RURAL COMMUNITY INSURANCE SERVICES, (bulletin MGR-98-031)	)	**AGBCA No. 2003-169-F**
Appellant	)	
Representing the Appellant:	)	
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RULING OF THE BOARD OF CONTRACT APPEALS

January 22, 2004

Before POLLACK, VERGILIO (presiding), and WESTBROOK, Administrative Judges. Opinion for the Board by Judge POLLACK; dissenting opinion by Judge VERGILIO.

Opinion by Administrative Judge POLLACK.

On May 9, 2003, the Appellant, Rural Community Insurance Services of Minneapolis, Minnesota, filed an appeal with the Board contesting a determination denying the request of the insurance company to obtain financial litigation assistance. The assistance had been requested under a Manager's Bulletin, specifically MGR-98-031. In 1997, this Board issued a decision in the appeal of Rain & Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111, involving a similar, but not identical, litigation expense manager's bulletin holding that the Board had jurisdiction under 7 CFR 400.169 to entertain the appeal. Subsequent to that decision, but prior to the effective date of the Standard Reinsurance Agreement (SRA) in dispute, Federal Crop Insurance Corporation (FCIC) made a change to subsection (c) of 7 CFR 400.169. In its Motion, FCIC has

contended that the regulatory change divests the Board of the jurisdiction over bulletins unless the bulletin interprets, explains or restricts the terms of the SRA.

FINDINGS OF FACT

1. For the 1999 crop year (which began July 1, 1998, and ended June 30, 1999), Rural Community Insurance Company[1] and the Federal Crop Insurance Corporation entered into an SRA. The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance under the authority of the Federal Crop Insurance Act, as amended, 7 U.S.C. §§ 1501 et seq. (Act). The SRA

> establishes the terms and conditions under which FCIC will provide subsidy and reinsurance on eligible crop insurance contracts sold or reinsured by the . . . insurance company. This Agreement is authorized by the Act and regulations promulgated thereunder codified in 7 C.F.R. chapter IV. Such regulations are incorporated into this Agreement by reference. . . . This is a cooperative financial assistance agreement between FCIC and the Company [i.e., the insurance company] to deliver eligible crop insurance under the authority of the Act.

(Exhibit J at 30) (all referenced exhibits are in the appeal file.)

2. The SRA contains a section, captioned Disputes and Appeals, which provides:

> 1. The Company [i.e., insurance company] may appeal any actions, finding, or decision of FCIC under this Agreement in accordance with the provisions of 7 C.F.R. 400.169.
>
> 2. FCIC shall generally issue a fully documented decision within 90 days of the receipt of a notice of dispute accompanied by all

[1] In its complaints in these matters, the insurance company indicates that Rural Community Insurance Company and Rural Community Insurance Agency are doing business as Rural Community Insurance Services. The Government has not raised any objection to the suit in the name of Rural Community Insurance Services, the named appellant, with which the Government corresponded regarding the underlying disputes. The Board uses the phrase "insurance company" to reference the party to the SRA or the appellant, as appropriate in context.

> information necessary to render a decision. If a decision cannot be issued within 90 days FCIC will notify the Company within the 90 day period of the reasons why such a decision cannot be issued and when it will be issued.

(Exhibit J at 56-57 (§ L).)

3. The SRA contains a section, captioned Litigation and Assistance, which states:

> 1. The Company's [i.e., insurance company's] expenses incurred as a result of litigation are covered by the A&O [administrative and operating expenses] subsidy and the administrative fee paid by the producer for CAT [catastrophic risk protection] coverage. FCIC has no obligation to provide any other funds to reimburse the Company for litigation costs.
>
> 2. FCIC will also provide indemnification, as authorized by the Act, including costs and reasonable attorney fees incurred by the Company, that result solely from errors or omissions of FCIC.
> . . . .
>
> 4. FCIC will, at its sole discretion, determine if the requested action under this section will be granted. The criteria to determine such action will be whether such action is in the best interest of FCIC and the crop insurance program.

(Exhibit J at 58 (§ Q).)

4. With a date of November 9, 1998, the Administrator of the Risk Management Agency issued bulletin No. MGR-98-031 on the subject of financial litigation assistance.

> **This bulletin rescinds MGR-009 and MGR-93-020. The acceptance criteria stated in this bulletin are effective beginning with the 1998 reinsurance year which began July 1, 1997. Nothing in this bulletin amends any provisions in the SRA or the rights and responsibilities of the parties thereto. This bulletin does not affect the amount of administrative expense reimbursement paid under the SRA. Litigation expenses paid under this bulletin should not be reported on Exhibit 20.**
>
> **This bulletin provides for additional financial assistance only in those cases where the insured is directly challenging the Federal Crop Insurance Corporation's (FCIC) crop insurance policy provisions or procedures and RMA determines that the case should be fully litigated to a judgment in order to protect the integrity of the program. Fully litigated to judgement means that all favorable defenses have been raised and may include arbitration and settlement**

> **if all requirements set forth below are satisfied. RMA's actions, findings, decisions, and determinations under this bulletin that are adverse to reinsured companies may be appealed in accordance with the provisions of 7 C.F.R. 400.169.**

(Exhibit A at 1.)

5. The regulation regarding appeals or "disputes" (with an effective date of January 25, 2000) states:

> **(a) If the [insurance] company believes that the Corporation [i.e., FCIC] has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement or any reinsurance agreement with FCIC, except compliance issues, it may request the Deputy Administrator of Insurance Services to make a final administrative determination addressing the disputed action. The Deputy Administrator of Insurance Services will render the final administrative determination of the Corporation with respect to the applicable actions. All requests for a final administrative determination must be in writing and submitted within 45 days after receipt after the disputed action.**
>
> **(b) With respect to compliance matters, the Compliance Field Office renders an initial finding, permits the company to respond, and then issues a final finding. If the company believes that the Compliance Field Office's final finding is not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may request, the Deputy Administrator of Compliance to make a final administrative determination addressing the disputed final finding. The Deputy Administrator of Compliance will render the final administrative determination of the Corporation with respect to these issues. All requests for a final administrative determination must be in writing and submitted within 45 days after receipt of the final finding.**
>
> **(c) A company may also request reconsideration by the Deputy Administrator of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive *which bulletin or directive does not 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 determinations of the Deputy Administrator 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 paragraph (a) or (b) of this section may be appealed to the**

> **Board of Contract Appeals in accordance with the provisions of subtitle A, part 24 of title 7 of the Code of Federal Regulations.**

(7 CFR 400.169 (2001); 65 Fed. Reg. 3781-82 (January 25, 2000) (emphasis added).)

6. The earlier version of this regulation stated:

> (a) If the [insurance] company believes that the Corporation [i.e., FCIC] has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement or any reinsurance agreement with 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 determinations 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 Sec. 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.

(7 CFR 400.169 (1996) (emphasis added)**. The only difference between the earlier and the new regulation was the removal in the new regulation of the word "affect" from paragraph (c).**

7. By letter dated February 15, 2001, to the Director of Reinsurance Services Division, the insurance company notified the Government of a court action against the insurance company filed by an insured who had obtained multi-peril crop insurance for the 1999 crop year for cotton said to be

grown in Florida. In the letter, the insurance company sought relief as follows: "I hereby request that this matter be accepted for defense and indemnity pursuant to Manager's Bulletin 98-031." (Exhibit B). By letter dated March 6, 2001, the director conditionally accepted the request for reimbursement of litigation expenses under the bulletin (Exhibit C). By letter dated April 22, 2002, the director reviewed and denied the request for reimbursement, thereby revoking the conditional acceptance. The letter states in part:

> A review of this case revealed that the producer asked the insurance agent if the land was insurable and was later informed that the acreage was covered. Also, the producer states that RCIS [the insurance company] made her replant part of her cotton crop. The documents you submitted do not provide evidence that the producer was directly challenging the policy provisions.
>
> Further, the Arbitration Panel determined that coverage existed under the policy and the producer relied in good faith upon the misrepresentations of RCIS or its agents regarding the insurability of their crop land.
>
> In accordance with MGR-98-031, this case must be rejected because the producer indicates that she relied upon the insurance agent's information that the crop was insurable. Therefore, the producer states that the insurance agent failed to properly service the policy.

(Exhibit D at 9-10). The letter concludes by stating that should the insurance company not agree with the determination, it may request reconsideration by submitting a written request to the Deputy Administrator of Insurance Services (Exhibit D at 10).

8. The insurance company sought reconsideration, by letter dated June 5, 2002, to the Deputy Administrator: "RMA should reverse its decision and grant [the insurance company's] request for litigation assistance pursuant to Manager's Bulletin 98-031." (Exhibit E).

9. Upon reconsideration, the Acting Deputy Administrator states that the request for financial assistance previously had been rejected because of agent error, i.e., an agent of the insurance company failed both to provide a copy of the policy to the producer and to provide the insured information regarding the insurability of her acreage. In conclusion, in affirming the denial, the letter specifies that the "decision to deny MGR-98-031 is unchanged." (Exhibit G at 22-23.)

10. By letter dated May 9, 2003, the insurance company filed a notice of appeal with this Board, contesting the determination to deny the request of the insurance company to obtain financial litigation assistance under MGR-98-031 (Exhibit H).

11. On July 24, 2003, FCIC filed a Motion to Dismiss for Lack of Jurisdiction. In that Motion, FCIC recited the various sections of 7 CFR 400.169 (see Finding of Fact (FF) 5 and 6) for text of regulations). More specifically at paragraph 3, FCIC pointed out that "Appealable final administrative determinations of the Corporation under paragraph (a) or (b) of this section may be

appealed to the Board of Contract Appeals." FCIC then continued at paragraph 6 to state that this case does not involve an action taken by FCIC which would put the matter under (a) or (b). At paragraph 7, FCIC stated, "This case does, however, fall under section 400.169(c)." FCIC then went on to discuss the meaning of (c) asserting that despite an earlier Board decision in Rain & Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111 (addressing a similar bulletin), finding otherwise, FCIC continued to hold the position that the bulletin does not "affect" the SRA. FCIC stated, however, that it was not necessary to re-argue that point because on January 25, 2000, FCIC took out of (c) the word "affect" and consequently FCIC can avoid Board jurisdiction as long as the bulletin does not interpret, explain or restrict the terms of the SRA (Paragraph 25 and 26 of Motion). Appellant filed a reply to FCIC's motion. There Appellant argued that the regulation only addressed those things that were excluded from an AGBCA appeal. Appellant pointed out that there was no list of inclusions in (c). Appellant continued that the change to (c) reduced, not expanded the exclusions. Appellant concluded that the change to the regulation did nothing to overturn existing AGBCA case law, which had found that the Board had jurisdiction over bulletins dealing with financial aid under the SRA.

DISCUSSION

FCIC moves to dismiss the appeal brought under MGR-98-031 (FF 10) for lack of jurisdiction. The Board previously assumed jurisdiction of appeals under prior versions of the bulletin. Rain & Hail Insurance Service, AGBCA 97-143-F, 97-2 BCA ¶ 29,111, and has consistently followed that precedent. Rain and Hail Insurance Service, Inc., AGBCA No. 97-198-F, 99-1 BCA ¶ 30,142; Rain and Hail Insurance Service, Inc., AGBCA No. 97-193-F, 99-1 BCA ¶ 30,143; Rain and Hail Insurance Service, Inc., AGBCA No. 99-127-F, 99-1 BCA ¶ 30,259; Rain and Hail Insurance Service, Inc., AGBCA No. 98-159-F, 99-1 BCA ¶ 30,308; Rain and Hail Insurance Service, Inc., AGBCA No. 99-117-F, 99-2 BCA ¶ 30,475; Rain and Hail Insurance Service, Inc., AGBCA No. 99-124-F; Rain and Hail Insurance Service, Inc., AGBCA No. 99-157-F. This matter as noted above is before us on a Motion to Dismiss. There has been no development of evidence as to the circumstances surrounding the drafting and choice of wording used in the regulation nor have the parties produced documents as to any exchanges or analysis occurring during the regulation revision. Our conclusions as to the understanding and actions of FCIC are based upon the representations of FCIC counsel in the brief, as well on information surrounding the earlier Board decisions on litigation cost bulletins.

Changes from the prior versions of the bulletin to the current one relate to the criteria for payment of litigation expense. Nothing in the changes made to the new the bulletin addresses Board review or our jurisdiction. After the Board's decision in Rain & Hail Insurance Service, AGBCA 97-143-F, 97-2 BCA ¶ 29,111, where on a Government Motion to Dismiss the Board ruled that it had jurisdiction over a dispute concerning a litigation bulletin which related to and affected the SRA, FCIC amended 7 CFR 400.169(c) to delete the word "affect." According to FCIC counsel in his brief, FCIC removed the wording, so as to provide that determinations under (c) were not appealable to the Board. (FF 5, 6.) The Board has little doubt as to the accuracy of FCIC counsel's representation of FCIC's intention in changing (c) so as to divest the Board of jurisdiction over bulletins which the Board found affected the SRA. Proving intention alone, however, is not

sufficient to establish the meaning of regulatory language, particularly where the language at issue appears inconsistent with the sponsored interpretation and where it does not operate to affect the section of the regulation under which the Board took jurisdiction in the earlier cases.

The Board's assumption of jurisdiction in Rain & Hail, 97-2 BCA ¶ 29,111 and subsequent cases, involving litigation costs under the earlier bulletin, was not based on (c) but rather on (a). As such, the change made by FCIC to (c), in removing the word "affect" has no apparent impact (at least on the record currently before us) on Board jurisdiction over the subject matter of this appeal. Absent FCIC establishing how its change to (c) has removed a matter from Board jurisdiction under (a), FCIC cannot prevail on its motion. FCIC has not made that case. Given the language at issue, FCIC's change to (c) did not on its face dispose of Board jurisdiction relating to litigation costs addressed in the bulletin.

It is important to first identify the premise of the Government's Motion, which is laid out in paragraphs 6, 7, 15 and 16 of that motion. In paragraphs 6 and 7, FCIC states that the case before us does not involve an action taken by FCIC with respect to a compliance matter which would be appealable to the Board under (b), nor does it regard provisions established under the SRA which are appealable under (a). FCIC asserts that the case "does however fall under section 400.169(c)." FCIC then asserts that section 7 CFR 400.169(c) was designed for the sole purpose of precluding companies from tying up the resources of FCIC when the appeal involves a denial of a request for assistance that FCIC has no contractual obligation to offer.

FCIC continues at paragraphs 15 and 16 asserting that the purpose behind MGR-98-031, was to advise the companies that FCIC would provide litigation assistance in certain cases, as well as to establish the criteria for acceptance of a case for financial assistance and to provide the procedures for the application and payment of such assistance. FCIC states that MGR-98-031 does not and never was intended to interpret, explain, or restrict the terms of the SRA, going on to note the following at paragraph 19, "Since the Bulletin does not interpret, explain or restrict the terms of the SRA, any appeal of a denial of assistance under MGR-98-031 must be in accord with 7 C.F.R. 400.169(c)."

We agree that under the current regulation, where FCIC renders a decision under (c), which decision addresses a matter that fits within one of the three categories identified in (c), that decision is only to be made by the Deputy Administrator and that decision is not subject to Board review. It is of note that looking at the categories set out in (c) for Deputy Administrator decision, each of the categories appear to address matters which would be unrelated to the SRA and therefore a matter over which the Board would not have jurisdiction, even under (a). FCIC issues directives and bulletins regarding a myriad of matters and all do not relate to the rights of parties under the SRA. We understand (c) to deal with that type of situation and not to control or modify Board jurisdiction under a completely different subsection.

In our decision in Rain & Hail, supra, the Board's first decision on jurisdiction over a litigation relief, the Board concluded that we had jurisdiction by virtue of the express delegation in 7 CFR 400.169(a). In that decision, the Board noted, "However, there is no impediment to jurisdiction

under 7 CFR 400.169(c) when the bulletin or directive affects, interprets, explains or restricts the terms of the SRA." The Board continued:

> Further, since the Board has jurisdiction over disputes involving an SRA by virtue of the express delegation in 7 CFR 400.169(a), where a dispute **relates** to a bulletin or directive that affects, interprets, explains or restricts an SRA, the Board has jurisdiction [citation to record there omitted]. Even the Government does not argue otherwise (emphasis added).

Rain & Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111 at 144,860.

In the above described decision, the Board further noted that MGR-93-020 set forth criteria and procedure for separate payments for recouping litigation expenses. The Board found the bulletin provided an incentive for an Appellant to participate in incurring litigation expenses. Thus, the Board said, "Therefore, MGR-93-020 had an "effect" on Appellant's evaluating litigation brought against it under the SRA, and in deciding whether or not to involve itself in such litigation." The Board concluded, "Clearly MGR-93-020 "affected" the SRA. Therefore, the Board has jurisdiction over disputes **relating** to the SRA and MGR-93-020." (emphasis added).

The basis of the jurisdiction in the above cited case was the fact that because the bulletin "affected" the SRA, the matter in the bulletin related to the SRA, thereby providing the Board jurisdiction over the matter under (a). The Board pointed out that (c) could have been written to avoid Board jurisdiction over disputes **relating** to a bulletin or directive, even if it did affect the SRA. Clearly, FCIC could have stated in (c) or somewhere else in 7 CFR 400.169(a)-(d) that the Board did not have jurisdiction to review decisions relating to bulletins or directives as to litigation expenses. That however is not how FCIC chose to make its intended change and at least for now, it appears that the method used to make the change was ineffective. As to the Board's statement in the Rain & Hail decision that there was no impediment to jurisdiction under (c), there the Board was simply saying that nothing in (c) took away the jurisdiction the Board independently had under (a). The Board was not saying there that its authority was dependent upon a grant of jurisdiction through (c).

Jurisdiction over litigation bulletins under (a) is well settled. What distinguishes the current dispute from the earlier case is the fact that in the new regulation, FCIC changed the language in (c) (FF 5, 6) so as to remove the word "affect" as an eligible item for review by the Deputy Administrator. FCIC argues that the removal of the word "affect" allows FCIC to avoid Board jurisdiction, as long as the bulletin does not interpret, explain or restrict the terms of the SRA. FCIC contends that it does not matter if the bulletin "affects" the SRA, because once FCIC removed the word from (c), the Board no longer had jurisdiction over litigation bulletins that simply affected the SRA. FCIC, is reading (c) as defining the scope of Board jurisdiction under (a). That, however, is not what (c) says. FCIC is reading wording into (c) that is not there.

The reading put forward by FCIC and the reading of the dissent, do not take into account the basis on which the Board originally assumed jurisdiction of Manager's Bulletin cases, and thus asserts an impermissibly strained interpretation. To prevail on its motion, FCIC must show that one can read

the new regulation to remove matters affecting the SRA from (a), or more narrowly, one can read it to remove bulletins and directives affecting the SRA from the coverage under (a). On a plain meaning basis, the removal from (c) of the word "affect," does not do that. Equally, if not more important, the interpretation put forth by FCIC is patently inconsistent with the words of the regulation as a whole.

As we noted at the outset, this matter is before the Board on a Motion to Dismiss. There has been virtually no development of the record as to the circumstances and actions involved in the drafting of the regulation and reactions to it. We are mindful that case law provides great deference to an agency's interpretation of its own regulations; however, that deference is not without limitations. The Supreme Court in Thomas Jefferson University v. Shalala, 512 U.S. 504, 114 S.Ct. 2381, 129 L.Ed. 2d 405 (1994) stated:

> We must give substantial deference to an agency's interpretation of its own regulations. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-151, 111 S.Ct. 1171, 1175-1176, 113 L.Ed. 2d 117 (1991); Lyng v. Payne, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341, 90 L. Ed. 2d 921 (1986); Udall v. Tallman, 380 U.S. 1, 16, 85 (S.Ct. 792, 801, 13 L.Ed. 2d 616 (1965). Our task is not to decide which among several competing interpretations best services the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Ibid. (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)). In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." Gardebring v. Jenkins, 485 U.S. 415, 430, 108 S.Ct. 1306, 1314, 99 L.Ed. 2d 515 (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697, 111 S.Ct. 2524, 2534, 115 L.Ed. 2d 604 (1991).

In further defining how one is to apply deference, Justice Scalia, in his concurrence in EEOC v. Arabian American Oil Co., 499 U.S. 244, 260, 111 S.Ct. 1227, 1237, 113 L. Ed. 2d 274 (1994) stated:

> Deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.

Applying the above law, FCIC has not established a basis for us to dismiss for lack of jurisdiction. For us to take the plain language of (a), as it has been interpreted and settled by this Board since 1997, and conclude that the grant of jurisdiction recognized there has been modified by the alteration

in issue, would require us, on the basis of the arguments made, to rely on too thin a reed to sustain such a judgment.

As we noted above, the dissent has come to a different conclusion. The dissent reads (c) as giving authority to the Deputy over decisions rendered under every bulletin or directive other than those that interpret, explain or restrict the terms of the reinsurance agreement. We agree with the dissent that (c) does not give the Deputy authority over matters that interpret, explain or restrict the terms of the reinsurance agreement. However, it must be noted that each of those matters independently fall under the Board jurisdiction under (a), as the matters are related to the reinsurance agreement. In contrast, we read the grant of authority to the Deputy over matters that do not interpret, explain or restrict the SRA as giving the Deputy authority (and reinsuring companies an added review procedure) for bulletins and directives that do not relate to the SRA). The fact that a reinsurer company can seek review of the Deputy for those limited matters does nothing to change the Board authority over matters relating to the SRA, which includes matters which affect the SRA. We find, on the record before us, that the language change in (c) does not take away Board jurisdiction over matters affecting the SRA under (a). We find the interpretation asserted by FCIC to be patently inconsistent with the language of the regulation.

We noted early on in our discussion, that we recognized (independent of the language in issue) that FCIC was making the change in (c) in order to divest the Board of jurisdiction over bulletins. We concluded that based on the fact that FCIC challenged our jurisdiction in the Rain & Hail, supra, and soon thereafter made the change. That being said, however, we understand the law to hold that even where we surmise or even know that an agency intended a specific meaning, that meaning is not automatically sustained if it is found to be patently inconsistent with the language the agency used in the regulation to convey that intent. We also note that through context, explanation and surrounding circumstances, there may be instances where language that otherwise appears patently inconsistent is determined to be otherwise. However, we must deal with the record before us. On that record, and in the context of a Motion to Dismiss, FCIC has not established that its reading is anything but patently inconsistent with the meaning it would have us adopt.

Regarding the dissent, we do not find the citation to National Crop Insurance Service, Inc. v. Federal Crop Insurance Corp., No. 02-03952 (8th Cir. Dec. 5, 2003) to be particularly helpful as to the issues in this appeal. The court there was simply quoting the language out of (c) and the decision there had nothing to do with addressing matters that were found to affect the SRA. As to the dissent's reliance on the fact that the Appellant sought relief through a request for reconsideration to the Deputy Administrator, seeking that the Deputy Administrator grant its "request for litigation assistance pursuant to Manager's Bulletin 98-031, relief," we note that in Rain & Hail Insurance Service, Inc. AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111, and all cases since, we have consistently treated the denial of relief for reconsideration by the Deputy Administrator as to a dispute from a bulletin affecting the SRA, to be within our jurisdiction under (a). The Board's consistent practice has been to take jurisdiction under (a) in appeals involving a request to the Deputy Administrator for relief
involving a bulletin affecting the SRA. Our ruling here is consistent with that practice.

RULING

The Board concludes that it has jurisdiction over this dispute. Accordingly, the Board denies the Government motion.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
ANNE W. WESTBROOK
Administrative Judge

Opinion by Administrative Judge VERGILIO, dissenting.

I dissent from the legal conclusion of the majority. The majority creates its own rationale for Board jurisdiction, as it ignores the explicit language of the regulation granting this Board limited authority over crop insurance matters. Despite the analysis and conclusions of the majority, the test for Board authority is not a matter "affecting" the SRA. The insurance company has not asserted that the Government has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement (SRA). The final administrative decision in this dispute has been rendered by the Deputy Administrator of Insurance Services, who denied the request for relief under the bulletin.

Background

On May 12, 2003, the Board received a notice of appeal from Rural Community Insurance Services (the insurance company). Regarding a lawsuit brought by an insured, the insurance company had sought financial litigation assistance under bulletin MGR-98-031 from the U.S. Department of Agriculture, Risk Management Agency (RMA) (which is said to administer and oversee all programs authorized under the Federal Crop Insurance Corporation (FCIC)). After conditionally accepting the request, the RMA denied the request. Disputing the determination, the insurance company submitted the matter for reconsideration to the Deputy Administrator of Insurance Services, who denied the request. The insurance company filed this appeal, contesting that denial. The sole basis for relief was the bulletin; the insurance company has not asserted that the Government has taken an action contrary to the terms and conditions of the SRA.

By motion dated July 24, 2003, the Government seeks to dismiss this matter for lack of jurisdiction by the Board. The insurance company filed a reply on September 4, 2003. The Government opted to make no further submission. The evidentiary record, consisting of an appeal file and supplement, closed on this jurisdictional issue. The insurance company maintains that the Board possesses jurisdiction over this matter pursuant to 7 CFR 400.169. The Government contends that the decision at issue is not subject to review by this Board, as the decision was issued, not pursuant to 7 CFR 400.169(a) or (b), but pursuant to the provision at 7 CFR 400.169(c). In focusing upon the request of the insurance company and the language of the regulation, bulletin, and SRA, the Government distinguishes Board decisions which considered prior versions of that regulation and bulletin.

In this matter, the insurance company is seeking litigation assistance under the bulletin; it does not maintain that the Government has taken any action which is not in accordance with the provisions of the SRA or any reinsurance agreement. In seeking relief, the insurance company is not disputing a determination with respect to a compliance matter. From this, I conclude that the insurance company is not disputing a matter pursuant to 7 CFR 400.169(a) or (b). The underlying dispute places the insurance company outside of the specific requirements of the regulation defining this Board's authority, as the matter does not come within the Board's authority defined in 7 CFR 400.169(d). Rather, the insurance company takes issue with determination of the Acting Deputy Administrator of the RMA under a bulletin. By its very terms, the bulletin does not amend any provision of the SRA or the rights and responsibilities of the parties thereto. By regulation, 7 CFR 400.169(c), the determination in dispute is final and binding and may not be appealed to this Board.

This Board lacks the authority to review the disputed decision of the Deputy Administrator. Accordingly, I grant the motion of the Government and would dismiss this matter for lack of jurisdiction.

Discussion

The insurance company sought to receive financial litigation expense reimbursement pursuant to bulletin MGR-98-031. Ultimately the Acting Deputy Administrator of Insurance Services denied the request. The insurance company here appeals that denial. In contending that this Board has jurisdiction under regulation, 7 CFR 400.169(d) (2001), the insurance company relies upon Rain & Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111, and those cases citing it. The line of cases considers prior versions of the bulletin and regulation. The Government maintains that, under the present bulletin, regulation, and SRA, the determination of the Acting Deputy Administrator is final and binding and may not be appealed to this Board.

The insurance company identifies a single basis for its relief against the Government: the bulletin. The insurance company does not assert that the Government **has taken an action that is not in accordance with the provisions of the SRA or any reinsurance agreement with FCIC. The "Litigation and Assistance" section of the SRA expressly states that the Government has no obligation to provide any other funds to reimburse the insurance company for its litigation costs, Rain & Hail Insurance Service, Inc., AGBCA 99-117-F, 99-2 BCA ¶ 30,475 (in a request for relief under a prior version of the bulletin, regulation, and SRA, the Board held that "the**

record does not demonstrate entitlement to the requested relief under the express terms of the SRA"). Further, the relief sought is not based upon any disputed compliance matter. Thus, the nature of the dispute does not fall within the first two provisions of the regulation, namely 7 CFR 400.169(a) and (b). The Board's jurisdiction is limited to disputes arising under either of these two provisions, 7 CFR 400.169(d). Because such a dispute is absent in this matter, the Board lacks authority to review the determination at issue.

This conclusion is further supported by a review of the dispute, the actions of the parties, and the third paragraph of the regulation. That is, not only does the dispute not fall within the ambit of provisions (a) or (b), but it falls within the express terms of (c). The insurance company seeks relief pursuant to the terms and conditions of a bulletin which expressly states that it does not amend any provisions in the SRA or the rights and responsibilities of the parties thereto. This bulletin does not affect the amount of administrative expense reimbursement paid under the SRA. The bulletin does not interpret, explain, or restrict the terms of the reinsurance agreement. Rather, the bulletin provides for relief outside of that available under the SRA. Relief under the bulletin arises under the conditions established in the bulletin and not under the terms and conditions of the SRA. The insurance company and Government followed the procedures dictated in the regulation, with the insurance company seeking reconsideration from the Deputy Administrator of Insurance Services. The determination upon reconsideration is final and binding under the regulation, 7 CFR 400.169(c), and not subject to Board review under the regulation, 7 CFR 400.169(d).

Moreover, although the insurance company does not cite or rely upon any provision of the SRA in support of its case, the applicable SRA expressly provides that the determination to provide or not reimbursement of litigation expenses is expressly reserved to the FCIC: "FCIC will, at its sole discretion, determine if the requested action under this section will be granted. The criteria to determine such action will be whether such action is in the best interest of FCIC and the crop insurance program." Thus, consistent with the terms and conditions of the SRA and the regulation, a matter involving the reimbursement of litigation expenses is not subject to Board review, as the FCIC expressly reserves such a determination to the sole discretion of the FCIC. The granting or denying of a request for reimbursement involves the consideration of the best interest of the FCIC and crop insurance program; the Board is not in a position to second guess a determination made considering such criteria.

In support of its position that the Board has the authority to resolve the underlying dispute regarding relief under the bulletin, the insurance company relies upon the initially-cited Rain & Hail case, as well as derivative decisions, e.g., Rain & Hail Insurance Service, Inc., AGBCA No. 1999-194-F, 02-2 BCA ¶ 31,871, at 157,461 ("this Board held that MGR 93-020 affected the SRA and therefore the Board has jurisdiction over disputes relating to the SRA and MGR 93-020"). In that initial decision, the Board stated that provision (c) of the regulation reserved to the Director of Insurance Services, to the exclusion of the Board, the resolution of disputes involving bulletins and directives which did not affect, interpret, explain, or restrict the terms of the SRA. Because, concluded the Board, the bulletin "affects" the SRA, such a determination was not reserved to the exclusive province of the Director, and could be reviewed by the Board. The Board stated:

> The regulation (7 CFR § 400.169(c)) could have been written to avoid Board jurisdiction over disputes relating to a bulletin or directive, even if it did affect the SRA. Therefore, while MGR-93-020 provides that it does not "amend" the SRA, that does not decide the question of whether it "affects" the SRA.

97-2 BCA ¶ 29,111, at 144,860.

In keeping with its consistent position that the Board is not authorized to review a determination made under a financial litigation assistance bulletin, in response to the Board decision, the FCIC amended the regulation by deleting the word "affect" in paragraph (c). This deletion of a word in the regulation is significant, particularly given that the interpretation of the FCIC, as the drafter of the regulation which provides the Board with authority to review specific FCIC determinations, is entitled to deference. Information Technology & Applications Corp. v. United States, 316 F.3d 1312 (Fed. Cir. 2003) ("Even were the regulations not clear, we give deference to an agency's permissible interpretation of its own regulations." (cited cases omitted).) The deletion was an attempt to conform the regulation to the position of the FCIC that the Board is not to review a determination made on a request for assistance under the bulletin.

The insurance company also focuses upon the **revised regulation; paragraph (c) states:**

> **A company may also request reconsideration by the Deputy Administrator of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not 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 determinations of the Deputy Administrator will be final and binding on the company. Such determinations will not be appealable to the Board of Contract Appeals.**

This paragraph specifies that if the Government renders a decision under a bulletin (or directive), an insurance company may request reconsideration by the Deputy Administrator of Insurance Services, who issues a final binding determination. Such matters are not reviewable by this Board. There are explicit exceptions in this provision. That is, this provision for a determination by the Deputy Administrator does not apply to those instances when the Government renders a decision under a bulletin (or directive) that interprets, explains, or restricts the terms of a reinsurance agreement. The underlying manager's bulletin does not interpret, explain, or restrict the terms of the reinsurance agreement; accordingly, the request for reconsideration may go to the Deputy Administrator but not to this Board.

The insurance company contends that removing the word "affect" from the prior version of the paragraph decreases the authority of the Deputy Administrator. That reading is incorrect. As noted above, the paragraph gives authority to the Deputy Administrator over decisions rendered under

every bulletin or directive, except for those instances which are identified (i.e., those bulletins or directives which interpret, explain, [affect,] or restrict the terms of the reinsurance agreement, under the regulation). By removing the word "affect," the agency limits the number of exclusions, and increases the area of authority of the Deputy Administrator. In resolving a question about the exhaustion of remedies, a court recently observed: " For challenges involving Manager's Bulletins, paragraph (c) of § 400.169 applies. Paragraph (c) states that the BCA does not have jurisdiction to hear appeals about bulletins which do not 'Interpret, explain, or restrict the terms of the reinsurance agreement.'" National Crop Insurance Services, Inc. v. Federal Crop Insurance Corp., No. 02-3952 (8th Cir. Dec. 5, 2003). Given that the bulletin in dispute does not interpret, explain, or restrict the terms of the reinsurance agreement, this Board should conclude that it lacks authority to resolve the underlying dispute concerning the Government's actions pursuant to that bulletin.

In any event, the instruction of Information Technology, and cases cited therein, is controlling: this agency's interpretation of its own regulation is permissible and therefore should be accorded deference. The events leading to the change in regulation in 2000 make clear the FCIC's intent. The Government reasonably (and correctly) contends that the decision by the Deputy Administrator was issued pursuant to paragraph (c).

In summary, the insurance company does not allege that the Government has taken action inconsistent with the terms of the SRA or that a compliance matter is at issue. It is only such disputes which provide a basis for this Board's jurisdiction. 7 CFR 400.169(a), (b), (d). Additionally, because the dispute involves a decision rendered under bulletin which does not interpret, explain, or restrict the terms of the reinsurance agreement, the regulation expressly makes the related determination not appealable to this Board, 7 CFR 400.169(c).

The line of cases interpreting the prior version of the regulation concluded that the financial litigation assistance bulletin did "affect" the terms of the reinsurance agreement. Given that conclusion, the Board determined that paragraph (c) did not vest the Director of Insurance Services with any ability to make a binding determination and did not divest the Board of authority to resolve a dispute regarding the bulletin. In contrast, in this case, the Government rendered a decision under a financial litigation assistance bulletin; the bulletin does not interpret, explain, or restrict the terms of the reinsurance agreement, whether or not it affects the agreement. The revised paragraph (c) specifies that any request for reconsideration of a determination rendered under such a bulletin is to be made to the Deputy Administrator of Insurance Services and not to this Board. Therefore, contrary to conclusion of the majority, the change in regulation does alter the authority of this Board described in the case law.

The majority misinterprets the revised regulation and fails to accord the regulation the permissible reading intended by the Government. Moreover, the majority ignores the underlying request for relief, which seeks payment under the bulletin, without reference to the SRA. The majority intrudes this Board into a process in which the Board lacks a place. In recognizing that its interpretation frustrates the apparent intent of the Government, the ruling of the majority encourages the Government to content itself with this Board's presence in the process, or to revise (once again) the regulation and/or the bulletin, or to take other action as the Government deems appropriate.

Decision

Unlike the majority, I would grant the Government motion and dismiss this appeal for lack of jurisdiction.

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JOSEPH A. VERGILIO
Administrative Judge

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