subject matter jurisdiction.

In response, Petitioner DCF contends that there is subject matter jurisdiction to hear this appeal because 1) administrative and judicial review of the Secretary's determination that a State has failed to meet established reporting requirements is not prohibited by 7 U.S.C. § 2025; 2) administrative and judicial review of the methodology used to calculate a State's assigned payment error rate is not prohibited by 7 U.S.C. § 2025; and 3) Respondent FNS is equitably estopped from asserting lack of subject matter jurisdiction.

Legal Standard of Review

Respondent FNS's Motion to Dismiss contends that the Secretary, and in particular the administrative law judge presiding over this case, lacks subject matter jurisdiction to review the

payment error rate assigned by FNS under the FNA.¹⁶ By analogy to the district courts, “[t]he party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).¹⁷ “In determining whether jurisdiction exists, the district court is to regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).¹⁸ “The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Id.*¹⁹

USDA Administrative Law Judge Jurisdiction Under the FNA

USDA administrative law judges (“ALJs”) provide fora of limited jurisdiction. This jurisdiction is limited to that provided by statute and regulation.²⁰ Congress expressly provided statutorily for administrative and judicial review of financial claims, liability amounts, determination of State payment error rates, and determination of whether a State’s payment error rate is excessive in the FNA,²¹ but expressly restricted administrative or judicial review of financial claims, liability amounts, determination of State payment error rates, and determination of whether a State’s payment error rate is excessive to instances where the Secretary has

¹⁶ 7 U.S.C. § 2025(c)(7)(B).

¹⁷ Citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.1989).

¹⁸ Citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pacific Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987).

¹⁹ Citing *Trentacosta*, 813 F.2d at 1558.

²⁰ 5 U.S.C. §§ 554(a); 556(b)(3).

²¹ 7 U.S.C. § 2025(c)(7).

established a claim or liability amount “with respect to the fiscal year” pursuant to 7 U.S.C. § 2025(c)(1)(C).²² The Secretary of Agriculture delegates authority to administrative law judges (“ALJs”) pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 556(b)(3), to hold hearings and perform related duties in proceedings under the FNA.²³ An ALJ’s jurisdiction is expressly limited to adjudicatory authority conferred by Congress.²⁴

Respondent FNS contends, Motion to Dismiss at 9, that the FNA mandates an unambiguous “statutory prerequisite for filing administrative and judicial appeals—a liability

²² 7 U.S.C. § 2025(c)(7)(B).

²³ See 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), 283.2 (limiting the scope and applicability of pt. 283 to “appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year (“FY”) 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).”).

²⁴ 5 U.S.C. §§ 554(a); 556(b)(3). See also 5 U.S.C. § 706(2)(C) (a reviewing court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”); *Corey Lea, Corey Lea Inc., Start Your Dream Inc., & Cowtown Found., Inc.*, 70 Agric. Dec. 384, 390 (U.S.D.A. 2011) (“Petitioners refer to the APA as the authorizing statute for OALJ’s jurisdiction, but fail to state with any specificity how the APA vests OALJ with statutory or regulatory jurisdiction. The APA provides a framework for agencies to follow to assure due process in adjudicatory proceedings, but the statute allows broad latitude to agencies to establish their own procedures within that framework. See, 5 U.S.C. § 554. The right to a hearing under the APA exists only so long as another statute provides for such right. 5 U.S.C. § 551 et seq. USDA has promulgated regulations governing adjudications before OALJ where prevailing statutes require a hearing on the record. Petitioners’ request for a hearing does not involve any of those statutes, which are enumerated at 7 C.F.R. § 1.131. Absent specific statutory authority, the APA does not vest OALJ with jurisdiction to hold a hearing in Petitioners’ complaints.”); *Burlington N. R.R. Co.-Order for Just Comp.-Nat’l R.R. Passenger Corp. (Amtrak)*, 7 I.C.C.2d 74, 77 (I.C.C. 1990) (“The Commission’s general powers to issue declaratory orders to eliminate controversy among parties under the APA and its inherent authority to issue declarations concerning matters within its regulatory jurisdiction cannot, as suggested by petitioner, be resorted to override an express Congressional withholding of jurisdiction to resolve the controversy at issue.”); *Califano v. Sanders*, 430 U.S. 99, 107 (1977), (Where Respondent contended that Section 10 of the APA (5 U.S.C. §§ 701-706) conferred judicial jurisdiction, the Supreme Court held it was the statute (28 U.S.C. s 1331(a)) and not the APA that confers subject matter jurisdiction, stating at 107 “Congress’ explicit entry into the jurisdictional area counsels against our reading the APA as an implied jurisdictional grant designed solely to fill such an interstitial gap” and concluding that

amount” and that the evidence, specifically the June 28, 2018 FNS Letter, demonstrates that Petitioner DCF “has not met this prerequisite and consequently, the Secretary lacks subject matter jurisdiction to hear this appeal.” I agree with Respondent FNS that the FNA unambiguously requires FNS to have established a claim or liability amount against a State before FNS’s determination of an error rate or FNS’s determination of an excessive error rate can be administratively or judicially reviewed.²⁵

Petitioner DCF, in its Response at 3, states that the “absence of statutory language allowing actions against the federal government alone is not grounds for dismissal.”²⁶ First, Petitioner DCF contends, *id.* at 4, that “[t]itle 7 U.S.C. § 2025 does not prohibit administrative or judicial review of the USDA Secretary’s decision that a State has failed to meet established reporting requirements.” Petitioner DCF states, *id.*, that Congress “defined three specific areas that are not subject to administrative or judicial review: 7 U.S.C. §§ 2025(c)(6)(D), (c)(7)(C), and (d)(4)” but that “[u]nlike these sections, § 2025(c)(4) does not contain a provision barring administrative review or judicial review.”

Second, Petitioner DCF contends that “[t]itle 7 U.S.C. § 2025 does not prohibit administrative or judicial review of the methodology used to calculate a State’s assigned payment error rate.” *Id.* Petitioner DCF differentiates appeal of the methodology used to calculate a State’s assigned payment error rate from 7 U.S.C. § 2025(c)(7)(B), where appeal of

“the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.”).

²⁵ 7 U.S.C. § 2025(c)(7)(B); 7 C.F.R. § 275.23(d)(3).

²⁶ Citing *Richlin Security Service Co. v. Chenoff*, 553 U.S. 571, 589 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474,493 (2008); *United States v. White Mountain Apache Tribe*, 537 T.J.S. 465, 472 (2003); *United States v. Navajo Nation*, 537 U.S. 488, 503, 123 (2003); *Scarborough v. Principi*, 541 U.S. 401, 420 (2004).

the assignment of a payment error rate is restricted from being administratively or judicially reviewed until a liability amount has been assessed.

Petitioner’s contention that administrative or judicial review of subject matter that is not expressly prohibited must be permitted is contrary to the canon of statutory construction applicable here—*expressio unius est exclusio alterius* (‘the expression of one thing is the exclusion of another’)—because Congress has specified instances where administrative or judicial review are authorized.²⁷ A USDA ALJ’s subject matter jurisdiction arises under statutory authority for administrative hearings and is derived with set procedure for such hearings from regulations promulgated by the Secretary thereunder.²⁸ Congress provides statutory authority to the Secretary to hear administrative appeals under the FNA.²⁹ The Secretary, as previously mentioned, has delegated authority to ALJs pursuant to the APA³⁰ to hold hearings and perform related duties in proceedings under the FNA.³¹

The “rules of practice” promulgated by the Secretary under the FNA for “appeals of Quality Control (QC) Claims,” 7 C.F.R. pt. 283, are limited to addressing “appeals by State agencies of Food and Nutrition Service quality control (QC) claims for Fiscal Year (“FY”) 1986 and subsequent fiscal years pursuant to sections 14(a) and 16(c) of the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2023(a) and 2025(c).” Part 283 (7 C.F.R. pt. 283), is divided into

²⁷ *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. 269, 270 (1871) (“When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.”).

²⁸ See 5 U.S.C. §§ 556(b)(3), 554(a), 706(2)(C).

²⁹ See 7 U.S.C. § 2025(c)(7).

³⁰ 5 U.S.C. § 556(b)(3).

³¹ See 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), pt. 283.

two limited types of appeals: “Subpart B – Appeals of QC Claims of \$50,000 or More”³² and “Subpart C – Summary Procedure for Appeals of QC Claims of Less Than \$50,000.”³³

It is noteworthy that the “usual” procedural rules, the “Rules of Practice Governing Formal Adjudicatory Administrative Proceeding Instituted by the Secretary” (“Standard Rules of Practice”), 7 C.F.R. §§ 1.130-.151, do not apply to any hearings under the FNA.³⁴

While I agree with Petitioner DCF that administrative and judicial review of the Secretary’s decision that a State has failed to meet established reporting requirements and of the methodology used to calculate a State’s assigned payment error rate is not expressly prohibited by the FNA, Congress has expressly limited administrative or judicial review, and in turn the Secretary has limited delegated adjudicatory authority to USDA ALJs, to instances where a claim or liability amount has been assessed.

The regulations are express that USDA ALJ jurisdiction to preside over appeals of assigned error rates in “situations,” such as the present matter, where “FNS determines that a State agency has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system” and where “FNS cannot correct the State agency’s deficiency,” resulting in FNS assigning “the State agency a payment error rate or negative case error rate based upon the best information available” must be conducted “in accordance with the procedures of Part 283.” The scope of Part 283³⁵ consists of “sections 14(a) and 16(c)” of the FNA, 7 U.S.C. § 2023(a)

³² 7 C.F.R. § 283.4-.23.

³³ 7 C.F.R. § 283.24-.32.

³⁴ *See* 7 C.F.R. § 1.131.

³⁵ 7 C.F.R. § 283.2.

and 2025(c). Therefore, Part 283 is necessarily limited to appeals where a claim or liability amount is assessed.

I acknowledge Petitioner DCF's efforts to differentiate its challenge to the methodology used by FNS "to calculate the assigned payment error rate" as opposed to challenging the "mere fact of the assignment of payment error rate." However, there exists no statutory or regulatory authority for a USDA ALJ to preside over a hearing of either such challenge unless a claim or liability amount has been established for the FFY.

The statute and regulations provide that once a claim or liability amount has been established for an FFY, "the administrative law judge shall consider all grounds for denying the claim or liability amount, in whole or in part, including the contention of a State agency that the claim or liability amount should be waived, in whole or in part, for good cause."³⁶ Therefore, once a claim or liability amount is established for an FFY, FNS's decision that a State has failed to meet established reporting requirements, as well as review of the methodology used to calculate a State's assigned payment error rate, may be considered pursuant to 7 C.F.R. § 275.23(b)(2)(ii).³⁷ Thus, the statute and regulations do not entirely preclude ALJ review of contentions that a State has failed to meet established reporting requirements or of the methodology used to calculate a State's assigned payment error rate for an FFY for which no

³⁶ 7 U.S.C. § 2025(c)(8)(H). "Good Cause" contentions are defined at 7 U.S.C. § 2025(c)(9) and 7 C.F.R. § 275.23(f),

³⁷ However, note that 7 C.F.R. § 275.23(d)(3) expressly states "The established national performance measure is not subject to administrative or judicial appeal, nor is any prior fiscal year payment error rate subject to appeal as part of the appeal of a later fiscal year's liability amount. However, State agencies may address matters related to good cause in an immediately prior fiscal year that impacted the fiscal year for which a liability amount has been established."

liability amount has been assessed. However, the review is limited to situations where a liability amount has been established for the FFY.

I recognize that this finding does not address administrative review of an assigned excessive payment error rate that may negatively affect a State's ability to qualify for a "high performance bonus."³⁸ But subject matter jurisdiction for ALJ review cannot be presumed where Congress has not otherwise provided such by statute. I do note, however, that States have the opportunity to seek administrative review within FNS, or arbitration, of QC validation reviews.³⁹

Estoppel, Waiver, and Consent

Respondent FNS further contends, Motion to Dismiss at 11-12, that there can be no waiver of, or consent to, subject matter jurisdiction. Respondent FNS concedes, *id.* at 11, that the June 28, 2018 FNS Letter "contained a statement erroneously advising all States receiving notices of assigned payment error rates . . . that they could file an appeal limited to the issue of whether a rational basis exists for the methodology used by the Secretary of Agriculture to establish the State's FY 2017 assigned error rate." Respondent FNS contends, however, that the erroneous statement in the June 28, 2018 FNS Letter "does not—cannot—waive the statutory and regulatory authority."⁴⁰

Petitioner DCF, Response at 5, contends that Respondent FNS is equitably estopped from asserting lack of subject matter jurisdiction because FNS "has stated, in three separate, official

³⁸ See 7 U.S.C. § 2025(d); 7 C.F.R. § 275.24. As an additional note, review of the Secretary's determinations "whether, and in what amount, to award a performance bonus" is not subject to administrative or judicial review. 7 U.S.C. § 2025(d)(4).

³⁹ 7 C.F.R. §§ 275.3(c); 275.14(b).

⁴⁰ Citing *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999) ("A party may neither consent to nor waive federal subject matter jurisdiction."); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal

communications with [Petitioner], that [Respondent] could appeal the methodology used by the Secretary to establish the FFY 2017 assigned payment error rate” (citing Petitioner DCF’s Appeal, exhibits E, G, and J). Petitioner DCF contends, Response at 6, that “[t]he federal government cannot repeatedly represent that the right to an appeal exists and then later assert lack of subject matter jurisdiction by claiming that these representations were ‘standard boilerplate’ and ‘erroneous advice.’”⁴¹

In the instant case Petitioner DCF avers that it filed the instant Appeal Petition due to FNS’s erroneous advice, including advice of the Office of General Counsel (“OGC”), that an appeal is available “limited to the issue [of] whether a rational basis exists for the Secretary’s exercise of section 16(c)(4) of the Food and Nutrition Act of 2008.”⁴² However, while equitable estoppel is a defense that can, on limited occasion, be brought against the government for “affirmative misconduct,” *see Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir. 1990),⁴³ here FNS’s erroneous advice cannot rise to “affirmative misconduct” as Petitioner DCF is an entity “who deal[s] with the Government[,] [is] expected to know the law and may not rely on the conduct of Government agents contrary to law.” *Heckler v. Cmty. Health Servs. of Crawford*

consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court.”).

⁴¹ Citing *Oil Shale Corp v. Morton*, 370 F.Supp. 108, 126 (D. Colo. 1973) (“[S]ome forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement.”); *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) (“[T]he collateral estoppel doctrine can properly be applied in this situation where the erroneous advice was in the form of a crucial misstatement in an official decision . . . [A]dministrative regularity must sometimes yield to basic notions of fairness.”)

⁴² Response at 6, citing Appeal Petition, Exhibit J (internal quotations omitted).

⁴³ *See also Charleston Housing Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 739 (8th Cir. 2005).

Cty., Inc., 467 U.S. 51, 63 (1984).⁴⁴ Moreover, Petitioner DCF does not aver that its filing of this appeal based on FNS's erroneous advice caused it any cognizable harm. Petitioner DCF may claim it incurred the out-of-pocket cost of preparing, filing, and defending its Appeal Petition, but DCF does not contend that in doing so it forewent any alternative legal rights. Petitioner DCF simply never had a legal right to appeal in the manner it attempts to do. Jurisdiction for me to hear Petitioner's appeal does not exist.

FNS passed an erroneous statement of the law on to Petitioner DCF on multiple occasions. However, such erroneous advice does not and cannot create nor confer subject matter jurisdiction.⁴⁵ Therefore, Petitioner DCF's contention that Respondent FNS is equitably estopped from asserting lack of subject matter jurisdiction is rejected.

CONCLUSIONS OF LAW

- 1) The Secretary lacks subject matter jurisdiction for review of DCF's notice of appeal. 7 U.S.C. §2025(c)(7).
- 2) There is no subject matter jurisdiction for administrative review of the Secretary's decision that a State has failed to meet established reporting requirements, as well as review of the methodology used to calculate a State's assigned payment error rate, where

⁴⁴ *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 63 ("Justice Holmes wrote: 'Men must turn square corners when they deal with the Government.' *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money").

⁴⁵ *See supra* note 24. *See also Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

a claim or liability amount has not been established. 7 U.S.C. §2025(c)(7); 7 C.F.R. §§ 275.23(d)(3), 275.23(b)(2)(ii), part 283.

ORDER

WHEREFORE, as no liability amount has been established against Petitioner Vermont DCF for the fiscal year 2017, I find that I have no jurisdiction to hear DCF's Appeal Petition and, therefore, Docket No. 18-0060 is **DISMISSED**.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order.

Copies of this Decision and Order shall be served by the Hearing Clerk upon all parties.

Issued this 18th day of June 2019, in Washington, D.C.



Channing D. Strother
Chief Administrative Law Judge

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