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**Appeal of The Calianos Insurance Agency of a
Decision of Commonwealth Automobile Reinsurers
Docket No. C2012-02**

**Order on the Calianos Insurance Agency's Appeal of a
Decision of Commonwealth Automobile Reinsurers**

Introduction

On October 5, 2012, the Calianos Insurance Agency (“Calianos Agency” or the “Agency”) filed with the Commissioner of Insurance (“Commissioner”) a Notice of Appeal from a Decision issued by the Commonwealth Automobile Reinsurers (“CAR”) Governing Committee (“GC”) on September 13, 2012. That decision upheld a decision of CAR’s Market Review Committee (“MRC”) affirming the Safety Insurance Company’s (“Safety”) termination of the Calianos Agency’s appointment to it as an Exclusive Representative Producer (“ERP”) for commercial business and decertified the Calianos Agency as an Assigned Risk Producer (“ARP”) authorized to place private passenger motor vehicle insurance with the Massachusetts Automobile Insurance Plan (“MAIP.”)¹ Along with that Notice of Appeal, the Calianos Agency also requested a stay of CAR’s decision.

A hearing on the request for a stay took place on October 12, 2012, and an order allowing the stay was issued on the same day.² The order also stated that a scheduling order would be forthcoming. The parties were advised that on appeals from CAR decisions the Commissioner

¹ The Calianos Agency, with its appeal, also filed a complaint with the Commissioner of Insurance, pursuant to Massachusetts General Laws Chapter 175, §113H (E), alleging that Safety and the Pilgrim Insurance Company had engaged in unfair or improper practices and seeking relief in the form of orders requiring them to take certain corrective action. In a subsequent amendment to the complaint, the Calianos Agency made similar allegations against additional insurers.

² The Calianos Agency, in its motion to stay, also asked for orders prohibiting companies that had written PPA policies through the MAIP for Agency customers from notifying those customers that the Agency had been decertified. No order issued against the companies; CAR, however, was ordered to advise them that the termination and decertification had been stayed.

customarily does not hold *de novo* hearings, but reviews the record of the proceedings before the relevant CAR committees.³ Therefore, the parties were asked to develop an agreed upon record of the proceedings at CAR. On December 10, 2012, the parties submitted a joint appendix consisting of 21 documents. They filed their respective memoranda of law on December 14. Each party attached four documents to its memorandum that were not included in the joint appendix. Two of those additional documents, a transcript of the October 12, 2012 hearing and Chapter II of the Assigned Risk Producer Procedures Manual, are identical. CAR filed a reply memorandum on December 21, 2012 and the Calianos Agency filed a reply memorandum on January 14, 2013.

I have reviewed the record and the parties' memoranda, and conclude, for the reasons stated below, that CAR's decision should be reversed.

Historical background

CAR operates the residual market for motor vehicle insurance in Massachusetts under a Plan of Operation ("CAR Plan") developed in 1983 in response to legislative amendments to Massachusetts General Laws Chapter ("Chapter") 175, §113H.⁴ In accordance with the legislation, the CAR Plan provided for the assignment of each licensed property and casualty insurance producer to a motor vehicle insurer that had been appointed as a Servicing Carrier. Assignment allowed the producer, known as an ERP for the insurer, to have access to a market for placing motor vehicle insurance. CAR promulgated Rules of Operation 1-20 ("CAR Rules") that set out in greater detail the requirements for appointment as a Servicing Carrier and assignment as an ERP. Because private passenger motor vehicle insurance and commercial motor vehicle insurance are considered separate lines of business, a producer might be assigned to one insurer for insuring private passenger motor vehicles and another for insuring commercial vehicles.⁵ Beginning in 2006, CAR changed the structure of the residual market for commercial vehicle insurance by appointing a limited number of Servicing Carriers to issue and service policies written in that market and developing a special program for insuring taxicabs and limousines.

³ The customary procedure applies when no material facts about the appeal are disputed and the record is complete. The Commissioner has discretion, however, to hold a hearing to resolve disputed factual issues where warranted.

⁴ See, Massachusetts 1983 Acts and Resolves, Chapter 241.

⁵ Over time, the CAR Rules were amended to impose some additional requirements for ERPs, such as maintaining a book of business at a prescribed minimum level and operating in a so-called "market need" territory.

In 2008, the residual market for private passenger motor vehicle insurance was significantly restructured, shifting from a reinsurance pool to which Servicing Carriers assigned policies that they declined to cover voluntarily to an assigned risk plan. Under the new Massachusetts Automobile Insurance Plan (“MAIP”), a producer submits an application for residual market insurance coverage to CAR, which then assigns it to a CAR member that has been designated as an Assigned Risk Company (“ARC”). The change to an assigned risk plan eliminated the appointment of ERPs to individual Servicing Carriers to write private passenger motor vehicle insurance and replaced it with a system certifying as ARPs all property and casualty producers who were licensed when the MAIP took effect. As part of the implementation of the new plan, CAR promulgated Rules of Operation 21-40 (the “MAIP Rules.”) The CAR Rules remain in effect for the commercial market, while the MAIP Rules address the residual market for private passenger motor vehicle insurance.

Under the CAR Rules, CAR appointed the Calianos Agency to Safety as an ERP both for commercial and private passenger business.⁶ Safety was among the carriers appointed to service the restructured commercial market in 2006 and the Calianos Agency continued to be a Safety ERP for commercial business. As of April 1, 2008, upon implementation of the MAIP, the Calianos Agency’s ERP appointment to Safety for private passenger business terminated automatically and the Agency was certified as an ARP under MAIP Rule 31.A. Since then, in that capacity, the Calianos Agency has submitted applications for private passenger motor vehicle insurance to CAR, which assigns them to ARCs, including Safety, according to a quota share formula.⁷

Chronology of Prior Proceedings

On April 17, 2012, Safety notified the Calianos Agency in writing that its ERP appointment for commercial business would be terminated as of May 21, 2012 (the “Termination Letter”). CAR Rule 20, in pertinent part, permits any person, including a licensed agent or broker, “aggrieved by any unfair, unreasonable or improper practice of CAR or a Member with respect to the operation of CAR” to request a formal hearing and ruling by the GC on the alleged practice.⁸ With its Termination Letter, Safety included a copy of CAR Rule 13 and CAR’s

⁶ According to CAR’s memorandum, these appointments were made in 1975.

⁷ The Calianos Agency’s private passenger business is almost entirely written in the residual market. At the hearing on the Calianos Agency’s request for a stay, Safety and the Commerce Insurance Company were identified as the two insurers that were assigned the largest number of MAIP applications submitted by the Agency.

⁸ CAR Rule 20 has not been amended to reflect changes to the Massachusetts statutes relating to insurance licenses that, as of May 2003, replaced the dual system of agent and broker licenses with a single insurance producer license.

standard hearing request form, titled Request for Review/Relief. On May 17, 2012, the Calianos Agency submitted to CAR a letter (the “May 17, 2012 Letter”) and two requests for Review/Relief forms, seeking review of Safety’s termination of its ERP appointment and also of Safety’s calculation of finance charges on commercial motor vehicle insurance policies that were financed through premium finance companies⁹.

CAR Rule 20 refers to a hearing and ruling by the GC but further provides that such hearings “shall” be held by a three-person panel appointed by the GC from among its voting members (the “GCRP”). Rule 20 refers as well to decisions made by “any committee sitting at the request of or under the authority of the GC.” Although the CAR Rules do not establish a standing committee that is authorized to hold hearings and issue decisions, in practice CAR created a Market Review Committee (“MRC”) that first hears requests for review of disputes between its member companies and their assigned ERPs.¹⁰ If the ERP does not obtain the relief sought at the MRC, he or she may appeal its decision to the GC, where they are heard by the GCRP. A majority ruling by the GCRP is deemed to be the formal GC ruling unless the full GC, on its own motion, modifies or rescinds the panel’s action. CAR Rule 20.B permits an appeal to the Commissioner of a formal GC ruling.

Consistent with that structure, on June 1, 2012, CAR issued a notice of a June 13 MRC meeting, including on the agenda the Calianos Agency’s two CAR Rule 20 requests for review.¹¹ The MRC met, as scheduled, on June 13, 2012, separately considered each of the Calianos Agency’s requests for review and denied each of them. At the Agency’s request, the MRC stayed the ERP termination pending an appeal to the GC. On July 12, 2012, the Calianos Agency filed with CAR a formal Request for Review of the MRC’s decision. On August 30, 2012, CAR issued a notice of a GCRP meeting to be held on September 11. The agenda included review of the MRC decision on Safety’s termination of the Calianos Agency.¹² On

⁹ Because that complaint related to commercial motor vehicle insurance, it was also made pursuant to CAR Rule 20.

¹⁰ CAR Rule 4.C.4, in pertinent part, authorizes the Governing Committee to appoint standing or temporary subcommittees in consultation with the Commissioner for purposes of assuring that subcommittees fairly represent the Member Companies and producers, with due consideration given to the existence of expertise appropriate for the subcommittee in question..

¹¹ The MRC’s agenda also included an additional request for review of a dispute between the Calianos Agency and the Commerce Insurance Company (“Commerce”) arising out of the latter’s alleged steering of a policyholder from the Calianos Agency to a voluntary producer for Commerce. The Joint Appendix filed in this proceeding does not include a formal Request for Review of that matter, nor is it mentioned in the Calianos Agency’s May 17 Request for Review.

¹² The GCRP agenda also included review of the MRC’s decision on the Calianos Agency’s dispute with Commerce. The Agency subsequently withdrew its appeal of that decision. The withdrawal was announced at the GCRP’s September 11, 2012 hearing.

September 7, 2012, CAR distributed a notice of meeting of the GC to take place on September 19, 2012, including on the agenda a report on the September 11, 2012 GCRP meeting.

The GCRP hearing took place as scheduled on September 11, 2012. On September 13, CAR sent a letter to the Calianos Agency notifying it that the GCRP upheld the MRC's decision on Safety's termination of the Agency's ERP appointment and that the Agency was also immediately decertified as an ARP.¹³ At the GC meeting on September 19, a member of that committee moved to amend the GCRP's decision by staying the termination and decertification for a limited time period, but it failed to pass.¹⁴ This appeal followed.

The Documentary Record

The Commissioner, when hearing an appeal from a CAR decision, absent a dispute about material facts, does not conduct an evidentiary hearing but considers the arguments of the parties based on the record of the proceedings at CAR. The material facts about the prior proceedings that engendered this appeal were not disputed, and the parties were ordered to submit a common record on which to base their legal arguments. The Joint Appendix is a chronological record of the documents that the Calianos Agency and Safety submitted to CAR in connection with the hearings before the MRC and the GCRP, CAR's internal reports of the committee proceedings that were transmitted to the GC, transcripts of the committee meetings, and copies of relevant CAR Rules and MAIP Rules.¹⁵

The Market Review Committee

CAR assigned a unique docket number to each of the two Requests for Review that the Calianos Agency filed on May 17, 2012, and marked documents that it submitted in support of each request with the appropriate number. Docket MR12.03 concerned the Agency's Request for Review of Safety's termination of its ERP appointment (also referred to as its "Taxi and Limited Servicing Contract.")¹⁶ With the June 1, 2012 Notice of Meeting sent to members of the MRC, CAR distributed copies of the Request for Review and ten pages of supporting materials

¹³ The GC's letter also referred to provisions in Rule 14.B.6.h about the servicing of policies written by a terminated ERP. The copy of Rule 14 included in the Joint Appendix includes no such provision.

¹⁴ Another member questioned whether the GC should reverse the GCRP. In the past, the GC has disagreed with the recommendations of a committee that first heard a dispute. *Kalafatas v. Commonwealth Automobile Reinsurers*, DOI Docket No. 86-11 (1986). Neither the GCRP nor the GC was bound to uphold the MRC's decision.

¹⁵ CAR distributed copies of materials submitted by Safety and the Calianos Agency to members of the MRC and the GCRP. The Joint Appendix includes some transcripts of the committee meetings directly and incorporates by reference others that were submitted at the hearing on the request for a stay.

¹⁶ Docket No. MR12.04 addressed the Calianos Agency's request for review of Safety's billing practices. The issue raised in that docket is not on appeal.

marked for consideration in that docket (the “June 1, 2012 Distribution”). Those materials consisted of :

Safety’s Termination Letter

Safety’s Termination Letter was signed by Michael Hussey, its Director of Commercial Underwriting. The text of the letter follows:

Your bank recently returned the enclosed agency checks numbered 1443 and 1481, both in the amount of \$1,080. Previous correspondence on January 31, 2011 from Jeffrey Paradis required you to submit payments via money order, bank or certified check, due to multiple instances of agency checks returned for insufficient funds. More recently, I wrote you on November 29, 2011 regarding an agency check that your bank returned for insufficient funds in the amount of \$1,080.

As a direct result of repeated instances of agency checks being returned for insufficient funds, please be advised that your Limited Authority and Servicing Agreement with Safety Insurance Company will be terminated effective May 21, 2012. Specifically, Safety Insurance Company is terminating the above captioned Agreements with the Calianos Insurance Agency for repeated violations of:

CAR Rule 13-B-(2)-(a): Failure to remit payments to a Servicing Carrier on a timely basis in accordance with CAR Rules...

CAR Rule 13-B-2-(f): Failure to comply with reasonable procedures of the Servicing Carrier for remitting premium....

Car Rule 15: The Producer shall remit premium payments in accordance with the contract signed with the Servicing Carrier.

The Calianos Agency’s May 17, 2012 Letter.

In that letter, Jason Calianos, writing for the Agency, in summary contended that it was not, and had not been, in violation of the Rules cited in the Termination Letter. He contended that Safety’s letter was unclear about the time frame to which it referred, stating that within the period of at least one year before the termination notice all payments were remitted to Safety in timely fashion. Mr. Calianos observed that he saw no reference to a late payment [in the Safety Termination Letter] and that he was unaware of any payments being sent late. In his letter Mr. Calianos stated that the Agency had complied with all reasonable procedures and remitted premium in its control in accordance with its contract with Safety. He further asserted that Safety had provided no notice or proof of late payments. The Agency sought reinstatement of its contract so that it could continue to serve its commercial clients.

In his May 17, 2012 letter Mr. Calianos also asserted that the three returned checks to which Safety referred in the Termination Letter, specifically two in March 2012 and one in November 2011, were the result of bank error. Mr. Calianos wrote that:

I have a trust account with Sovereign Bank. Unfortunately, a client copied the RTN and account number and proceeded to pay his credit card on line. Due to this fraudulent activity, the account was closed and another trust account was established. The check that Mr. Hussey wrote about on November 29 was written on this account. I explained this to Safety at that time, and assumed that all issues regarding this were resolved. In addition to this error, Sovereign made another error on the subsequent trust account that resulted in two checks being returned in March 2012. Attached is a letter and a fraud report confirming these errors. The second I was informed, all funds were immediately replaced. Again, I assumed that this matter was also resolved, as I heard nothing from Safety on this until a termination letter was received.

Three documents were attached to the May 17, 2012 Letter: a communication from Karl Duguerre of Sovereign Bank to Michael Hussey of the Safety Insurance Group and two statements signed by Jason Calianos affirming that in 2011 the Sovereign Bank made two unauthorized electronic payments from the Agency's bank account.

In a second mailing to MRC members on June 7, 2012, CAR distributed 17 pages of material that Safety submitted to Docket No. MR12-03 for consideration on June 13, 2012. Its submission consisted of a cover letter from Mr. Hussey and 16 additional pages described as documentation related to Safety's termination of the Calianos Agency.¹⁷

¹⁷ The first page shows two charts, one titled *Calianos Agency-Return Check History* and the other *Payments Received 10 or More Days after Agent's Online Notification to Safety*, both of which cover a time period starting on June 10, 2010. The last entry on the first chart is dated March 22, 2012, while the second states "to date" but includes no actual date. The subsequent pages include copies of four checks written in 2010 on a Citizens Bank account that were returned for insufficient funds and of a letter dated January 12, 2011 to the Agency from Jeffrey Paradis, Safety's director of premium accounting. That letter advised the Agency that if another check was returned to it as unpaid, Safety would no longer accept Agency checks and would require it to submit payments by money order, bank, or certified check. Enclosed with Mr. Paradis's letter was a chart showing additional detail on the four checks returned between June and December 2010. Safety also submitted copies of another Citizens Bank check returned to Safety on or about January 25, 2011 and a letter dated January 31, 2011 from Mr. Paradis stating that a fifth agency check had been returned, that Safety would no longer accept Calianos Agency checks, and that it should submit payments by money order, bank or certified check. Safety submitted four additional documents relating to returned checks from the Calianos Agency. A letter dated November 29, 2011 to the Agency from Mr. Hussey enclosed a copy of a check dated November 4, 2011 written on a Calianos Agency Trust Account with Sovereign Bank. Two additional pages reproduced checks numbered 1461 and 1443, on the same Trust Account, that were returned. Mr. Hussey's November 29 letter referred to the January 31, 2011 correspondence from Mr. Paradis about submitting payments by money order, bank, or certified check and warned the Calianos Agency that its Limited Servicing Carrier and Taxi Agreements with Safety could be terminated for repeated violations of CAR Rule 14-B-1.f, 14-B-1 l and Rule 15. The final two pages of material Safety submitted for Docket MR12-03 were a copy of the Termination Letter. Safety also submitted to the MRC seven additional documents that were marked as

The Governing Committee Review Panel

CAR assigned the Calianos Agency's July 12, 2012 Request for Review Docket Number GCRP12-03. On August 30, 2012, with the Notice of the September 11, 2012 GCRP meeting, CAR distributed three sets of documents, two submitted by or on behalf of the Calianos Agency and one by Safety. The first set of documents submitted by the Calianos Agency consisted of seven pages of materials, including the Request for Review form, a letter dated July 12, 2012 from the Agency to CAR (the "July 12, 2012 Letter"), and three pages containing the text of five of e-mails exchanged between the Agency and Safety dated between June 27 and July 12, 2012; this package was marked as Exhibit 1.¹⁸ The second set of documents in GCRP Exhibit 1 was a notice of appearance by Timothy Loff, Esq. for the Calianos Agency, and the third, four pages of materials from Safety, including an e-mail dated August 13, 2012 from Mr. Hussey to two members of CAR staff, a single page titled Payment Notification-Summary of Function, and two pages that Mr. Hussey described in his e-mail as "a more detailed exhibit of the late payment activity from the Calianos Agency after they had completed the payment notification procedure."¹⁹ On September 5, 2012, CAR distributed to GCRP members 22 pages of additional information from Safety about the termination of the Calianos Agency's commercial ERP appointment.²⁰ CAR also distributed to the GCRP seven pages of records of the MRC June 13, 2012 meeting that included a written summary of the hearings on the three Calianos Agency requests for review, issued by a CAR corporate documentation specialist on June 15, 2012 and the attendance list. In a separate mailing on September 5, CAR distributed to GCRP members

an exhibit in Docket MR2012-04. Nothing in the transcript of the MRC hearing suggests that it considered those documents in connection with Docket No. MR12-03.

¹⁸ The Agency's July 12, 2012 letter stated that Safety had acknowledged that a main reason for termination of the Agency's commercial ERP contract was late submission of payments to Safety. It referred specifically to a list of late payments submitted to CAR five days before the [MRC] hearing that provided no specifics about the listed policies and referenced MAIP policies, not commercial policies. [The reference is to the second chart on the first sheet attached to Mr. Hussey's June 6, 2012 letter that was distributed to the MRC on June 7, 2012.] The Agency contended that, without detailed information, it was impossible accurately to dispute Safety's charges. Mr. Calianos further stated that he had requested information from Mr. Hussey and was told to look it up himself. He requested an appeal to address all Safety's allegations.

¹⁹ Safety wrote that "[t]he exhibit contains the same policies as the original exhibit, but we have included more data such as the date the payment notification was made by the agency and the date Safety credited the account..." The two pages list insurance policies by Number, Effective Year, Bill Type, Days, Payment Notification Date, Payment Notification Amount, Check Date, Payment Amount, Date Applied, and Form of Payment. Mr. Hussey further stated that policyholder names were omitted from the list provided to CAR, but that they were included in a copy of the exhibit that he had just sent to Mr. Calianos.

²⁰ Pages 2 through 17 duplicate materials distributed to the MRC on June 7. Mr. Hussey identifies Pages 18-19 and 20-22 as, respectively, lists from Citizens Bank and Sovereign Bank of checks that the Calianos Agency submitted to Safety beginning on July 29, 2010; each list marks checks returned for insufficient funds with asterisks.

six pages of additional information from the Calianos Agency²¹. At the hearing, Safety offered another documentary exhibit that does not appear to have been entered into evidence.²²

The Governing Committee

On September 14, 2012, CAR distributed to the Governing Committee the records of the September 11, 2012 GRCP meeting, in the form of a written summary of the GRCP hearing issued by a CAR corporate documentation specialist on September 14, 2012.

The Transcripts.

The record in this proceeding includes, in addition to CAR's June 15, 2012 written summary of the June 13, 2012 MRC meeting, a transcript of the meeting made by two registered professional reporters from an audio recording on compact disc. That document was placed in the record at the October 12, 2012 hearing at the Division in this proceeding that addressed the Agency's motion for a stay. It was incorporated by reference into the Joint Appendix. Similarly, in addition to CAR's written summary of the September 11, 2012 GRCP hearing, dated September 14, the hearing was transcribed by a registered professional reporter from an audio recording. That transcript was also placed in the record at the October 12, 2012 hearing, and incorporated by reference into the Joint Appendix. A transcript of the GC September 19, 2012 meeting, prepared by a registered professional reporter from an audio recording, was also placed in the record at the October 12, 2012 hearing and incorporated by reference in the Joint Appendix, at Tab 19. The Joint Appendix also includes a second transcript of portions of the September 19, 2012 meeting, at Tab 20, dated November 2, 2012.²³

The Parties' Arguments on Appeal

The parties' arguments are fully set out in their initial and reply memoranda of law. A summary of their arguments is set forth below.

²¹ The materials consisted of a transmittal letter from Attorney Loff, a letter dated September 3, 2012 from Karl Duguerre at the Sovereign Bank providing additional information about errors made by the Bank in connection with the return of checks numbered 1209, 1443 and 1481, and four pages of the Agency's response to the information that Safety sent to CAR on August 13, 2012.

²² The proposed exhibit consisted of Safety's response to statements about allegedly late payments made to Safety by the Calianos Agency. Safety asked the GCRP's permission to distribute the document; counsel for the Calianos Agency objected because it had not been given five days advance notice of the document and asked to postpone a decision on admitting it. The transcript offers no further information on the distribution of the physical exhibit and it was not included in the Joint Appendix.

²³ The transcriber is not identified by name or occupation, nor is there any indication of whether he or she was present at the GC meeting. Neither party has identified any differences between the two transcripts of the September 19, 2012 GC meeting. Therefore, for purposes of this appeal, I accept the transcript submissions as accurate.

The Calianos Agency

The Calianos Agency argues that CAR's decision must be reversed because: 1) the law and the facts do not support the sole stated reason for terminating the Agency's ERP appointment set out in the Termination Letter, *i.e.*, dishonored checks; and 2) CAR erred as a matter of law by decertifying the Agency as an ARP pursuant to MAIP Rule 31.D.3 when Safety had not terminated its ERP appointment for violations of Rule 14. On the first issue, the Agency contends that there were a number of specific errors in the termination process, including Safety's failure to comply with the CAR Rules relating to termination and its introduction at the MRC hearing of a different basis for termination, alleged late payments by the Calianos Agency. Safety, it argues, relied on factors that were not relevant to the Calianos Agency's ERP business as justification for its termination. It further asserts that CAR decertified the Agency prematurely, without giving it an opportunity to appeal the GC's decision.

The Agency also points out that Safety terminated it for alleged violations of CAR Rules 13.B.(2)(a) and 13.B.2(f), neither of which is a correct citation. It argues that Safety offered no evidence that the Agency had violated any CAR Rule and provided no citation to its contract with the Calianos Agency and no documentation of non-compliance with a CAR Rule. It contends that, even assuming, *arguendo*, that Safety meant to cite to the pertinent Rule 13.B.(6)(h)(2)(a) and (f), the returned checks did not constitute "failure to remit payments to a Servicing Carrier on a timely basis in accordance with CAR's Rules of Operation." It argues that Safety provided no evidence of the relevant time factor and did not specify the CAR Rule that was allegedly violated. With respect to the three checks identified in the Termination Letter, the Agency contends that they were found, without dispute, to have been returned as a result of bank error and fraud, through no fault of the agency.²⁴

The Agency points out that Safety raised questions about a letter from Sovereign Bank that the Agency submitted to it and also provided to the MRC, but did not question a second letter from Sovereign Bank that was part of the documentation from the Agency that was distributed to the GCRP. The Agency argues that it was improper for Safety to refuse to accept documentation that the three checks identified in that letter were returned for reasons outside the Agency's control, to hold the Agency responsible for the returned checks, and to support termination of the ERP appointment based on those checks. It contends that it was improper for

²⁴ The Agency notes that the documentation Safety submitted to support the claim showed only one check with the number identified in the Termination Letter.

CAR, under its Rules, to consider any issues relating to the Agency's termination other than the dishonored checks specified in the April 17, 2012 Letter.

With respect to Safety's document entitled *Calianos Agency-Return Check History* that CAR distributed in its June 7, 2012 mailing to members of the MRC, the Agency does not deny responsibility for the five additional returns. It points out, however, that those returns occurred between June 2010 and January 2011, that there is no allegation that Safety did not receive replacement payments, and that the Agency demonstrated that it put new systems in place to ensure that returned check issues would not recur. The Calianos Agency observes that no check-related incidents occurred for ten months after January 2011, arguing that Safety should not be permitted to terminate an ERP agreement for events that occurred almost two years before the termination decision.

The Calianos Agency also argues that Safety has offered no support for the statement in the Termination Letter that it terminated the ERP agreement for "failure to comply with reasonable procedures as supplied by the Servicing Carrier for processing claims, remitting premiums, and requesting coverages." The Agency points out that the Termination Letter does not state which "reasonable procedures" the Agency allegedly failed to follow, and the documentary source of those procedures. It hypothesizes that Safety was referring to transmission of funds by Agency check after Safety stated, in January 2011, that it would no longer accept such checks. The Calianos Agency contends that it sent bank checks and money orders to Safety until it established a trust account, which it then used to transmit payments. It also asserts that in later conversations with Safety, Mr. Calianos was led to believe that Safety had no objection to this procedure. The Agency observes that at the MRC Safety's representative stated that Safety made no attempt to determine whether checks it received from the Agency were bank checks or Agency checks, and that an MRC member questioned whether Safety had therefore acquiesced to accepting Calianos Agency checks as a method of payment.

The Calianos Agency also argues that it was improper for CAR to consider Safety's chart entitled *Payments Received 10 or More Days after Agent's Online Notification to Safety*, that was distributed in CAR's June 7, 2012 mailing to the MRC. It contends that Safety's claims relating to "late payments" were outside the scope of the Termination Letter, that the chart was not timely submitted under the applicable CAR Rules, and that it provided information insufficient to permit the Agency to respond. Further, it points out, the vast majority (80 of 89) of the allegedly late payments referred to PPA policies written through the MAIP. Safety

identified no authority that would permit it to terminate a commercial ERP agreement because of alleged problems with performance in a wholly separate business context. The Agency observes, as well, that the allegedly late payments on the commercial policies all occurred before April 2011, and that time it implemented operational changes that successfully prevented subsequent occurrences.

The Calianos Agency argues that its decertification as a MAIP producer based on the termination of the ERP agreement was an error of law that must be reversed. CAR decertified the Agency in reliance on MAIP Rule 31.D.3, which provides that an ERP's termination for violations of CAR Rule 14 renders the producer ineligible for a MAIP appointment. However, Safety terminated the Calianos Agency's ERP appointment for alleged violations of CAR Rules 13 and 15. As a matter of due process, the Calianos Agency argues, it was entitled to be informed by Safety of the specific rule violations with which it was charged. It points out that the Termination Letter did not charge the Calianos Agency with violations of CAR Rule 14. Further, the Agency contends, contrary to CAR's representations, the Rule 13 and Rule 14 provisions relating to termination are different.

The Calianos Agency also contends that CAR's decision to terminate it as an ARP immediately after the GCRP issued its decision also violated CAR's own rules. It points out that, according to the transcript of the GCRP hearing, counsel for CAR, at the end of that hearing, stated that "under the [CAR] Rules of Operation, if the termination is not appealed and not reversed by the Commissioner of Insurance, the Calianos Agency also loses its eligibility for certification as an assigned risk producer under the MAIP." The Agency notes that CAR's September 13, 2012 letter to the Calianos Agency stated, however, that its ARP certification was revoked immediately. CAR's reliance on the Assigned Risk Producer Procedures Manual to support immediate decertification is, the Agency argues, misplaced, noting that Chapter II.B.5 of that Manual allows for immediate suspension of ARP certification for a period of one to six months for certain violations but, in determining the length of suspension, considers the severity of the violations. The Calianos Agency points out that there is no allegation that it committed any of the listed violations that might lead to suspension. Further, the Agency argues, the circumstances that led to decertification of other producers are not applicable to the Calianos Agency and provide no support for CAR's decision.

CAR

CAR argues in its memoranda that the record amply supports termination of the Agency and that CAR's hearings were procedurally proper. It argues that all the CAR committee meetings occurred in a public forum and in accordance with the provisions of the Open Meeting Law, Chapter 30A, §§18-25. It notes that formal written notices of all committee meetings are posted on its website and are distributed to various groups, including committee members.²⁵ CAR states that it sends information to its distribution lists by e-mail, and that individuals are responsible for advising CAR of any changes in e-mail address. It asserts that there is no requirement that materials to be considered by a public body be distributed in advance of a meeting but that, as a regular business practice it distributes, with the notice of meeting, written materials to be considered by a committee that are timely submitted in advance of a meeting.

CAR also confirms, in footnote 5 to its memorandum, that Safety's citations to Rule 13 in the April 17, 2012 letter refer to subsection B.(2)(a) and (f), but argues that "it is clear from the context" and the language that Safety quotes that it intended to refer to Rules 13.B.6.h(2)(a) and (f). CAR also states that the MRC's decision was reported to the GC at its June 20, 2012 meeting, noting that at that meeting the GC reviewed a report it had prepared at the request of the Division of Insurance ("Division") concerning continued coverage through the MAIP of policyholders of decertified ARPs. CAR notes that, as summarized by its president, the report concluded that the decertification of an ARP does not create a substantial problem for policyholders and works to ensure that they have the required insurance coverage.

With respect to the GCRP, CAR argues that the panel voted unanimously to uphold the MRC's decision, and that pursuant to Rule 31D of the Rules of Operation "the termination would also have the effect of making the Agency ineligible for continuation of its private passenger certification for the MAIP until such time as Calianos would be eligible to reapply for appointment in connection with the taxi and commercial business. CAR also points out that at the end of the GCRP meeting, the Calianos Agency did not express an intent to appeal its decision or request a stay. CAR further asserts that at the September 19, 2012 GC meeting, Calianos was present but did not request that the decision of the GCRP be reconsidered, modified or rescinded. A GC member made a motion to take such action.

²⁵ CAR states that its procedures also comply with the Attorney General's regulations relating to the Open Meeting Law, 940 CMR 29.00, *et seq.*

CAR further argues that Rule 20 does not require the Commissioner to undertake a *de novo* review of a CAR ruling or decision. It notes that under Rule 20.B he may approve, modify, amend or disapprove a GC ruling, or direct the GC to reconsider its ruling.²⁶ Further, CAR cites to provisions of Chapter 175, §113H (E) that address the Commissioner's authority to cause a "proper hearing" to be held and his authority to issue orders that he "deems appropriate." It notes as well that in certain circumstances the Commissioner "may" issue a written order. The use of words such as "appropriate" and "may," CAR argues, connote discretion, and therefore demonstrate that the appropriate standard of review is deferential to CAR's decision and ruling.

CAR argues that the MRC was presented with the task of reviewing Safety's termination letter that was based on repeated instances of Agency checks being returned for insufficient funds.²⁷ The Rules of Operation, it states, establish the policies that govern Servicing Carriers, CAR members and producers with regard to the operation of and participation in, CAR. Those rules, CAR argues, must be read as a harmonized and unified whole. CAR contends that the Rules constitute an objective list of standards and that a Servicing Carrier's subjective motivation in proceeding with a termination is immaterial. CAR observes that CAR Rule 13 enumerates reasons that "entitle" a Servicing Carrier to terminate an ERP; it further describes CAR Rule 14 as the counterpart to Rule 13 which outlines the requirements applicable to ERPs.

CAR asserts that Safety terminated the Calianos Agency, in part, because of the return of eight Agency checks for insufficient funds since June 24, 2010. It notes that the Termination Letter referred to previous letters addressing the issue of returned checks and, in January 2011, requiring the Agency to submit payments by money order or bank or certified check. It notes that Safety and the Calianos Agency made presentations to the MRC and that Safety reviewed the history of agency checks returned for insufficient funds that, CAR argues, "formed the basis of its termination of the Agency's ERP contract for failure to remit payments."

CAR also argues that the Calianos Agency's submissions focused on the most recent three of the eight checks returned for insufficient funds. It further asserts that the Agency acknowledged that Safety had not received payment for the coverage. CAR argues that the Calianos Agency offered justifications and excuses for the returned checks, and refused to acknowledge any wrongdoing notwithstanding what CAR refers to as a "documented history in

²⁶ CAR notes that the identical language appears in MAIP Rule 40.B. However, because this appeal relates to a commercial ERP appointment, it is brought pursuant to Rule 20.

²⁷ The Termination Letter uses the words "multiple" and "repeated" to describe the history of returned checks, without reference to any particular quantitative framework.

failing to remit payments to Safety.” It contends that Calianos did not provide an adequate explanation for his use of Agency checks after Safety required him to submit payments by money order or bank or certified check. CAR argues that the record does not support the Agency’s contention that bank error was the basis for Safety’s termination of the ERP appointment, because the termination was never based solely on three returned checks.

CAR notes that Safety, in addition to the eight returned checks referred to in its correspondence with the Agency, presented evidence to the MRC of 89 instances of receiving payment more than ten days after the Agency had notified Safety that it had collected a payment from the policyholder. It argues that the late payments reflect a longstanding pattern of issues relating to the Agency’s timely remittance of payments to Safety. CAR contends that the Calianos Agency dismissed the information on the 89 payments as irrelevant and focused only on transactions in 2011. It characterizes as “cavalier” what it describes as the Calianos Agency’s dismissal of Safety’s evidence of late payments. CAR argues that even though many of the 89 payments related to MAIP policies, a producer is obligated to submit all payments in accord with the Rules of Operation.

CAR also argues that if the Calianos believed it was improper to consider the additional information that Safety submitted, it did not make an effort to preclude the MRC’s consideration of such material or to postpone the MRC meeting. It also notes that the Calianos Agency’s request for review was made pursuant to CAR Rule 20 that, unlike Rule 40, does not explicitly require that documentation to be considered by the GC be forwarded to the MAIP at least five days before the hearing. CAR contends that its notification process complies with the Open Meeting Law. Safety, CAR asserts, submitted the additional material to the CAR docket clerk on June 6, 2012, and it was distributed to the MRC on June 7, 2012. CAR argues that the Open Meeting Law does not require that documents be distributed in advance of a public meetings and that, as noted on the Request for Review form, CAR committees have discretion to admit and consider materials submitted less than five days before a scheduled meeting. It argues as well that Calianos, as a member of the MRC, received all communications from CAR to that committee and that, even if he were not a member, the additional information was publicly available on CAR’s website. CAR concludes that there is thus no basis for a claim that CAR did not comply with procedural due process.

CAR argues that the record reflects the MRC’s serious concerns about the operation of the Calianos Agency and Mr. Calianos’s credibility. It points out that the MRC challenged the

authenticity of an undated letter from Sovereign Bank relating to bank error, questioned why the Agency had no explanation for the other five returned checks or the 89 late payments and was concerned about the Agency's practice of sending Agency checks to Safety after Safety stated that it would not accept those checks. CAR concludes that the weight of the evidence and questions about credibility support the MRC's decision to uphold Safety's termination of the Calianos Agency.

CAR argues that Safety, at the GCRP, reviewed its termination of the ERP agreement based on the Agency's failure to remit payments in a timely manner since June 24, 2010. It points out that because counsel for the Agency objected to consideration of an additional document from Safety relating to late payments that was not distributed in advance, the GCRP chose not to accept it, further contending that the additional document was not distributed or read by the GCRP. CAR further argues that the GCRP heard Safety's position on the 89 late payments, and the Calianos Agency's statements about changes it had made to its operations in 2011. It asserts that Mr. Calianos made inconsistent statements in response to questions made by members of the GCRP.

CAR notes that the September 13, 2012 letter to the Calianos Agency stated that the Agency's termination as an ERP was immediate but that, under Rule 14.B.6.h, the Servicing Carrier would continue to service the Agency's in-force business. It states that the letter also informed the Agency that its ARP certification would terminate immediately, a position that, CAR argues, is consistent with the procedures that were followed for other decertified ARPs and, as reported to the GC in June 2012, do not adversely affect policyholders. CAR asserts that the Rules of Operation do not provide a mechanism for an automatic stay of the effect of Rule 31.D.3.

CAR argues that Massachusetts Rule of Civil Procedure 62, which addresses the stay of proceedings to enforce a judgment, provides guidance on the appropriateness of the immediate decertification of Calianos Agency. CAR notes that while a judgment for money damages is effectively stayed pending an appeal, a judgment granting or denying injunctive relief will take effect unless the court, in its discretion, orders a stay during the pendency of the appeal. CAR views the GC's decision as injunctive, because the Calianos Agency is not required to make any payments, and notes that the GC considered, but rejected, a motion to stay the GCRP's decision.

Analysis and Discussion

Standard of Review

The parties disagree on the appropriate standard for the Commissioner's review of a CAR decision. The Calianos Agency cites to the language in CAR Rule 20 and MAIP Rule 40, which both provide that the Commissioner may "approve, modify, amend or disapprove the ruling, or direct the Governing Committee to reconsider the ruling. In addition, the Commissioner may issue any other appropriate order, including granting the aggrieved party a new hearing." The Agency concludes that the review on appeal is limited to the record before CAR, but that it is a plenary power of review that need not defer to CAR's determinations.

CAR argues that, although the Division supervises CAR's operations, CAR Rule 20, MAIP Rule 40, and Chapter 175, §113H (E) do not require the Commissioner to undertake a *de novo* review of a CAR ruling and decision. It contends that Chapter 175, §113H (E) gives the Commissioner discretion to respond to a complaint. As support for its position, it cites the decision in *Hanover Insurance Company v. Commissioner of Insurance*, 443 Mass. 47, 50 (2004), in which the Court, in upholding the Commissioner's decision to dismiss Hanover's appeal, pointed out that the use of the words "appropriate" and "may" in §113H(E) connotes discretion with which the Commissioner may respond to a complaint. The Court therefore reviewed the Commissioner's action to determine whether she had abused that discretion and concluded that she had not. CAR contends that, accordingly, the applicable standard of review in this proceeding is deference to CAR's decision and ruling.

CAR's argument is not persuasive. Chapter 175, §113H (E) provides two routes for a hearing before the Commissioner on matters related to the operation of the residual market plan. Paragraph 6 provides that "[a]ny insurer and any other party affected may appeal to the Commissioner from any ruling or decision with reference to the operation of the plan." It authorizes appeals from CAR rulings or decisions, but does not further prescribe an appeal process. Paragraphs 9 and 10 state that "[a]ny insurer or group of insurers participating in such plan and other persons aggrieved shall be authorized to bring a complaint to the commissioner alleging unfair or unreasonable or improper practices by any insurer, agent or broker." The language refers to a "complaint" rather than an "appeal." The Commissioner is instructed to cause a "proper" hearing to be held on the complaint and then to issue such orders as he deems appropriate. Paragraph 10 permits the Commissioner to issue written orders, including an order

to discontinue a practice that the Commissioner has found to be unfair, unreasonable or inconsistent with §113H.²⁸

The Calianos Agency, as a party affected by a CAR Ruling or decision relating to the operation of the residual market plan, has appealed to the Commissioner as permitted by ¶6. Paragraph 6 does not parallel the language in ¶9 that gives the Commissioner discretion to decide whether a complaint states a cause of action. That §113H (E) ¶6 does not create an option to hear an appeal from a CAR ruling or decision is reflected in both CAR Rule 20 and MAIP Rule 40, that simply provide a time frame and procedure for appealing a GC ruling to the Commissioner. A person aggrieved by such a ruling “may” appeal to the Commissioner, but neither Rule 20 nor Rule 40 suggests that the appeal will not be heard. CAR’s argument that the Commissioner should defer to its decision would essentially enlarge the Commissioner’s discretionary authority to hear a complaint filed under ¶¶9 and 10 to an abuse of discretion standard for review of an appeal filed under ¶6. Because its analysis relies entirely on language in ¶¶9 and 10 relating to complaints brought directly to the Commissioner that does not appear in ¶6, relating to appeals from CAR decisions, it is not directly relevant to this proceeding.²⁹ CAR has offered no persuasive argument for merging the two sections.

The appropriate starting point for determining the applicable standard of review is, instead, the text of CAR Rule 20.B, reiterated in MAIP Rule 40, which states that the Commissioner “may” approve, modify, amend or disapprove the GC’s ruling, direct the GC to reconsider it, and issue any other appropriate order, including a new hearing.³⁰ The range of options would be meaningless unless the Commissioner has an opportunity to examine the entire record and to determine, based on that review, what is appropriate in a particular appeal.

CAR’s position that the abuse of discretion standard applied to a decision made by the Commissioner in a complaint filed with him under ¶9 mandates deference to CAR’s decision in an appeal under ¶6 or requires that the sole standard for review is an abuse of discretion, imposes a limitation on the scope of the Commissioner’s review that is not compatible with his authority under Rule 20B to take a range of specified actions on an appeal. CAR offers no support for the

²⁸ The distinction between the two types of proceedings was acknowledged in *Trust Insurance Company v. Commissioner of Insurance* (No. 2), 48 Mass. App. 628, 629-630 (2000). See, also, *Trust Insurance Company v. Commissioner of Insurance* (No. 1), 48 Mass. App. 617, 622-623 (2000).

²⁹ The Calianos Agency’s October 5, 2012 submission included both an appeal to the Commissioner of a CAR decision and complaints about actions taken by insurance companies following that decision. The difference was addressed at the October 12, 2012 hearing on the Agency’s request for a stay of CAR’s decision. This decision addresses only the appeal of CAR’s decision.

³⁰ These options parallel those given to the courts when reviewing an agency decision. See Chapter 30A, §14, (7).

proposition that a offering a range of outcomes to a decisionmaker on appeal necessarily implies deference to a prior ruling or decision. To the extent that CAR seeks to invoke the familiar principle, enunciated in *Hanover Insurance Company v. Commissioner of Insurance*, 443 Mass. 47, 50 (2004), of deference to decisions of administrative agencies, it provides no legal basis for equating itself to such an agency.³¹ Even it were, the principle that courts ordinarily give weight to an agency's interpretation of its own rule is one of "deference, not abdication." *Finkelstein v. Board of Registration in Optometry*, 370 Mass. 476, 478 (1976).³² In that decision, the Court further noted that "courts will not hesitate to overrule agency interpretations of rules when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the rule itself." CAR cites no precedent for its position that the Commissioner, on appeal, should apply a deferential abuse of discretion standard to its decision, and a review of past appeals of CAR decisions to the Commissioner does not support its argument.³³

The genesis of this proceeding is a decision by Safety, a CAR Member and Servicing Carrier, to terminate the Calianos Agency, a producer appointed by CAR as an ERP, for alleged violations of CAR Rule 13. Aggrieved by Safety's action, the Agency sought review at CAR,

³¹ Chapter 30A, §1 (2) defines "agency" as any "department, board, commission, division or authority of the state government. ...authorized by law to make regulations or to conduct adjudicatory proceedings. ..." Although CAR is created by statute and under its enabling legislation must comply with the Open Meeting Law, Chapter 30A, §11A ½, it is not authorized to make regulations. CAR is an entity overseen by an administrative agency whose decisions are appealable to that agency.

³² The Board of Registration in Optometry had suspended Finkelstein's license to practice optometry on the ground that, because he also had a separate business as a dispensing optician, he had violated an advertising rule. The Court questioned whether Finkelstein had transgressed any Board rule, commenting that the Board could not arbitrarily construe its rules so as to expand their application. It pointed out that the record did not indicate that Finkelstein had advertised as that term was defined in the Board's regulations.

³³ The Commissioner has consistently disapproved decisions by CAR and its predecessor organization, the Massachusetts Motor Vehicle Reinsurance Facility, when his or her review determined that the decision was in error. See, e.g., *Goldman v. Allstate Insurance Company, et al.*, DOI Docket No. A81-1-5 (1981) (Facility improperly upheld a termination notice that was issued in violation of the petitioner's agreement with Allstate); *Cirino v. Commonwealth Automobile Reinsurers*, DOI Docket No. 85-5-1 (1985) (CAR improperly refused an ERP's petition for a change of servicing carrier); *Kalafatas v. Commonwealth Automobile Reinsurers*, DOI Docket No. 86-11 (1986) (Governing Committee improperly refused an ERP's petition for a change of Servicing Carrier); *Bouchie v. Commonwealth Automobile Reinsurers*, DOI Docket No. G90-21 (1990) (Disapproving Governing Committee's decision to deny petitioner's application for an ERP appointment); *Appeal of the Amica Insurance Company*, DOI Docket No. G93-42 (1995) (remanding matter to CAR when record insufficient to determine basis for decisions by its committees); *Appeal of Cullinane Turn Key Agency*, Docket No. C94-4 (Disapproving GCRP's decision denying petitioner's request to relocate his agency); *Appeal of Robert J. Firnstein*, DOI Docket No. 94-13 (disapproving CAR's decision denying an application for an ERP appointment); *Appeal of Richard S. O'Brien*, DOI Docket No. C97-3 (disapproving CAR's decision affirming termination of an ERP appointment).

pursuant to CAR Rule 20.A. CAR's obligation under that Rule is to review the Member's action and to decide whether it constitutes an "unfair, unreasonable or improper practice."³⁴

The tasks that CAR performs as manager of the residual market for motor vehicle insurance include, under Rule 20, hearing disputes relating to the operation of the residual market plan. In that capacity, it functions as an adjudicator of disputes between participants in that plan. CAR's adjudicatory function with respect to participants in the residual market is analogous to that of entities that are responsible for the oversight of participants in other enterprises.³⁵ Its obligation is to act as a neutral and unbiased factfinder, to conduct fair and impartial hearings and to interpret and apply the CAR Rules and the MAIP Rules reasonably.³⁶ Ultimately, it is the Commissioner's responsibility to conduct an independent review of a decision and to determine whether CAR has complied with its obligations.

The Commissioner's task is analogous to that of a court reviewing a decision made by an entity that exercises an adjudicatory function with respect to participants in a regulated system. The procedures and standards for such review are set out, by statute, in G. L. Chapter 30A, §14 ("§14"). As with an appeal under Rule 20.B, the court conducts a review solely on the record, unless the appeal raises issues of alleged procedural irregularities that cannot be determined from the record. The Commissioner's options under Rule 20.B are similar to the court's decision-making options under §14: to affirm, set aside or modify the decision, or remand the matter for further proceedings. Section 14 sets out seven factors that are relevant to the court's analysis of the underlying decision. Five of those seven are particularly applicable to the Commissioner's review of CAR's decision in this proceeding. They are whether the decision was: 1) based on an error of law; 2) made upon unlawful procedure; 3) unsupported by substantial evidence, 4) unwarranted by facts found [by the Commissioner] on the record; and 5) arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law.

The CAR Rules

Rule 13

³⁴ The language incorporated into Rule 20 is identical to the statutory standard for bringing a complaint directly to the Commissioner under Chapter 175, §113H (E), ¶¶9 and 10. The Commissioner's task in hearing such a complaint is to determine whether the challenged practice is unfair, unreasonable or inconsistent with §113H.

³⁵ Such entities may be government agencies that license trades and occupations or organizations, such as the Financial Industry Regulatory Authority, that operate in the private sector.

³⁶ The impartial hearing obligation and measures for determining when a hearing is impartial are established in, *Harris v. Board of Registration in Chiropractic*, 343 Mass. 536, 540-541 (1962). Harris appealed a Board decision on the grounds that it was procedurally improper.

CAR Rule 13.B.6.h.(3) requires that ERP appointment termination notices be in writing and state the specific CAR Rule provisions that constitute the basis for the termination. As the basis for terminating the Calianos Agency the Termination Letter references three CAR Rules, two of which, 13-B-(2)-(a) and 13-B-2-(f) do not exist. In its Request for Review, the Calianos Agency contended that it was not in violation of and had not violated those rules. CAR acknowledges that Safety's citations to Rule 13 in the Termination Letter are incorrect, but argues that "it is clear from the context" and the language that Safety quotes that it intended to refer to Rules 13.B.6.h(2)(a) and (f). CAR's argument fails to address the initial issue of Safety's compliance with Rule 13.B (6)(h)(3). It proposes to correct its error by referring to "context." CAR offers no justification for its failure to require Safety to comply with the specificity requirement of Rule 13.B.6.h.(3). Its approach effectively imposes on the recipient of a termination letter the obligation to decipher what rule he or she is alleged to have violated.³⁷

Rule 13.B.6.h(2) identifies the conditions that may provide "cause" for a Servicing Carrier to terminate an ERP and entitle the ERP to a 30-day written notice of termination.³⁸ Subsection (a) refers to "[f]ailure to remit payments to a Servicing Carrier on a timely basis in accordance with CAR's Rules of Operation and (f) refers to "[f]ailure to comply with reasonable procedures as supplied by the Servicing Carrier for processing claims, remitting premiums and requesting coverages." The Calianos Agency argues that, even if Safety had correctly cited to CAR Rule 13, its Termination Letter was improper because it did not advise the Agency of the particular procedures or facts it relied on to support termination of the Agency for alleged violations of those rules.³⁹

CAR Rule 13.B.6.h.(3) requires ERP termination notices to be in writing and to specify the CAR Rule provisions that were allegedly violated, but offers no specific guidance on the extent to which such notices must identify the factual basis for the Servicing Carrier's determination that a CAR Rule was violated. Absent such a directive, it is reasonable to consider

³⁷ CAR avoided addressing the issue and perpetuated the error by referring to Safety's incorrect citations in the Termination Letter both in the records of the MRC meeting and in its reports of the MRC and GCRP hearings to the Governing Committee, perpetuated the error.

³⁸ CAR argues, incorrectly, that Rule 13 "entitles" a Servicing Carrier to terminate an ERP. It does not acknowledge that the Rule only "entitles" a servicing carrier to terminate an ERP immediately for conditions identified in Rule 13.B.6.h (1). Those include failure to hold a valid "agents/brokers" (*i.e.* producer's) license, willful appropriation of premium, or a finding in a judicial proceeding that the producer has engaged in fraudulent activity in connection with the business of motor vehicle insurance. Safety does not base its termination of the Calianos Agency on any of those factors. The conditions listed in Rule 13.B.6.h (2) constitute "cause" for termination; the word "entitle" does not appear.

³⁹ Safety does not cite to any CAR Rule of Operation to demonstrate that the returned checks constitute failure to remit payments on a timely basis in accordance with CAR's Rules of Operation.

general principles of fairness that should be applicable to termination of a privilege to participate in the residual market for motor vehicle insurance.

CAR granted the Calianos Agency ERP status under CAR Rule 14.2, a scheme that provides access to the residual market for producers who satisfy certain standards and do not have a voluntary contract to write commercial motor vehicle insurance.⁴⁰ Termination of an ERP appointment affects both the producer who is deprived of a market and consumers who have obtained residual market coverage through that producer. The process for terminating an ERP should be carefully calibrated to ensure that it is fair and reasonable to both the ERP and the Servicing Carrier.⁴¹

Because a proceeding to terminate an ERP appointment is a serious matter reasonably analogous to disciplinary actions against those holding licenses to practice trades and professions, the principles expressed in decisions on such matters provide guidance on what is considered fair in a notice of termination of a CAR appointment. The basic principle enunciated in such decisions is that notice must be reasonably calculated to advise an interested party of the proceeding and to afford him an opportunity to present his case. *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 376-377 (1985), and cases cited therein.

CAR's memorandum specifically identifies the task presented to the MRC as the review of Safety's Termination Letter that was based on repeated instances of Agency checks being returned for insufficient funds. The Calianos Agency agrees, contending as well that Safety's letter failed to advise it of any factors other than the three identified returned checks that Safety relied on in deciding to terminate the Agency, and arguing that it was error to consider any other issues. The detailed discussion of the three returned checks in the Agency's May 17, 2012 Letter supports a conclusion that the Calianos Agency, understanding that Safety based its termination

⁴⁰ The statute creating CAR, Chapter 175, §113H, limited the grounds on which the CAR Governing Committee could decline to appoint a producer to a servicing carrier. Subsection C, (i) through (iv) states that CAR is not required to make such an appointment if, subject to reasonable standards adopted by the Governing Committee, the producer has been convicted of a dishonest act related to his occupation as an insurance producer; the producer's insurance license has been revoked; there has been a material and substantial breach of a contract between a servicing carrier and a producer; or the producer has an uncured default in remittance of any premiums due the servicing carrier.

⁴¹ CAR is a statutory creation that is charged with the operation of the residual market for motor vehicle insurance. With respect to the residual market for commercial coverage, the CAR rules govern the process of appointing and terminating ERPs. A producer who has no voluntary contract with an insurer to write commercial motor vehicle insurance has no access to that market unless he or she has an ERP appointment. Cancellation of an ERP appointment therefore deprives the producer of access to the commercial market and of any attendant economic benefits from participating in that market.

decision on the three checks identified in the Termination Letter, responded directly to that ground.

Despite the statement in its memorandum, the MRC and the GCRP considered issues other than the returned checks identified in the Termination Letter at their hearings before its committees. Documents in the Joint Appendix demonstrate that Safety, after the Calianos Agency filed its Request for Review, submitted additional material to CAR for distribution to the MRC. Those materials included the chart entitled *Calianos Insurance Agency-Return Check History* listing five checks returned between June 10, 2010 and January 31, 2011 that were not specifically mentioned in the Termination Letter.⁴² Although the Calianos Agency pointed out to the MRC that the Termination Letter identified only three checks with 2011 and 2012 dates, and did not refer to 2010 checks, the transcript of the MRC hearing does not reflect any discussion of the question of appropriate notice to the Calianos Agency of Safety's apparent reliance on other returned checks as a factor in terminating its ERP appointment.⁴³

Concurrently with the *Calianos Insurance Agency-Return Check History* chart, Safety also submitted for distribution to the MRC a chart entitled *Payments Received 10 or More Days after Agent's Online Notification to Safety*. The Calianos Agency argues that CAR improperly considered that document because Safety's claims relating to "late payments" were outside the scope of the Termination Letter. Further, it contends, the absence of identifying information on alleged late payments did not permit the Agency to formulate a response. It is evident from the transcript that the hearing and CAR's review were not confined to the single issue of checks returned in November 2011 and 2012, but considered Safety's later assertions relating to older checks and late payments as well as other issues.

CAR contends in its memorandum that notice was adequate because it distributed documents relating to additional checks and late payments prior to the MRC hearing. It argues that under the Open Meeting Law it was not required to distribute any documents in advance of its meetings. CAR's position ignores the explicit procedures incorporated into its Request for Review form. It also converts the procedures for submitting exhibits to be considered at a

⁴² The chart actually appears three times in CAR Docket MR12-03, Exhibit 2, at page 2, page 8 and page 11.

⁴³ The issue is why Safety, if it relied on that earlier history, did not incorporate it into the Termination Letter with the same level of detail as the three checks that were identified. As written, the Termination Letter did not provide information adequate to permit a formal written response similar to that made with respect to the three identified checks.

hearing as a standard for determining the adequacy of a notice of termination.⁴⁴ CAR, by condoning Safety's failure to notify the Calianos Agency of its complete reasons for termination, effectively prevented the Agency from responding to those reasons in its Request for Review. I find no merit to its position that distributing documents to the MRC constituted adequate notice of Safety's reasons for terminating the Calianos Agency.⁴⁵

The Reliance on MAIP Data as a Basis for Terminating an ERP

The Calianos Agency challenges Safety's reliance on alleged events that occurred not in connection with its ERP commercial business but involved PPA policies written through the MAIP as a reason to terminate its ERP contract. It objected on the record at the GCRP to the panel's consideration of documents relating to MAIP violations at a hearing on terminating a commercial contract. Safety's Late Payment Chart specifies that the vast majority of the allegedly late payments (80 of 89) related to MAIP policies. Its chart listing returned checks similarly showed that, of the five checks that had been returned before November 2011, two related solely to MAIP payments and two included payments for both commercial and MAIP business. The Calianos Agency argues that Safety identified no authority that would permit it to terminate a commercial ERP agreement because of alleged problems in a wholly separate business context. CAR does not disagree that most of the alleged late payments occurred on MAIP policies, but contends that a producer is obligated to submit all payments in accord with the Rules of Operation.

CAR's position fails to acknowledge that, historically, it has recognized that ERP appointments for PPA and for commercial business are independent of each other.⁴⁶ Under the MAIP Rules, producers are no longer appointed as ERPs for PPA insurance but are certified as

⁴⁴ Even if Safety had cited Rule 13.B.6.h.(2)(a) as a basis for termination, the rule establishes a two-pronged requirement for finding a violation. Payments must fail to be made on a "timely basis," a term defined in accordance with the CAR Rules. Safety's Termination Letter refers to alleged violations of "[f]ailure to remit payments to a Servicing Carrier on a timely basis" but provides neither factual support sufficient to permit a response nor any reference to a CAR Rule establishing a framework for determining what is timely.

⁴⁵ Rather than consider the adequacy under the CAR Rules of Safety's Termination Letter, CAR argues that if the Calianos Agency believed it was improper to consider the additional information that Safety submitted, it could have made an effort to preclude the MRC's consideration of such material or to postpone the MRC meeting. Its argument ignores the Agency's position, reiterated at the hearing, that the Termination Letter did not identify what Safety claimed were violations of the CAR Rules. When an MRC member expressed concern about the adequacy of the information Safety submitted about the late payments; Safety indicated that it had the information in its office. In response, the MRC Chairman suggested suspending the meeting to another date, unless a member made a motion. At that time, a member moved to uphold the termination.

⁴⁶ See *Appeal of Firnstein*, DOI Docket No. C94-13. CAR's position in that case was that, because it made separate ERP appointments for private passenger and commercial business, the producer's ineligibility for a private passenger ERP appointment did not affect his appointment as an ERP for commercial business.

ARPs. An ERP appointed to write commercial business and an insurer appointed as a Servicing Carrier for that business are expected to comply with the CAR Rules of Operation. Since implementation of the MAIP, ARPs and ARCs writing PPA insurance are expected to comply with the MAIP Rules that specifically apply to that business. The CAR Rules and the MAIP Rules provide quite different procedures for terminating a producer for failure to comply with the rules applicable to the relevant line of business.⁴⁷

As an ARC, Safety is expected to comply with the MAIP Rules on reporting alleged violations of the MAIP Rules to CAR. Assuming, *arguendo*, that Safety determined that the Calianos Agency had violated a MAIP rule relating to the timely transmission of payments, according to the Assigned Risk Producer Procedures Manual it should have notified both CAR and the Agency of the alleged violation. Safety, instead, improperly relied on alleged problems with the Calianos Agency's PPA business as support for terminating his ERP appointment.⁴⁸ Permitting Safety to invoke alleged violations of the MAIP Rules to support termination of an ERP appointment flouts the MAIP procedures for resolving complaints between an ARC and an ARP relating to MAIP operations.

Safety's reliance on alleged violations of the MAIP Rules as a ground for terminating the Calianos Agency was not apparent from the text of the Termination Letter but arose from a review of the exhibits it submitted for review by the MRC.⁴⁹ The Calianos Agency objected to Safety's reliance on MAIP data to terminate an ERP appointment. Although the issue of such reliance was squarely before CAR, the transcript indicates that nevertheless it did not address the

⁴⁷ Before the MAIP, an ERP's Servicing Carrier was principally responsible for initiating a termination of an ERP appointment, whether the producer wrote PPA, commercial coverage, or both. CAR's role was to hear appeals of such terminations. The Assigned Risk Producer Procedures Manual ("ARPPM"), submitted by both parties with their memoranda of law, demonstrates that the MAIP substantially revised the system for terminating an ARP's authority to submit PPA business to CAR, shifting responsibility to CAR to initiate an action to decertify an ARP. As set out in Chapter II.B of the ARPPM, the basis for such actions is information about ARPs reported to CAR by ARCs alleging failure to comply with the producer requirements in MAIP Rule 31. An ARC, pursuant to Chapter II.B.1, is to report producer violations on line and to forward the report to the ARP, who then has an opportunity to respond to CAR. Rule 31.D.1, addressing certification ineligibility, states that "[g]rounds for revoking the certification of an ARP shall be pursuant to Rules 30 and 31." Under the MAIP, if Safety, or any other Servicing Carrier, encounters problems with an ARP, it is obligated to report the events to CAR. The procedures for suspending or decertifying an ARP, published in the ARPPM, further prescribe a system for determining the validity of the Servicing Carrier's report and quantifying a tolerance limit for validated violations.

⁴⁸ Safety did not allege that the Calianos Agency had violated any MAIP Rule. There is no evidence that Safety notified CAR of any infractions that would support decertification under the MAIP Rules. Mr. Paradis's January 12, 2011 and January 31, 2011 letters to the Calianos Agency about returned checks were both copied to CAR. The charts enclosed with his letters link the payments transmitted by those checks to MAIP policies. Even assuming, *arguendo*, that these letters were meant to advise CAR of complaints about the Calianos Agency's performance as an ARP, the record is devoid of any reference to any subsequent inquiry arising from those letters.

⁴⁹ The lists of allegedly late payments and returned checks linked the transactions to MAIP or commercial accounts.

legal question of Safety's failure to recognize and comply with the separate procedures under the CAR Rules and the MAIP Rules for addressing alleged violations of those rules by ERPs and ARPs.⁵⁰ Instead, CAR allowed Safety to rely on alleged violations of the MAIP Rules as support for terminating the Agency.

Rule 15 Violations

The Termination Letter also asserts as a ground for termination that the Calianos Agency violated CAR Rule 15: "[t]he ERP shall remit premium payments in accordance with the contract signed with the Servicing Carrier."⁵¹ The Termination Letter does not, however, cite to any specific contract provision or identify any actions by the Calianos Agency that did not comply with its contract.⁵² Mr. Calianos, in the May 17, 2012 Letter, asserted that he had remitted premium in his control in accordance with his signed contract and had received no notice from Safety of non-compliance with that contract. The absence of information in the Termination Letter identifying the contract provision that the Calianos Agency allegedly violated gave the Agency inadequate notice of any Rule 15 violation that Safety claimed as support for its decision to terminate the Agency.⁵³ As with Safety's allegations relating to CAR Rule 13, CAR

⁵⁰ CAR did, however, in part justify its decision by referring to decertifications of ARPs. The Calianos Agency's private passenger automobile business is principally written through the residual market; all of its commercial business is placed with Safety. The ARPPM provisions relating to decertification of ARPs observes that decertification is the harshest sanction against an agency and is a rare event. CAR did not consider comparative sanctions but contends that its decision should be upheld because decertification of the Calianos Agency as an ARP will not adversely affect its customers. It cites no authority for that standard, although it was raised as a concern at the GC's September 19, 2012 meeting. The transcript indicates that one member opined that, given the scale of the Agency's business, the loss of its ARP certification would create great hardship for consumers. Another member disagreed, commenting that the ARCs could service the business directly, and that consumers would not be "put at any disadvantage by the fact that they cannot go to this agency to continue to service the business." The extent to which CAR weighed the interests of consumers in reviewing Safety's ERP termination decision, particularly when consumer complaints were not a basis for termination, cannot be fully discerned from those comments. Nevertheless, CAR relies on the second prognosis to support decertification, referring to a June 2012 report to the GC on the continuation of MAIP coverage when the producer who submitted the application was decertified. Of the five ARPs in question, the report provides no facts on two whose books of business were sold. For all three of the other agencies, the number of assigned policies totaled 223. Because none of the decertifications involved a large agency operating as a going concern, they are not an appropriate basis for considering the effect on the marketplace of terminating a large agency. Even if there may be merit in weighing the effect on consumers in determining appropriate sanctions for MAIP violations, the June 2012 report provides no persuasive support for CAR's argument in this case.

⁵¹ Safety did not claim that the Calianos Agency had violated any of the specific provisions in Rule 15 that relate to such matters as premium deposits or the forwarding of premiums collected by the ERP on direct bill invoices to the customer.

⁵² Pursuant to CAR Rule 13.B.6.a Safety, as the Servicing Carrier, was required to provide a contract, consistent with the CAR Rules, to the Calianos Agency as an ERP for commercial business. The only contract in question would relate solely to commercial business and would be irrelevant to Safety's MAIP business with the Calianos Agency.

⁵³ The transcripts of the hearings at CAR before the MRC, the GCRP and the GC show that no CAR committee squarely addressed the question of a breach of contract in connection with its review of the termination of the

did not initially review the Termination Letter to determine whether it gave adequate notice to the Calianos Agency of the reasons why Safety sought to terminate it for violations of Rule 15.

Further, the record indicates that Safety, in the course of the proceedings at CAR, did not offer any evidence supporting breach of contract as a basis for terminating the Agency. None of the documents Safety submitted to CAR for distribution included any section of its contract with the Calianos Agency. Safety made no other statements at the MRC or GCRP hearings that could provide a factual basis for CAR to evaluate Safety's claim that it terminated the Calianos Agency for violations of Rule 15, or to affirm termination for that reason.⁵⁴ The transcript records no discussion of Safety's presentations to the MRC or the GCRP addressing the absence of any articulated factual basis for terminating the Calianos Agency for violations of Rule 15.

The CAR Hearings

The 48-page transcript of the MRC hearing and the 58-page transcript of the GCRP hearing both reflect an informal process in which the parties, Safety and the Calianos Agency, made statements and responded to questions from members of the committee.⁵⁵ The MRC as a whole did not, on the record, formally review the information it received orally or in the form of documents or make specific findings of fact. At the end of the GCRP hearing, individual panel members commented on the proceedings, but did not, as a panel, perform any formal review or analysis of the statements and documents presented to them.⁵⁶ The transcripts demonstrate that, before taking their votes, the MRC and the GCRP focused on the following issues.

Calianos Agency. It is reasonable to expect a fair review process expressly to consider the adequacy of notice and the evidentiary support offered with respect to each claimed basis for termination. An appeal under Rule 20 is available because a person is aggrieved by any "unfair, unreasonable or improper practice of CAR or a Member." CAR did not address the question of whether a Servicing Carrier's inclusion of unsupported violations of a CAR Rule as a ground for termination might constitute an "unfair, unreasonable or improper practice" by a member company.

⁵⁴ It is troubling that at the June meeting of the Governing Committee the Chairman of the MRC reported that Safety terminated the Calianos Agency for alleged violations of CAR Rue 13.B.2.a, 13.B.2.f and Rule 15, "which include failure to remit payments to a servicing carrier on a timely basis, failure to comply with reasonable procedures of the Servicing Carrier for remitting premium, and failing to remit premium payments in accordance with the contract signed with the Servicing Carrier," despite Safety's failure to present any evidence of violations of Rule 15. Similarly, the chair of the GCRP, reporting to the GC in September 2012, did not separately address each of Safety's stated reasons for termination.

⁵⁵ No party has identified any training programs or guidelines that CAR provides to its members or to producers holding an ERP appointment or ARP certification that address practices or procedures to be followed at Rule 20 hearings. Similarly, nothing in the record suggests that the factfinders are given any guidance on evaluating evidence. Although CAR contends that the Rules provide an objective list of standards for termination, they rarely set quantitative guidelines for evaluating when termination is appropriate.

⁵⁶ Comments from various committee members reflect a range of responses to particular issues, but no efforts to explore issues in depth or to reach consensus. The absence of any focused analytical discussion either with relation to the parties' presentations or to the CAR and MAIP Rules is a disservice to CAR, its member companies and producers who, as ERPs or ARPs, may ask for hearings, as well as to future reviewers of CAR's decision. It is

The Returned Checks

a. The three returned checks (November 2011 and March 2012)

At the MRC, Mr. Calianos reiterated the information in the May 17, 2012 Letter about the three returned checks identified in the Termination Letter.⁵⁷ Mr. Hussey acknowledged that he had received the documentation relating to the three checks that was attached to the May 17, 2012 letter, but stated that Safety thereafter, for different reasons, decided not to withdraw the termination. He commented that the letter from the Sovereign Bank about the two March 2012 returned checks was undated and “not constructed well,” and that there was nothing in it that “would change Safety’s mind that this would be a matter of termination.”⁵⁸ Mr. Hussey again stated to the GCRP that the undated letter “left a lot of confusion in our minds at Safety as to what really happened with those NSF checks.”

Mr. Calianos and Mr. Hussey agreed that, after the Sovereign Bank returned the November 2011 check, Mr. Calianos called Safety to inform it that the return had occurred because of unauthorized withdrawals from the account resulting from the theft of his check routing number. Mr. Hussey stated that he thanked him for calling and thought that the incident was an explanation for a bounced check. He also commented that he could not determine what had happened based on Mr. Calianos’s statements, and also expressed concern about the timing of the affidavits relating to the fraudulent transfers from the Agency’s bank account.⁵⁹

particularly problematic when a challenged action is not based on easily documented objective factors such as failure to maintain a book of business at a level specifically required by a CAR Rule.

⁵⁷ The Calianos Agency, in its Request for Review, stated that the two 2012 checks were returned as a result of bank error and the 2011 check occurred because of fraudulent acts by an Agency customer. He also stated that he had discussed the latter event with Safety at the time it occurred.

⁵⁸ The Termination Letter refers to two “recently returned” checks. The record indicates that they were returned on or about March 22, 2012.

⁵⁹ According to the transcript of the MRC hearing, Mr. Hussey later stated to the MRC that he wasn’t “convinced that the explanations were all that solid for the three checks, and they were on top of the other five.” He continued on to say to the MRC that “[w]e felt at that time, you know, we’ve got some vague evidence, not sure if it applies or not, the affidavits were four months after the supposed event. We looked at that and said, based on the other five bounced checks since 2010, we needed to terminate.” Mr. Hussey expressed to the MRC concern about the timing of the affidavits with respect to the unauthorized withdrawals, commenting that the withdrawals were not reported to Safety until four months after they occurred.

The affidavits in question, copies of which were provided to the MRC, were dated in October 2011; Mr. Calianos, in his statements at the MRC hearing, contended that he had filed the affidavits immediately but that the bank lost the originals. The MRC did not question Safety’s apparent premise for rejecting the affidavits, the theory that unauthorized withdrawals in June 2011 could not have caused the November 2011 overdraft, given that the business was “running through a lot of checks every month, every week.” It did not explore optional explanations, for example, that it might be equally plausible in such a business that an unauthorized withdrawal would not immediately cause a check to be returned for insufficient funds.

The Calianos Agency distributed to the GCRP a second letter from Sovereign Bank dated September 3, 2012 about the returned checks identified in the termination letter. Sovereign's letter confirmed that two of those checks, Numbers 1481 and 1443, were returned because of a bank error. The Termination Letter does not identify the check returned in November 2011 by number; Sovereign's September 3, 2012 letter refers to check No. 1209 and explains that one of the Calianos Agency's accounts was closed as a result of fraud and that this check was returned because of a bank error relating to deposits. In its June 2012 submission to the MRC, Safety included check 1209 on the list of returned checks and provided a copy of that check. The record thus supports conclusions that the Termination Letter in fact referred to checks numbered 1209, 1481 and 1443 and that Sovereign Bank confirmed Mr. Calianos's account of the reasons those checks were returned.

That these three checks were returned for insufficient funds is not contested. The Calianos Agency takes the position that they were unquestionably returned as a result of bank error and fraud and that CAR improperly refused to accept documentation that the three checks were returned for reasons outside the Agency's control. The task for the MRC and GCRP was to determine whether the record, as a whole, persuasively supported Safety's decision to reject the documentary evidence relating to responsibility for those returns. If the record did not, Safety could not properly rely on those three checks as a basis for terminating the Agency's ERP appointment.⁶⁰ CAR, in its memorandum, does not squarely address the evidentiary issues relating to the three returned checks, arguing that the record does not support the Agency's position that Safety based termination of its ERP appointment on bank error, because the termination was never based solely on three returned checks.⁶¹

CAR's memorandum, at the same time, identifies the task presented to the MRC as the review of Safety's Termination Letter that was based on repeated instances of Agency checks being returned for insufficient funds. The MRC's obligation, in executing its adjudicatory function was, as an initial step, to evaluate all the evidence that Safety and the Calianos Agency submitted relating to the three specific checks identified in the Termination Letter as "repeated" instances. The transcript demonstrates that the MRC did not independently determine whether

⁶⁰ CAR argues that the MRC challenged the authenticity of the first Sovereign Bank letter. The MRC's job was to evaluate the merits of Safety's concerns about the letter, not to express other concerns.

⁶¹ CAR does not argue that Safety could base a termination on returned checks that were caused by events, such as bank error, that are outside the Agency's control. However, a member of the GCRP stated that he "could understand the company's [Safety's] concern about the NSF checks regardless of the reasons why those checks were returned for insufficient funds."

Safety had sound grounds to reject the documents attached to Calianos Agency's May 17, 2012 Request for Review relating to the bank errors, nor did it question Safety's statement that nothing in the Sovereign Bank letter would have changed its mind about terminating the Agency.⁶²

Further, the MRC did not remain neutral in the course of evaluating Safety's concerns about the Sovereign Bank letter attached to the Calianos Agency's May 17, 2012 Request for Review. As shown by the transcript of the MRC hearing, a member of the committee, concerned because the letter from the bank was undated, attempted to contact the signatory. He informed the MRC that he made three or four phone calls, was told that the person worked in another branch, and never got a call back. CAR's role in conducting a hearing is to evaluate the statements and documents presented by the parties to a dispute, not to undertake an independent investigation of matters before the committee. Even though the precise effect of the member's actions on the MRC's decision cannot be determined on this record, it is patently unfair for a party to be confronted at a hearing with actions by and statements from a voting committee member offered as support for the opposing party's concerns.

In response to the comments on the Sovereign letter at the MRC, the Calianos Agency provided the GCRP with a second letter from Sovereign Bank, dated September 3, 2012. The GCRP acknowledged receiving the letter, but did not evaluate it as rebuttal evidence to Safety's concerns about and reliance on the earlier letter.⁶³ Without addressing the second Sovereign Bank letter on the record, the GCRP moved to adopt the MRC's recommendation.⁶⁴ The GCRP's failure to re-examine the MRC's support of the termination in light of this new evidence supports a conclusion that, with respect to determining responsibility for the three returned checks, the Agency did not receive a fair hearing.⁶⁵

b. *The earlier returned checks*

Mr. Hussey did not limit his statements at the MRC to the three identified checks but also commented on the *Calianos Insurance Agency-Return Check History* chart that Safety had provided to CAR for distribution to the MRC. Safety's chart listed five checks returned for

⁶² Some members of the committee indicated that they were satisfied with the Agency's explanation.

⁶³ In its presentation to the GCRP, Safety did not challenge in any way the Sovereign Bank's September 3, 2012 letter stating that the three checks were returned as a result of bank error. Mr. Hussey commented that Safety had not seen the second letter until it was distributed prior to the hearing and Mr. Paradis expressed confusion about the identity of the trust accounts.

⁶⁴ The motion was made immediately after a member of the GCRP suggested that it did not matter whether the checks were returned as a result of bank error.

⁶⁵ CAR argues that the discussion about the first communication from Sovereign Bank raised concerns at the MRC about Mr. Calianos's credibility. In light of the second letter from the Bank, the GCRP should have inquired into and addressed any such concerns.

insufficient funds between June, 2010 and January, 2011. The Calianos Agency objected, noting that the time frame in the Termination Letter did not go back to 2010 but only referenced checks returned in 2011 and 2012. Mr. Hussey first asserted, incorrectly, that the checks returned in 2010 were listed in his November 29, 2011 letter to the Calianos Agency.⁶⁶ Later, responding to a question from an MRC member, Mr. Hussey agreed that the Termination Letter did not refer to those checks. Despite Safety's statement, the MRC did not address the question of notice to the Calianos Agency that Safety intended to raise the issue of earlier returned checks.⁶⁷

Safety appeared to take the position that the Termination Letter, by referring to a January 31, 2011 letter requiring the Calianos Agency, because of returned checks, to submit payments by means other than agency checks, thereby notified the Agency that the 2010 checks were relevant to Safety's decision to terminate.⁶⁸ Neither the MRC nor the GCRP questioned Safety about the omission from its Termination Letter of direct notice to the Calianos Agency that the termination was in any way based on the 2010 returned checks.⁶⁹ Neither questioned the reasonability of Safety's somewhat convoluted theory about notice to the Agency. Further, CAR did not require Safety to isolate checks transmitting payments for MAIP policies from those that related to commercial business under the ERP assignment and to treat only the latter as relevant to its termination decision.

c. The Late Payments

The transcript of the MRC hearing indicates that Safety drew the MRC's attention to the chart headed *Payments Received 10 or More Days after Agent's Online Notification to Safety*. Mr. Hussey stated that "while the insufficient funds checks were really the impetus, but looking at the pattern, looking at the pattern of held payments, late payments, again, we felt there was

⁶⁶ The letter, found at page 13 of Exhibit 2 to the MRC hearing, makes no reference to checks written in 2010.

⁶⁷ In its memorandum, CAR expressed no concern about the inconsistency between Mr. Hussey's statement about the November 29, 2011 letter and the document itself.

⁶⁸ Mr. Hussey acknowledged that the Termination Letter did not list the checks. He stated that the January 31, 2011 letter specifically referred to the initial four checks. The information does not appear in the text of the letter, but could have been in an enclosure.

⁶⁹ No questions were raised about the timing of Safety's decision to provide information on checks returned in 2010 or early 2011. In response to a question from a member of the MRC about the 2010 checks, Mr. Calianos explained that he had encountered problems with his Citizens Bank account and in response opened accounts at Sovereign Bank. Safety did not pursue the matter but a member of the MRC commented on his personal experience with Citizens Bank, stating that he had had no problems with his checking account at that institution. As with the inquiry into the Sovereign Bank letter, it was inappropriate for a committee member to report his personal experience with Citizens. Such irrelevant comments serve no legitimate purpose. Again, the precise effect of the member's comment on the MRC's decision cannot be determined on this record. However, at least one other member of the MRC apparently found the bank issues somewhat significant; he asked if the Calianos Agency had written to Citizens about the problem.

no—there was a [sic] choice but to proceed with the termination.” Mr. Hussey acknowledged, in response to an MRC member’s statement, that the Termination Letter did not reference late payments.⁷⁰ At the GCRP hearing, Mr. Hussey took a somewhat different position, informing the Panel that Safety first advised the Calianos Agency that it was terminated based on returned checks, but later stated that it was terminated for failure to remit payments on a timely basis.

The MRC questioned whether it could consider the late payments because they were not referenced in the Termination Letter, but after hearing from CAR’s counsel that the chart had been distributed in accord with the open meeting laws, proceeded to pursue the issue.⁷¹ Mr. Calianos pointed out that the chart referred to payments made in 2010, not the period mentioned in the Termination Letter and stated that he could not tell from the list what the particular problems might be with each policy.⁷² Mr. Hussey reiterated Safety’s position that the Termination Letter, by referring to the November 29, 2011 letter, informed Mr. Calianos that it based the termination decision on events from 2010 forward; at the same time, he acknowledged that Safety made no specific reference to events that would support failure to remit premium on a timely basis as a reason for termination.⁷³

The Agency objected, in its Request for Review by the MRC, to Safety’s failure to identify late payments as a reason for termination, and Safety acknowledged that the Termination Letter did not do so. Nevertheless, the MRC’s concerns about allegedly late payments are apparent from the discussions in the transcript, and it is not unreasonable to conclude that the

⁷⁰ In spite of that, an MRC member stated that he was more concerned about the late payments than the returned checks.

⁷¹ The Calianos Agency objected to the MRC’s consideration of the late payments, arguing that Safety’s materials were not distributed in accord with the timetable in the Request for Review Form. That form requires written exhibits (documents) that a party to a hearing wishes to be considered by a committee to be submitted to CAR’s docket clerk no later than five business days before the scheduled meeting date. It does not specify a schedule for distribution. The MRC met on June 13, 2012; because of the weekend, compliance with that timetable would require submission of documents no later than June 6. The record indicates that Safety’s documents were distributed on June 7. The transmittal letter from Safety to CAR, included in the Joint Appendix, is dated June 6, but because it does not bear a date received stamp there is no basis for determining whether the CAR docket clerk received the exhibits that same day. The record shows that the documents were distributed later than five business days before the meeting. However, the Request for Review Form relates to submission of documents, not to distribution. . Because the record does not show the date on which Safety submitted the documents to CAR, it is insufficient to permit a finding on its compliance with the timetable in the Request for Review. In the interests of fairness and to minimize controversy, it might be advisable to require distribution within a prescribed advance period.

⁷² Mr. Calianos, in response to a question from an MRC member to explain delays in payment in 2010, described issues relating to waiting for policy numbers on financed policies, with particular reference to MAIP policies. Safety contended that all the policies on the list were existing policies. An MRC expressed concern about lack of information about the 89 late payments, but as noted above, the hearing was not continued.

⁷³ Again, although the Termination Letter cites to a (misidentified) CAR Rule relating to failure to remit premium on a timely basis as reason for termination , it gave no specific information to the Agency.

MRC sustained the termination at least in part on that basis.⁷⁴ The Agency's Request for Review to the GCRP specifically addressed issues additional issues related to the late payments, identifying two in particular: 1) its inability to respond at the MRC to Safety's chart because of the limited information in that chart; and 2) Safety's utilization of payment data relating to MAIP policies to terminate an ERP appointment.

Between the MRC and GCRP hearings, the Calianos Agency contacted Safety to obtain additional information about the alleged late payments.⁷⁵ The e-mail correspondence between them, copies of which were distributed to the GCRP, shows that the process did not proceed smoothly. On August 13, 2012, Safety transmitted to CAR another document relating to the alleged late payments that included information such as the date and amount of payment and the date Safety credited the account; it was distributed to the GCRP and marked as an exhibit in GCRP Docket 2012-03. At the GCRP hearing, Mr. Hussey indicated that Mr. Calianos had reviewed that list with Safety and had offered explanations for the payment histories; Safety then proffered an exhibit documenting its responses to the Agency's explanations. The Calianos Agency objected that the document had not been timely offered and that it was unfair to expect it to address its contents. The GCRP did not accept the document as an exhibit, but Mr. Hussey proceeded to read its contents.⁷⁶ He disagreed that Safety misapplied funds, argued that any late payments caused by system errors were the result of errors in the Calianos Agency systems, and pointed out that Mr. Calianos agreed that some late payments resulted from agency error.⁷⁷ The

⁷⁴ CAR's memorandum acknowledges that Safety presented information on late payments to the MRC and argues that the weight of the evidence on all of the MRC's concerns supports its decision.

⁷⁵ The e-mails between the Agency and Safety indicate that Safety, at the Agency's request, provided an "unredacted" copy of the additional information Safety had sent to CAR. The e-mail did not further describe the nature of the information on the "unredacted" list. However, the Agency asked that Safety provide the dates and amounts of payments, because some of the policies were in effect over a two-year period. Rather than provide the information, Safety referred the Agency to a data base; it also stated that it would, "upon notification from CAR of an appeal hearing, provide CAR with further information regarding late receipt of payments to us from your Agency." The Agency further responded, again asking for the specific dates and amounts of payments, and noting that, because Safety was trying to cancel his contract based on late payments, it was reasonable to ask it to provide that information.

⁷⁶ CAR vigorously argues in its memorandum that its proceedings filled all requirements of due process, pointing out that the GCRP decided not to enter into the record a document prepared by Safety relating to the possible causes of late payments. The GCRP did not, however, decline to hear Mr. Hussey's oral summary of that document. CAR's argument that the GCRP's decision not to admit the document as an exhibit is evidence of compliance with due process thus has no merit. Further, CAR contends that the Agency had no explanation for the 89 late payments and then characterizes Mr. Calianos's explanations as excuses that it views as evidence of his lack of credibility. As noted above, to the extent that all but eight of the payments in question related to the MAIP, the discussion was not relevant to the termination of an ERP appointment.

⁷⁷ Mr. Hussey also commented that Safety had gone through a warning stage. However, both Mr. Hussey and Mr. Paradis then described the "warnings" as related only to returned checks; neither identified any "warning" relating to late payments.

Calianos Agency observed that the vast majority of the allegedly late payments occurred in 2010 and early 2011, when the Agency was addressing new MAIP procedures. Mr. Calianos stated that, recognizing problems with the Agency's operations, he made significant changes in its business practices.⁷⁸ Since the Agency had changed its banking arrangements and reorganized its own practices, he pointed out, the alleged late payments were substantially reduced.⁷⁹

Without addressing the initial question of Safety's failure to notify the Agency that such payments were a reason for terminating its ERP appointment, both the MRC and the GCRP heard statements from both parties on the question of late payments.⁸⁰ The transcript of the GCRP hearing indicates that at least one member of the panel thought that the late payment issue was particularly significant.⁸¹ Despite the Agency's argument that Safety, in addition to its failure to notify it that allegedly late payments were a basis for termination, improperly based its decision to terminate an ERP for alleged late payments related to MAIP policies, CAR did not address that question at any stage of the proceedings.

d. *The Use of Agency Checks*

The Termination Letter, in addition to terminating the Agency as a "direct result of repeated instances of checks being returned for insufficient funds" also stated that "[p]revious correspondence on January 31, 2011 from Jeffrey Paradis required you [the Calianos Agency] to submit payments via money order, bank or certified check, due to multiple instances of agency checks returned for insufficient funds." Safety submitted to the MRC copies of the January 31, 2011 letter and a January 12, 2011 letter from Mr. Paradis advising the Agency that, if another check were returned for insufficient funds, Safety would impose a requirement to submit

⁷⁸ CAR argues that the Calianos Agency refused to acknowledge any "wrongdoing." It ignores statements from Mr. Calianos, and his counsel, describing operational problems that it encountered and the steps it had taken to correct those problems, including changing its banking arrangements, improving its computer systems, and working with a different finance company.

⁷⁹ Of the 89 policies Safety listed, 81 were MAIP policies, and most involved payments made before May 2011. Of the 42 payments described as late in 2010, four were for commercial business. Of the 40 policies considered late in 2011, four were commercial policies and 36 of the allegedly late payments occurred before May 25. Of the six payments described as late in 2012, all were on MAIP policies and only two occurred before Safety sent its termination letter. The later four could therefore have played no role in the termination. Even if Safety could have considered the MAIP problems in connection with an ERP termination, terminating based on incidents, most of which occurred more than a year before that decision was taken raises an issue of fairness. At CAR, members of the MRC and GCRP apparently did not consider the relationship between the steep decline in allegedly late payments and the management changes that the Agency implemented in 2011.

⁸⁰ The GCRP also did not address the issue of Safety's failure, upon request, to provide detail that would enable the Agency to identify the specific payments that Safety characterized as "late."

⁸¹ He commented, "I can't imagine anything as important to the insurance company as receiving timely and accurate payments, and I'm really concerned about the history of late payments." Nothing in the record indicates that Safety alleged that any payments were inaccurate. CAR did not evaluate the "history" in terms of time periods or line of business.

payments by money order, bank or certified check. Safety's presentations to the MRC and the GCRP characterized the January 31, 2011 letter as a statement to the Calianos Agency that it considered returned checks in addition to those specified in the Termination Letter as support for its termination decision.

Although the Termination Letter cited "failure to comply with reasonable procedures of the Servicing Carrier for remitting premium" as a reason for terminating the Calianos Agency, it did not connect its claim to any particular procedure. The Calianos Agency argues that the sole possible basis for Safety's claim was the use of Agency checks after January 31, 2011. At the MRC Mr. Hussey characterized its instruction to the Agency to remit funds by means other than Agency checks as a "procedure," stating that "[w]e feel we created a new procedure when we advised the agency that they would no longer be able to send us their own agency check."⁸²

Questions from members of the MRC and the GCRP that were, as shown in the transcripts, addressed both to Safety and Mr. Calianos support a conclusion that both groups viewed the constraint on transmitting funds by agency check as significant.⁸³ Neither group questioned the connection between that issue and the content of the Termination Letter, explored whether what Mr. Hussey identified as a "new procedure" is a published standard applicable to all ERPs or an *ad hoc* requirement imposed on the Calianos Agency, or examined the further question of whether such a procedure is "reasonable," particularly in view of Safety's admitted inability to measure compliance.⁸⁴ Mr. Hussey, in response to questions about any actual rejections of Agency checks; opined that Safety had accepted agency checks from the Calianos

⁸² Mr. Hussey erroneously told the GCRP that the January 12, 2011 letter advised the Agency that it could no longer send payments by Agency check. The letter stated that the Agency would be required to do so if another check were returned for insufficient funds.

⁸³ A member of the MRC expressed the issue as not just whether checks bounced, but whether they should have been received.

⁸⁴ The question of reasonability is not insignificant. In its Payment Notification instructions, distributed by Safety to the GCRP as an exhibit on August 13, 2012, Safety states that it expects payments received by the agent to be mailed to it the same day, but does not explain how that expectation applies if the agent receives a payment late in the day or on a day when there is no mail service. It is difficult to imagine that rational factfinders would conclude that a procedure with which it is impossible to comply is "reasonable." Further, given that, except for returns the bank acknowledged resulted from its error, no Agency checks were returned after the Agency revised its banking operations in 2011, CAR's continued focus on compliance with Safety's January 29, 2011 directive is somewhat mystifying. In effect, CAR did not consider whether requiring the Agency to transmit premiums by means other than Agency check would still be a "reasonable procedure" even after the Agency instituted operations that, except for checks returned because of bank error, appear to have resolved the returned check problem.

Agency, commenting that Safety received hundreds of thousands of checks “over this time” and that he thought the company would be unable to cull out one agency’s checks.⁸⁵

Mr. Calianos, in response to questions about compliance with Safety’s warning letters on transmitting payments, stated that he did send money orders or bank checks until he established separate Agency trust accounts at Sovereign Bank.⁸⁶ He noted that Safety accepted checks drawn on the Sovereign Bank accounts and that the only checks that were returned on the trust account were those for which the bank had taken responsibility.⁸⁷

The transcripts reflect various concerns about the warning letters, the Agency’s responses, and Safety’s conceded inability effectively to monitor the Agency’s compliance with its request.⁸⁸ The record leaves no doubt that Safety instructed the Calianos Agency, by letter dated January 31, 2011, that it should no longer send payments by Agency checks because five checks had been returned for insufficient funds.⁸⁹ The letter does not specify whether the proscription related to payments for MAIP policies or commercial coverage. Safety did not challenge the Agency’s statement that it complied with that instruction, at least until it

⁸⁵ He again confirmed later, in response to a question from another MRC member, that Safety could not cull out Calianos Agency checks, but that he did not consider that the company therefore acquiesced to the transmission of payments by agency check.

⁸⁶ Mr. Calianos stated that he spoke with Safety, probably in November 2011, about the new trust account, possibly in connection with a call about the check that Sovereign Bank returned at that time. He stated that Mr. Hussey did not object to the transfer of payments with checks drawn on that account and that Safety accepted those checks. Mr. Calianos did not recall whether he specifically asked Mr. Hussey about sending Agency checks on a trust account. Mr. Hussey denied authorizing the use of Agency checks at any time; his November 29, 2011 letter reminded the Calianos Agency of the instructions in the January 31, 2011 letter and warned about the possibility of terminating his ERP contract for violations of CAR Rules 14 and 15. The record does not indicate whether the check related to a commercial or a PPA policy. Whatever the details of the conversations in November 2011, Safety must have been aware at that time that the Calianos Agency was transmitting payments from its trust account. A member of the MRC voiced the opinion that the Calianos Agency should have gotten a letter from Safety approving the use of Agency checks to transfer payments from the trust account.

⁸⁷ Safety submitted documents to the GCRP on August 31, 2012, that included a five page list of checks written on Citizen’s Bank and Sovereign Bank, the former during a period from July 29, 2010 through March 23, 2012, and the latter from June 29, 2011 through August 24, 2012 (Exhibit 4, pp. 18-22). The dates suggest that the Sovereign Bank account was opened at the end of June 2011. The list also confirms that the only checks returned from that account are the three that, according to the Agency, resulted from bank error. The list shows as well that Safety continuously accepted checks on the Sovereign account through August 24, 2012.

⁸⁸ One GCRP member suggested that Safety could have taken a sample of policies written through the Calianos Agency and seen if agency checks were sent; he thought Safety might have set a precedent by not doing anything to enforce the warning. Another member thought the principal issue was whether there was “due notice” to the Agency that it could not send checks, and that the whole issue of the returned checks was “almost moot.”

⁸⁹ The first letter did not prohibit the Agency from sending checks on its account; the second letter dated January 31, 2011 was formal notification that Safety would no longer accept agency checks. The November 29, 2011 letter from Hussey referred back to the January 31, 2011 letter and warned the Agency that its ERP contract could be terminated for repeated violations of CAR Rule 14.

restructured its banking arrangements with the goal of avoiding returned checks.⁹⁰ Safety's own exhibit for the GCRP, showing that no checks were returned by the Sovereign Bank trust account until the three that were the result of bank error, suggests that the restructuring successfully resolved the problem.

Safety's Termination Letter unquestionably referenced its January 31, 2011 letter. While that reference could perhaps be interpreted as a message that the checks would not have been returned if the Agency had transmitted funds by another method, it is far from a direct statement that Safety considered failure to do so as a ground for terminating the Agency. Mr. Hussey's statements about Safety's inability to select Calianos Agency checks from the stream of payments to the company demonstrate that, in any event, it could not monitor compliance with its own instruction.⁹¹

Inquiries and comments by members of the MRC and the GCRP on the topic of payment transmission support a conclusion that CAR gave weight to an issue that Safety did not identify as a reason for termination and one for which it could provide no data support. CAR's responsibility, as an adjudicator, was to focus its review on Safety's stated reasons for terminating the Calianos Agency and the Agency's responses to those stated reasons. The hearing transcripts confirm that CAR's committees did not address the initial question of whether Safety adequately identified noncompliance with the January 31, 2011 letter later that year as a basis for termination. Even after CAR heard statements that Safety could not identify any such noncompliance and that no Agency checks had been returned since January 2011 for any reason other than the asserted bank error, committee members continued to express concern about payment transmission. CAR erroneously considered a reason for termination that was not explicit in the Termination Letter, even after hearing uncontroverted statements that Safety could not develop data on which to base such a claim.⁹²

The Hearing Process

⁹⁰ Safety never argued that, following the January 31, 2011 letter, the Calianos Agency did not comply with its instructions. An exhibit relating to late payment notification distributed to the GCRP (Exhibit 3, p.3) identifies the form of payments received from the Agency in 2010 and 2011. Of 42 payments in 2010, 31 were made by agent check, while all payments in 2011 are shown as "agent mo" or "insured check."

⁹¹ Mr. Hussey's statement may be inconsistent with Safety's GCRP Exhibit 3, pp. 3 and 4, discussed above. Safety appears to have had the capacity to identify the form of agent payment, at an undetermined point in its system. It may have had no impetus to be concerned about the form or source of payment as long as checks were honored.

⁹² Again, no distinction was drawn between checks issued in connection with PPA policies and commercial business.

CAR argues at some length that its hearings were procedurally proper and fully complied with the Open Meeting Law.⁹³ It does not address the conduct of the hearings themselves.⁹⁴ The transcripts convey a disturbing tendency at all levels of the proceedings for CAR committees to abjure the neutral approach to resolving this matter that is appropriate to performance of its adjudicatory function under Rule 20.A and, instead, to engage in personal commentary and to articulate issues that are not relevant to evaluating Safety's termination decision. A member of the MRC, for example, described as "cavalier" what he believed was a decision of the Calianos Agency not to comply with what the MRC member viewed as letters saying that Safety would not accept Agency checks. Another member characterized as "technical" the assertion that Safety could not cancel the Agency for incidents that were not in the Termination Letter.

Committee members questioned Mr. Calianos's personal responses to aspects of the hearing. Some members of the MRC were critical of his request for time to look at the late payment chart that CAR distributed on June 7, 2012, and suggested that the Calianos Agency did not take the information seriously. One commented that he, himself, would have gone back and looked at the late payment information as soon as he got it, "because it is information we can take into consideration." He further observed, "why would you just discount that [information], throw it aside, and figure Well, I'll tell them I'll look at it later?" He expressed his personal opinion that he "would have gone through them ahead of time and made sure I had the information for the Committee to review." Another member said that he was confused, "in light of the magnitude of this issue with the evidence presented, and I think you said you didn't bother printing."⁹⁵ A member of the GCRP suggested that Calianos might have gone into the Safety payment system on a periodic basis just to make sure things were going well.⁹⁶

⁹³ CAR points out, in particular, that it posts notices on its public website, that its e-mails generally contain links to its website, and that the Open Meeting Law does not require it to distribute materials in advance of a meeting. It gives short shrift to the instructions on its Request for Review form on the submission and distribution of exhibits for consideration at a committee meeting, including the timing of such submissions and distribution to opposing parties. It further argues that, unlike Rule 40, Rule 20 does not include the language in the Request for Review relating to the timing of submissions in an appeal proceeding. Its argument is irrelevant.

⁹⁴ The conduct of proceedings is appropriate for review on appeal of a CAR decision. *Appeal of Amica Insurance Company*, DOI Docket No. G93-42 (1995). (The transcript raised question of the reasonableness of proceedings at the Governing Committee.)

⁹⁵ At the MRC, a member referred to a letter in the packet that was distributed to committee members, including Mr. Calianos, although the latter does not appear on the list of MRC members on the transcript. In response to the member, Mr. Calianos stated that he had not printed it out, a statement that led one committee member to conclude that he didn't "bother" to print it. However, another member had earlier suggested, and Mr. Calianos confirmed, that he had received the material as the person who filed the appeal.

⁹⁶ Mr. Calianos was also criticized for not taking a procedural step that was not available to him. A member of the GC, at its September 19, 2012 meeting, questioned why Mr. Calianos had not requested an extension of the effective

Members raised other issues that were not specific to Safety’s Termination Letter but expressed their personal opinions or concerns about Mr. Calianos or the Calianos Agency. A Panel member commented that agents have a fiduciary responsibility with clients’ money and funds, and further commented he saw “real deficiencies in your ongoing management personally. . . . What I’m afraid of, what potential errors are still out there.” The same person, concerned about references to overdraft protection on an Agency bank account, made a comment about “counting on overdraft protection.” He further stated, “[m]aybe my agency is run a lot differently, but I would never want to have that ever—that event even occur, have an account on overdraft. . . .” The comments continued even at the GC’s September 19, 2013 meeting. A member of the Panel, responding to a proposal to stay the termination, commented “[a]nd then particularly in light of the nature of the violation, that there are questions about his handling of money. I would be very, very concerned with extending the time on this individual case to allow the agent additional time. I think that’s certainly going to put the carriers at risk for loss of money.”

As discussed earlier in this decision, CAR’s role under Rule 20 is to hear disputes between parties and to conduct fair and impartial hearings. In that capacity it is expected to act as a neutral factfinder. In its decision in *Harris v. Board of Registration in Chiropractic (Podiatry)*, 343 Mass. 536, 540-541 (1962), the Supreme Judicial Court established standards for measuring compliance with those principles, identifying factors that led to its conclusion in that case that the overall atmosphere at the Board’s hearing was not conducive to impartiality. The specific actions that supported its decision included comments from Board members that “transcended reasonable limits,” some of which the Court characterized as “vehement expressions” that “reflected a biased attitude of mind by one sitting as a judge and cast serious doubt on the impartiality of the hearing.”

A second standard articulated in the *Harris* decision is limitation of the hearing to the articulated grounds for the contested action. The Court noted that questions from members of the Board of Chiropractic indicated that it was impressed by indications of conduct that had not been specified as misconduct in the charges against the plaintiff. A third measure of impartiality

date of the termination decision. CAR, in its memorandum, also observed that Mr. Calianos was present at the meeting but did not ask for reconsideration of the GCRP decision. As formulated, the question and the CAR’s argument imply that he could have done so. However, according to CAR Rule 20, a request to modify a GCRP decision must be made by a GC member. Because he was not a member of the GC, Mr. Calianos could not have made such a request.

is the reliance by the adjudicators on statements by a party that were not relevant to the claims of misconduct.⁹⁷

The transcripts demonstrate that the hearings at CAR were not limited to the reasons for termination set out in the Termination Letter. Comments made by members of the MRC and the GCRP relating to such matters as the management of the Calianos Agency and the handling of client funds were not relevant to claims in that letter. The comment at the GCRP on the potential risk to ARCs if the Agency remained in business was particularly egregious because Safety's Termination Letter never claimed that the Calianos Agency owed money to Safety. Safety did not allege that the Calianos Agency had compromised any fiduciary responsibilities; it made no assertions of problems with Agency clients' funds. Mr. Calianos twice stated to the MRC that any checks that were returned for insufficient funds were immediately replaced; his counsel at the GCRP reiterated that statement. Safety did not challenge any of those statements.⁹⁸ The expansion into negative personal commentary that had no relevance to the stated reasons for termination of the Calianos Agency was not consistent with the requirements for an impartial hearing.

MAIP Rule 31.D.3

MAIP Rule 31.D.3 states, in pertinent part, that if a Servicing Carrier has terminated an ERP's appointment for "violations of any obligations(s) delineated in Rule 14," except for the production criteria, "the ERP is ineligible for certification or continuation of its residual market certification." It is undisputed that Safety did not base its termination of the Calianos Agency as an ERP on any alleged violations of Rule 14. The Calianos Agency argues that CAR's conclusion that Rule 31.D.3 compels its decertification as an ARP is therefore incorrect as a matter of law.

CAR describes CAR Rule 13 and CAR Rule 14 as "counterparts," the first outlining the responsibilities of Servicing Carriers and the second the obligations of ERPs. From that, it

⁹⁷ The *Harris* Court further observed that the Board had apparently relied to some degree on an alleged misrepresentation by Harris that was not relevant to the claims of misconduct.

⁹⁸ CAR, in its memorandum, contends that "the Agency acknowledged that Safety had not received payment for the coverage" and refers to a "documented history in failing to remit payments to Safety." It provides no citation in support of either statement. Its statement is particularly puzzling because the chair of the MRC, reporting to the GC in June, 2012, referred to a statement from Mr. Calianos that "once the issue [of the returned checks] was brought to his attention, replacement checks were immediately written to Safety, and he assumed that the matter had been resolved." CAR mischaracterizes Safety's issue, allegedly late payments, as failure to remit payments. Had that occurred, Safety could have terminated the Calianos Agency immediately. In its reply memorandum, CAR again mischaracterizes Safety's complaint, contending that the Calianos Agency bound Safety to provide insurance coverage for which it had not received premium. Safety's Termination Letter made no such claim.

appears to take the position that alleged violations of Rule 13 equate to violations of Rule 14, thus triggering the operation of MAIP Rule 31.D.3. Its argument is not persuasive.

First, the plain language of MAIP Rule 31.D.3 refers only to termination of an ERP for violations of CAR Rule 14 as an event rendering the ERP ineligible for ARP certification. CAR has offered no support for expanding the unambiguous language of the MAIP Rule to include Rule 13. In the past, the Commissioner has concluded that clear and unambiguous language in a CAR Rule should be applied as written. The decision in *Firnstein v. CAR*, DOI Docket No. C94-13 (1994) overruled a CAR decision that incorrectly applied CAR Rule 14.G.1 to an applicant for an ERP appointment. In a decision in *Kenyon v. Commonwealth Automobile Reinsurers*, DOI Docket No. G93-23 (1993), the Commissioner affirmed CAR's strict application of its Dual Status Rule to the appellant, who sought an exemption from that rule.⁹⁹

Second, the Rule 14 requirements and the Rule 13 requirements are not identical. An ERP, under Rule 14.B.1.(f) must remit payments on a timely basis in accordance with the provisions set forth in the contract between the Servicing Carrier and the ERP, and receives an extended period if a policy is financed through a premium finance company. Under Rule 13.B.6.h.(2) (a) an ERP may be terminated for “[f]ailure to remit payments to a Servicing Carrier on a timely basis in accordance with CAR’s Rules of Operation.” The two rules set different standards for measuring a “timely basis.”

Similarly, Rule 14.B.1.(l) requires the ERP to “conduct all monetary transactions with the insured and the SC as required by the Rules of Operation and the Exclusive Representative Producer contract.” Rule 13.B.6.h.(2) (f) permits termination for “[f]ailure to comply with reasonable procedures as supplied by the Servicing Carrier for processing claims, remitting premiums and requesting coverages.” Rule 14 emphasizes compliance with the CAR Rules and the ERP contract, while Rule 13 looks at and “reasonable procedures” supplied by the Servicing Carrier.¹⁰⁰ The language in the CAR Rules does not support CAR’s position that they are interchangeable.

Timing of the Decertification

⁹⁹ The Commissioner commented in the decision that “CAR Rules, by their very nature, need to be construed and applied as written, for consistency.”

¹⁰⁰ Mr. Hussey’s November 29, 2011 letter to the Calianos Agency referred to the potential for terminating its ERP appointment for violations of the two cited sections of CAR Rule 14, as well as CAR Rule 15. The actual Termination Letter contained no such references.

The Calianos Agency argues that it was further error for CAR to decertify it two days after the GCRP meeting, contending that it is premature to decertify until an agency's ERP termination has been reviewed on appeal. It points out that MAIP Rule 31.D.3 provides that ineligibility for ARP certification occurs only when a servicing carrier has terminated an ERP for violations of Rule 14, "*with said termination not having been reversed by the Governing Committee, the Division of Insurance, or court of competent jurisdiction.*" (emphasis added)

The cited language appears in essentially identical form in the two sections of Rule 14 that relate to eligibility for an ERP appointment and link Rule 14 to MAIP Rule 31.D. Rule 14.A.e.(6)(k), in pertinent part, states that an applicant for an ERP appointment must satisfy the GC that he or she has not had an ERP appointment assigned rescinded or cancelled by a Servicing Carrier under Rule 14.H, "*said rescission or cancellation not having been reversed by the Governing Committee, the Division of Insurance or a court of competent jurisdiction.*" Rule 14.H.5 specifies that if CAR has revoked the certification of a MAIP ARP for any violations of the ARP's obligations delineated in Rule 31, "*with said revocation not having been reversed by the Governing Committee, the Division of Insurance, or court of competent jurisdiction, the producer is ineligible for the appointment or continuation of its residual market appointment.*" (emphasis added) Because the Calianos Agency's ERP appointment was not terminated for violations of Rule 14, it is unnecessary in this proceeding to decide how the cited language might apply.

CAR Rule 13, Safety's grounds for terminating the Calianos Agency, contains no comparable language. CAR Rule 13.B.6.(3).e. ¶4 addresses the procedure for obtaining a stay of an MRC decision upholding an ERP's termination, requiring the ERP to request the stay before the end of the MRC meeting that upheld the termination, and linking it to the ERP's stated intent to seek review by the GCRP. Under the rule, the MRC has discretion to grant the stay only "if it deems such action appropriate." The transcript of the MRC meeting reflects that CAR's counsel advised the Calianos Agency of the procedure for requesting a stay, that the Agency made a request in accord with that procedure and that on motion the MRC agreed, without further discussion, to a stay. CAR Rule 20 offers no parallel process for obtaining from CAR a stay of a GCRP or GC decision.¹⁰¹

¹⁰¹ CAR, in its memorandum, made the gratuitous comment that the Calianos Agency did not state at the conclusion of the GCRP meeting that it would appeal or request a stay. Nothing in Rule 20 required it to do so.

I decline to expand the scope of Rule 13 by reading into it the language in CAR Rule 14 and MAIP Rule 31.D.3 that, the Calianos Agency argues, postpones the potential effective date of a decision terminating an ERP for violations of CAR Rule 14 and concurrently decertifying that producer as an ARP.¹⁰²

Conclusion

After a thorough review of all aspects of CAR's decision, including the documentary exhibits, the hearing transcripts, and the parties' memoranda of law, I conclude, for the following reasons, that CAR's decision affirming Safety's termination of the Calianos Agency's ERP appointment must be set aside.

Rule 13 addresses the obligations of an insurer seeking to terminate an ERP and identifies actions by and ERP that may support termination. CAR, acting as the adjudicator of a dispute initiated under Rule 13, did not, in the course of its hearings, apply Rule 13 equally to both parties. The Termination Letter has a dual function: to give fair and adequate notice to the Agency of the grounds for the termination and to establish boundaries on the issues to be considered in any appeal of the termination decision.

The Termination Letter stated that termination was the "direct result of repeated instances of agency checks being returned for insufficient funds," and identified three such checks that were returned between November 2011 and April 2012. CAR did not limit its hearings on the termination decision to an analysis of the documentary evidence and oral statements relating to those three checks. Further, with respect to those checks, it did not carefully consider all the evidence that the parties presented relating to responsibility for the return of those three checks. Further, even though the Termination Letter only referred to events in 2011, CAR permitted Safety to submit documents relating to check returns that predated that time frame.

¹⁰² Of concern is CAR's apparent inconsistency about the immediacy of the MAIP decertification. The transcript of the GCRP hearing reports that Ms. Davidson, counsel for CAR, after the GCRP announced its decision, informed Mr. Calianos that the Agency could appeal that decision to the Commissioner by submitting a notice of appeal within 30 days. She further stated that under the Rules of Operation, "if the termination is not appealed and not reversed by the Commissioner of Insurance, the Calianos Agency also loses its eligibility for certification as an ARP under the MAIP." The transcript of the report of the GCRP to the GC on September 19, 2012, confirmed her statement. However, the GCRP's written decision, dated September 13, 2012, and its letter to the Commissioner bearing that same date both stated that decertification would be effective immediately. CAR offers no explanation for the difference between the statements at the GCRP hearing and the notification letter. At the GC's September 19, 2012 meeting, CAR's Counsel, at the request of its Chair, stated that decertification would be effectively immediately. It is not unreasonable to expect CAR to make accurate and consistent statements about the timing of a decision. Similarly, it is unclear why, when the termination was based on CAR Rule 13, the GCRP included a reference to a non-existent Rule 14.B.6.h in its letter notifying the Calianos Agency of its decision. The relevant provision appears to be Rule 13.R.6. (3).e.

Despite Safety's statements that the Termination Letter did not identify late payments as a reason for termination, CAR's hearings, in large measure, focused on documents relating to allegedly late payments that Safety distributed to CAR before the MRC hearing. The transcripts also demonstrate substantial discussion at the CAR hearings about the Agency's transmission of payments to Safety. CAR's decision reflects a failure to evaluate the relationship between the content of the Termination Letter and documents submitted by Safety to CAR after the Agency sought review of the Termination Letter in order to evaluate whether the later documentation related to the grounds for termination set out in that Termination Letter. It did consider whether the Termination Letter gave fair notice to the Calianos Agency of the reasons for termination that Safety asserted at the hearings. CAR did not evaluate the evidence before it to determine whether, based on the evidence before it, Safety's termination of the Agency was an unfair, unreasonable, or improper practice by a CAR member. Expansion of the hearing beyond the boundaries of reasons for termination that were adequately identified in the Termination Letter was legal error and procedurally improper.

CAR failed to evaluate Safety's action to determine compliance with the separate procedures now prescribed by the CAR Rules and the MAIP Rules for the appointment and termination of ERPs and ARPs. CAR did not require Safety, if it believed that the Calianos Agency, as an ARP handling policies assigned to Safety, had failed to comply with the MAIP Rule requirements, to follow the reporting procedures in the ARPPM. CAR did not reject Safety's reliance on alleged violations occurring in connection with MAIP policies as a basis for a decision terminating an ERP. In so doing, it failed to apply its own Rules properly.

CAR further failed to review each of Safety's alleged violations of CAR Rules and to determine whether the evidence it offered independently supported each purported violations. With respect to Safety's alleged breach of contract, because the record is devoid of documents or oral references to any contract provisions, there was no evidence to permit a conclusion that termination was justified on that basis. Similarly, although Safety alleged late payments, it proffered no evidence that the Agency, in connection with its ERP business, had "failed to remit payments to a Servicing Carrier on a timely basis in accordance with CAR Rules." Nor did Safety offer evidence that the Agency had violated "reasonable procedures" that it had in place for remitting premium. With respect to the three returned checks that Safety viewed as grounds for termination, CAR did not evaluate the merits of Safety's response to the first letter from

Sovereign Bank that the Agency submitted and declined to review at all a second letter from the Bank.

Although its role was to act as an impartial adjudicator evaluating a controversy between an ERP and a Servicing Carrier, CAR improperly imposed its own concerns on the matter, focusing on issues that Safety did not identify in the Termination Letter as grounds for its decision and inserting into the hearings comments on the Calianos Agency that were not relevant to that decision. Reviewing the record as a whole, I find that CAR's hearings did not comply with the principles of and standards for an impartial hearing as set out in *Harris*.

With respect to the decertification of the Calianos Agency or Jason Calianos as an ARP, CAR erred, as a matter of law, by CAR misapplying MAIP Rule 31.D.3. The Calianos Agency's ERP appointment was not terminated for violations of CAR Rule 14. Its decision on that question was made on an error of law and must be set aside for that reason.¹⁰³

Taken as a whole, the record in this proceeding supports conclusions that the Governing Committee's decision was based on errors of law, including a failure to apply the CAR Rules and the MAIP Rules correctly, was unsupported by substantial evidence, and was made on procedures that did not comply with common law principles for conducting fair and impartial hearings.

For those reasons, the decisions of the CAR Governing Committee terminating the appointment to Safety Insurance Company of the Calianos Agency and Jason Calianos as an ERP for commercial business and decertifying the Calianos Agency and Jason Calianos as ARPs are hereby set aside.

Dated: November 25, 2013

Jean F. Farrington
Presiding Officer

Affirmed this 25th day of November, 2013

Joseph G. Murphy
Commissioner of Insurance

¹⁰³ The record in this case provided no other basis for CAR to decertify the Calianos Agency as an ARP for private passenger motor vehicle insurance.

