



INTERIOR BOARD OF INDIAN APPEALS

Harold Hansen v. Aberdeen Area Director, Bureau of Indian Affairs

5 IBIA 4 (01/20/1976)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF HAROLD HANSEN
v.
AREA DIRECTOR, ABERDEEN AREA OFFICE ET AL.

IBIA 75-68-A

Decided January 20, 1976

Appeal from a decision of the Area Director, Aberdeen Office, affirming the decision of the Superintendent, Crow Creek Agency, canceling farm lease.

Reversed.

1. Indian Lands: Leases and Permits: Generally

Except where prohibited by statute or regulations a lease which remains executory in part may be canceled or abandoned by mutual consent.

2. Indian Lands: Leases and Permits: Generally

Cancellation or abandonment of a lease may be implied from acts of the parties in negotiating for a new lease concerning the same property or subject matter.

3. Indian Lands: Leases and Permits: Generally

Upon issuance of a show cause letter by the Bureau of Indian Affairs, and it appearing that the alleged violation can be corrected, the lessee shall be given a reasonable opportunity to cure the breach.

APPEARANCES: Riter, Mayer, Hofer & Riter, by E. D. Riter, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Appellant, on November 10, 1969, entered into Farm Lease Contract No. 11-150-414 with George A. Howe, owner of Crow Creek Allotment No. CC-1262, described as SE 1/4, sec. 33, T. 109 N., R. 75 W., Fifth Principal Meridian, South Dakota, for a term of 3 years beginning January 1, 1971, and ending December 31, 1973, at a yearly rental of \$640. The subject lease was approved by the Acting Superintendent on December 17, 1970. A performance bond was executed by the lessee on January 4, 1971.

Prior to the expiration of Contract No. 11-150-414, the parties entered into a new contract on May 17, 1972, with respect to the same subject matter or property (Farm Lease Contract No. 11-175-523) for a period of 3 years beginning on May 17, 1973, and "ending 1976," at the same yearly rental. The lessee asserts that the lease was prepared by the Bureau of Indian Affairs which assertion has not been denied by the Bureau and consequently is accepted to be true. The lessee paid the rent for the 3 years in advance. No performance bond was executed respecting the new contract.

On November 8, 1974, the Superintendent, Crow Creek Agency, issued a show cause letter advising the appellant that pursuant to 25 CFR 131.5(e) leases entered into more than 12 months prior to the commencement of the term of the lease were prohibited. The Superintendent further advised that the new lease was entered into and approved 19 months prior to the expiration of the old lease. The appellant was given 10 days to show cause why the lease should not be canceled.

On December 20, 1974, the Superintendent issued a decision canceling the new lease for the following violations in accordance with 25 CFR 131.5(e):

1. Lease No. 11-175-523 was entered into more than 12 months prior to the commencement of the lease.
2. Payment was made for the full term, the lease states payment will be made upon approval of lease and January 1, thereafter.
3. The term calls for 3 years, yet the dates stated came out to 3 years and 7 months.
4. The lessee did not acquire the required bond.

The lessee appealed and on January 27, 1975, the Acting Area Director, Bureau of Indian Affairs, affirmed the Superintendent. Lessee then appealed to the Commissioner of Indian Affairs who referred said appeal to this Board for disposition.

It would appear from an examination of the record that the new contract was entered into by mutual consent of the parties on May 17, 1972, for a period of 3 years beginning on May 17, 1973. The agreement was approved by the Superintendent on the following day, May 18, 1972. Both the prior and the new agreements expressly state that they are subject to existing law and Departmental regulations. The prior contract contains neither prohibition against entering into a new contract prior to expiration of the existing contract nor prohibition against the canceling or abandoning of the executory portion of the existing contract. No reference is made of the prior contract in the new contract.

It has been consistently held that a contract or lease which remains executory in part may be canceled or abandoned by mutual consent. Moreover, cancellation or abandonment of a contract or lease may be implied from acts of the parties in negotiating for a new and different contract concerning the same property or subject matter. The Board has no problem determining the expiration date of the new contract. The new contract expressly states it to be for a period of 3 years beginning on the 17th day of May 1973, and "ending 1976." We find the expiration date to be May 17, 1976.

We are unable to find a related statute that prohibits the parties from entering into a new contract prior to the expiration of the existing contract. Consequently, we turn to an examination of the related Departmental regulations, Part 131 thereof in particular.

We believe the show cause letter of November 8, 1974, from the Superintendent to the appellant to include the crux of this matter. Paragraph three thereof reads as follows:

Under our regulations in 25 Code of Federal Regulations 131.5(e), "No lease shall be entered into more than 12 months prior to the commencement of the terms of the lease." (Underscoring supplied for emphasis.)

We find the underscored language to be clear and not subject to interpretation. We find the new contract was entered into 12 months prior to the commencement of the terms of the lease, the new lease having been executed on May 17, 1972, to commence on May 17, 1973.

We note the Superintendent's decision of December 20, 1974, canceling lease No. 11-175-523 included three further violations of part 131.5(e) not included in the November 8, 1974, show cause letter. Specifically they are:

2. Payment was made for the full term, the lease states payment will be made upon approval of lease and January 1, thereafter.

3. The term calls for 3 years, yet the dates stated came out to 3 years and 7 months.

4. The lessee did not acquire the required bond.

Part 131.14 of Departmental regulations provides in part the following:

* * * the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be canceled.

* * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach.

We find that the Superintendent failed to comply with the aforementioned regulation by his failure to include the three asserted violations in a show cause notice and granting appellant an opportunity to take corrective action to cure such breach.

We find that (3) above, namely, "The term calls for 3 years, yet the dates stated came out to 3 years and 7 months" did not constitute a violation of Part 131 of the Departmental regulations.

We further find that the violations referred to as (2) and (4) in the Superintendent's December 20, 1974, decision were inconsequential and could and would have been corrected within a reasonable time given the opportunity.

We note appellant's willingness to abide by the expiration term contained in the writing of the lease, that is to say, May 17, 1976.

To recapitulate, the Board finds that:

1. The new contract was entered into 12 months prior to the commencement of the terms of the new lease and consequently did not constitute a violation of Part 131.5(e).

2. Asserted violation No. 3 contained in Superintendent's decision of December 20, 1974, did not in fact constitute a violation of Part 131.

3. The Superintendent failed to comply with Part 131.14 of Departmental regulations by not including asserted violations (2) through (4) contained in Superintendent's decision of December 20, 1974, in a show cause letter and consequently affording lessee a reasonable opportunity to correct same, which appellant could obviously have done.

We cannot agree with the Superintendent's decision of December 20, 1974, affirmed by the Acting Area Director on January 27, 1975, canceling appellant's lease.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the decision of the Acting Area Director, Aberdeen Office, Aberdeen, South Dakota, dated January 27, 1975, affirming the decision of the Superintendent, Crow Creek Agency, dated December 20, 1974, canceling appellant's farm lease be, and the same is hereby REVERSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge