



IN THE
Supreme Court
OF THE
Commonwealth of the Northern Mariana Islands

**IN RE DECISION OF THE OFFICE OF THE PUBLIC AUDITOR ON THE
ADMINISTRATIVE APPEAL OF GPPC, INC.,
OPA Appeal No. BP-A094.**

COMMONWEALTH UTILITIES CORP.,
Contracting Agency,

RNV CONSTRUCTION,
Petitioner-Appellant,

v.

GPPC, INC.,
Respondent-Appellee.

Supreme Court No. 2021-SCC-0009-CIV

SLIP OPINION

Cite as: 2021 MP 13

Decided December 30, 2021

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Civil Action No. 20-0127-CV
Judge Wesley M. Bogdan, Presiding

INOS, J.:

¶ 1 RNV Construction challenges the validity of the Commonwealth Utilities Corporation (“CUC”) procurement regulation which designates the Office of the Public Auditor (“OPA”) to hear administrative appeals. RNV asserts OPA does not have the legal authority or jurisdiction to hear administrative appeals. For the following reasons, we find neither the NMI Constitution, the Commonwealth Auditing Act, nor the procurement regulation grant OPA appellate jurisdiction. We therefore hold NMIAC § 50-50-405 invalid, VACATE the Superior Court’s order upholding OPA’s decision, and remand this matter to CUC for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This case started as a bid protest under CUC’s procurement regulations. RNV was the lowest bidder on a contract, but was deemed unresponsive, so the next lowest bidder, GPPC, Inc., won the contract. RNV protested the award to CUC’s Executive Director, who agreed with RNV and reversed. GPPC then appealed that decision to OPA, which agreed with GPPC and reinstated the original contract.

¶ 3 RNV moved for reconsideration, claiming OPA lacked jurisdiction to hear administrative appeals, including procurement appeals. OPA rejected the claim, stating it has jurisdiction under the NMI Constitution and its statutory duties to prevent fraud, waste, and abuse and its ability to recommend policies and provide assistance to agencies. NMI Const. art. III, § 12; 1 CMC § 2304.

¶ 4 RNV then petitioned the Superior Court for judicial review under the Commonwealth Administrative Procedure Act (“CAPA”) on the grounds that OPA’s decision was arbitrary and capricious, an abuse of discretion, and not in accordance with law, and that OPA lacked jurisdiction. Without explicitly ruling on jurisdiction, the court upheld the decision on other grounds.

¶ 5 We take judicial notice that around the same time as the court’s decision, OPA made a notable announcement in an unrelated case, *Micronesian Environmental Services v. Peter*, Civ. No. 21-0004. Reversing its long-standing position, it claimed that it could not hear administrative appeals because neither the Constitution nor statutes granted it such authority.

¶ 6 After OPA adopted a new position, the Department of Finance revised its regulations to provide administrative remedies within the department rather than

rely on OPA.¹ CUC has not followed suit. OPA continues to hear CUC procurement appeals while reiterating its new stance.²

¶ 7 RNV now challenges OPA’s jurisdiction to hear administrative appeals of CUC’s procurement decisions, arguing that the Constitution and applicable statutes do not grant OPA such authority and that CUC by regulation cannot grant OPA authority it otherwise lacks.

II. JURISDICTION

¶ 8 We have appellate jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI Const. art. IV § 3; *see also* 1 CMC § 9113, governing appeals from judicial review under the CAPA.³

III. STANDARD OF REVIEW

¶ 9 We “hold unlawful and set aside agency action, findings, and conclusions found to be . . . [i]n excess of statutory jurisdiction, authority, or limitations.” 1 CMC § 9112(f). An agency’s jurisdiction or authority is a question of law, which we review *de novo*. *Commonwealth v. Atalig*, 2002 MP 20 ¶ 2.

IV. DISCUSSION

¶ 10 The sole issue on appeal is whether OPA has the authority to review final agency decisions on procurement. Agencies like OPA are “creatures of statute” which possess only the powers that the NMI Constitution or legislature bestow on them. *U.S. Fidelity and Guar. Co. v. Lee Investments, LLC.*, 641 F.3d 1126, 1135 (9th Cir. 2011); *see also Manglona v. Civ. Serv. Comm’n*, 3 NMI 243, 251 (1992) (holding that the Civil Service Commission lacks the authority to review the personnel contracts of employees of the Mayors of Rota and Tinian). Thus, any assertion of authority or jurisdiction must have a constitutional or statutory basis.

A. OPA Background

¶ 11 NMI Constitution Article III, Section 12 creates the position of public auditor and entrusts it with the authority to “audit the receipt, possession and disbursement of public funds by the executive, legislative and judicial branches of the government, an instrumentality of the Commonwealth or an agency of local government and shall perform other duties provided by law.” The public auditor’s jurisdiction “extends to every branch and agency of the government.”

¹ Proposed Amendments to Procurement Regulations, 43 Commonwealth Reg. 045667 (Apr. 29, 2021) (codified at NMIAC § 70-30.3-505). The proposed amendments were adopted the next month. 43 Com. Reg. 46393 (May 28, 2021).

² *See* Replacement of Sadog Tasi WWTP Clarifier, BP-A101 (Off. of the Pub. Auditor Sep. 16, 2021).

³ 1 CMC § 9113 states: “An aggrieved party may obtain a review of any final judgment of the Commonwealth Superior Court under this chapter by appeal to the Commonwealth Supreme Court. The appeal shall be taken as in other civil cases.”

Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands at 91 (1976).

¶ 12 The Commonwealth Auditing Act of 1983 established the OPA and gave it the duty to “make such other audits of Commonwealth agencies, activities, contracts, or grants as are possible within the budget provided to the Public Auditor and as the Public Auditor deems to be in the public interest and consistent with this chapter and with the Auditing Act, 1 CMC § 7811 et seq.” 1 CMC § 2303(b). Under 1 CMC § 2304(a), OPA possesses the duty to “specially act to prevent and detect fraud, waste and abuse in the collection and expenditure of all public funds.”

¶ 13 The legislature has over the years expanded OPA’s authority. The Government Ethics Code Act of 1992 empowered OPA to investigate government ethics violations. 1 CMC §§ 8501-8577. The Public Auditor Amendments Act of 1994 required audited agencies to implement OPA’s audit recommendations. 1 CMC § 7823(d). The Commonwealth Auditing Amendments Act of 2001 granted OPA increased flexibility in hiring and setting its own compensation scales due to “the immense responsibilities placed upon” it. 1 CMC § 2305. Public Law No. 18-09 designated OPA’s investigators as law enforcement officers. 6 CMC § 10101(y)(15).⁴ In addition, Public Law No. 18-46 gave OPA the duty to help prevent election fraud. 1 CMC § 6529.

¶ 14 Finally, by regulation, various agencies have designated and authorized OPA to provide administrative remedies for their final procurement decisions.⁵ CUC’s regulations provide that “A written appeal to the Public Auditor from a decision by the Director may be taken . . .” NMIAC § 50-50-405(a).

B. OPA’s Authorities

¶ 15 OPA has both constitutional and statutory authorities. Constitutional interpretation begins with examining the provision’s text and giving it its plain meaning, looking beyond the text only if it is unclear. *Elameto v. Commonwealth*, 2018 MP 15 ¶ 15. Similarly, “[the] primary basis for statutory interpretation is the plain language of the statute.” *Oden v. Northern Marianas College*, 2003 MP 13 ¶ 10. If the statute is unclear, “[our] objective is to ascertain and give effect to the intent of the legislature.” *Commonwealth v. Camacho*, 2019 MP 2 ¶ 10 (citation omitted).

⁴ The provision designating OPA investigators as law enforcement officers was originally located at 6 CMC § 2208(h), which has since been repealed.

⁵ OPA hears administrative appeals regarding procurement for CUC, Northern Marianas College, Commonwealth Healthcare Corporation, and Northern Marianas Housing Corporation. Adopted 13 Com. Reg. 7853 (Aug. 15, 1991); Adopted 33 Com. Reg. 31393 (Feb. 24, 2011); Adopted 37 Com. Reg. 37237 (Nov. 28, 2015); Adopted 42 Com. Reg. 43291 (Feb. 28, 2020). The Department of Finance, which had designated OPA in 1985 to hear appeals for procurement, revised its regulations in May 2021, and now the Secretary of Finance decides administrative appeals.

¶ 16 NMIAC §50-50-405 describes what an administrative appeal to OPA entails. Briefly summarized, it is an adjudicatory process to determine whether the procurement decision was in line with the applicable laws and regulations. A dissatisfied bidder may appeal the Executive Director’s final procurement decision within 10 days to OPA. Both the appellant and the Executive Director are required to submit information, while interested parties can also make submissions. A hearing is possible, but not required. Depending on OPA’s findings, it can cancel, revise, or affirm the contract. NMIAC §50-50-410.

¶ 17 Broadly speaking, “[t]he purpose of an administrative appeal is to review and, if necessary, to correct the decision below.” *Richmond v. Barlow*, No. 2:10cv95, 2011 U.S. Dist. LEXIS 13025, at *9 (N.D.W. Va. 2011). As one court said:

The administrative appeal serves legitimate functions in the deliberative process the agency is required to follow. The administrative appeal is a means for interested participants to question the accuracy of assumptions . . . relied upon in the agency decision. It is a means of permitting the agency to exercise its expertise prior to judicial intervention, if that takes place, by answering the specific allegations of an appellant . . . It provides the agency the opportunity to explain why [its decision] complies with the applicable standards and statutes. Most importantly, it completes the administrative record so that proper judicial deference to agency decision-making can be measured and applied . . . From the agency’s perspective the administrative appeal provides an opportunity to correct mistakes or to reconcile inconsistencies, thus narrowing issues that might be subject to judicial review. It also provides a complete record for judicial review and enables a court to realistically assess whether the proposed action is arbitrary or capricious. The agency might alter, amend, or reconsider its decision depending on the issues raised in the administrative appeal. The appeal may avoid a legal challenge or narrow the issues that can be reviewed.

Wilderness Soc’y v. Rey, 180 F. Supp 2d 1141, 1148-49 (D. Mont. 2002).

¶ 18 The agency that adjudicates administrative appeals has the power either to uphold, modify, or overturn the decision. Nothing is unusual about an administrative appeal happening within the agency whose decision is being challenged, since agencies typically have internal hierarchies where management direct employees below them. This case presents a different question of whether one agency, OPA, can hear procurement appeals from another agency, CUC, which includes the power to overrule its decisions. We review OPA’s authorities in turn.

i. Duty to Prevent and Detect Fraud, Waste, and Abuse

¶ 19 OPA’s main statutory duties are codified at 1 CMC §§ 2303-2304. The first sentence of 1 CMC § 2304(a) sets out OPA’s mandate. It reads “The office of the Public Auditor shall specially act to prevent and detect fraud, waste and abuse in the collection and expenditure of all public funds.” The ensuing language lays out the methods by which OPA can fulfill its mandate. The next line states “[t]he] Public Auditor may audit any transaction involving the procurement of supplies or the procurement of any construction by agencies of the Commonwealth, and the procurement of any supplies and services in connection with such construction.” The next part of the statute, 1 CMC 2304(b), allows the Public Auditor to conduct audits and investigations, review legislation and regulations, and make recommendations on legislation, regulations, and policies. Nowhere in the statute is there any language giving OPA the ability to hear appeals from other agencies. Although hearing procurement appeals might allow OPA to help fulfill its duty to prevent and detect fraud, waste, and abuse of public funds, any action it takes to fulfill that duty still has to stem from authority given by the Constitution or the legislature. We find that OPA’s duties as statutorily defined does not allow it to hear procurement appeals.

ii. Audit Authority

¶ 20 OPA has the duty and authority to review contracts of Commonwealth agencies such as CUC. NMI Constitution Article III, Section 12 says, “The public auditor shall audit the receipt, possession and disbursement of public funds by the executive, legislative and judicial branches of the government, an instrumentality of the Commonwealth or an agency of local government and shall perform other duties provided by law.” 1 CMC § 2303(b) reads “The Public Auditor shall from time to time make such other audits of Commonwealth agencies, activities, contracts, or grants as are possible within the budget provided to the Public Auditor and as the Public Auditor deems to be in the public interest and consistent with this chapter and with the Auditing Act, 1 CMC § 7811 et seq..” The second sentence of 1 CMC § 2304(a) reads “The Public Auditor may audit any transaction involving the procurement of supplies or the procurement of any construction by agencies of the Commonwealth, and the procurement of any supplies and services in connection with such construction.”

¶ 21 The statute defines “audit” as:

[A]n independent examination of books, performance, documents, records, and other evidence relating to the receipt, possession, obligation, disbursement, expenditure, or use of public funds by any agency or any activity of any agency; or relating to any contract or grant to which any agency is a party, including any operations relating to the transactions. Audit includes financial audits, performance audits, and program audits or any combination of the audits that the Public Auditor may deem appropriate.
1 CMC § 7813(b).

- ¶ 22 Financial audits include an “audit to determine . . . whether any agency, contractor, or grantee has complied with laws and regulations applicable to its operations.” 1 CMC § 7813(e)(3).
- ¶ 23 Under this authority, OPA performs “independent examination[s] of . . . documents, records, and other evidence” to determine whether an actor “has complied with laws and regulations applicable to its operations” and which makes recommendations that must be implemented pursuant to 1 CMC § 7823(d). At first glance, this seems analogous to the power to adjudicate.
- ¶ 24 That said, most of the definition’s language seems focused towards conducting investigations rather performing an impartial adjudication between two opposing sides. Moreover, OPA itself does not treat its appellate holdings as recommendations which must be implemented under 1 CMC § 7823(d). Its procurement decisions do not resemble its audit reports, do not frame the conclusion to uphold or overturn the agency decision as a recommendation, and are not included in its Audit Recommendation Tracking System.⁶ Finally, if OPA’s audit authority allowed it to overturn CUC’s decisions, then it follows that OPA could overturn the decision of any agency which it audits, which is every agency. 1 CMC § 2303(a). The plain meaning of the text does not warrant such sweeping power. OPA’s audit authority therefore does not allow it to hear administrative appeals.

iii. Helping Agencies Implement Policies

- ¶ 25 1 CMC § 2304(b) says:

The person in charge of, or the governing body of any Commonwealth agency, involved in the expenditure of public funds for the purpose of procurement of supplies or construction, and the services and supplies in connection therewith, may request the assistance of the office of Public Auditor with respect to implementation of any suggested policy.

- ¶ 26 This section permits certain agencies to ask OPA for assistance implementing policies. It is clear that hearing administrative appeals is quite different from helping agencies implement policies. Arguably, agencies have a policy of conforming to procurement laws and regulations, and that when agencies designate OPA to hear administrative appeals from their decisions, they are asking OPA to help implement that policy by reviewing their work and making sure they have acted lawfully. However, following the applicable laws and regulations is something that any government agency is required to do and cannot be regarded as a “suggested policy.” 1 CMC § 2304(b). The power to

⁶ The Audit Recommendation Tracking System is a database of audit recommendations and agencies’ progress implementing them. *Audit Recommendation Tracking System (ARTS)*, OFF. OF THE PUB. AUDITOR, <https://www.opacnmi.com/document-category/opa-arts/> (last visited Dec. 23, 2022).

adjudicate is too far removed from the power to help implement policies for this section to give OPA the ability to hear administrative appeals.

iv. The CUC Private Sector Partnership Act

¶27 The only statute that mentions OPA’s jurisdiction regarding appeals is the CUC Private Sector Partnership Act of 2008. The Act’s purpose is to encourage CUC to work with the private sector through private sector assistance agreements (PSAA) to generate electricity. *See* 4 CMC § 8191. Section 8192 lays out the review process for such agreements. It begins “Notwithstanding 1 CMC § 9101 et seq., 1 CMC § 7811 et seq., 2 CMC § 2301 et seq.,⁷ or any other provision of law. . .” The first citation is to the CAPA, while the other two statutes contain OPA’s authorities. Thus, Section 8192 describes exceptions to OPA’s statutory authorities. The relevant provision is § 8192(a)(7). It reads:

The Public Auditor shall have no involvement in a CUC PSAA procurement, nor jurisdiction over an appeal arising from such a procurement; provided that nothing in this subsection shall be construed to limit the authority of the Public Auditor set forth in article III, § 12 of the Constitution of the Northern Mariana Islands.

¶28 Arguably, the legislature’s decision to exempt this particular type of procurement from OPA’s appellate jurisdiction indicates that generally speaking, OPA does have appellate jurisdiction over procurement. However, this argument is unpersuasive considering how appellate jurisdiction clearly does not fall within any of OPA’s authorities. The plain language of the Private Sector Partnership Act does not grant any authority to OPA.

¶29 Nothing in the NMI Constitution or any statute clearly allows OPA to hear administrative appeals for procurement matters. If OPA had appellate jurisdiction, the legislature would have plainly said so.⁸ It is a significant power for one agency to overturn decisions of another, and we would be disregarding the plain language of the text if we found such power within OPA’s existing authorities. In other jurisdictions where the equivalent of OPA can hear administrative appeals, statutes expressly grant that authority.⁹ We find that OPA lacks the constitutional or statutory authority to hear administrative appeals.

C. CUC’s Regulation

¶30 We now examine whether NMIAC § 50-50-405 grants OPA jurisdiction. “An agency delegates its authority when it shifts to another party almost the

⁷ The current citation is 1 CMC § 2301.

⁸ As Justice Scalia observed, legislatures do not “hide elephants in mouseholes.” *Whitman v. Am Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001).

⁹ *See, e.g.* 31 U.S.C. § 3551 et seq.; 5 GCA § 5703. Those provisions, respectively, grant authority to the Government Accountability Office, OPA’s federal counterpart, and Guam’s OPA.

entire determination of whether a specific statutory requirement . . . has been satisfied, or where the agency abdicates its final reviewing authority.” *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2nd Cir. 2008) (citations and internal quotations omitted). CUC is responsible for providing utilities, and the regulation gives OPA power over CUC that it would not otherwise have. 4 CMC §§ 8122-8123. While the regulation provides that aggrieved parties must first appeal to CUC’s Executive Director, after that, OPA makes the final decision which CUC must accept. NMIAC §§ 50-50-401, 50-50-405. Therefore, CUC abdicated its final reviewing authority for utilities procurement and so performed a subdelegation to OPA.

¶ 31 Whether one agency can subdelegate its authority to another is an issue of first impression. We look at other jurisdictions for guidance. Subdelegation between different agencies appears to be uncommon and even fall outside the very definition of the word used in several state courts. *See e.g. Bellacosa v. Classification Review Bd. of Unified Court System*, 530 N.E.2d 826, 831 (N.Y. 1988) (saying that “subdelegation” means “the transmission of authority from the heads of agencies to subordinates”) (citing Kenneth Culp Davis, *Administrative Law* § 3:16, at 216 (2d ed. 1978)); *State ex rel. Guide Management Corp. v. Alexander*, 59 N.E.2d. 169, 171 (Ind. 1945) (“If the statute expressly authorizes the redelegation of authority to a subordinate official, the subdelegation is valid.”) (internal citation omitted); *Kaiser v. Sundberg*, 734 P.2d 64, 69 (Alaska 1987) (“Authorities discussing the appropriate subdelegation of agency authority generally analyze the delegation by agency heads to subordinates”). Still, some cases offer general principles which we can apply. The Supreme Court of Vermont has said “The keys to subdelegation are that the ability to delegate be authorized, and that the delegating authority articulate clear standards under which the delegated authority is to be used.” *In re Vermont Marble Co.*, 648 A.2d 381, 383 (Vt. 1994). According to the Supreme Court of Rhode Island, determining whether a subdelegation is authorized “is primarily a question of statutory interpretation.” *In re Advisory Opinion to Governor*, 627 A.2d 1246, 1250 (R.I. 1993).

¶ 32 A widely-cited federal case that examines subdelegation is *United States Telecom Ass’n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004). The court held that “subdelegation to a subordinate . . . is presumptively permissible absent affirmative evidence of a contrary congressional intent,” but that “no such presumption cover[s] subdelegations to outside parties.” *Id.* at 565. Citing *United States Telecom Ass’n*, the Ninth Circuit held that an “agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself.” *Wildearth Guardians v. EPA*, 759 F.3d 1064, 1073 (9th Cir. 2014). *See also G.H. Daniels III & Assocs. v. Perez*, 626 Fed. Appx. 205, 212 (10th Cir. 2015) (citing *United States Telecom Ass’n* to hold that “subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”).

¶ 33 We find persuasive the approach that *United States Telecom Ass’n* takes and will assume that a subdelegation from one agency to another is improper

without an affirmative showing that the legislature approved it. Here, nothing in the statutes permits CUC to subdelegate its authority to OPA, a separate agency. Therefore, NMIAC § 50-50-405 is invalid. 1 CMC § 9112(f). OPA’s exercise of jurisdiction was therefore *ultra vires* and null.¹⁰ See *Santos v. Public School System*, 2002 MP 12 ¶ 25.

¶ 34 Because it cannot delegate its authority to another agency, CUC will have to revise its regulations to handle procurement internally. Although we do not mandate any particular method for CUC to address procurement appeals, we note that several agencies resolve procurement appeals through an appeal committee.¹¹ Regardless, the CAPA provides that people “adversely affected or aggrieved by agency action” such as the denial of a bid protest are entitled to judicial review. 1 CMC § 9112(b); *Triple J. Saipan v. Muna*, 2019 MP 8 ¶ 4. Agencies must establish factual findings and conclusions of law before a matter reaches the court for judicial review. The best way to create a record for the court is to conduct a hearing as laid out in 1 CMC §§ 9109-9110.

V. Conclusion

¶ 35 For the foregoing reasons, we hold NMIAC § 50-50-405 invalid, VACATE the Superior Court’s order upholding OPA’s decision, and REMAND this matter to CUC for further proceedings consistent with this opinion.

SO ORDERED this 30th day of December, 2021.

/s/

ALEXANDRO C. CASTRO
Chief Justice

/s/

JOHN A. MANGLOÑA
Associate Justice

/s/

PERRY B. INOS
Associate Justice

¹⁰ We note that Northern Marianas College, Commonwealth Healthcare Corporation, and Northern Marianas Housing Corporation also currently designate OPA to hear their procurement appeals.

¹¹ Those agencies are the Commonwealth Ports Authority, Public School System, and Marianas Visitors Authority. NMIAC §§ 40-50-905, 60-40-405, 90-20-905.

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