
**Appeal of the Drivers Insurance Agency of a
Decision of Commonwealth Automobile Reinsurers
Docket No. C2005-06.**

Decision and Order

I. Introduction and Procedural History

By letter dated July 13, 2005, the Drivers Insurance Agency (“Drivers”), a recently appointed exclusive representative producer (“ERP”) assigned to the State Farm Insurance Company (“State Farm”), appealed to the Commissioner of Insurance (“Commissioner”) a decision of the Commonwealth Automobile Reinsurers (“CAR”) Governing Committee Review Panel (“GCRP”) denying its request for a change in assignment to a different servicing carrier. The appeal was filed pursuant to Rule 20 of the CAR Rules of Operation (“Rule 20”). Because the Safety Insurance Company (“Safety”) manages State Farm’s private passenger automobile ERPs, Drivers’ allegations related to interactions with Safety, rather than State Farm. The Commissioner designated me as presiding officer for this proceeding.

An initial order, issued on July 14, 2005, set a schedule for Drivers’ submission of a detailed written statement on the background of its appeal, responses from Safety and CAR, and a prehearing conference. On August 5, Drivers timely filed its statement and a set of attachments consisting of documents relating to the prior proceedings at CAR, including: 1) the contracts between Drivers and Safety; 2) correspondence from Drivers to Safety and CAR; 3) a May 6, 2005, request to CAR for a review of Drivers’ complaints about Safety and a May 27, 2005, request for review by the CAR Governing

Committee; 4) business transcripts of hearings held before the CAR Market Review Committee (“MRC”) and before the GCRP; and 5) decisions of the Market Review Committee and the GCRP. Safety filed its response on August 17, 2005 and CAR submitted responses on August 24 and August 30.¹

A prehearing conference took place on September 1, 2005. John A. Kiernan, Esq. and Linda Melconian, Esq. represented Drivers. CAR was represented by Joseph J. Maher, Jr., Esq., and Safety by Peter S. Rice, Esq. At the conclusion of that conference, proceedings were suspended to permit Drivers to seek reconsideration of the GCRP’s decision by the full CAR Governing Committee at its September meeting. On December 20, 2005, Drivers was asked to submit a status report on its efforts to settle this matter with CAR. Drivers submitted its report on January 5, 2006. It stated that the full Governing Committee had adopted the GCRP’s report, and declined to intervene in the matter. Drivers then asked the Commissioner to resolve the matter by ordering CAR to reassign Drivers as part of an imminent redistribution of ERPs among CAR servicing carriers. On January 9, I asked CAR and Safety to submit responses to Drivers’s proposal by January 17. Both filed timely responses. By letter dated February 8, I advised Drivers that its proposed settlement was not approved and scheduled a prehearing conference for February 21.

On February 16, Drivers requested that the prehearing conference be rescheduled for March 8. On March 6, with the consent of the other parties, it again sought to continue the conference to a date in April. By letter dated March 7, the prehearing conference was rescheduled for April 24.² At the close of that conference, Drivers was ordered to submit a written memorandum setting out all of its arguments for setting aside the decision of the GCRP and identifying the record evidence supporting each of its contentions. CAR and Safety were ordered to file reply memoranda. Drivers submitted its memorandum on May

¹ The date for submission of CAR’s response and the date of the prehearing conference set out in the initial order were continued by agreement of the parties. CAR’s August 24 response included, in error, statements from Drivers’s counsel, John Kiernan. Its August 30 submission substituted the correct attachments to the August 24 response.

² On April 3, Charlene Sellica, identified as president of Drivers in the request for review it submitted to CAR, wrote directly to the Commissioner requesting her assistance in resolving this matter. A letter to Ms. Sellica from Elisabeth Ditomassi, Esq., general counsel for the Division of Insurance, noted that the Commissioner does not comment on or intervene in pending appeals, and that Ms. Sellica would have an opportunity to raise her concerns at the April 24 prehearing conference.

17; Safety filed a response on June 7 and CAR submitted a memorandum on June 16.³
This decision now addresses Drivers's specific request to set aside the GCRP decision.

The Proceedings at CAR

Documents submitted by Drivers provide the following chronology of events. By notice dated March 29, 2005, CAR advised Charlene Sellica that it had assigned Drivers to Safety as an ERP for commercial motor vehicle insurance and to State Farm as an ERP for private passenger motor vehicle insurance.⁴ The notice stated that the servicing carriers would contact Ms. Sellica shortly to arrange the necessary contracts.⁵ On April 8, Paul Coleman, a marketing representative for Safety, met with Ms. Sellica at the Drivers office (the "April 8 meeting").⁶ Two signed contracts dated April 8 set out the agreements between Safety and Drivers.⁷ In addition, Ms. Sellica executed a guaranty to Safety, and received a copy of a notice for ERPs detailing Procedures and Instructions Related to Premium Financing for policies issued by Safety.

One day later, on April 9, Ms. Sellica sent a letter to Mr. Coleman asking that he "null and void" the contract she had signed, asserting that she could not accede to Safety's alleged request not to write business at the minimum liability limits mandated by law, and that she found Safety's procedures relating to premium financing "threatening and intimidating." She further asserted that Safety would not allow her to propose any changes to the contract, a position that she characterized as "derogatory, unethical and chauvinistic and one that she, as a woman agent, found appalling." She complained that Safety had not immediately provided her with stamps that would allow her to process insurance applications and claimed that she had signed the contracts under "stress and duress," asserting the Safety's requests were "unfair, unreasonable and constituted

³ On December 13, Ms. Sellica sent a letter to me stating that she could no longer afford legal representation in connection with her appeal and again requested that the Commissioner order CAR to reassign her to another servicing carrier. By letter dated December 15, Mr. Kiernan moved to withdraw his appearance as counsel for Ms. Sellica.

⁴ The record is not entirely clear on the relationship between Drivers and Ms. Sellica, who is referred to both as the president of Drivers and as its principal and owner. Although the appeal was filed on behalf of Drivers, there is no evidence that it has a separate corporate existence. For purposes of this proceeding, Drivers will be considered the name under which Ms. Sellica conducts her insurance business.

⁵ Because Safety administers State Farm's ERP business, it would effectively be the servicing carrier for both commercial and private passenger motor vehicle insurance.

⁶ Robert Hebert, an employee of Drivers, was also present at the meeting.

⁷ Drivers apparently signed the contract on April 8; it was subsequently executed on behalf of Safety.

improper business practices, not to mention discriminatory.”⁸ She asked Safety to support her request to CAR for reassignment to a different servicing carrier. On April 11, Ms. Sellica contacted CAR, asking for reassignment for business purposes. She also sent an e-mail to Safety asking that it not process any contracts at that time.

On May 6, Drivers submitted a request for review (the “May 6 RFR”) to CAR, seeking a change in assignment pursuant to CAR Rule of Operation 14.F.1 (“Rule 14.F.1”) on four stated grounds: 1) Safety had demanded that Drivers unlawfully deny insurance coverage to applicants who wanted to purchase policies with minimum limits of bodily injury liability (i.e., 20/40 limits); 2) Safety had threatened and intimidated Ms. Sellica and Drivers and forced them to enter into a contract under stress and duress; 3) Safety treated Drivers unfairly by requesting Ms. Sellica to sign a premium financing agreement exclusively for ERPs that was not required of voluntary agencies; and 4) Safety had discriminated against Drivers based on its president’s gender, and her location as an inner city agent.⁹ The May 6 RFR represented that Drivers had been ready to operate since a visit from a CAR administrator on March 18, at which he had given it what Drivers characterized as a “verbal assignment” to Commerce Insurance Company (“Commerce”). It asserted that because Drivers was a newly appointed ERP that had not begun business, reassignment would not disrupt the marketplace or result in an unfair or inequitable apportionment of premiums, losses or expenses. The May 6 RFR concluded that reassignment was the only solution because Safety’s conduct made it impossible for Drivers to conduct business.

The MRC heard the matter on May 18. At that hearing, Drivers asked that the MRC consider the matter as a question of “reasonable business purpose,” rather than gender bias, arguing that, notwithstanding the representations in the May 6 RFR, its goal was to avoid asking the MRC to make a determination of credibility. In addition to the statements in the May 6 RFR, Drivers asserted that the contract between it and Safety should be void for public policy reasons because it was non-negotiable.

⁸ The stamp in question is a signature stamp that is applied to insurance applications as evidence that an insurer has agreed to insure the vehicle, a requirement for registering a motor vehicle.

⁹ The May 6 RFR incorrectly refers to Safety as Drivers’s Servicing Carrier. As noted above, Drivers was assigned to State Farm for private passenger automobile insurance and to Safety for commercial vehicle insurance. It appears that Drivers, because of the arrangement between State Farm and Safety, considered the latter to be its Servicing Carrier for both lines.

James Berry, director of Massachusetts automobile insurance for Safety, and Mr. Coleman were present at the MRC hearing and responded to questions. Safety took no position on Drivers's proposal to resolve the matter through reassignment, but vigorously contested Drivers's presentation of the facts about the April 8 meeting. An affidavit from Mr. Coleman addressing those facts was distributed to members of the MRC. Safety asserted that Drivers requested reassignment because it thought it would be assigned to a different servicing carrier and was disappointed that it was assigned to State Farm. Safety pointed out that Ms. Sellica's complaint that she did not have insurance stamps was inconsistent with her request, made the day after she signed the business contract with Safety, that Safety not process any business. It also stated that, while it denied any wrongful acts by Mr. Coleman, it had offered to assign Drivers to a different Safety representative, a proposal that Drivers rejected.

A member of the MRC moved to uphold the request for reassignment; that motion was subsequently amended. Following discussions of the consequences of permitting reassignment and its potential impact on Drivers, Safety and other servicing carriers, a vote was taken. The motion failed to pass.¹⁰ The MRC decision, dated May 18, 2005, stated that, while the committee understood Drivers's desire to conduct business with a servicing carrier other than Safety, a majority of its members felt that reassignment was not the correct course of action. The decision advised Drivers that it could seek formal review from the CAR Governing Committee.

On May 27, 2005, Drivers filed a Request for Review by the Governing Committee (the "May 27 RFR"), that is virtually identical to the May 6 RFR. On June 15, a three-person GCRP heard the matter. Drivers's presentation paralleled that made to the MRC. Notwithstanding the content of the May 27 RFR, Drivers again indicated, with respect to the question of gender bias, that it wished to avoid the issue. It argued that its situation satisfied the Rule 14. F. 1 criterion that allows change of an ERP's assignment for reasonable business purposes. Characterizing its circumstances as unique, because it has written no policies at this time, Drivers asserted that reassignment would not disrupt the motoring public. It also stated that in its opinion, even though Safety had informed Drivers after the MRC hearing that it would provide the agency with insurance stamps, no

¹⁰ Four members of the MRC voted for reassignment; six voted against it.

business relationship was possible. Drivers argued, as well, that Safety had taken no position on reassignment, and that the MRC decision had been reached on a “close” vote.

Safety’s response to Drivers’s presentation to the GCRP also reiterated the positions it took before the MRC. It continued to take no position on the application of Rule 14. F. 1 to Drivers, and disputed Drivers’s allegations relating to the April 8 meeting and about the nature of the contract documents. Mr. Berry, who again spoke for Safety, suggested that CAR, as an alternative resolution to the matter might, under its affiliated producer rule, appoint Drivers to the same servicing carrier which the insurance agency operated by Ms. Sellica’s husband represents as an ERP.¹¹

The GCRP addressed the four issues that Drivers raised in the RFR as grounds for reassignment. On the matter of accepting applications for coverage at the mandatory basic limits, the comment was made that an affidavit had been filed that addressed the issue.¹² With respect to the non-negotiable nature of the contracts, in response to a question from a GCRP member it was pointed out that CAR does not require a standard contract for ERPs and servicing carriers; counsel for Safety noted that the use of standardized form contracts has been approved by the United States Supreme Court as a way to promote transactional efficiency. Counsel for CAR identified the issue before the GCRP as whether the disagreement between Drivers and Safety merits a change in servicing carrier.

The panel members noted the concerns expressed at the MRC hearing about the precedential effect of allowing the requested change in servicing carrier and about the random assignment of brokers to servicing carriers. A member of the panel voiced the opinion that the random selection of [servicing] carriers is paramount to an orderly market. A motion was made, and seconded, to deny the appeal and to affirm the assignment to Safety. After a brief discussion, a vote was taken, and the motion was unanimously approved. On June 23, the GCRP issued its decision. This appeal to the Commissioner followed.

The Arguments to the Commissioner

¹¹ CAR counsel noted, however, that Drivers had been approved for its own ERP assignment and that because of subscription methodology the only action the GCRP could take would be to consider reassignment to an undersubscribed carrier other than Safety or State Farm.

¹² Mr. Berry also stated to the GCRP that Safety does write business at the 20/40 level, noting that a lot of inner city business is written at that level.

A. Drivers

Drivers seeks a hearing before the Commissioner to allow it to present evidence in addition to that brought to the attention of the MRC and the GCRP. It also asks to conduct limited discovery so as to establish the existence of a reasonable business purpose for assignment to another servicing carrier. It further asks the Commissioner to issue appropriate orders that will remedy the significant damages which Drivers has allegedly suffered and award it additional relief.

In its initial statement, Drivers argues that G.L. c.175, §113H and CAR Rule 14.F.1 authorize CAR to change the assignment of a licensed producer to a servicing carrier “for reasonable business purposes,” provided that the reassignment does not cause significant disruption of the marketplace and does not result in the unfair or inequitable apportionment of premiums, losses or expenses. It asserts that this standard is met because Safety has made it impossible for Drivers to conduct an insurance business. Further, Drivers notes, because it has not begun to place or service business a change in its assignment could not disrupt the motoring public. A change, it argues, would actually benefit the motoring public because it is now denied access to Drivers as a source of insurance. Drivers argues that no evidence shows that changing its assignment would result in an unfair or inequitable apportionment of premiums, losses or expenses, because it has not yet produced any business that would generate any of those items. It contends, further, that the Governing Committee’s position, that the random selection of servicing carriers is necessary to keep an orderly market would, if followed, negate CAR’s authority to order reassignment for a reasonable business purpose. Drivers argues that it is not seeking a specific servicing carrier, but will work with any carrier other than Safety.

Drivers argues that it is unable to work with Safety because the company would require it to reject customers who wanted to purchase only basic limits bodily injury coverage, in violation of the “take all comers” provisions of Massachusetts law. It asserts that its agreement with Safety is void as a matter of public policy because the contract is unconscionable, was presented as non-negotiable, and was entered into involuntarily, without adequate time to review it in advance. Drivers argues that CAR placed it into an involuntary relationship with Safety, and that it had no alternative to entering into an agreement.

Drivers further contends that the premium finance agreement that Safety requires of its ERPs violates G.L. c. 175, §113H and CAR Rule 14.A 2 because it differs from the agreement with its voluntary agents and therefore puts Drivers at a competitive disadvantage with voluntary agents. It also argues that the premium finance agreement is not consistent with Massachusetts law and that it includes a “draconian” indemnity provision. In addition, Drivers argues that Safety discriminated against it because its principal officer, Ms. Sellica, is a woman. It alleges that the tone and demeanour of Safety’s agent “threatened, demeaned, harassed and intimidated Ms. Sellica,” arguing that a male ERP would not have been told that the contract with Safety was non-negotiable.

Drivers argues that CAR’s decision should be set aside because the hearing process at CAR was biased in favor of Safety. As support for its position, Drivers argues that: 1) at the MRC hearing a producer member of the committee commented that he had known Safety’s representative, Mr. Berry, for a long time and tended to believe him; and 2) after the GCRP voted, the chairman of the panel commented that his daughter, who was the president of his agency, got along well with people from Safety and that he thought “Ms. Sellica could get along with them.” These comments, Drivers asserts, raise serious questions about the respective CAR committees’ ability to make unbiased decisions about Safety.

In its May 2006 memorandum, Drivers argued that it had presented additional evidence at the April 24 prehearing conference regarding the relationship between the members of the GCRP and Safety, to support its contention that the GCRP’s decision resulted from an “unfair, biased and prejudicial” hearing and violated Article X of the CAR Plan of Operation. Asserting that Article X allows it to file a complaint as a person aggrieved by any “unfair, unreasonable or improper” practice of CAR, Drivers reiterated its request for an evidentiary hearing before the Commissioner to present additional evidence on the identity and backgrounds of the GCRP members in support of its bias claims.¹³ Even if there is no proof of actual conflict, Drivers asserts, it is entitled to an

¹³ Drivers alleges that two members of the GCRP, James Tarpey and Dennis F. Murphy Jr. are agents for Safety and among the largest producers for the company. The third member of the panel, Timothy DelGrande, it asserts, represents the Norfolk and Dedham [Insurance] Group, a Group for which both Mr. Tarpey and Mr. Murphy are also agents. Therefore, Drivers concludes, all three are professionally associated with and receive income from Norfolk and Dedham. It reiterates Mr. Tarpey’s comment made to Drivers about his daughter’s relationship to Safety, and also notes a statement from Mr. Delgrande that he

opportunity to show that the relationships between the panel members and Safety created the appearance of impropriety, or that the interests of justice support a hearing before a different review panel.

Drivers argues that it attempted to ensure that the GCRP would be impartial by asking that Safety's president recuse himself from participation, but did not know that the other panel members were agents for Safety or professionally associated with Safety agents. Because CAR's General Counsel chose the GCRP members, Drivers contends, CAR is accountable for "stacking" the panel, even though it is responsible for ensuring a fair hearing for Drivers and avoiding any actual or perceived conflicts of interest. Other individuals who did not have any disqualifying associations were, according to Drivers, available to serve as members of the GCRP.¹⁴ Drivers argues that it has been aggrieved by CAR's practices, as well as those of Safety, and that it is clear that CAR will not reassign Drivers unless the Commissioner orders it to do so.

With respect to its Rule 20 appeal, Drivers asserts that not all the evidence needed to support its contentions is before the Commissioner. It reiterates its contentions that the contract between Drivers and Safety is unenforceable as "unconscionable" and violates Massachusetts law and the CAR Rules. Drivers seeks limited discovery, particularly of contracts between other servicing carriers and their ERPs, and an opportunity to present certain findings to the Division. It also seeks to offer testimony from Ms. Sellica and a Drivers's employee about their meeting with Safety's representative, noting that Drivers avoided litigating the gender bias issue at CAR in order to "avoid an unnecessary exercise in adversarial combat." Drivers contends that the Commissioner cannot make an informed decision on the merits of its claim without such testimony, arguing that the GCRP decision creates the impression that there is no factual support for Ms. Sellica's allegations of gender bias. Further, it asserts, the issue of gender bias is not limited to Ms. Sellica's appointment, but raises a broader concern about the number of women with ERP appointments. Drivers argues that the GCRP decision effectively vacated Ms. Sellica's appointment and prohibited her from functioning as an ERP.

was bothered by the allegations of gender bias against Safety. Drivers contends that Mr. Tarpey and Mr. Murphy would not vote against an entity, Safety, from which they derive income, and that the three members of the panelists were deliberately selected to sit on the GCRP.

¹⁴ Drivers articulates no reason why CAR would have any interest in "stacking" a GCRP against Safety.

Drivers notes that Safety did not object to its request for reassignment, but was concerned about the relationship between reassignment and any implications of wrongdoing on the part of its representatives. To that end, Drivers states, it hoped to achieve its goal without any admission of liability. As precedent for reassignment for “reasonable business purposes,” it refers to a case reassigning the Viveiros Agency.¹⁵

B. CAR

CAR’s response to Drivers’s statement addressed the issues related to its actions but deferred to Safety’s submission with respect to the allegations about Safety’s conduct and the terms of its contract. CAR points out that, although it has authority under Rule 14.F.1 to reassign ERPs for reasonable business purposes, CAR Rules 13 and 14 provide an intricate scheme for assigning ERPs to address the statutory requirement of fair and equitable apportionment. It comments that each ERP assignment affects both the subscription level of the servicing carrier to which it is assigned and, in many instances, the order in which servicing carriers are placed for purposes of receiving the next ERP. CAR also pointed out that Drivers, although it is a newly emerging ERP, appears to have significant common interests with the Sellica Insurance Agency (“Sellica Agency”), owned by Ms. Sellica’s husband.¹⁶ Those interests, it argues, raise the question of whether Drivers and the Sellica Agency are, under the CAR Rules, affiliated producers. If so, risks previously written through the Sellica Agency could be written through Drivers, thus transferring the benefits and burdens of that business from one servicing carrier to another and potentially unfairly affecting subscription and participation levels.¹⁷

With regard to the issue of a reasonable business purpose, CAR asserts that if the contract between Drivers and Safety is consistent with applicable law and regulation, the issue becomes the perception of one party of the style of the other party’s communication before signing the contract. On the issue of gender bias, CAR notes the allegations were not based on any specific language or act that would be considered unlawful, but on Ms. Sellica’s statement that she believed that Safety would have been less insistent about the

¹⁵ Other than identify the name of the agency, Drivers did not explain why its request for reassignment had been approved, or offer any analytical application of the reasoning in that decision to its situation.

¹⁶ CAR observed that Mr. Sellica had attended both hearings at CAR and also tried to speak with CAR staff about Drivers assignment.

¹⁷ CAR did not pursue this theory in its later submission.

non-negotiability of the contract if she were male. CAR contends that the MRC and the GCRP both concluded that Drivers did not make a case for gender bias.

CAR argues that a decision by the GCRP to reassign Drivers based on unsubstantiated allegations about the attitude of a company representative would have precedential value, and could open up the prospect of “forum shopping” by any ERP who was dissatisfied with its assigned carrier. It disputes Drivers’s assertions that the MRC and the GCRP improperly denied its request for reassignment because the members were biased in favor of Safety. CAR characterizes the comment of a member of the MRC relating to statements by the witness for Safety as a fair and open statement of the member’s belief about the credibility of the witness, rather than evidence of bias. Similarly, CAR notes, the statement made at the GCRP by Mr. Tarpey about his daughter’s experience with Safety was made after the evidence had been presented and the appeal considered. It contends that the statement was made to suggest to Ms. Sellica that Drivers and Safety could favorably resolve the issues between them, and that their differences did not rise to a level that would require reassignment.

In its June 2006 submission CAR asserts that Drivers, because it did not achieve a favorable outcome at the GCRP, now seeks to overturn a reasonable and legitimate decision by appealing to the Commissioner under Article X. It argues that the Commissioner should grant substantial deference to the MRC decision, as affirmed by the GCRP, so long as that decision was reasonable and not an abuse of discretion. As evidence that its decision had a supportable basis, CAR points to the concerns expressed by members of the MRC, including the effect on Safety if reassignment were approved, the precedent such a decision would create, and the “upset” that reassignment might cause. Drivers’s reliance on a decision to reassign the Viveiros Agency is, CAR contends, misguided; the MRC reviews each request on its own facts and is not bound by prior decisions in unrelated requests with distinct factual backgrounds.

With respect to Drivers’s assertions that the GCRP was biased in favor of Safety, CAR argues that, generally, it is within the discretion of a judge or member of a panel responsible for deciding a dispute to recuse him or herself from the matter, and that such decisions will be reversed only on a showing of an abuse of discretion. Abuse of discretion, CAR asserts, is generally shown by evidence that the person demonstrated bias

or prejudice arising from an outside source, not from something learned in the course of the proceeding. CAR contends that members of a GCRP must therefore evaluate whether their impartiality might reasonably be questioned, including any personal bias or prejudice about a party. It argues that Drivers's assertions about the business relationship between Safety and Mr. Murphy and Mr. Tarpey are tenuous and not dispositive of the issue of bias or prejudice. CAR states that although both Tarpey and Murphy's agencies are agents for Safety, each agency has multiple voluntary contracts with other carriers; both write personal lines for seven servicing carriers and commercial business for 23 companies. In addition, it notes that each of these agencies has low loss ratios for both private passenger and commercial motor vehicle insurance. It is thus illogical, CAR argues, to conclude that either Mr. Tarpey or Mr. Murphy would act in a biased manner because they are beholden to Safety as a source of income; it is equally likely that Safety would want to retain its beneficial relationship with low loss ratio producers. The connection that Drivers attempts to make between Mr. DelGrande and the other two members of the GCRP, based on their common connection with Norfolk and Dedham is, CAR asserts, extremely attenuated. Contending that unsupported speculation is not sufficient to establish bias, CAR argues that on these facts the members of the GCRP did not abuse their discretion by not recusing themselves from hearing Drivers's appeal, or that the composition of the panel created any appearance of impropriety. Further, CAR asserts, the isolated comments that Drivers relies on to support its claim of bias are expressions of opinion that, viewed in the context of the hearing, are not of a nature to support such a claim.

CAR points out that a GCRP is selected from the thirteen members of the Governing Committee. Members of a particular panel are chosen from those who are available to participate in a hearing which, under the CAR Rules, must be held within 15 days of filing a request for review. Two individuals who might, according to Drivers, have been members of the panel were out of town and unavailable on June 15, 2005, the applicable date in this case. Three members of the Governing Committee who also sat on the MRC were also precluded from hearing the matter. Two other members of the Governing Committee recused themselves; one is the CEO of Safety and the other a representative of a company which was a party to another case to be heard by the GCRP

on June 15. CAR argues that, given these constraints, Drivers's allegations that the GCRP was "stacked" in favor of Safety are "impractical and uninformed."

In its June 2006 statement, CAR reiterated its position that Safety was in a better position to respond to Drivers's specific assertions about Safety's presentation to it, but offered additional information to augment Safety's arguments. CAR noted that, for policy year 2005, the percentage of business that Safety wrote at the statutory minimum for bodily injury coverage was on a par with the industry-wide percentage. It argues that those data indicate that Safety is not declining to write or discouraging submission of such business. On the contract issue, CAR notes that Safety, like other servicing carriers, offers a standard contract to its ERPs, and that such contracts are ubiquitous in the business context. Even if the contract terms are not subject to negotiation, CAR argues, that does not make the contract void or coercive. In addition, it asserts, case law does not support the contention that the contract is unconscionable. Further, CAR comments, Drivers's assertion that no rational person would voluntarily sign the indemnification provisions in the contract is erroneous and exaggerated; all of Safety's other ERPs have signed contracts with such a provision.

In response to Ms. Sellica's claims of gender bias, CAR first points out that although Drivers argues that the issue of gender bias raises concerns beyond Ms. Sellica herself, the record relates to no person other than Ms. Sellica. Therefore, CAR argues, her claim must be evaluated solely on the facts of the matter at issue, not on purported discrimination against an entire class. Further, CAR asserts, Drivers made a tactical choice to avoid testimony in addition to its written submissions at CAR on the subject of gender bias, in order to foster amicable resolution of this dispute. It argues that Drivers should not now be allowed to shift the focus of its case to the issue of gender discrimination and to conduct discovery or present testimony. For those reasons, CAR argues, the agency's requests for discovery and an evidentiary hearing should be denied.

C. Safety

Safety takes no position on whether CAR should approve Drivers's request to be reassigned to another servicing carrier, because it considers that the assignment of producers to servicing carriers is a matter that should be resolved solely among Drivers and CAR, and now the Commissioner. At the same time, it strenuously disagrees with

some of the factual allegations and with the legal arguments that Drivers makes in support of its request. In its response to Drivers's initial statement, Safety disputed specific issues raised, pointing out, with respect to the allegations about the April 8 meeting, that Mr. Coleman's affidavit, a part of the record at CAR, describes that meeting. Safety argued that the affidavit addresses Drivers's allegations that Safety would not write bodily injury liability coverage at the minimum limits, and that Mr. Coleman demonstrated bias against women or businesses operated by women. Further commenting, Safety noted that over 60 percent of the new business produced by Safety and State Farm ERPs is written with minimum bodily injury limits, a statistic that shows that Safety does not discourage ERPs from writing business at the limits selected by the policyholder or applicant for insurance. It also reported that 30 of its 117 ERPs are women or are insurance agencies that are owned or operated by women. Safety stated that Mr. Coleman is Safety's principal representative for many of its women ERPs, and that none of these ERPs have complained about any bias against them.

With respect to the contract between Safety and Drivers, Safety asserted that no contract existed because, in compliance with an April 11, 2005 communication from Drivers, Safety did not execute the ERP contracts.¹⁸ It noted, however, that it remained willing to enter into a contractual relationship with Drivers. Safety disagrees with Drivers's representations about its ERP contract, arguing that: 1) it is a standard form contract that allows Safety to comply with the CAR rule that a servicing carrier provide a contract to a new ERP within 15 days; 2) the use of such contracts is an accepted business practice; and 3) they are enforceable so long as they are reasonable. No aspect of the contract, it argues, would require Ms. Sellica to violate either Massachusetts law or the CAR Rules. Safety asserts that Ms. Sellica, to qualify as an ERP, represented to CAR that she would comply with the provisions of her contract with a servicing carrier. The CAR Rules, it points out, do not require Safety to provide an opportunity to negotiate contract terms, but only direct it to provide a contract that is substantially similar to the contract it offers its voluntary agents. The provisions of the ERP contract that Ms. Sellica found onerous, Safety argues, are identical to the provisions in its voluntary producer contracts.

¹⁸ This appears to be inaccurate. The copies of the contracts that Drivers submitted with its initial statement had been executed both by Drivers and Safety. However, I do not find it material to any issue in this appeal.

Responding to Drivers's representations about the size of the contract and the time available to review it, Safety notes that its ERP agreement is ten pages long, not an inch-and a half to two inches thick, and that Ms. Sellica could have taken all the time she wanted to review the document.¹⁹ Safety argues that, contrary to Drivers's representations, Ms. Sellica was neither oppressed nor the victim of unfair surprise during her meeting with Safety. It notes that she is, presumably, a savvy and experienced business person.²⁰

Regarding premium finance procedures, Safety argues that there is no support for Drivers's position that its procedures violate CAR Rules because Safety treats its ERPs differently from voluntary agents. It asserts that the premium financing guidelines that are distributed to each class of producers are not materially different, and that neither document contains any provision for the amount of down payment to be made in connection with premium financing.²¹ Further, Safety comments, Drivers's position that its premium finance provisions violated Massachusetts law is invalid, because different laws apply depending on whether the policyholder pays premium to the insurer or uses a premium financing company. In addition, Safety points out that a preliminary decision by the Superior Court, subsequently affirmed by the Appeals Court, in the litigation that Drivers relied on as support for its argument on the legality of Safety's premium finance contract, concluded that Safety's procedures were lawful.²²

In support of its position that it is not at fault for any of the issues raised by Drivers, Safety points out that, despite its disagreement with Ms. Sellica on what occurred at the April 8 meeting, it offered to provide a female representative to work with Drivers. However, Drivers immediately and unconditionally rejected that offer. Safety also argues that it has no power to honor a request from Drivers to consider its ERP assignment to be null and void. Under Massachusetts law, it asserts, it is obligated to honor CAR's

¹⁹ Safety points out that Drivers's counsel indicated that she took half an hour to look them over.

²⁰ At the MRC hearing, Ms. Sellica was described as a businesswoman who had been in a sales representative position for the last twenty-one years, and who had worked in an insurance agency.

²¹ Copies of the documents were attached to its response.

²² The Superior Court denied a preliminary injunction to two finance companies, plaintiffs in litigation against Safety. The Appeals Court, on an interlocutory appeal, affirmed the Superior Court's decision.

assignments. Safety affirms that it is willing to attempt to service Drivers until CAR reassigns it to a different servicing carrier or Drivers is no longer eligible to be an ERP.²³

In its June 7, 2006, submission Safety reaffirmed the position and reiterated the arguments made in its initial response. It took no position on whether Drivers should be given an evidentiary hearing on its allegation that the GCRP was biased. However, Safety observed that, if the GCRP truly had a pro-Safety bias, as alleged by Drivers, it would have voted to reassign Drivers to another carrier rather than require Safety to remain in a strained relationship. Further, Safety argued, Drivers could not submit evidence that would refute Safety's position that it writes policies at minimum bodily injury limits. The contract issues that Drivers raises, Safety notes, are questions of law about which no additional evidence need be submitted. With respect to Drivers complaint about Safety's premium finance requirements, Safety reported that the finance companies that had filed suit against Safety, after their request for a preliminary injunction was denied, agreed to dismiss the litigation. Safety concludes that the record demonstrates that Safety has no bias against Drivers, Ms. Sellica, women or agencies owned by women, and that no further evidentiary proceedings are required to determine that issue.

Analysis and Discussion

The sequence of events that gave rise to this appeal is not disputed. Drivers, an insurance producer without a voluntary contract with an insurer to sell automobile insurance, applied to CAR for appointment as an ERP. CAR, after review of the agency's qualifications, including visits to its office, approved the appointment and assigned Drivers to State Farm for private passenger automobile insurance and to Safety for commercial motor vehicle insurance.²⁴ Because State Farm contracts with Safety to manage its ERPs, in effect Drivers' working relationship was with Safety for both lines. The day after its initial meeting with Safety's marketing representative, at which Drivers executed an ERP contract and other documents, it asked Safety to cancel the relationship.

²³ The CAR Rules provide for the reassignment of ERPs when necessary to adjust for changes in the servicing carriers over- and under-subscription levels. The process, however, is initiated by an over-subscribed servicing carrier and is resolved after review of industry statistical data. It does not contemplate reassignment of any particular ERP.

²⁴ Drivers was never assigned to Commerce. Statements before the GCRP indicate that an ERP assignment is not perfected until CAR sends a letter of assignment. Because subscription levels were recalculated between March 18 and March 29, on the latter date State Farm was the servicing carrier in line to receive additional ERP assignments.

Two days later, Drivers again asked Safety not to process any business and, pursuant to CAR Rule 14.F.1, requested CAR to reassign it to a different servicing carrier. This appeal arose from the denial of that request, first by CAR's MRC and then by a GCRP. Drivers seeks an order from the Commissioner requiring CAR to assign Drivers to a different servicing carrier. It also argues that it should be awarded damages, but cites to no authority that would allow such an award.²⁵

A. The legal basis for this appeal.

Drivers filed its July 2005 appeal pursuant to CAR Rule 20.B, which permits appeals to the Commissioner from a ruling of the CAR Governing Committee.²⁶ Drivers summarized the allegations that, it argued, supported its request for reassignment, reiterated its position that reassignment was the only possible solution, and alleged that the MRC and the GCRP improperly denied its request because the committee and panel members were biased in favor of Safety.

At the April 2006 prehearing conference, Drivers stated that it was now appealing to the Commissioner pursuant to Article X of the CAR Plan of Operation, which allows any person "aggrieved by any unfair, unreasonable or improper practice of a member company or CAR to file a complaint with the Commissioner."²⁷ Its Article X appeal, Drivers argued, arises from the composition of the GCRP that heard its appeal from the MRC. Drivers asserted that the relationships between the panel members and Safety either demonstrated conflicts of interest requiring recusal from the panel, created an appearance of impropriety, or were such that, in the interests of justice, a different panel should have been convened. It further asserted that CAR violated Article X by selecting for the panel Governing Committee members who had some relationship with Safety, thus creating an unfair, unreasonably constituted and biased review panel.

The Commissioner's jurisdiction over disputes involving CAR derives from three sources. G.L. c. 175, §113H (E) ¶6 permits an insurer or other party affected to appeal to the Commissioner from any CAR ruling or decision with reference to the operation of the

²⁵ Drivers did not make this request in its initial statement, but added it in its June 2006 submission.

²⁶ Rule 20 provides that "Any person, including a licensed [producer] aggrieved by any unfair, unreasonable or improper practice of CAR or a Member with respect to the operation of CAR may request a formal hearing and ruling by the Governing Committee on the alleged practice." The Commissioner may approve, modify, amend or disapprove the ruling, order the Governing Committee to reconsider its ruling, or issue other appropriate orders.

²⁷ It reiterates its position in its May 2006 submission.

residual market plan. Consistent with the statutory requirement, Rule 20 permits any person, including any member of CAR, licensed agent, or licensed broker, who is aggrieved by an unfair, unreasonable or improper practice of CAR or a CAR member, with respect to CAR's operations, to request a hearing before and ruling from the Governing Committee and to appeal its decision to the Commissioner.

In contrast, G. L. c. 175, §113H (E) ¶9 authorizes an insurer or group of insurers that participate in CAR, or other aggrieved person, to complain directly to the Commissioner alleging unfair or unreasonable or improper practices by any insurer, agent or broker. CAR is not among the entities whose allegedly unfair, unreasonable or improper practices may be the basis for filing a complaint directly with the Commissioner. Driver's Article X complaint is limited to the single issue of an alleged unfair, unreasonable or improper practice by CAR; it did not complain directly about any alleged unfair, unreasonable or improper practice by Safety. For that reason, as a matter of law, the Article X complaint is outside the Commissioner's statutory authority. To the extent that Drivers now purports to state claims against CAR, it may not do so under Article X, and its Article X claim is hereby dismissed.²⁸

Dismissal of the Article X complaint, however, does not remove from consideration in this appeal the issue of bias in the proceedings before CAR. Drivers's July 2005 appeal arises from a CAR decision relating to the operation of the residual market including, as permitted by Rule 20, allegations about CAR's conduct. Because Drivers raised the issue of bias in that appeal, it will be addressed in this decision.

B. Drivers' Request for an Evidentiary Hearing.

Drivers sought to obtain a hearing before the Commissioner by filing a separate Article X complaint against CAR. Because, as noted above, Drivers cannot, by statute, present a claim against CAR directly to the Commissioner, it is not entitled to a hearing on that claim.

In a Rule 20 appeal, a hearing is discretionary. *See, Appeal of Liberty Mutual*, C94-10, 8, fn. 16. In administrative proceedings a reviewing agency is entitled, as a

²⁸ Although Article X of the CAR Plan is more expansive than G.L. c. 175, §113H (E) ¶9, this is a jurisdictional issue in which the statute is controlling. *See Ansaldo v. Commissioner*, DOI Docket No. C94-1, at 9, fn. 9, aff'd by the Superior Court (Barrett, J.) on March 1, 1995. The Appeals Court dismissed Ansaldo's subsequent appeal by order dated May 6, 1996.

threshold requirement, to review the factual information provided to it and to determine whether an evidentiary hearing would serve a useful purpose. Summary disposition of an administrative matter based on papers or pleadings does not offend a statutory or constitutional right to a hearing if the papers or pleadings show on their face that the hearing can serve no useful purpose. *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 9 Mass. App. 775, at 784, 785 (1980.) Similarly, the Supreme Judicial Court has indicated that it is entitled to make a threshold determination as to what is properly before it on appeal. *American Dog Owners Association, Inc. v. City of Lynn*, 404 Mass. 73, at 78 (1989). Thus, it is appropriate for the Commissioner initially to examine the allegations and the asserted legal grounds for an administrative complaint or appeal and then to determine whether to hold a hearing.

Based on my review of the documents submitted by the parties and consideration of their arguments, I am not persuaded that an evidentiary hearing is necessary. The sequence of events in this matter, summarized above, the information before the MRC and GCRP, and the transcript of the proceedings before them, as placed in the record by Drivers, are not disputed. Drivers and Safety presented their respective positions on the content of the April 8 meeting at the CAR hearings. The MRC and the GCRP thus had an opportunity to weigh the competing statements, to ask questions and to factor the information presented into their decisions. On appeal, the issue before the Commissioner is whether, on the evidence before it, CAR correctly applied Rule 14.F.1 to Drivers's request. Drivers appeal reiterates to the Commissioner the arguments it made to CAR. It has presented no reason to hold an additional evidentiary hearing before the Commissioner.²⁹

C. The Merits of the Appeal

Drivers, in essence, seeks to establish that its decision to reject the contract with Safety was justified and to persuade CAR that it has satisfied the criteria for reassignment under Rule 14.F.1. It combines allegations about matters discussed at the April 8 meeting and arguments about the legal principles that, it contends, should be applied to the transaction. Ultimately, Drivers argues that CAR erroneously rejected its request for reassignment because the members of the MRC and the GCRP were biased in favor of

²⁹ The issue of an additional hearing on the issue of gender bias is addressed *infra*.

Safety. Underlying its argument is the premise that, absent such bias, CAR would have approved Drivers's request for reassignment.

Rule 14.F.1 permits reassignment "for reasonable business purposes . . . provided there is no significant disruption of the marketplace and no unfair or inequitable apportionment of premiums, losses or expenses." The MRC and the GCRP had before them Drivers's RFRs and heard from its counsel, who asserted that the correct standard of review is whether there was a reasonable business purpose for the reassignment.³⁰ Drivers asserted that it met this standard because its dissatisfaction with the April 8 meeting with Safety made any future working relationship impossible and made reassignment the sole possible relief. After reviewing the documents and testimony that were before the MRC and the GCRP, I am persuaded that CAR properly considered the information presented to it and that the evidence fully supports its decision to deny Drivers the relief it requested.

Drivers argued to CAR that it rejected appointment to State Farm because of three alleged problems with Safety's contracting procedures: 1) an alleged refusal to write automobile insurance at the mandatory minimum level, characterized by Drivers as a violation of the "take all comers" rule; 2) the alleged unconscionability of the Safety ERP contract, which was described as a non-negotiable document an inch and a half to two inches thick and 150 to 200 pages long; and 3) and the premium financing agreement that allegedly set different requirements for ERPs than for voluntary agents. It concluded that these factors justified rejection of the Safety contract and, further, made any future relationship with Safety impossible.

In opposition to Drivers's allegations, the MRC and the GCRP heard statements from Mr. Berry and reviewed an affidavit from Mr. Coleman. Mr. Berry stated that Safety writes coverage at the 20/40 limits from any agency. Further, he stated, Safety requires the same financing procedures from voluntary agents and ERPs. He acknowledged at the MRC that a legal challenge had been made to Safety's premium financing agreement but at the GCRP further noted that a request for a preliminary injunction in that litigation had been denied. Mr. Coleman's affidavit affirmed Mr. Berry's statement about the premium financing agreement; he observed that his discussion with Drivers about purchasing

³⁰ Except for a response from Ms. Sellica to a question from a member of the MRC, neither she nor Mr. Hebert spoke at the MRC hearing.

automobile insurance above the mandatory limits arose in the context of a conversation about advising customers who were purchasing homeowners insurance about carrying a prudent level of automobile insurance. He also stated that although Drivers was asked to sign a standard contract that is non-negotiable, he offered to discuss any elements of the contract with Ms. Sellica. At the GCRP, counsel for Safety, Peter Rice, Esq., commented that the use of form contracts is legally acceptable. In response to questions, counsel for CAR commented to the MRC and to the GCRP that CAR would be involved with questions about a contract between an ERP and its servicing carrier only if any of the contract terms were alleged to violate the CAR Rules. Drivers did not assert that the contract provisions violated any provision of the CAR Rules.³¹ On this record, I am persuaded that CAR had before it ample evidence to support a conclusion that Drivers had not demonstrated that its rejection of the contract and subsequent request for reassignment were justified by alleged flaws in Safety's procedures relating to management of ERP business.³²

The second issue was Safety's alleged failure to provide Drivers with the materials that it needed to commence business on April 8. Drivers asserted that Safety failed to provide it with stamps immediately after Ms. Sellica signed the contract, precluding her from being able to sell insurance. Mr. Coleman's affidavit stated, however, that he had informed Ms. Sellica that the contracts had to be finalized before the stamps could be issued, and that he anticipated ordering the supplies on April 11 and delivering them to Drivers by the end of the week.³³ However, on April 11 Drivers asked Safety not to process any contracts. At the GCRP hearing, Drivers confirmed that after the MRC hearing, Safety had stated that it would provide stamps so that Drivers could conduct business. Nevertheless, Drivers continued to maintain its position that no viable business relationship was possible. As Mr. Berry observed, Drivers now complains that Safety did not provide it with the materials required to conduct business, even though it specifically

³¹ CAR has no authority to consider legal issues relating to a contract, such as its validity, that are not directly correlated with the operation of the residual market.

³² A member of the GCRP noted that CAR could not resolve questions relating to the contract or the premium finance arrangement. Drivers argued to the GCRP that it was no longer asking CAR to determine whether the Safety contract violated state law, but whether the positions of Safety and Drivers have created an "atmosphere, circumstance or situation" that would suggest the need for a different assignment.

³³ April 11 would have been the first regular business day following the April 8 meeting.

asked Safety to nullify the contract between them.³⁴ On this record, CAR could well conclude that the alleged delay in providing Drivers with stamps did not justify rejection of the contract and therefore did not support reassignment.

Third, Drivers argues that Safety does not contest its request for reassignment, noting that the company, while it disputes Drivers's allegations about what occurred during its meeting and disagrees with its legal arguments, has expressed concern about going forward with the relationship. Safety, pointing out that it is obliged to work with ERPs assigned to State Farm, has consistently taken no position on whether Drivers established grounds for reassignment pursuant to CAR Rule 14.F.1. The record demonstrates that Safety is willing to work with Drivers and would accept CAR's decision on reassignment. However, the ultimate responsibility for assigning ERPs rests with CAR, which was asked, in this case, to apply Rule 14.F.1 to a request for reassignment to a different servicing carrier. The standards set out in the rule for allowing such reassignment do not include concurrence with the ERP's request by the current servicing carrier. Therefore, under the rule, Safety's position was not relevant to CAR's decision on reassignment.

In order to prevail on its request, Drivers bore the burden of persuading CAR that it had requested the reassignment for "reasonable business purposes" and that there would be "no significant disruption of the marketplace and no unfair or inequitable apportionment of premiums, losses or expenses." Neither the MRC nor the GCRP were persuaded that a producer's dissatisfaction with a servicing carrier's procedures for initiating a business relationship with an ERP should be characterized as a "reasonable business purpose." The MRC, although its members expressed concern about maintaining a relationship for which neither party had any enthusiasm, questioned whether, by reassigning Drivers, it would create a precedent that would allow an ERP who did not like the servicing carrier to which it was assigned to change servicing carriers by making disparaging remarks about the company and its representative.³⁵ It did not find persuasive

³⁴ Safety argued that it, as a servicing carrier and as the manager of State Farm's ERP business was obligated to honor CAR's ERP assignments, and could not set the contract aside.

³⁵ Other than avoiding a relationship with Safety, the motivation for seeking reassignment is not entirely clear. Although Drivers claimed that it was not requesting reassignment to manipulate the market, it stated to both the MRC and the GCRP that CAR had indicated, when it visited the Drivers office in mid-March 2005, that the appointment would be to Commerce. Drivers told the MRC that on March 18, CAR staff had

Drivers's argument that it viewed reassignment as a "settlement" of its dispute with Safety, rather than as a CAR decision that might set a precedent for actions by other ERPs.³⁶

On the second issue, Drivers contends that, because it has written no business and has no clients, reassignment will not disrupt the marketplace or produce an unfair or inequitable apportionment of premiums, losses and expenses. It further commented to the MRC that its current situation deprived the motoring public of an opportunity to place insurance. Drivers argued that there was no "downside" to reassigning it to a different servicing carrier. Contrary to Drivers's position, it was noted that, for insurers, the transfer of an ERP from one servicing carrier to another is not a neutral event without financial implications, but involves cost shifting among those servicing carriers. CAR pointed out that changing Drivers's assignment would directly affect State Farm, because of the costs to a servicing carrier of receiving a particular ERP, but would have no effect on Safety in its capacity as a third party manager for State Farm's ERP business. The reassignment of 400 exposures from State Farm would also have a particular impact on the company because of the size of its market share in Massachusetts.³⁷

Granting Drivers's request would also have required CAR to make exceptions to its rules on subscription assignments. It was pointed out at the MRC meeting that, as of that date, Safety was an undersubscribed carrier and would therefore receive the next ERP assignment. For that reason, to award Drivers the relief it requested, CAR would have had to make a special arrangement to assign Drivers not to the most undersubscribed servicing carrier (i.e., Safety) but to the next company in line to receive additional ERP

reviewed Drivers's premises, approved it as an office, said, in essence, that it was approved as an ERP, and orally indicated that Drivers would be assigned to Commerce Insurance Company as its servicing carrier. However, between March 18 and March 29, there was a change in servicing carrier subscription levels, so that Drivers was assigned to a different servicing carrier. Mr. Berry stated his opinion that Drivers, as a newly emerging ERP, was disappointed because it was assigned to a different servicing carrier than the one it had expected to represent. The record does not include any response from Drivers to his statement.

³⁶ Drivers did not explain why a solution that would have given it precisely the relief it sought should be considered a "settlement." In addition, the MRC had been made aware that Drivers had rejected a compromise offered by Safety that included assigning a different marketing representative to Drivers.

³⁷ A servicing carrier's ERP subscription level is determined as a fraction of the private passenger automobile insurance business that it writes in Massachusetts.

exposures.³⁸ It was also pointed out that Drivers assignment to Safety for commercial business would need to be changed.

The MRC noted that the CAR Rules provide for the assignment of ERPs to servicing carriers based on the order of the servicing carriers' subscription levels and that reassignment would have a greater effect than appears on the surface. The importance of preserving a system of random assignment of ERPs was affirmed by the GCRP, where it was described as "paramount to an orderly market." The comment was made that an action that would move away from that system would make it difficult to have fair and equitable distribution of urban exposures.

Looking at the record as a whole, it is apparent that CAR did not find persuasive Drivers's arguments that reassignment would not cause significant market disruption or unfair or inequitable apportionment of premiums, losses or expenses. I conclude that CAR correctly applied Rule 14.F.1 and that its decision should be upheld.³⁹

Drivers does not accept statements expressing CAR's concerns about the application of its rule regarding reassignment of ERPs to servicing carriers as the basis for the MRC and GCRP decisions, but instead argues that CAR was biased in Safety's favor. Drivers raises two separate issues in its appeal to the Commissioner. First, it asks that it be allowed a hearing to pursue its claim of gender bias. In both its RFRs, Drivers identified gender bias as a fourth basis for its position that it had established a reasonable business purposes for reassignment, but at the hearings on those RFRs stated that it wished to avoid that issue, and did not think it necessary to pursue it.⁴⁰ The record indicates that Drivers, for its own reasons, declined to pursue at CAR allegations of gender discrimination against Safety. I find no reason to allow Drivers to raise on appeal an issue that it intentionally elected not to address at CAR.⁴¹

³⁸ A subsequent calculation at the MRC concluded that, if the 400 exposures credited to State Farm as a result of assigning Drivers to it as an ERP were taken away, State Farm would again become the most undersubscribed carrier. Consequently, if reassignment were approved, it would have to provide that Drivers would not be assigned either to Safety or to State Farm.

³⁹ Drivers argued that CAR, by emphasizing maintenance of an orderly residual market, effectively negated its authority to order reassignment for a reasonable business purpose. I do not find its argument persuasive.

⁴⁰ Drivers indicated to the MRC that it did not want the MRC to have to make decisions on the credibility of the witnesses.

⁴¹ An option open to the Commissioner in an appeal of a Rule 20 decision is to remand the matter to CAR for further proceedings. However, in light of Drivers' consistent statement that it did not want to pursue the issue of gender bias at CAR, I am not persuaded that remand is appropriate. Although the extent of CAR's

Drivers also argues that two separate aspects of the proceedings at CAR showed bias toward Safety: comments made in the course of the hearings and the composition of the GCRP. On the first issue, its arguments are not persuasive. Drivers specifically objected to a comment by a member of the MRC voicing his opinion about the credibility of a witness. The comment was made in the context of the member's expression of concern that a vote in favor of a motion to approve reassignment would suggest that Safety had engaged in "misbehavior" when he was not sure that it had. The motion itself was subsequently amended by its maker to state specifically that passage of the motion would not affirm Drivers's allegations or indicate any liability on Safety's part.⁴² I am not persuaded that an opinion expressed by a committee member based on his personal knowledge of a witness should be considered evidence of bias. In any event, I conclude that the opinion to which Drivers objects could not have biased the MRC decision because, as a result of amendments to the original motion, a committee member's vote would not have constituted adoption of either Drivers's or Safety's version of the facts relating to the April 8 meeting.

The second comment to which Drivers objects, a statement made by a member of the GCRP about his daughter's experience with Safety, was not made during the course of the hearing, but only after the vote was taken. Therefore, the panel could not have considered the comment during its evaluation of the evidence before it. Further, although Drivers characterizes the statement as evidence of bias, it is consistent with comments made both at the MRC and the GCRP regarding the possibility that Drivers and Safety could resolve their difficulties. I find it equally reasonable, as argued by CAR, to view the statement in question as responsive to Drivers's representations that it was willing to compromise with Safety.

Drivers's second claim of alleged bias relates to the composition of the GCRP. It is apparent from the record that Safety and Drivers both understood that it would be inappropriate for Safety to participate in any proceedings relating to Drivers's appeal. The member of the MRC who represented Safety correctly recused himself from hearing

authority to address contract questions was raised, the issue of whether CAR was the correct forum in which to raise a claim of gender discrimination was not discussed.

⁴² Drivers did not object to the amendment and, at the GCRP, stated that by ruling in its favor the GCRP would not validate Driver's allegations or "besmirch" the reputation of Safety's witness.

the matter. Before the GCRP hearing, Drivers took steps to ensure that Safety's representative on the Governing Committee would not be on the GCRP. However, even though two members of the GCRP were insurance producers, Drivers made no inquiry into any relationship that they might have with Safety. On appeal to the Commissioner, Drivers has constructed a theory of bias and seeks an opportunity to conduct discovery to prove its case.⁴³ It offers no reason for its failure to express any concerns about the particular composition of the GCRP before the hearing.

Drivers attempts to raise on appeal an issue that could, and should have, been addressed either before commencement of the hearings at CAR or at the start of Drivers's presentation. Its approach is contrary to the well-established principle that a party to a dispute should address all issues which it considered relevant and material to its claim at the initial forum which hears its complaint.

Conclusion

For the above-stated reasons, I find that CAR's decision on Drivers's request for reassignment should be upheld. The appeal filed by Drivers Insurance Agency of a May, 2005 decision of the CAR Governing Committee is hereby denied.

Issued: March 5, 2007

Jean F. Farrington
Presiding Officer

This decision may be appealed pursuant to G. L. c. 175, §113H.

⁴³ Drivers has also attempted on appeal to expand its claim of bias, refocusing it from the individuals who heard its appeal to CAR itself, in the form of a complaint alleging an intent to constitute a GCRP that would be biased in favor of Safety. As noted above, such a complaint is not allowed by statute.