AMERICAN GROWERS INSURANCE COMPANY (Ronald J. Boilini),	)	**AGBCA No. 99-134-F**
Appellant	)	
Representing the Appellant:	)	
Bruce B. Green Willson & Pechacek, P.L.C. P.O. Box 2029 Council Bluffs, Iowa 51502	)	
Representing the Government:	)	
Steven G. Reed Donald P. Risher, II Office of the General Counsel U. S. Department of Agriculture 200 North High Street Room 209 Columbus, Ohio 43215-2408	)	

RULING ON GOVERNMENT'S MOTION TO DISMISS

October 28, 1999

OPINION BY ADMINISTRATIVE JUDGE ANNE W. WESTBROOK

On January 27, 1999, the Board received this appeal from American Growers Insurance Company, (Appellant or American Growers). The appeal arises out of a Standard Reinsurance Agreement (SRA) originally executed between City Insurance Company of New York, New York, and the Federal Crop Insurance Corporation (FCIC) on August 20, 1986, and October 24, 1986, respectively. (Appeal File (AF) 1-45.)[1] At the time Optional Amendment No. 10 to the SRA (July 1, 1987) was

[1] Exhibit A to the SRA is a list of the names and addresses of six insurance companies including City Insurance Company and Redland Insurance Company. Exhibit D contains the name and address of American Agrisurance, N. 112 University, Suite 100, Spokane, Washington 99206, Steve Witthuhn, 509-926-2515. No explanation of the meaning of either exhibit has been provided.

executed, the company is shown as Redland Insurance Company of Council Bluffs, Iowa (AF 10). This appeal arises under the 1991 SRA. In a letter dated July 14, 1995, American Growers Insurance Company agreed to assume all liability for the Multiple Peril Crop Insurance (MPCI) business written under past and present SRAs with Redland. The SRA contains no federal contract number.

The appeal raises the issue whether American Growers is liable to the FCIC for an alleged overpayment of $57,446, excluding interest, for indemnity payment made pertaining to insured Ronald Boilini. The insured was the subject of an Inspector General (IG) investigation and a criminal proceeding wherein he pled guilty to one of six counts.

The Government has moved to dismiss the appeal as untimely. Appellant has filed a Resistance to the Motion to Dismiss. At issue is whether the Board lacks jurisdiction to hear the appeal because the Appellant failed to file an appeal within 90 days of a properly designated final agency decision.

FINDINGS OF FACT

1. Appellant sold two MPCI policies to Ronald J. Boilini for the crop year 1991. Appellant paid claims under the policies that were later determined to be fraudulent. These policies became the subject of Compliance Case No. IN-RI00-105. (AF 147.)

2. Manager's Bulletin MGR-001, dated January 15, 1988, states:

> Overstated indemnities and understated premium determined by the Federal Crop Insurance Corporation (FCIC) to be errors as a result of the company not following practices and procedures approved by FCIC in the adjustment of claims will be recovered from the company as they are identified.
>
> For policies, reinsured by FCIC, involved with a claim payment where it is found that the producer attempts to defraud the company and where the company or its agent or employees have not participated in the attempt and have followed practices and procedures approved by FCIC, every reasonable effort must be made by the company to recover the overstated indemnity. FCIC will not expect reimbursement from the company of any funds until such time as they are recovered by the company. If the company does not believe that the efforts in recovery are reasonable, the company must advise FCIC of the circumstances involved. If FCIC insists that the effort in recovery be undertaken by the company, then those costs associated with a recovery may be deducted from the funds recovered by the company with the net amount recovered reimbursable to FCIC.

> Nothing herein is intended to amend the Standard Reinsurance Agreement. Reasonable costs to the collection of overpaid indemnities are still considered to be an expense covered by the expense reimbursement as provided in the Agreement.

(AF 46.)

3. An April 28, 1995, Informational Memorandum from Garland D. Westmoreland, Acting Director of Compliance, to all Risk Compliance Acting Directors, states that when MGR-001 is explained in compliance memos and letters its four points should be stated as follows: (1) There must have been fraud or an attempt to defraud by the producer; (2) neither the company, its agents, nor its employees may have been involved in the attempt to defraud; (3) the company and its employees must have followed practices and procedures approved by FCIC in adjustment of the claim; and (4) the company must have made reasonable efforts to recover the funds. (AF 47.)

4. The claims in question were the subject of Inspector General (IG) and criminal actions. The IG investigation and report and the criminal action also pertained to other fraudulent activities involving the Feed Grain and Disaster programs of the Commodity Credit Corporation (CCC), another instrumentality within the United States Department of Agriculture (USDA). At that time, the Agricultural Stabilization and Conservation Service (ASCS) administered these programs for CCC. Some of the matters that were the subject of the IG and criminal actions involved later crop years. (AF 66-125.) In a letter dated August 31, 1993, ASCS recommended to the Regional Inspector General for Investigations that possible fraudulent claims by Ronald Boilini be investigated. (AF 50.)

5. The IG Report of Investigation was dated January 12, 1995. The conclusions of the IG report were that (1) in 1991 Boilini falsely certified to planting corn in order to receive an ASCS Feed Grain Program payment of $7,070; (2) also in 1991 Boilini falsely certified to corn production and acreage reports in order to receive ASCS Disaster Program payments of $16,577 and FCIC crop insurance payments of $62,985; (3) in 1992 Boilini presented to ASCS forged documents in an attempt to overturn an ASCS decision denying him Disaster Program benefits; and (4) in 1993 Boilini falsely certified to operating a farm in order to receive an ASCS Feed Grain Program benefit of $5,459. (AF 66-68.)

6. On March 8, 1996, Boilini was indicted on six counts of violating 18 U.S.C. § 287 (three counts) and 18 U.S.C. § 1001 (three counts). (AF 127.) Count One involved a false certification that he had planted and harvested corn on a tract of land on which he had not grown any corn. Count Two involved a matter within the jurisdiction of FCIC where Boilini had presented false certifications, fraudulent grain elevator corn sales tickets, and made grain sales in other persons' names to certify, represent and make it appear that he produced and sold in 1991 approximately 7,000 bushels of corn when in fact he had produced and sold significantly more. (AF 127-28.)

7. On May 10, 1997, Boilini filed a Petition To Enter A Change Of Plea in the United States District Court for the Northern District of Indiana. His petition recited that he had agreed to plead guilty to Count One of the Indictment. In exchange for the plea, the United States agreed to dismiss

Counts Two through Six. However, Boilini agreed that, for the purpose of sentencing, it would be deemed that he had committed the offenses outlined in those counts. He recited understanding of the maximum penalties in imprisonment and fines and that the Government and Defendant had agreed to make a binding recommendation to the court that the court sentence him to the minimum number of months applicable under the sentencing guidelines. Otherwise the plea agreement would be set aside. He agreed that the court might order him to make restitution. (AF 134-41.)

8. Judgment was entered on April 18, 1997. The Judgment recited that Ronald Boilini had pleaded guilty to Count One; that Counts Two through Six were dismissed on the motion of the United States; that he was to be imprisoned for a term of 5 months and that he should make restitution to the United States in the amount of $7,070. (AF 142-45.) The Judgment as contained in the Appeal File is a four-page document with an unnumbered first page (AF 142), and pages 2 (AF 143), 4 (AF 144), and 5 (AF 145). The restitution order is on page 5. However, it appears that the entire Judgment was a five-page document, the third page having been omitted from the Appeal File.

9. By letter dated October 2, 1997, Gene Prochaska, Director of the Indianapolis Field Office (IFO) of the Risk Management Agency, Risk Compliance, issued "FCIC Initial Findings" in the case of Ronald L. [sic] Boilini in Compliance Case Number IN-RI00-105. (AF 147-56.) He concluded that Appellant did not qualify for relief under Manager Bulletin MGR-001 from liability for the indemnity overpayments because not all four of the conditions imposed by the Bulletin had been met. The initial findings were that only two of the required four conditions were met. There was fraud or an attempt to defraud by the producer. Neither the company nor its employees were involved in the attempt to defraud. However, the IFO found that the company and its employees did not follow FCIC approved practices and procedures in adjustment of the claim and that the company had made no effort to recover the funds. If Appellant disagreed with the findings, Appellant was to provide a fully documented response by November 21, 1997. (AF 149.) The first and third pages of the Judgment were attached as exhibits to the October 2, 1997 letter. The first page was marked as "Exhibit 1.1, Pg. 1 of 1." (AF 151.) The third page was marked as "Exhibit 1.2, Pg. 1 of 1." (AF 152.) Pages 2, 4 and 5 were not attached. From the context, it can be inferred that the page numbered 3 and marked "Exhibit 1.2, Pg. 1 of 1" is the page omitted from inclusion in the Appeal File copy of the Judgment. Page 5 indicating the amount of restitution Boilini was ordered to make (AF 145), was not attached to the FCIC Initial Findings.

10. Appellant provided its undated response to FCIC, arguing that the case qualified for approval under MGR-001. Appellant stated that it agreed with FCIC that fraud had been established; that neither the company nor its employees were involved in the attempt to defraud; and that every effort must be made to recover the overstated indemnity when all production data is made available. Appellant did not agree that FCIC practices and procedures were not followed in the adjustment of the claim. Specifically, Appellant disagreed with FCIC's position that the adjuster made no attempt to verify the accuracy and completeness of the scale tickets. Appellant maintained that on December 23, 1991, at 2:00 p.m., the adjuster, Gary Siemens, required Boilini to sign an MPCI agreement. The Proof of Loss was not signed. All information that could be secured to the claim was sent to the company for approval. Appellant contended that it took the combined resources of the IFO

and the IG to support a finding in United States District Court requiring the dismissal of five of six counts of fraud. Appellant, it contended, had fewer resources than IFO and the IG. Its then recent efforts to obtain from the grain elevators or IFO the settlement sheets needed to resolve discrepancies in the production amounts had been unsuccessful. Appellant argues that it made sincere attempts to follow FCIC procedures in a case where the insured deliberately used incomplete or false information and where the elevator owner/operator could not or would provide needed data. Appellant cited its inability to compel the production of that information from third parties. Appellant reiterated its contention that all conditions to allow reimbursement only after recoupment from the producer had been met. (AF 157-58.)

11. On January 20, 1998, FCIC issued a "FCIC Final Determined [sic]" affirming the IFO's initial determination that Appellant was indebted for indemnity overpayments in the amount of $57,446. The letter, on IFO letterhead, was signed by Gene D. Prochaska for Garland D. Westmoreland, Deputy Administer [sic] for Compliance. By its own terms, the letter was "the final determination of the Federal Crop Insurance Corporation (FCIC) that REDLAND is indebted to it for indemnity overpayments of $57,446 on policy numbers 09555 and 09556, Ronald L. [sic] Boilini (BOILINI)." Appellant received that letter January 23, 1998. The Deputy Administrator's letter contained the following paragraph:

> If you do not agree with this determination, you may appeal in accordance with Title 7, Code of Federal Regulations, Part 400.169. The appeal must be filed in writing with the Risk Management Agency, Risk Compliance, Stop 0806, 1400 Independence Avenue SW, Washington, D.C., 20250-0806. The appeal must be filed within 45 days of receipt of this letter. If you appeal this determination, the accounting report adjustments will not have to be made at this time.

(AF 166-70.)

12. By memorandum dated March 25, 1998, the Risk Management Agency, Risk Compliance Division, in Indianapolis referred this matter to its Fiscal Operations Branch for further review and requested collection action if no corrections had been made for the policy. Appellant was furnished a copy. (AF 171.) By check dated May 27, 1998, Appellant made payment. (AF 172-73.) Payment, notwithstanding, by letters of May 20, 1998, and June 11, 1998, Appellant sought "reconsideration." (AF 174-79.) The May 20, 1998 letter was on the letterhead of American Agrisurance[2] and signed, "Kim Gibson, President." He conceded that the time period for appealing the Boilini compliance case and another had passed. However, he stated that "we" will be submitting a complete argument for why Risk Management Agency should reconsider the position taken and its message concerning consequences of reporting fraud cases to Risk Management. (AF 174.)

---

[2] Other than the listing of the name and address of American Agrisurance on Exhibit D, the record is silent on why American Agrisurance is corresponding as the contractor. Neither party has raised this as an issue, and the Board makes no finding as to its relevance, if any.

13. In the June 11, 1998 letter,[3] Appellant challenged FCIC's interpretation of the MGR-001 verbiage, "where they followed practices and procedures." Appellant argued that FCIC's interpretation meant that any infraction whatsoever of FCIC practice or procedure by a reinsurance company involving any aspect of the claim, even though that infraction did not contribute in any way to an improper disbursement, was grounds for FCIC to withhold the relief intended by MGR-001. Appellant argued that the verbiage in question could and should be interpreted to mean that relief under MGR-001 would be withheld if any failure of a company to follow applicable practice or procedure resulted in inability to detect insured fraud or directly contributed to an improper disbursement. Appellant's contention was that for FCIC to take the position it did was not only unfair and punitive, it discouraged private industry from reporting insurer fraud to FCIC because the companies risked penalty even without contributing fault. The June 11, 1998 letter discussed the Boilini case and another not here at issue. In both cases, FCIC was demanding reimbursements from Appellant in excess of that demanded from insureds who had been convicted of fraud. Appellant argued that in the past MGR-001 had provided an incentive to report producer fraud but that the current application of the bulletin and the demands for reimbursement in excess of the amounts required from the parties convicted of fraud in restitution was a disincentive to reporting. (AF 175-78.)

14. Speaking specifically to the Boilini case, Appellant pointed out that only pages 1 and 3 of the criminal judgment had been attached to the initial case findings. By obtaining the entire criminal judgment, Appellant learned that Boilini had been ordered to make restitution in the amount of $7,070, approximately 12 percent of the amount Appellant was being required to reimburse. Appellant pointed out that Boilini sold the unreported production in the names of other individuals and asserted that this type fraud would be nearly impossible for a loss adjuster to determine from elevator settlement sheets. Nothing in FCIC loss reporting procedure, Appellant contended, requires canvassing area elevators to locate production a producer might be selling under other names. The insured provided production information signed under penalty of perjury. The claim file contained settlements from one elevator owner/operator. (AF 175-77.)

15. Finally, Appellant referred to the April 28, 1995 Informational Memorandum from Garland D. Westmoreland, attached to the October 2, 1997 Initial Findings as Exhibit 1.2. While Appellant points out that it is an internal memorandum not circulated to reinsurance companies, Appellant also makes the point that the focus of the memorandum is producer fraud, not the adjusting practices of the company, especially when the practice in question would not have detected the fraud. (AF 177.)

16. By letter dated July 6, 1998, the Administrator, Risk Management Agency, Washington, D.C., responded to Appellant's May 20 letter. Therein, he surveyed the following events: October 2, 1997, Indianapolis Compliance Field Office Initial Findings; October 22, 1997, response from American

[3] Page 4 of the June 11, 1998 letter contains a typographical error which dates that page only as June 10, 1998.

Agrisurance; January 20 Final Determination signed for on January 23, 1998; April 30, 1998, collection letter to American Agrisurance; June 1, 1998, certified check. The Administrator did not respond substantively to the new arguments in the June 11, 1998 letter. The Administrator's letter finally stated the following:

> According to Title 7, Code of Federal Regulations, Part 400.169 disputes concerning Final Determinations must be submitted in writing to the Deputy Administrator of Risk Compliance within 45 days.
>
> Title 7, Part 400.169, states in part:
>
> ...the Corporation will issue a final determination denominated as "the determination of the Corporation." That determination will advise the Company of its rights under this section. The Company, if it disputes the Corporation's determination, must appeal that determination in writing, within 45 days of the receipt of the determination, to the Deputy Manager, Federal Crop Insurance Corporation, U. S. Department of Agriculture, Washington, D.C. 20250....
>
> The regulations provide that all disputes concerning final determinations must be submitted to the Deputy Administrator for Risk Compliance within the stated time period. Then all disputes concerning the determinations of the Deputy Administrator of Risk Compliance may be appealed with the United States Department of Agriculture Board of Contract Appeals, United States Department of Agriculture within 90 days.
>
> Since these disputes were not submitted to the Deputy Administrator for Risk Compliance or to the Department of Agriculture Board of Contract Appeals within the parameters of the governing regulation, the Risk Management Agency (RMA) cannot reconsider these cases.
> . . .

(AF 180-81.)

17. Kim Gibson, President of American Agrisurance, made a substantive response in a letter dated August 18, 1998. He expressed dissatisfaction that the July 6, 1998 letter of the Administrator of the Risk Management Agency did not address the "larger questions" regarding the actions of "Compliance" in handling the Boilini and other fraud case. The letter closed with the following: "We will hold this matter open until September 1, 1998, to allow you additional time to respond and extend MGR-001 relief in this matter. If that does not occur, we will proceed to the Board of Contract Appeals or whatever other legal remedies that are available to us." The record contains no response by the FCIC. (AF 183-85.)

18. Title 7, Code of Federal Regulations § 400.169, Disputes, reads as follows:

(a) If the company believes that the Corporation has taken an action that is not in accordance with the provisions of the standard Reinsurance Agreement or any reinsurance agreement with the FCIC, except compliance issues, it may within 45 days after receipt of such determination, request, in writing, the Director of Insurance Services to make a final administrative determination addressing the disputed issue. The Director of Insurance Services will render the final administrative determination of the Corporation with respect to the applicable issues.

(b) If the company believes that the Corporation's compliance review findings are not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may within 45 days after receipt of such determination, request, in writing, the Director of Compliance to make a final administrative determination addressing the disputed issue. The Director of Compliance will render the final administrative determination of the Corporation with respect to these issues.

(c) A company may also request reconsideration by the Director of Insurance services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not affect, interpret, explain, or restrict the terms of the reinsurance agreement. The company, if it disputes the Corporation's determination, must request a reconsideration of that determination in writing, within 45 days of the receipt of the determination. The determination of the Director will be final and binding on the company. Such determinations will not be appealable to the Board of Contract Appeals.

(d) Appealable final administrative determinations of the Corporation under § 400.169 (a) or (b) may be appealed to the Board of Contract Appeals in accordance with the provisions of part 24 of title 7, subtitle A, of the Code of Federal Regulations, 7 CFR part 24.

DISCUSSION

The Government's Motion to Dismiss and the Appellant's Resistance to the Motion to Dismiss

In moving to dismiss, the Government contends that (1) a "final determination" was made by the Risk Compliance Indianapolis Field Office on January 20, 1998, and received by Appellant on January 23, 1998; (2) the determination letter informed Appellant of "its opportunity to appeal in accordance with 7 C.F.R. § 400.169 within 45 days of receipt of the determination letter"; (3) under 7 C.F.R. § 400.169, Appellant was required to request the Director of Compliance to make a final determination that addressed the disputed issues; (4) Appellant failed to file a request for a final determination by the 45th day which was March 9, 1998; (5) Appellant submitted a request for reconsideration on May 20, 1998; (6) the request for reconsideration was not in accordance with 7

C.F.R. § 400.169 because it was made to the Administrator of the Risk Management Agency, rather than to the Director of Compliance; and, (7) on July 6, 1998, the Administrator of the Risk Management Agency responded to Appellant's May 20, 1998, request for reconsideration advising that since Appellant failed to timely appeal "the Risk Compliance Indianapolis Field Office's" determination (January 20, 1998 letter), as required by 7 C.F.R. § 400.169 that FCIC could take no further action on the case. Alternatively, the Government argues that if the Board decides that "it has jurisdiction to consider an appeal of the January 20, 1998, determination by the Risk Compliance Division or the July 6, 1998, determination by the Administrator that the time to appeal had expired."

Appellant argues, in its Resistance to FCIC's Motion to Dismiss, that the FCIC's failure to address the new arguments first raised in the June 11, 1999, letter constituted a "final decision" of the FCIC entitling it to a recitation of appeal rights not contained therein. That failure to provide appeal rights, according to Appellant's argument, tolled American Growers' appeal rights to the Board. Appellant also contends that the FCIC notices were defective in that they failed to inform it that the Federal Crop Insurance Act prohibited the FCIC from collecting any alleged indemnity overpayments after three years from the end of the insurance period in which an alleged error, omission or failure occurred. Finally, Appellant averred that the only issue possibly waived by Appellant's failure to appeal is the MGR-001 issue and not what it characterizes as the "other issues" set forth in its Response.

Summarizing the parties' contentions, the Government's primary argument is that no final agency determination was issued because none was requested timely. Alternatively, the Government argues that if the Board finds the January 20, 1998 letter to be a final agency determination, the Board lacks jurisdiction because Appellant failed to appeal it timely to the Board. Appellant argues that the FCIC's July 6, 1998 letter denied its request for relief under MGR-001; failed to address "its new" claims; and, failed to set forth the right to appeal the "new" claims issue.[4]

The Regulation

This appeal arises under 7 C.F.R. § 400.169 pertaining to disputes arising out of SRAs. Each of the four paragraphs, (a) through (d) of that section pertains to a particular set of circumstances and each employs nomenclature different from the others. For example, the word "reconsideration" is contained only in paragraph (c) relating solely to decisions of the Corporation rendered under any Corporation bulletin or directive not affecting, interpreting, explaining or restricting the terms of the reinsurance agreement. Determinations under paragraph (c) are not appealable to the Board of Contract Appeals. Apart from the "not appealable" language in (c), the word "appeal" is contained only in paragraph (d) and refers only to appeals to the Board of Contract Appeals. (Finding of Fact

[4] Appellant has argued that neither it nor the FCIC had authority to collect from the insured amounts in excess of those ordered to be repaid pursuant to a court-approved plea agreement and that the Federal Crop Insurance Act, 7 U.S.C. § 1506(q) prohibits collection of indemnity payments after expiration of 3 years from the end of the relevant insurance period. We reject Appellant's contention that these arguments constitute later claims separate from those addressed in the correspondence between the parties and outlined in the preceding findings of fact. The grounds on which we make this ruling obviates the necessity to discuss that contention more fully.

(FF) 18.) The parties here have used language in other than the precise usage of the regulation. That imprecision is compounded by the frequent cites to 7 C.F.R. § 400.169 without a paragraph reference. As each paragraph pertains to a different set of circumstances or procedural stage, the failure to cite a paragraph is significant and confusing.

Analysis

This appeal arises out of Compliance Case No. IN-RI00-105. Paragraph (b) of § 400.169 sets forth the process for review of compliance review findings. Paragraph (b) states that a reinsurance company "may" within 45 days after receipt of compliance review findings request, in writing, the director of Compliance to make a final administrative determination. (FF 18.) In this case, FCIC issued initial findings October 2, 1997, out of the IFO. Appellant was given until November 21, 1997, a period of 50 days from the date of the initial findings, to provide a fully documented response. (FF 9.) Appellant provided a response (FF 11) and by certified mail, the FCIC issued what it called its "FCIC Final Determined [sic]" on January 20, 1998 (FF 11). This document was on letterhead of the IFO. The individual signing was the same person who signed the initial findings. However, he signed the January 20, 1998 document "for GARLAND D. WESTMORELAND, Deputy Administer [sic] for Compliance." In the January 20 letter, FCIC stated as follows:

> If you do not agree with this determination, you may appeal in accordance with Title 7, Code of Federal Regulations, Part 400.169. The appeal must be filed in writing with the Risk Management Agency, Risk Compliance, Stop 0806, 1400 Independence Avenue SW, Washington, D.C., 20250-0806. The appeal must be filed within 45 days of receipt of this letter. If you appeal this determination, the accounting report adjustments will not have to be made at this time.

The above language does not track with the wording of the controlling regulation, 7 C.F.R. § 400.169(b) which does not use the word "must" in connection with compliance cases and does not state that failure to appeal such a determination or act on the letter serves to bar Appellant from later asking for a "final agency determination" from the Director of Compliance.

The Government's Motion to Dismiss is based on the premise that Appellant was required to request a final administrative determination from the Director of Compliance within 45 days after receipt of the January 20, 1998, determination or else be barred from later securing such a determination. As noted above, the regulation on which the letter was based contains no such restrictive language. Rather in the paragraph dealing with compliance cases it provides as follows:

> (b) If the company believes that the Corporation's compliance review findings are not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may within 45 days after receipt of such determination, request, in writing, the Director of

> Compliance to make a final administrative determination addressing the disputed issue. The Director of Compliance will render the final administrative determination of the Corporation with respect to these issues.

To grant the Motion on the record before us, based on the Government's primary argument, we would have to read the word "may" in 7 C.F.R. § 400.169(b) to mean "must." No other reading would "require" a company to seek such a determination within the specified period of time. The record here contains no evidence of regulatory history or customary usage that the language in paragraph (b) was intended to be, or has been customarily interpreted, as mandatory. Mitigating against that interpretation is the wording of paragraph (c) addressing decisions of FCIC that do not affect, interpret, explain or restrict terms of the reinsurance agreement. Paragraph (c) states that a company which disputes FCIC's determination in that context "must" request a reconsideration. (FF 18.) Where different language is employed in parallel contexts, it is presumed absent evidence to the contrary, that the parties intended the different language to have a different meaning. See Newhall Refinery Co., EBCA No. 363-7-86, 87-1 BCA ¶ 19,630.

The employment of the word "must" there makes clear to a company that future rights are foreclosed unless reconsideration is requested within 45 days. On the record before us, we have no reason to determine without additional evidentiary support that the drafters of paragraph (b) meant for "may", which usually has a permissive meaning, to, in fact, have the identical meaning of the usually mandatory "must" used in paragraph (c). Possibly, the Government will be able to show such an intent, or such a customary usage. We do not have evidence to that effect before us and lacking it, are unwilling at this point, to foreclose a party's right to present its case. Thus, we reject the Government's argument that Appellant's failure to "appeal" the January 20, 1998 letter within 45 days of receipt foreclosed all future rights of review.

We are aware that the Board has previously commented that "7 C.F.R. § 400.169(b) imposes a 45-day statute of limitations on an insurance company's request for a final administrative determination by the Director of Compliance." Rain and Hail Insurance Service, Inc., AGBCA Nos. 97-173-F, 97-174-F, and 97-175-F, 97-2 BCA ¶ 29,120. We note that the issue presented in those appeals did not pertain to the period for requesting a final agency determination, but rather to whether the FCIC could indefinitely delay the issuance of a determination. In addition, the Board did not address the permissive versus mandatory meanings of "may" and "shall."

In addition to the defects we see in interpretation of the regulation that the Government urges, we find the factual record unclear. The Government characterizes the January 20, 1998, letter as something other than a final agency determination, but argues in the altemative that were the Board to consider it as such, it is untimely. We note that the document was apparently prepared at the IFO which previously had issued initial findings dated October 2, 1998. On its face, the January 20, 1998, document purports to be final. It was issued over the signature block of the Deputy Administrator, an officer who customarily issues final determinations. It is possible that one might reasonably conclude the January 20, 1998 letter was intended to be the final agency determination. In that case, the notice of appeal rights paragraph provided inaccurate information.

Title 7 C.F.R. § 24.4(b) provides for appeals of final agency determinations pertaining to SRAs to the Board of Contract Appeals within 90 days from the date of receipt of the Corporation's final determination. The regulations contain no affirmative requirement for final agency determinations required by § 400.169(b) to include a paragraph informing reinsurance companies of the time limit for appeal to the Board imposed by § 24.4(b). We are not here deciding that a statement of appeal rights is required. But, we note that FCIC sought to provide such information in the January 20, 1998, determination. And, using the assumption of the Government's alternate argument that the document was a final agency determination appealable directly to the Board, in that case, the notification contained inaccurate information, misidentifying both the entity to which the appeal should be made and the time limit.

Finally, for the purpose of deciding this Motion to Dismiss on the grounds of untimeliness, we conclude that neither the January 20, 1998 letter nor the July 6, 1998 letter clearly qualifies as a final determination under § 400.169(b). The January 20, 1998 letter, while calling itself a final determination and being issued over the signature block of an official who customarily issues such, included a statement of "appeal" rights inconsistent with its being a final determination. Reference to a further "appeal" within FCIC nullified whatever characteristics of finality it may have had. The July 6, 1998 letter, which the dissent treats as the final agency determination, did not identify itself an a final determination and, in fact, took pains to characterize itself otherwise. We find no language therein which would have put the Appellant on notice that it was a final agency determination.

In ruling as we do, the Board in no way intends to undermine or modify the principle that Board jurisdiction is predicated on an appeal of a final determination by FCIC, or the "deemed denial" of a request for a final determination. Further proceedings will be conducted on a "deemed denial" basis. The Board has held that it will deem requests for final determinations denied after a reasonable time has elapsed, and thereafter consider deemed denied appeals on their merits. Rain and Hail Insurance Service, Inc., supra.

In summary, we reiterate that this decision arises out of a Motion to Dismiss by FCIC. As is evident from the finding of fact, we have looked at some extraneous evidence and thus, in our analysis, we have viewed the matter as if we were dealing with a Motion for Summary Judgment. Under such an analysis, we must find all favorable inferences in favor of the Appellant, the non-moving party. In doing that we find too many existing inconsistencies and a lack of specificity as to the history and meaning given to the terms "may" and "must" in the regulation, to comfortably rule, as a matter of law, that the Appellant is time barred from pursuing its appeal.

RULING

The Government's Motion to Dismiss is denied.

_____
ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
HOWARD A. POLLACK
Administrative Judge

Dissenting With Separate Opinion

_____
EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
October 28, 1999

DISSENTING OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

I would grant the Government's Motion and dismiss the appeal as untimely. None of the facts necessary to support this conclusion are in dispute.

FINDINGS OF FACT

1. This appeal arose under a Standard Reinsurance Agreement (SRA) between American Growers Insurance Company of Council Bluffs, Iowa (Appellant), and the Federal Crop Insurance Corporation (FCIC), U. S. Department of Agriculture. Under the SRA, Appellant sells and administers Multi-Peril Crop Insurance (MCPI) policies on behalf of FCIC.

2. Under an MPCI policy between Appellant and Ronald Boilini, an insured, Boilini secured a $57,446 indemnity payment based upon Boilini's fraud. The Government filed a six count criminal charge against Boilini, settling one count and receiving $7,070 in restitution, while dismissing the remaining five counts.

3. Under FCIC Manager's Bulletin MGR-001, FCIC had set forth its policies regarding recoupment of indemnities paid by insurers such as Appellant when such indemnities were based on insurer fraud. FCIC would seek recoupment only if the insurance company failed to follow FCIC approved practices and procedures in adjusting the claim. Based upon a "compliance review" FCIC concluded that Appellant had failed to follow such practices and procedures.

4. Title 7 C.F.R. § 400.169(b) provides that if the company believes the "compliance review findings" are incorrect, it may appeal within 45 days of "such determination" to the Director of Compliance (Risk Management Agency (RMA)),[5] who will "make a final administrative determination."

5. By determination labeled a "final determination" from the RMA's Indianapolis Field Office (IFO), received by Appellant January 23, 1998, the IFO concluded that Appellant was indebted to the FCIC in the amount of $57,446. Appellant was further advised that if Appellant disagreed with the determination, Appellant must appeal within 45 days to the RMA in Washington, D.C., citing 7 C.F.R. § 400.169. (Appeal File (AF) 166-70.)

6. By letters dated May 20, 1998, and June 11, 1998, 87 and 109 days after the receipt of the IFO determination, Appellant filed an appeal with the RMA in Washington, D.C., contending in the June 11, 1998 letter for the first time, in addition to its MGR-001 position, that (1) FCIC had no right to collect amounts in excess of the $7,070 in restitution FCIC agreed to accept, and (2) that the Federal Crop Insurance Act at 7 U.S.C. § 1506(q) prohibited FCIC from collecting overpayments more than 3 years after the alleged error or omission occurred. Appellant did not indicate in its letters

[5] The RMA administers the Federal Crop Insurance program for the FCIC.

that it was confused, or that it had been misled about where or with whom it should appeal, or the time frame within which it must have appealed. (AF 174-79.)

7. By letter dated July 6, 1998, citing Appellant's failure to comply with 7 C.F.R. § 400.169 by not appealing within 45 days, the RMA refused to grant the requested reconsideration, or consider the additional issues raised by Appellant, stating that it must adhere to the regulations and maintain "a fair and even playing field for all reinsurance companies" (AF 180-82).

8. By letter to the RMA dated August 18, 1998, Appellant reargued its position and asserted unilaterally that it would hold the matter open until September 1, 1998, to allow FCIC to reconsider, prior to seeking relief from the Board (AF 183-85). Appellant did not indicate in its letter that it was confused, or that it had been misled about where or with whom it should appeal, or the time frame within which it must have appealed. After receiving no response from RMA, Appellant filed an appeal on January 27, 1999, more than 6 months after the RMA rejected Appellant's appeal as untimely. Appellant did not indicate in its letter that it was confused, or that it had been misled about where or with whom it should appeal, or the time frame within which it must have appealed.

DISCUSSION

Because Appellant did not seek review within 45 days of the determination received January 23, 1998 (Findings of Fact (FF) 5, 6), that determination became final. Thereafter, the agency was not compelled to review the decision. Even if the agency was required to review the decision, Appellant's appeal to the Board was also untimely (FF 8).

If the letter received by Appellant January 23, 1998, is considered a "determination," within the meaning of 7 C.F.R. § 400.169(b), as I believe it was, then Appellant was obligated to seek a "final administrative determination" within 45 days, if at all, from the Director of Risk Compliance (RMA), as required by 7 C.F.R. § 400.169(b) and as instructed by the IFO. Appellant failed to do so. On the other hand, if the January 23, 1998 letter is considered a "final administrative determination" within the meaning of 7 C.F.R. § 400.169(b), as the majority sometimes infers, then Appellant was obligated to appeal to the Board within 90 days as required by 7 C.F.R. part 24, and § 400.169(d). Appellant failed to do so.

Moreover, Appellant failed to appeal the July 6, 1998 denial of Appellant's request for reconsideration to the Board within 90 days, as required by 7 C.F.R. part 24, and § 400.169(d). Appellant did not file its appeal with the Board until January 27, 1999, more than 6 months after Appellant's request for reconsideration was denied.

Even if the FCIC regulations required that the notice of appeal rights be given (they do not), and even if the Contract Disputes Act were applicable to the present appeal (it is not), deficiencies in the

statement of appeal rights provide no basis for exercising jurisdiction over an otherwise untimely appeal, unless the contractor was prejudiced by the deficiency. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996). Appellant has not only shown no prejudice, it has demonstrated a conscious disregard of agency instructions and regulations (FF 6-8).

For these reasons alone, I would grant the Government's Motion and dismiss the appeal.

The FCIC regulations are a waiver of its sovereign immunity. It is not for the Board to expand upon this waiver by decision without Administrative Procedure Act rule making by the FCIC. See Rural Community Insurance Services, AGBCA No. 98-173-F, 99-1 BCA ¶ 30,144, where the Board held that 7 C.F.R. § 400.169(b) provided for a 45-day appeal period to the RMA, and that Appellant could not appeal the field office determination directly to the Board.

The majority state that they are aware that the Board "commented" that 7 C.F.R. § 400.169(b) imposes a 45-day limitation in Rain & Hail Insurance Service, AGBCA Nos. 97-173-F, 97-174-F and 97-175-F, 97-2 BCA ¶ 29,120, but that the Board did not address the permissive versus mandatory meanings of "may" and "shall." The majority presume that the unanimous Board in Rain & Hail, and again later in Rural Community, and again later, this same Board panel in American Agrisurance, Inc., AGBCA No. 98-169-F, 1999 WL 79360 (Feb. 10, 1999), overlooked or disregarded the interpretation of the same regulation that the majority now finds so obviously flawed. Moreover, the majority decide this issue without the parties having raised it.

The majority hold that 7 C.F.R. § 400.169(b) does not require an appeal within 45 days because the regulation uses the word "may" instead of "shall" or "must." Title 7 C.F.R. § 400.169(b) simply provides that if Appellant concludes the determination it received was incorrect, Appellant "may" appeal within 45 days. The use of the term "may" in this context simply indicates permissiveness, allowing Appellant to appeal or not appeal, within 45 days. The clear implication of the language is that an insurance company has no right to review after 45 days have elapsed. Use of the word "may" does not mean that Appellant can elect to appeal anytime after the expiration of the 45 days, as the majority concludes.

Even the Contract Disputes Act (CDA) mixes the use of "may" and "shall" for mandatory appeal periods. Regarding boards of contract appeals, the CDA at 41 U.S.C. § 606, provides that within 90 days of receipt of the Contracting Officer's decision, "the contractor may appeal." Regarding the Court of Federal Claims, the CDA at 41 U.S.C. § 609(a)(3), provides that "any action . . . shall be filed within 12 months." Use of the word may in 41 U.S.C. § 606 has not been interpreted to permit the open ended appeal period allowed by the majority. Nor has the mixed use of may in 41 U.S.C. § 606, and shall in 41 U.S.C. § 609(a)(3), been interpreted to allow such a result, as the majority state it should.

Relying on Newhall Refinery Co., EBCA Nos. 363-7-86 et seq., 87-1 BCA ¶ 19,630, the majority state that where the parties employ different language in parallel contexts it is presumed that the parties intended the differing language to have a different meaning. As indicated with the use of

"may" and "shall" in the CDA, this statement has not been applied to invalidate the mandatory 90-day appeal period to boards. Nor is this statement obviously correct as a general rule of interpretation. It is even less so as it relates to the use of "may" instead of "shall" or "must" in the context of 7 C.F.R. § 400.169. Not surprisingly, there was no authority cited in Newhall to support this statement.

The holding in Newhall works against the conclusion reached by the majority. In Newhall there were three contract clauses that allowed termination, but only two of the three allowed termination "in whole or in part." The Government partially terminated the contract, relying on the clause that did not include the language "in whole or in part." The Board in Newhall found the termination improper, concluding at page 99,373, that to hold otherwise, would render the words in the other two clauses surplusage. Similarly, the majority interpretation of 7 C.F.R. § 400.169(b) renders this regulation surplusage, void of any reasonable meaning. The result is an open-ended waiver of FCIC's sovereign immunity.

Perhaps most significantly, the majority decision, allowing the appeal as one that has been deemed denied, treats the July 6, 1998 determination of the RMA Administrator as a nullity, apparently because the determination does not directly address the merits of Appellant's claim, but denies such claim on the basis that the claim was untimely filed. Based upon the majority holding, an Appellant can intentionally file an untimely appeal with the Administrator after the 45 days, receive a denial of the appeal based upon untimeliness, then file a timely "deemed denial" appeal with the Board, after the expiration of 90 days, as under the present facts.

For all these reasons, the Government's Motion should be granted and the appeal dismissed as untimely.