

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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Docket No. 15-0151

In re:

DEPARTMENT OF PUBLIC HEALTH AND
SOCIAL SERVICES, GUAM

Petitioner¹.

DECISION AND ORDER

I. PRELIMINARY STATEMENT

The instant matter involves a petition filed on July 28, 2015, by the Department of Public Health and Social Services of the territory of Guam (“Petitioner”) for review of sanctions imposed against Petitioner by the Food and Nutrition Service of the United States Department of Agriculture (“FNS”). Jurisdiction for this proceeding is authorized by section 16(c) (7)-(8) of the Food and Nutrition Act of 2008 (“FNA”), 7 U.S.C. 20:25 (c) (7)-(8). The matter involves a quality control review of Guam’s supplemental nutrition assistance program for fiscal year (FY) 2014.

II. PROCEDURAL HISTORY

The geographical distance between Petitioner and Respondent created difficulties in the ability of the parties to meet timeframes established by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (“the Rules”) (7 C.F.R. § 1.30 et seq.). Petitioner’s appeal was filed with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) on July 28, 2015. Because Petitioner had not filed submissions as required, by Order

¹ The parties are advised that the proper caption for this matter appears herein. 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.

issued October 15, 2015, I directed Petitioner to file pleadings pursuant to 7 C.F.R. § 283.25(e). I also directed Respondent FNS to file a response to the petition. On October 16, 2015, counsel for FNS entered his appearance. On November 3, 2015, Petitioner moved for additional time to file its submissions, and on November 19, 2015, Respondent filed notice that it did not object to the motion. Before I could rule on the motion, Petitioner filed its submissions on November 23, 2015, which it supplemented with a brief filed on December 1, 2015. On February 1, 2016, Respondent moved for summary judgment.

On March 11, 2016, Petitioner filed a response to the motion for summary judgment that did not explicitly raise genuine issues of material fact, but asked for reconsideration of the civil penalty. I shall address this issue in my discussion.

III. AUTHORITIES

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c)).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670, 1998 WL 247700 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual

dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183, 2001 WL 1006180 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380, 1993 WL 325496 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793, 1988 WL 79269 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

The Food and Nutrition Act of 2008 (“FNA”) (7 U.S.C. §§ 2011 et seq.) applies to the adjudication of the instant proceeding, which involves Petitioner’s administration of the Supplemental Nutrition Assistance Program (“SNAP”). SNAP is a Federal aid program designed to “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 program, which is administered by FNS, provides low-income and no-income households benefits that are to “be used only to purchase food from retail food stores which have been approved for participation in the supplemental nutrition assistance program.” 7 U.S.C. § 2013(a);

7 C.F.R. § 271.3(a). The amount of benefits a recipient receives depends upon the household's size, income, and expenses. The Act authorizes the Secretary of Agriculture to pay each State (or territory) agency fifty percent (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. 7 U.S.C. § 2025(a).

In addition to providing the benefits, the FNA establishes a quality-control system for SNAP, and implemented regulations directing FNS to evaluate each "State [or territory] agency's payment accuracy based upon its error rates." 7 C.F.R. § 275.23(b). The review establishes a payment error rate that is based upon a two-year liability system that compares each State's (or territory's) performance to a national performance measure ("NPM"). F.N.A. § 16(c) (6) (A); 7 U.S.C. § 2025(c) (6) (A).

The review process begins when FNS conducts an annual validation review of the territory's monthly collection of sample cases in which the territory identified payment errors. 7 C.F.R. § 275.2. After identifying cases in which FNS disagrees with the territory's conclusions about specific cases ("disagrees"), FNS shares the results of its review with the territory and gives it the opportunity to contest FNS' findings. 7 C.F.R. §§ 275.3 (c); 275.14(b). States and territories may also request binding arbitration of a disputed FNS quality control validation review. 7 C.F.R. § 275.3(c) (4).

A territory is deemed to be in "liability status" 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 NPM. When FNS assigns a territory liability status, the territory is put on notice that if its agency's performance error rate exceeds the NPM in the subsequent FFY, the territory will be assessed a monetary liability amount. A liability amount

must be established when, for the second or subsequent FFY, FNS determines that there is a 95 percent (95%) statistical probability that the agency's payment error rate exceeded 105 percent (105%) of the NPM for payment error rates. F.N.A. § 16(c) (1) (D); 7 U.S.C. § 2025(c) (1) (D).

FNS is required to designate 50 percent (50%) of the liability to be newly invested in SNAP improvement activities by the territory and to designate 50 percent (50%) of the liability to be considered as "at-risk" for repayment. F.N.A. 16 § (c) (1) (D); 7 U.S.C. § 2025(c) (1) (D).

The standard of review applicable to this appeal is set forth at F.N.A. §§ 14(a) (8) and 16(c)(8) (7 U.S.C. 2023(a) (8) and 2025(c) (8)). Pursuant to the FNA, an administrative law judge is authorized to apply the factual allegations underlying the petition to statutes and regulations applicable to SNAP. The FNA provides that "[a] State [or territory] agency aggrieved by a claim shall have the option of requesting a hearing to present its position in addition to a review of the record and any written submission presented by the State agency." 7 C.F.R. § 276.7(a) (2). An administrative law judge may then determine that the grounds that the territory asserts for relief from the liability amount constitutes "good cause" for relieving the liability in full or in part. FNA § 16(c) (7), (8); 7 U.S.C. § 2025(c) (7), (8); 7 C.F.R. § 275.23(f). Relevant to the instant action, a State [territory] is entitled to seek relief from liability of all claims on the basis that the State [territory] agency "had good cause for not achieving the payment error rate tolerance" where the agency has shown "otherwise effective administration" of SNAP. 7 C.F.R. § 275.23.

"Good cause" is defined in 7 C.F.R. § 275.23(f):

(f) 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. Paragraphs (f)(1) through (f)(5) of this section describe the unusual events that are considered to have a potential for disrupting program operations and increasing error rates to an extent that relief from a resulting liability amount is appropriate. The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate. Good cause relief will only be considered for that portion of the error rate /liability amount attributable to the unusual event...

7 C.F.R. § 275.23(f).

FNS regulations identify five “unusual events” that territory agencies “may use as a basis for requesting good cause relief”: (1) natural disasters and civil disorders; (2) strikes; (3) caseload growth; (4) program changes; and (5) significant circumstances beyond the control of the State [or territory] agency. 7 C.F.R. §§ 275.23(f) (1), (2), (3), (4), (5). These five grounds, however, constitute exceptions to a State [territory] agency’s “otherwise effective administration” of SNAP. 7 C.F.R. § 275(f). “The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State [territory] agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate.” Id.

IV. DISCUSSION

In its response to Respondent’s motion for summary judgment, Petitioner did not object to the entry of summary judgment, but asked Respondent to adjust the results of FNS’ quality control review of Petitioner’s error rate for FFY 2014 to eliminate errors that arose from “household error” rather than “agency error”. Petitioner is seeking a reduction in the liability of \$117,060.00 calculated by FNS.

I find that the material facts in this matter are not in dispute. In an undated memorandum to Guam's Attorney General, Petitioner acknowledged that the national average payment error for FFY 2014 was 3.66%. Respondent's FFY 2014 quality control validation review ("QVCR") of Petitioner's monthly reviews identified 375 cases with which FNS disagreed. Petitioner challenged 43 out of those 375 cases and requested informal resolution of only two cases. One of those cases was overturned upon review by FNS. See, Declaration of Lynn Sims, at Appendix III to Respondent's motion. Petitioner did not request arbitration to resolve the remaining challenged findings. *Id.* Rather, Petitioner submitted a corrective action plan based upon the payment errors reviewed by FNS in its FY 2014 QVCR. See, Declaration of Shady Monemzadeh at Appendix VI to Respondent's motion.

By letter dated June 26, 2015, FNS advised Petitioner that its combined overpayment and underpayment error rates resulted in a payment error rate of 7.08%. Email exchanges between Petitioner and Respondent establish that Petitioner lodged informal objections. In correspondence addressed to the Administrator of FNS dated July 17, 2015, Petitioner asserted that the error rate of 7.08% was inconsistent with the "partnerweb"² error rate of 6.91%. Petitioner attributed 65% of errors to client errors and potential client fraud, and contended that delay in the review of its reinvestment plan for FY 2011 and FY 2012 hampered its ability to implement improvement activities. Petitioner averred that it had not been given the opportunity to challenge the evidence on which FNS calculated its error rate.

Since the calculation of the error rate is based upon a statistical sample, I find no great difference between the 7.08% that FNS calculated and the 6.91% that was reported on Petitioner's account on the agency's "partnerweb". Petitioner's claim that its high error rate was

² "Partnerweb" is a website designed to assist the administration of FNS programs, which provides participants with access to information compiled by the agency, as well as updates on rules and directives.

due to errors and fraud committed by its beneficiaries suggest that Petitioner was not administering FNS programs with proper oversight. The delay in receiving funding is not an unanticipated possibility when your funding source is the federal government, and does not alleviate Petitioner from its responsibility to prevent errors. Finally, the evidence demonstrates that Petitioner had several opportunities to challenge FNS' FY 2014 quality control review findings, and failed to exhaust them.

None of Petitioner's arguments constitute good cause as defined by the prevailing Regulations, and therefore, I find no grounds to relieve Petitioner of its liability.

V. FINDINGS OF FACT

1. Petitioner, the Department of Public Health and Social Services for the Territory of Guam, administers Petitioner's Supplemental Nutrition Assistance Program. (SNAP).
2. For FFY 2014, Petitioner's SNAP payment error rate exceeded the NPM for SNAP payment rates for that FFY, which Petitioner admitted was 3.66%.
3. For FFY 2014, Petitioner's SNAP payment error rate was 7.08 percent (7.08 %).
6. For FFY 2014, a 95 percent (95%) statistical probability existed that Petitioner's payment error rate exceeded 105 percent (105%) of the NPM for SNAP payment error rates.
7. As a result of Petitioner's error rates in FFY 2014, Respondent established a liability amount of \$117,060.00 for Petitioner for FFY 2014.

VI. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Summary judgment is appropriate in this matter as no genuine issue of material fact exists.

3. Petitioner is not entitled to good-cause relief for its SNAP payment error rate for FFY 2014.

ORDER

The Petition for Appeal by Petitioner Department of Public Health and Social Services of Guam, a territory of the United States of America is DENIED.

Petitioner is assessed a monetary liability of \$117, 060.000 for FFY 2014, which shall be allocated in accordance with statutes, regulations, and other rules that apply to the SNAP.

This Decision and Order shall become final and effective thirty (30) days after the date of service thereof unless a petition for review is filed with the Judicial Officer pursuant to 7 C.F.R. § 283.20.

The Hearing Clerk shall send copies of this Order by certified and regular mail.

So ORDERED this 22nd day of April, 2016, in Washington, D.C.



Janice K. Bullard
Administrative Law Judge