

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: )  
)  
LOUISIANA DEPARTMENT OF )  
CHILDREN AND FAMILY SERVICES ) FNS Docket No. 18-0063  
)  
Petitioner. )

REC'D - USDA/OALJ/DHG  
2019 JUN 18 AM 11:25

**DECISION AND ORDER DISMISSING CASE**

Appearances:

*Celia M. Williams-Alexander, Esq., Karen Yarbrough, Esq., Koki Otero, Esq., Bureau of General Counsel, Baton Rouge, Louisiana, for Petitioner, Louisiana Department of Children and Family Services (“DCFS”); and*

*Chu-Yuan Hwang, Esq., 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,<sup>1</sup> Louisiana Department of Children and Family Services (“DCFS”) by a Notice of Appeal filed on July 26, 2018. Specifically, Petitioner DCFS filed the Notice of Appeal stating, at 1, “DCFS is appealing the assignment of the 6.56 percent payment error rate as calculated by” Respondent Food and Nutrition Service (“FNS”) under the Supplemental Nutrition Assistance Program (“SNAP”). Petitioner DCFS stated, *id.*, that the

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<sup>1</sup> 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.”).

“period covered by the assigned payment error rate is October 2016 – September 2017,” that the FNS letter “notifying DCFS of the assigned payment error rate, was signed by a designee of FNS on June 28, 2018 and received by DCFS via email on June 28, 2018,” and that the appeal “is filed in accordance with the language in the attached letter signed by Brandon Lipps, Administrator, Food and Nutrition Service.”

In response, Respondent FNS filed a motion to dismiss (“First Motion to Dismiss”) pursuant to 7 C.F.R. § 283.5(a) on August 7, 2018, contending, at 2, that Petitioner DCFS’s appeal was time barred because it was filed sixteen days after the “10-day deadline had passed”<sup>2</sup> in accordance with Section 16(c)(8)(D)(i)<sup>3</sup> of the Food and Nutrition Act of 2008 (“FNA”), as amended (7 U.S.C. 2011-2036) and 7 C.F.R. § 283.25(a).

Petitioner DCFS filed a Memorandum in Opposition to Appellee’s Motion to Dismiss (“First Response”) on August 30, 2018, in which it conceded, at 1-2, that DCFS received Respondent FNS’s letter on June 28, 2018 by email but, although the FNS letter stated the assigned error rate and that the method of error rate determination was appealable, the letter did not provide a claim or liability amount, did not cite to the authority on which the state has the right to appeal, and did not provide the procedure to appeal. In the First Response, at 2, Petitioner DCFS contended that Respondent FNS’s First Motion to Dismiss was improper because “no regulation exists that provides for the procedural measures for an appeal of the assignment of an error rate (1) for less than \$50,000 (2) not in excess of the tolerance level, and

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<sup>2</sup> Citing *Idaho Department of Health and Welfare, Statewide Self Reliance Programs*, 2007 WL 3227056 (U.S.D.A. 2007); *Marjorie Walker*, 2006 W.L. 2439003 (U.S.D.A. 2006); and *In re: Hereford, Texas, Factory*, 65 Agric. Dec. 294 (U.S.D.A. 2006).

<sup>3</sup> 7 U.S.C. § 2025(c)(8)(D)(i). Also citing 7 C.F.R. § 283.25(a).

(3) with no assessment of a liability or claim amount; thus 7 C.F.R. 283.5(a) has been improperly applied because no delays have been established setting the parameters for the proper filing of an appeal in this instance.” Petitioner also contended, at 6, that neither Section 16(c)(8)(D)(i) of the FNA (7 U.S.C. § 2025(c)(8)(D)(i)) nor 7 C.F.R. § 283.25 apply to the current appeal; that Respondent FNS itself failed to adhere to 7 C.F.R. § 283.25(a) because the June 28, 2018 FNS Letter was delivered via email rather than certified mail or personal service; and that, because DCFS is still in the process of disputing the FNS findings from the FY 2017 QC Integrity review, “[t]here exist[s] an inherent issue with the process and issuance of the payment error rates as such letters, claims, or bills of collection should be issued after the period of time has run to dispute the findings on which they are based.”

On October 26, 2018, I held a telephone conference with the parties to discuss the status of the case and to better understand why, as it came to my attention, Respondent FNS had taken conflicting stances regarding USDA administrative law judge (“ALJ”) jurisdiction over an appeal by a State of its “assigned error rate.” Specifically, in this Docket No. 18-0063, as previously mentioned, FNS filed its First Motion to Dismiss on August 7, 2018, arguing that DCFS’s July 25, 2018 Notice of Appeal was untimely under Section 16(c)(8)(D)(i) of FNA (7 U.S.C. § 2025(c)(8)(D)(i)) and 7 C.F.R. § 283.25(a); however, in a similar docket, Docket No. 18-0060 (“*Vermont*”), concerning a Notice of Appeal filed by the State of Vermont, Department for Children and Families, FNS filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, taking the position that states had no right of appeal where no payment liability amount was established. Similarly, in Docket No. 18-0059, concerning Petitioner Florida Department of Children and Families, based on Petitioner’s withdrawal of its appeal, FNS communicated the position that states have no right of appeal where no payment liability amount

has been established. In my Summary of October 26, 2018 Telephone Conference, at 3, I noted that “[t]o grant FNS’s Motion to Dismiss in this docket would be to rule that, contrary to FNS’s contentions elsewhere, states that receive a QC error rate determination with no associated liability amount had a right to appeal under 7 C.F.R. 275.23(b)(2)(ii) and 7 C.F.R pt. 283, albeit a right subject to a ten-day deadline.” Therefore, it was agreed by both parties that they would confer regarding possible resolution of this matter and provide a status update.

The parties filed a Joint Status Report on November 6, 2018, requesting additional time to confer, which was granted on November 7, 2018. The parties filed a second Joint Status Report on November 26, 2018, requesting additional time to confer, which was granted on November 29, 2018. On February 26, 2019 I issued a *Sua Sponte* Order Setting Revised Status Report Filing due to the furlough of federal employees from December 22, 2018 through January 28, 2019. Accordingly, the parties filed a third Joint Status Report on March 21, 2019, stating at 1-2 that “[t]he parties do not anticipate that further discussions will prove fruitful” and that “DCFS has recommended that the Respondent request leave of this administrative court to file the appropriate amended or supplemental pleading to correct its argument and put this case in the proper posture so that the Court may rule.” Respondent FNS filed a Motion for Leave to File Amended Motion to Dismiss on March 25, 2019, which was granted on April 1, 2019.

Respondent FNS filed an Amended Motion to Dismiss (“Second Motion to Dismiss”) on April 12, 2019. In summary, Respondent FNS moved to dismiss for lack of subject matter jurisdiction, contending, at 8-9, that because “not only did Respondent not establish a liability amount for Petitioner, but Respondent made clear to the Petitioner that its assigned payment error rate for FY 2017 would not count as the first year of the two consecutive years trigger”

pursuant to the FNA, specifically 7 U.S.C. § 2025(c)(7)(B), “the Secretary lacks subject matter jurisdiction to hear this appeal.”

Petitioner DCFS filed an Amended Memorandum in Opposition to Petitioner’s Amended Motion to Dismiss (“Second Response”) on May 7, 2019, incorporating “its original Motion in Opposition filed on August 28, 2019 by incorporating and amending the same” and further contends a “lack of due process afforded state agencies wherein no amount of liability is established.” Second Response at 1. In particular, Petitioner DCFS contends, at 5-11, that 1) Respondent FNS improperly applied 7 C.F.R. § 283.5(a); 2) sections 16(c)(8)(D)(i) of the FNA (7 U.S.C. § 2025(c)(8)(D)(i)) nor 7 C.F.R. § 283.25(a) apply to Louisiana’s Appeal of the QC error rate finding; and 3) the regulations do not provide an appellate process for the appeal of the payment error rate for a viable means of appeal for Louisiana. Petitioner DCFS requests therein, at 12, “that its appeal be accepted as timely and the Respondent’s Amended Motion to Dismiss be denied.”

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 ALJ 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, although a payment error rate was assigned to Petitioner DCFS, no excessive payment error rate for the FY 2017 was assigned, the FY 2017 assigned payment error rate was not

considered a “first-year” of the two consecutive years trigger,<sup>4</sup> and, as a result, necessarily no liability amount was established against Petitioner DCFS 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 the FNS actions. FNS’s earlier misstatements of DCFS’s rights to appeal FNS’s determinations cannot create review authority in me where none has been established by the applicable statutes and regulations, and would, in fact, be contrary to the applicable statutes and regulations. Petitioner DCFS’s contention that there is a lack of due process in the instant matter is *ultra vires* to my legal authority to rule upon such contention. DCFS presents a constitutional challenge to a statutory and regulatory scheme that I am bound by unless and until that scheme is overturned by a forum that has authority to overturn that scheme. DCFS’s Notice of Appeal 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.”<sup>7</sup> 7 U.S.C. § 2011. The FNA authorizes the Secretary of Agriculture to pay each State<sup>5</sup> fifty percent

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<sup>4</sup> See 7 U.S.C. § 2025(c)(1)(C).

<sup>5</sup> 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.<sup>6</sup>

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.”<sup>7</sup> 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)<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> After identifying cases in which FNS disagrees with the State’s conclusions about specific cases, FNS

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<sup>6</sup> 7 U.S.C. § 2025(a).

<sup>7</sup> 7 U.S.C. § 2025(c)(1)(A)(i).

<sup>8</sup> 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).

<sup>9</sup> *See Quality Control Error Rates*, <https://www.fns.usda.gov/snap/quality-control> (last visited May 8, 2019).

<sup>10</sup> 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.<sup>11</sup>

States may request binding arbitration of such an FNS quality control validation review if the State contests FNS findings.<sup>12</sup>

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."<sup>13</sup> 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.<sup>14</sup>

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."<sup>15</sup>

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

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<sup>11</sup> 7 C.F.R. §§ 275.3(c); 275.14(b).

<sup>12</sup> 7 C.F.R. § 275.3(c)(4).

<sup>13</sup> 7 C.F.R. § 275.23(a).

<sup>14</sup> See 7 C.F.R. § 275.23(b)(2).

<sup>15</sup> 7 C.F.R. § 275.23(b)(2)(ii).

State's payment error rate exceeds 105 percent (105%) of the national performance measure ("NPM"). When FNS assigns a State an excessive payment error rate for a first FFY, no liability amount is established. Rather the State is put on notice that if its performance error rate exceeds the NPM in the subsequent FFY, FNS will establish a liability against the state for the subsequent FFY.<sup>16</sup> A liability amount is to be established when, for the second or subsequent FFY, FNS determines there is an excessive payment error rate.<sup>17</sup> FNS does not assess a monetary liability amount for an FFY unless an excessive payment error rate has been determined for two subsequent fiscal years. In the current situation, FNS assigned Louisiana a payment error rate for FFY 2017 but found that the assigned payment error rate did not meet the criteria of an "excessive payment error rate," which, as previously noted, requires a finding that the error rate is 105 percent (105%) of the NPM within a 95 percent (95%) statistical probability. Thus, under the FNA and implementing regulations, FNS did not and could not establish a liability amount against Louisiana DCFS for FFY 2017. Moreover, its determination that there was no excess payment error rate for FFY 2017 precludes the assignment of a liability amount for FFY 2018, even if an excessive payment error rate was later found for 2018.

### **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**

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<sup>16</sup> 7 U.S.C. § 2025(c)(1)(C).

<sup>17</sup> 7 U.S.C. §§ 2025(c)(1)(C)-(D).

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 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 DCFS’s Notice of Appeal stated, at 1, that “DCFS is appealing the assignment of the 6.56 percent payment error rate as calculated by” Respondent Food and Nutrition Service (“FNS”) under the Supplemental Nutrition Assistance Program (“SNAP”). Petitioner DCFS stated that the “period covered by the assigned payment error rate is October 2016 – September 2017,” that the FNS letter “notifying DCFS of the assigned payment error rate, was signed by a designee of FNS on June 28, 2018 and received by DCFS via email on June 28, 2018,” and that the appeal “is filed in accordance with the language in the attached letter signed by Brandon

Lipps, Administrator, Food and Nutrition Service.” *Id.* The “attached letter” (hereinafter referred to as the “June 28, 2018 FNS Letter”) is two pages and the pages are not numbered as part of the Notice of Appeal.

The June 28, 2018 FNS Letter, attached to Petitioner DCFS’s Notice of Appeal, stated in pertinent part, at 1-2 (emphasis added):

Louisiana was notified on June 12, 2018, that the Food and Nutrition Service (FNS) would assign a payment error rate to the State for FY 2017. The integrity review of Louisiana's QC system by FNS, conducted January 29, 2018, through February 2, 2018, cited findings of non-compliance with SNAP rules in the State's QC system during the FY 2017 review period that precluded FNS from verifying Louisiana’s reported error rate data as required by 7 CFR 275.23(a). Section 16(c)(4) of the Act provides the Secretary of Agriculture, through FNS, the statutory authority to assign an error rate when the State fails to meet QC reporting requirements established by the Secretary.

Louisiana's assigned QC error rates for FY 2017 are:

Overpayment Rate	5.51 percent
Underpayment Rate	1.04 percent
Payment Error Rate	6.56 percent

....

Under the Act, a 2-year liability system is in place. Under this system, a liability amount shall be established when, for the second or subsequent consecutive FY, the Food, Nutrition, and Consumer Services determines that there is a 95 percent statistical probability that a State’s payment error rate exceeds 105 percent of the national performance measure for payment error rates. **Louisiana’s assigned payment error rate falls within the tolerance level for QC related liability assessments and FY 2017 will not count as a first year for your State agency.**

**FNS’ assignment of a FY 2017 error rate may 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 Second Motion to Dismiss, at 7, explains that the language in the June 28, 2018 FNS Letter, which states that the "FY 2017 error can be administratively appealed," was "an incorrect statement of applicable law" and that "FNS was advised to include this boilerplate language by a USDA attorney who has since retired." *See id.*, n. 6. Respondent FNS contends, *id.* at 12, 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 DCFS incorporates its August 30, 2018 First Response, and reiterates the following contentions: 1) FNS improperly applied 7 C.F.R. § 283.5; 2) neither Section 16(c)(8)(D)(i) of the FNA nor 7 C.F.R. § 283.25(a) apply to the current appeal of the QC error rate finding; and 3) the regulations do not provide the due process legally required because they fail to provide an appellate process for the appeal of the FNS assigned payment error rate.

### ***Legal Standard of Review***

Respondent FNS's Second 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.<sup>18</sup> 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).<sup>19</sup> “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).<sup>20</sup> “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.*<sup>21</sup>

#### ***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.<sup>22</sup> 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,<sup>23</sup> but expressly restricted administrative or judicial review of

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<sup>18</sup> 7 U.S.C. § 2025(c)(7)(B).

<sup>19</sup> 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).

<sup>20</sup> 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).

<sup>21</sup> Citing *Trentacosta*, 813 F.2d at 1558.

<sup>22</sup> 5 U.S.C. §§ 554(a); 556(b)(3).

<sup>23</sup> 7 U.S.C. § 2025(c)(7).

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 established a claim or liability amount "with respect to the fiscal year" pursuant to 7 U.S.C. § 2025(c)(1)(C).<sup>24</sup> The Secretary of Agriculture delegates authority to 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.<sup>25</sup> An ALJ's jurisdiction is expressly limited to adjudicatory authority conferred by Congress.<sup>26</sup>

Respondent FNS contends, Motion to Dismiss at 10, that the FNA mandates an unambiguous "statutory prerequisite for filing administrative and judicial appeals—a liability

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<sup>24</sup> 7 U.S.C. § 2025(c)(7)(B).

<sup>25</sup> 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).").

<sup>26</sup> 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.*

amount” and that the evidence, specifically the June 28, 2018 FNS Letter, demonstrates that Petitioner DCFS “has met neither the preliminary nor subsequent causes for review: 1) it has not had even one year, much less two consecutive years, of a payment error rate above 105 percent of the national performance measure, and 2) FSA has not established a liability amount for it.” 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.<sup>27</sup>

In the Second Motion to Dismiss, Respondent FNS did not acknowledge nor provide an explanation for its change of position and legal analysis regarding the FNA and the regulations promulgated thereunder as to USDA ALJ jurisdiction to review the instant appeal. However, although not stated directly in Respondent FNS’s Second Motion to Dismiss, it is inherent, based on the record, that Petitioner FNS has changed its legal opinion and, by amending its first Motion to Dismiss, has abandoned the argument that Petitioner’s appeal should be dismissed for failure to timely file a Notice of Appeal. *See* Summary of October 26, 2018 Telephone Conference; Joint Status Report filed March 21, 2019; and Respondent’s Motion for Leave to File Amended Motion to Dismiss filed March 25, 2019 (where Respondent FNS acknowledged at 2-3 “that it has in fact taken conflicting stances in the three related dockets” but that “the parties agreed that,

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

<sup>27</sup> 7 U.S.C. § 2025(c)(7)(B); 7 C.F.R. § 275.23(d)(3).

‘to promote judicial consistency comparable with the similarly situated cases’ discussed above, the Respondent would file a Motion requesting leave of this court to file an amended pleading, i.e., an amended Motion to Dismiss, and that Petitioner would have no objection to Respondent so doing.”).

By incorporating the First Response, the majority of Petitioner DCFS’s Second Response consists of contentions with regard to the First Motion to Dismiss, which has been supplanted, instead of the Second Motion to Dismiss. Because, as stated above, Respondent FNS has amended and replaced the First Motion to Dismiss with the Second Motion to Dismiss, I will only lightly address Petitioner DCFS’s contentions regarding the First Motion to Dismiss.

By contending in its Second Response, at 5-7, that the FNA and regulations, particularly Section 16(c)(8)(D)(i) of the FNA<sup>28</sup> and 7 C.F.R. part 283, do not apply to Petitioner’s appeal, Petitioner DCFS apparently agrees with Respondent’s contentions that neither the FNA nor the regulations promulgated thereunder provide subject matter jurisdiction for this appeal. First, as to the First Motion to Dismiss, Petitioner DCFS contends that “FNS filed their Motion to Dismiss pursuant to 7 C.F.R. 283.5(a) . . . . [i]n their pleading, FNS clearly emphasizes ‘the appeal petition was not filed in accordance with [7 C.F.R.] § 283.4 . . . The prong opted as the basis of the motion to dismiss emphasized by FNS clearly does not apply here in that Louisiana was not issued a bill of collection for a claim of \$50,000 or more for a QC error rate in excess of the tolerance level.’”<sup>29</sup> Then, as to the Second Motion to Dismiss, Petitioner DCFS contends that

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<sup>28</sup> 7 U.S.C. § 2025(c)(8)(D)(i).

<sup>29</sup> Petitioner DCFS’s reference to “page 1 of their [FNS’s] pleadings”, Second Response at 5 is referring to the First Motion to Dismiss page 1. The Second Motion to Dismiss, page 1, does not reference 7 C.F.R. § 283.4 nor have any bolded text, but states that Respondent FNS

“Respondent amended its Motion to Dismiss negating a bases for an argument that the filing of their motion pursuant to §283.5(a) based on 7 C.F.R. 283.4 was erroneous and was not substantiated by clear and convincing proof of any of these factors to validate grounds for dismissal; but, the amended motion is still brought forth pursuant to 7 C.F.R. § 283.5.” *Id.* at 6.

I agree with Petitioner DCFS that FNS’s statement that it “submits this Amended Motion to Dismiss pursuant to 7 CFR §§283.5 and 283.18” is *non sequitur* to the basis of Respondent FNS’s argument—that the case should be dismissed for lack of subject matter jurisdiction as there is no authority for this appeal in either the FNA nor the regulations promulgated thereunder. However, Petitioner DCFS neither provided any authority nor reasoning for the argument that FNS’s Second Motion to Dismiss was “not substantiated by clear and convincing proof of any of these factors to validate grounds for dismissal” nor provided authority for such legal standard of proof. As earlier noted, the standard is that it is “the party asserting jurisdiction that bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction.”<sup>30</sup> Given that the facts are uncontested that the FNS did not establish a liability amount, it is clear as a matter of law that I have no jurisdiction to consider the DCFS notice of appeal.

Second, as to the First Motion to Dismiss, Petitioner DCFS contends that FNA section 16(c)(8)(D)(i)<sup>31</sup> is inapplicable to this appeal because the June 28, 2018 “assesses no liability amount” and “DCFS contends that the [June 28, 2018 FNS] letter itself does not establish a

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“respectfully submits this Amended Motion to Dismiss pursuant to 7 C.F.R. §§ 283.5 and 283.18.”

<sup>30</sup> *Dynamic Random Access Memory.*, 546 F.3d 984. *See supra* note 19.

<sup>31</sup> 7 U.S.C. § 2025(c)(8)(D)(i).

claim because it does not assert a right or sum due by the agency and therefor the letter is not a notice of claim.” Second Response at 6. Respondent FNS, in its Second Motion to dismiss, clearly changes FNS’s stance from its First Motion to Dismiss, and is in agreement with DCFS in that the FNA and regulations regarding the appeal of QC error rates are not applicable because “1) [DCFS] has not had even one year, much less two years, of payment error rate above 105 percent of the national performance measure, and 2) FSA has not established a liability amount for it.” Second Motion to Dismiss at 10.

Lastly, Petitioner DCFS contends, Second Response at 10, that “the methodology utilized by FNS warrants review and what better jurisdiction to bring forth an accurate evaluation and assessment.” Petitioner DCFS states, at 11, that “OALJ is charged with conducting adjudicatory hearings subject to the Administrative Procedures Act (APA), 5 U.S. § 551 *et seq.* [*sic*] . . .[t]his adjudication is the due process allotted the state agencies” and contends that “§ 551(7) is clear and the lacking of such process is one that the U.S. Department of Agriculture must cure.” Petitioner DCFS’s contention is without merit. As further set out below, only Congress may statutorily confer jurisdiction; an agency, and a USDA ALJ, cannot have jurisdiction to review a matter without the statutory authority to do so.<sup>32</sup> The APA does not independently create ALJ jurisdiction to adjudicate a matter.<sup>33</sup>

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

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<sup>32</sup> 5 U.S.C. § 554(a).

<sup>33</sup> *See supra* note 26.

promulgated by the Secretary thereunder.<sup>34</sup> Congress provides statutory authority to the Secretary to hear administrative appeals under the FNA.<sup>35</sup> The Secretary, as previously mentioned, has delegated authority to ALJs pursuant to the APA<sup>36</sup> to hold hearings and perform related duties in proceedings under the FNA.<sup>37</sup>

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 two limited types of appeals: “Subpart B – Appeals of QC Claims of \$50,000 or More”<sup>38</sup> and “Subpart C – Summary Procedure for Appeals of QC Claims of Less Than \$50,000.”<sup>39</sup>

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.<sup>40</sup>

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

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<sup>34</sup> See 5 U.S.C. §§ 556(b)(3), 554(a), 706(2)(C).

<sup>35</sup> See 7 U.S.C. § 2025(c)(7).

<sup>36</sup> 5 U.S.C. § 556(b)(3).

<sup>37</sup> See 7 C.F.R. §§ 2.27(a)(1), 275.23(d)(3), 275.23(b)(2)(ii), 275.23(f), pt. 283.

<sup>38</sup> 7 C.F.R. § 283.4-.23.

<sup>39</sup> 7 C.F.R. § 283.24-.32.

<sup>40</sup> See 7 C.F.R. § 1.131.

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 283<sup>41</sup> consists of “sections 14(a) and 16(c)” of the FNA, 7 U.S.C. § 2023(a) and 2025(c). Therefore, as both parties agree,<sup>42</sup> Part 283 is necessarily limited to appeals where a claim or liability amount is assessed.

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.”<sup>43</sup> Therefore, the USDA Secretary’s decision that a State has failed to meet established reporting requirements, as well as the methodology used to calculate a State’s assigned payment error rate, may be reviewed pursuant to 7 C.F.R. § 275.23(b)(2)(ii) as long as a liability amount has been established for the FFY.<sup>44</sup>

I recognize that this finding does not address administrative review of an assigned payment error rate that may negatively affect a State’s ability to qualify for a “high performance

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<sup>41</sup> 7 C.F.R. § 283.2.

<sup>42</sup> See Respondent’s Second Motion to Dismiss at 10 and Petitioner’s Second Response at 5.

<sup>43</sup> 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).

<sup>44</sup> 7 U.S.C. § 2025(7).

bonus.”<sup>45</sup> 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.<sup>46</sup>

### ***Waiver and Consent***

Respondent FNS further contends, Second 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.”<sup>47</sup>

There is no current dispute and no question that FNS passed an erroneous statement of the law on to Petitioner DCFS on two occasions. *See* Second Response at 4 and 8. However,

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<sup>45</sup> *See* Petitioner’s Second Response at 11.

For context, *see also* 7 U.S.C. § 2025(d); 7 C.F.R. § 275.24. As an additional note, review of the Secretaries 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).

<sup>46</sup> 7 C.F.R. §§ 275.3(c); 275.14(b).

<sup>47</sup> 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 consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court.”).

Respondent FNS is correct that such erroneous advice does not and cannot create nor confer subject matter jurisdiction.<sup>48</sup>

### ***Due Process Claim***

While Petitioner DCFS and Respondent FNS seem to agree that neither the FNA nor the regulations promulgated thereunder apply to the instant appeal, Petitioner DCFS raises a constitutional question contending that “the statutory law lacks sufficient due process and mandate to allow state agencies in the position of Louisiana a right to appeal.” Second Response at 3.

In particular, Petitioner DCFS contends that the QC Integrity Review process is unfair because “in its haste to issue assigned payment error rates by the June 30<sup>th</sup> deadline mandated under Sec. 16(c)(8)(C), state agencies are still within their allowed 30-day timeframe in which to dispute the findings of the QC Integrity review whose report must be completed by May 31st of the review year. Sec. 16(c)(8)(B). FNS issues its audit findings, allows a period in which to dispute those findings, but issues its error rates based on those findings before reviewing and responding to the contested findings.” Second Response at 7. Therefore, Petitioner argues, *id.*, “[t]here exists an inherent issue with the process and issuance of the payment error rates as such letters, claims, or bills of collection should be issued after the period of time has run to dispute the findings on which they are based.”

I acknowledge Petitioner DCFS’s constitutional argument that the current QC review process lacks due process and here note that this issue has been timely raised and is preserved for

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<sup>48</sup> See *supra* note 26. See also *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

appeal. However, although it is well-settled that constitutional issues can and should be raised during administrative proceedings,<sup>49</sup> this constitutional issue is outside the scope of my authority to consider. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) (“The agency is an inappropriate forum for determining whether its governing statute is constitutional.”).

### CONCLUSIONS OF LAW

- 1) The Secretary lacks subject matter jurisdiction for review of DCFS’ notice of appeal. 7 U.S.C. §2025(c)(7).
- 2) There is no subject matter jurisdiction for administrative review of the 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, where a claim or

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<sup>49</sup> *See Horne v. Dep’t of Agric.*, 569 U.S. 513, 528 (2013) (stating “[a]llowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails.”); *Lesser*, 52 Agric. Dec. 155, 167-68 (U.S.D.A. 1993) (stating “Although an agency cannot declare a statute unconstitutional, constitutional issues can (and should) be raised before the ALJ.”).

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.

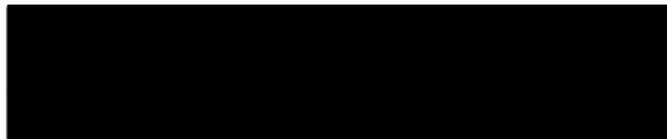
**ORDER**

WHEREFORE, because there is no liability amount established for the fiscal year 2017 against Petitioner Louisiana DCFS, I find that I have no jurisdiction to hear DCFS's appeal and, therefore, Docket No. 18-0063 is **DISMISSED**.

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

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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