



INTERIOR BOARD OF INDIAN APPEALS

Fred Porter v. Aberdeen Area Director, Bureau of Indian Affairs

14 IBIA 251 (09/05/1986)

Related Board case:
14 IBIA 1



United States Department of the Interior

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

FRED PORTER,	:	Order Adopting Recommended
Appellant	:	Decision and Remanding Case
	:	
v.	:	
	:	Docket No. IBIA 86-23-A
AREA DIRECTOR, ABERDEEN AREA	:	
OFFICE, BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	September 5, 1986

On January 8, 1986, the Board of Indian Appeals (Board) received the administrative record in the above case on referral from the Acting Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR 2.19(a)(2). The appeal, which was filed with the Deputy Assistant Secretary by Fred Porter, sought review of a March 1, 1985, decision of the Aberdeen Area Director, Bureau of Indian Affairs, pertaining to the leasing of the Charles Porter Allotment No. 24-0.

In his referral memorandum, the Acting Deputy Assistant Secretary suggested that the appeal might require an evidentiary hearing because of the many factual questions raised. After review of the record, the Board agreed with the Acting Deputy Assistant Secretary, and, by order dated January 14, 1986, referred the matter to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision.

A hearing was held by Administrative Law Judge John R. Rampton, Jr., on May 20, 1986, after settlement negotiations proved unsuccessful. The Judge's recommended decision, issued on July 8, 1986, noted that the parties could file exceptions to the recommendation with the Board within 30 days. No exceptions were filed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Judge's recommended decision, which is attached to this order, is hereby adopted as the Board's opinion. By requiring the lease to be readvertised before the 1987 growing season, this decision necessarily negates the three years remaining on the lease awarded to James L. Morgan. The case is remanded to the Bureau of Indian Affairs to effectuate this decision.

//original signed
Kathryn A. Lynn
Administrative Judge

//original signed
Anita Vogt
Administrative Judge

Attachment



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
6432 FEDERAL BUILDING
SALT LAKE CITY, UT 84138-1194

July 8, 1986

FRED PORTER,	:	Docket No. IBIA 86-23-A
Appellant	:	
	:	
v .	:	
	:	
AREA DIRECTOR,	:	
ABERDEEN AREA OFFICE,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Respondent	:	

RECOMMENDED DECISION

By order dated January 14, 1986, the Interior Board of Indian Appeals referred this matter to the Office of Hearings and Appeals for an evidentiary hearing and recommended decision. Pursuant to notice, a hearing was scheduled for May 19, 1986, at Sioux City, Iowa. Present, representing the respondent, was Mr. Marcus Sekayouma, Realty Officer for the Winnebago Indian Agency, Aberdeen Area Office, Bureau of Indian Affairs. Present also, representing himself, was Mr. Fred F. Porter, the appellant, and Mr. Doyle French, the former lessee of the Charles Porter Allotment 24-0. Initially, after an unsuccessful attempt was made to settle the matter without a hearing, the hearing was held on May 20 with testimony received from Mr. Sekayouma, Mr. Porter, and Mr. French. Received into evidence as Exhibit 1 was a draft of a proposed decision dated August 16, 1985, prepared by Mr. Frank Hissong, a Realty Specialist in the Tenure and Management Section, Office of Real Estate Services, Bureau of Indian Affairs, for the signature of the Deputy Assistant Secretary, Indian Affairs. This unsigned draft set forth in detail the factual background of this matter and the issues involved. If issued, it would have reversed the decision of the

Aberdeen Area Director to uphold the Superintendent's award to the lease to James L. Morgan. Although none of the parties present at the hearing had previous knowledge of this draft letter and proposed decision, it had been included as part of the file transmitted to the Hearings Division. It was never implemented because Mr. Porter withdrew his appeal on August 20, 1986. The appeal was refiled on October 9, 1986.

Statement of the Case

On March 1, 1984, the owners of the Charles Porter Allotment 24-0 were informed that the lease in force would expire as of February 28, 1985, and that they would have 90 days to negotiate a new lease with a lessee of their choice. Should no agreement be reached, the land would be advertised and the lease awarded to the highest bidder.

On March 12, 1984, Doyle French who had leased the allotment for 15 years, submitted a proposed lease for an annual rental of \$5,000, a figure \$390 below the appraised value. When informed of this fact, he amended his bid to \$5,400 per year. Apparently he may not have had 100 percent of the owners' signatures and, sometime subsequent to the presentation of his lease, one or two of the owners came to the Agency to state that their signatures were forged. On June 15, 1985, Mr. French deposited with the agency a cash bond of \$5,900 and paid lease fees of \$110. The tract was advertised for lease but subsequently removed from the list to give Mr. French time to secure the remaining signatures, post a surety bond, and satisfy any noncompliance he had on proposed or other leases.

On April 9, 1985, a Bureau memorandum stated that Mr. French's bid was rejected on August 22, 1984, because he had failed to comply with the existing Lease No. 9345 and was in noncompliance with other tracts.

Invitation No. 84-2, issued on August 15, was opened on September 2, 1984. Mr. French's bids were set aside for failure to comply with the requirement that 10 percent of the first year's rental be posted as part of having bids considered.

Two bids were submitted in response to Invitation No 84-3, one in the name of C. D. French & Sons, Inc., for \$5,800 and one from James L. Morgan for \$4,230. An April 9, 1985 memorandum in the agency files states:

Due to economic conditions which occurred in the last 6 to 9 months, the appraisal's (sic) were reviewed and this tract was reduced to \$4,252.

On December 14, 1984, Donald French, Secretary, C. D. French and Sons, Inc., requested that their bid be withdrawn. On December 20, Clifford D. French wrote to the Aberdeen Area Director stating that they had been informed by the Superintendent, Winnebago Agency, that the withdrawal of the bid was necessary because of a "conflict of interest" situation. The situation involved two employees of the Winnebago Agency who were married to sons of Mr. French and who may have informed him that the bid was too low.

On January 3, 1985, the Superintendent accepted the bid made by James L. Morgan, and Mr. Porter filed his initial appeal. The superintendent's response on February 19, 1985, stated that the award was made to Mr. Morgan because of the Frenchs' failure to follow agency procedures on advertising, bid opening, and acceptance of bids. It indicated that there was a problem of noncompliance in any lease that was still in effect if the lessees had not fully satisfied their lease obligation on prior leases, and that Mr. Doyle French, who was one of Clifford's sons, was in noncompliance and still owed liquidated damages. Through inquiries, it had been ascertained that other sons had no knowledge about the bid and that Mr. Don French was notified that his father, Clifford, had submitted the bid in the name of C. D. French & Sons, Inc. Mr. Don French then called the Realty Office and said he wanted his bid withdrawn because he had no knowledge of what was going on.

On March 1 the Area Director denied Mr. Porter's appeal because his review indicated that the requirements of 25 CFR 162.4(a)(4) had been met and that Mr. Morgan was the only successful bidder. On March 5 the Area Director wrote to Mr. French in response to his letter of December 20 stating that the decision to advertise had been the result of one landowner's claim that her signature on the French lease had been forged, and noting also that Donald French had requested the bid be withdrawn. The question of conflict of interest was addressed in the following manner:

Regarding the conflict of interest, we were advised that one of your sons wife was employed within the Branch of Land Operations, where the appraisals and farm stipulations are prepared and would have access to certain information which is used in connection with advertised lease. This does have the appearance of a conflict of interest.

The letter further stated that there is no mention of coercion to withdraw the bid by Donald L. French in behalf of C. D. French and Sons, Inc., and without supporting evidence there are no discrepancies in the leasing of the Charles Porter Allotment, and the matter was closed.

Proposed Decision

The draft decision (Ex 1) prepared for the Assistant Secretary's signature noted three areas in which the agency decision was apparently flawed. First, that the agency records on the question of the alleged forgery of a land owners signature are incomplete and the lack of documented follow-up by the agency seriously weakens their position. Second, the major justification for the agency not awarding the lease to the higher bidder was the lack of compliance with an existing lease on the allotment. There is nothing in the Invitation for bids on advertised leases which makes reference to compliance with existing leases being a criterion for award of a new lease, and it is therefore improper to deny an application for lease on that basis. Third, there is nothing in the record indicating that the agency gave consideration to the fact that Mr. Porter was able to negotiate his own lease for this tract at least two, and possibly three, lease terms prior to the one under appeal. Considered together, the above three factors suggest that Mr. Porter should have been allowed to negotiate a lease for this allotment.

The draft proposed decision stated that sufficient on its own to call into question the actions of the Agency, is the matter of fair rental value. When Mr. French approached the Agency in March of 1984 with a bid of \$5,000 per year in annual rent, he was advised it was below the appraised value \$5,390. He then raised his bid to \$5,400. However, the agency accepted a bid some \$1,570 lower than offered by Mr. French with the notation that "the appraisal was reviewed and adjusted downward due to economic conditions which occurred in the last 6 to 9 months." No appraisal documents were of record nor did the record show that the question was considered in the Area Director's decision, and the author stated it is hard to imagine how the value of land could drop by close to 30 percent in less than a year. Absent such justification, he found it difficult to view the Agency's action in awarding the lease to Mr. Morgan as in the best interest of the Indian landowner.

Mr. Sekayouma had no personal knowledge of the events surrounding the issuance of the lease other than to refer to

the draft letter prepared for the Assistant Secretary's signature. He was present as the Acting Superintendent of the Winnebago Agency on or about August 20, 1985, when Mr. Porter came into the office and asked to get his money from his individual Indian monies account. As a result of that conversation, Mr. Porter voluntarily requested that the appeal be withdrawn, and Mr. Sekayouma typed up a withdrawal of appeal.

On the question raised as to whether or not the leased land dropped in lease value by over \$1,200 in the 7 or 8 months from when the tract was first advertised for sale on October of 1984 and April 1985, he stated, it is not unknown for real estate values to drop within a short period of time, but he has no personal knowledge of why, during this period of time, the lease value was appraised at such a dramatic lower figure.

To his knowledge several of the French family, including Mr. Doyle French, farm on the reservation, and the policy of the agent is either to hold in abeyance or disallow leases where individual tenants are in noncompliance or are in technical breach of their contract until the breach is corrected. However, in view of the fact that the invitation to bid made no mention that the leases could not be awarded if any member of the French family or groups submitting the bid is in noncompliance, he agreed that the decision made by the agency was on weak ground.

Mr. Fred Porter testified that Mr. Sekayouma was not at the Agency when the lease issue first came up. The Superintendent was a man named Christi who, in Mr. Porter's opinion, developed some kind of feeling against Mr. French and, for personal reasons, denied his bid. He initially withdrew his appeal because he was told the lease money could not be released with his appeal pending.

With respect to the alleged forged signature, he stated that two of his nieces, each of whom own a small interest in the allotment, authorized their sister to sign for them. They were drinking at the time but, when they sobered up a couple of days later, refused to acknowledge that they had given her permission to sign for them. He was given no explanation of why the lease was not awarded to Mr. French, and he was not given any explanation as to why the land value dropped by some 30 percent.

Both Mr. Porter and Mr. Sekayouma stated that it is common practice for near relatives to sign for others when they are unable to write or are old, infirm, or unable to sign

because they have been drinking. Mr. Sekayouma also stated that it is common for allotment owners to ask for advance rentals from their lessees and, if their demands are not met, the lessee is threatened with a refusal to renew the lease. This, he said, was a very real possibility in this case.

Mr. Porter requested that the lease to Mr. Morgan be voided, and that it be issued to Doyle French for \$5,400 per year.

Mr. Doyle French testified that, in his opinion, the value of the lease had not dropped in valuation as stated in the justification for awarding the lease to Mr. Morgan. When he submitted his first bid, he had obtained all the signatures, and it was Mr. Christi who told him that everything was fine except for the fact that it was not quite up to appraisal. In Mr. Christi's presence, he scratched out the amount of the bid and raised the amount above the appraisal.

He also stated that, if the matter could be settled through negotiation with Mr. Morgan, he would be willing to stand by the amount he had previously bid and reimburse Mr. Morgan for any preliminary work already done on the land.

At the conclusion of the hearing, Mr. Sekayouma stated that he would be willing to contact Mr. Morgan and attempt to negotiate a settlement whereby Mr. French would take over the lease and reimburse Mr. Morgan for any expenses incurred. Subsequently by letter dated May 21, 1986, the Superintendent of the Winnebago Agency informed me that Mr. Morgan was unwilling to voluntarily surrender his lease because he had already planted the ground and was committed to a Federally sponsored Farm Subsidy Program. In addition, the Washington Office of the Bureau of Indian Affairs informed him that, since the matter could not be settled by agreement with Mr. Morgan, a decision by the Interior Board of Indian Appeals would be necessary.

Conclusions

Although the testimony available and offered at the hearing was limited, the three issues identified by the letter prepared for the Assistant Secretary's signature were addressed, and at least partial answers to the factual issues raised were given.

There is no evidence of any conflict of interest justifying the rejection of the bid by Mr. French. It was Mr. Christie, the Superintendent of the Reservation, who

informed him that his bid was below appraisal and, in Mr. [Christie's] presence, the bid was raised. The fact that two employees of the Winnebago Agency might be married to the sons of Mr. French had absolutely nothing to do with the situation.

There is absolutely no evidence that the reduced appraisal had any justification in fact, thus allowing the Agency to award the bid to Mr. Morgan for \$4,252.

There is, apparently, nothing in the record to indicate that Mr. Porter, as the major land owner of the leasehold, should not be able to negotiate his own lease provided he is able to obtain the signatures and approval of all of the other leaseholders. Considering the circumstances surrounding the submission of the original bid, the approval of all of the lease owners had been obtained and the allegation of forged signatures not based on fact.

For the foregoing reasons, it must be concluded that the decision awarding the lease to James L. Morgan was in error. However, at this point in time, the issues raised in the appeal are to all intents and purposes moot. It serves no purpose to issue a decision, which would be subject to a time consuming appeal by Mr. Morgan, reversing the Agency decision in time to award Mr. French the lease for the 1986 growing season. Since good faith efforts to settle by negotiation have thus far proved fruitless, and Mr. Morgan is unwilling to release the lease voluntarily to Mr. French, even with full compensation for labor and monies spent, it is recommended that the lease to Mr. Morgan remain in effect for the 1986 growing season. For the 1987 season, the lease must be readvertised with all procedural processes scrupulously observed and Mr. Porter given full opportunity, within the requirements of the regulations, to negotiate the lease with the party of his and the other landowners choice.

As provided in the final paragraph of the IBIA order of remand, any party may file exceptions or comments with the Board within 30 days from receipt of this recommended decision. The Board will then inform the parties of any further procedures in the appeal or issue a final decision.

//original signed
John R. Rampton, Jr.
Administrative Law Judge