AMERICAN GROWERS INSURANCE COMPANY (Vontz & Sons),	)	**AGBCA No. 99-131-F**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Bruce B. Green	)	
Willson & Pechacek, P.L.C.	)	
P.O. Box 2029	)	
Council Bluffs, Iowa 51502	)	
	)	
Representing the Government:	)	
	)	
Maria Giatrakis	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery Street, 17th Floor	)	
San Francisco, California 94105-4511	)	

RULING ON GOVERNMENT'S MOTION TO DISMISS

June 13, 2000

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

This appeal, received at the Board January 25, 1999, arises out of 1991 and 1992 Standard Reinsurance Agreements (SRAs), executed between the Federal Crop Insurance Corporation (FCIC) and Redland Insurance Company (Redland). Under the SRAs, Redland sold and administered Multi-Peril Crop Insurance (MPCI) contracts in furtherance of the Government's crop insurance program. The Risk Management Agency (RMA), an agency of the U. S. Department of Agriculture, oversees the FCIC and provides administration and oversight of the program authorized by the Federal Crop Insurance Act. Beginning in June 1995, American Growers Insurance Company (American Growers or Appellant), agreed to assume all liability for the MPCI business written under all past and present SRAs between the FCIC and Redland.

The Government has filed a Motion to Dismiss the appeal for lack of jurisdiction as untimely.

The Board's jurisdiction to decide FCIC appeals is regulatory and arises out of 7 C.F.R. § 24.4(b) and 7 C.F.R. § 400.169(d).

FINDINGS OF FACT

1. Title 7 C.F.R. § 24.4(b) grants the Board of Contract Appeals jurisdiction of appeals of final administrative determinations of FCIC pertaining to SRAs under 7 C.F.R. § 400.169(d).

2. Section 400.169(a), which was effective May 1, 1995, allows a reinsurance company to request the Director of Insurance Services to make a final administrative determination addressing disputed issues (other than compliance issues which are addressed elsewhere). The Director of Insurance Services will render the final administrative determination of the FCIC. Section 400.169(d) states that appealable final administrative determinations of FCIC may be appealed to the Board of Contract Appeals in accordance with 7 C.F.R., part 24.

3. The present dispute arises out of an August 16, 1993 request for litigation expenses pursuant to Manager's Bulletin 93-020 (MGR 93-020) (Appeal File (AF) 44-45). By letter dated December 8, 1994, the FCIC denied the request for failure to meet the criteria of MGR 93-020 (AF 33-35). Appellant requested reconsideration in a December 23, 1994 letter to Ken Ackerman, Acting Deputy Administrator for Risk Management (AF 36).

4. After the May 1, 1995 effective date of 7 C.F.R. § 400.169, in a letter dated August 14, 1996, RMA acknowledged receipt of Appellant's letter "renewing the request for reconsideration." Appellant was informed that a paralegal in the Appeals and Litigation Group was assigned to review the case. Based upon that review, the Director of Insurance Services would issue a "final determination" and notify Appellant of his decision. (AF 47.) The RMA reconsidered and over the signature of Robert J. Prchal, Insurance Services, informed Appellant on November 5, 1996, that the request for reconsideration had been reviewed; the decision was unchanged; and assistance under MGR 93-020 was denied. The letter also stated that because the MPCI policy contained a state law conformance clause, from the beginning this case had not qualified for MGR 93-020. (AF 52.)

5. Eight days later, on November 13, 1996, Appellant responded to the RMA letter disputing the applicability of the state law conformance clause and further noting that the November 5, 1996 letter did not inform Appellant of its appeal rights. The letter asked to be informed of appeal rights and requested a citation of authority if RMA took the position that Appellant had no appeal rights. (AF 54.) The record contains no response from RMA.

6. In letters dated March 18, 1997, November 24, 1997 and February 10, 1998, Appellant stated that it had never been informed of its appeal rights (Supplemental Appeal File 560-61; AF 54-56). The RMA replied in a March 10, 1998 letter that it had found no reason for FCIC to take further action. In addition, the letter stated that regulations for handling FCIC disputes had been

published May 1, 1995, and FCIC had acted in accordance with those regulations. It also stated that pursuant to 7 C.F.R. § 400.169, FCIC had responded to Appellant's reconsideration request and issued the final determination on November 5, 1996. (AF 57.)

7. From April 20, 1998, to August 18, 1998, Appellant continued to write letters seeking to engage in a dialog on the merits of its argument. On two occasions during that period, RMA responded that the final agency determination had been issued November 5, 1998. (AF 58-67.)

8. This appeal followed. In its answer, the Government pled lack of jurisdiction as an affirmative defense. In a telephonic conference, the Board informed the parties that it would decide the timeliness issue as on a motion to dismiss. The Government was offered the opportunity to file such a motion with argument and the Appellant the opportunity to respond. The Government filed such a motion and accompanying memorandum of law. The Appellant responded.

DISCUSSION

The Government argues that a final determination was made on November 5, 1996, by the Director of Insurance Services and that Appellant acknowledged receipt of the letter on November 13, 1996. Further, according to the Government, Appellant had the opportunity to file a notice of appeal in accordance with 7 C.F.R. § 24.5 which states that a notice of appeal under § 24.2(b) shall be filed within 90 days from the date of receipt of the FCIC's final determination. Appellant did not file a notice of appeal until January 22, 1999. The Government points out that under 7 C.F.R. § 24.5, the time for filing a notice of appeal shall not be extended by the Board. In support, the Government cites American Agrisurance, Inc., AGBCA No. 98-169-F, 99-1 BCA ¶ 30,237.

Appellant argues that the November 5, 1996 letter was not a final agency determination because it did not so identify itself and because it did not contain a recitation of appeal rights. Appellant also relies on the fact that it informed the FCIC that the response was unacceptable. Further, Appellant argues that it had requested reconsideration by Mr. Ackerman and had been informed that the matter had been assigned to a paralegal in the Appeals and Litigation Group. Finally, Appellant contends that the lack of a notification of appeal rights in effect tolls the appeal period. In support of the latter contention, Appellant cites Pathman Construction Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987) and other decisions decided under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA).

In appealing to the Board, Appellant cited, as jurisdictional basis, regulations providing for the rendering of final administrative determinations by the Director of Insurance Services (Findings of Fact (FF) 1, 2). Appellant's request for litigation expense assistance was denied initially on December 8, 1994. In a letter to the Acting Deputy Administrator of RMA, Appellant requested reconsideration (FF 3). In the course of correspondence, specifically by letter of August 14, 1996, while that request was pending, the FCIC informed Appellant that review was underway and when it was concluded, a "final determination" would be issued by the Director of Insurance Services. The Director of Insurance Services sent a letter dated November 5, 1996, advising that the earlier denial had been reconsidered and the decision was unchanged. While the letter did not use the words "final

agency determination," the surrounding correspondence, including the identity of the officer issuing it, makes it clear that the letter was such a determination. (FF 3.) If Appellant wished to appeal the denial of assistance under MGR 93-020, appeal should have been taken from this document.

However, despite the fact that both the regulation effective May 1, 1995, and the August 14, 1995 letter clearly stated that the final agency determination would be issued by the Director of Insurance Services, Appellant did not appeal the denial contained in the November 5, 1996 letter signed by that official. Rather, Appellant chose to continue presenting factual arguments.

Appellant relies on the fact that the November 5, 1996 letter did not advise Appellant of its appeal rights (FF 3). However, 7 C.F.R. § 400.169(a) contains no such requirement. Appellant cites cases decided under the CDA as authority for its contention that the letter was defective as a final agency determination for lack of a notification of appeal rights. That reliance is misplaced as those cases were construing the statutory requirement for a notice of appeal rights contained in 41 U.S.C. § 605 (a). The Board's decision in Rain and Hail Insurance Service, Inc., AGBCA Nos. 97-173-F, 97-174-F and 97-175-F, 97-2 BCA ¶ 29,120, also cited by Appellant, adopted the 60-day period provided for in the CDA for issuance of a Contracting Officer's decision as a reasonable period for issuance of a final agency determination after which a reinsurance company would have a right to appeal the deemed denial of a request for such a determination. The crux of the Board's decision was that a company should be able to appeal an unreasonable delay in issuing a determination. Without such a right to appeal the failure to issue a final administrative determination within a reasonable amount of time, the right to request such a determination would be rendered illusory. The Board adopted the CDA period of 60 days merely as a reasonable period. The Board did not find the statutory CDA requirements applicable to FCIC regulatory proceedings. Here, Appellant asks us to extend the CDA statutory requirement of a statement of appeals rights to regulations containing no such requirement. We find no basis to do so.

It should be noted that Appellant makes neither allegation nor argument that it was prejudiced by the omission of the November 5, 1996 letter to recite appeal rights. The fact that Appellant raised that issue well within the appeal period confirms that Appellant was aware of that issue. The regulation containing those rights had been published in the Federal Register and Appellant was on constructive, if not actual, notice of its contents. Appearance of rules and regulations in the Federal Register gives legal notice of their contents [to the general public] . . . regardless of actual knowledge of what is published in the regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947).

RULING

The appeal is dismissed.

_____
ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

_____
HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
June 13, 2000