



INTERIOR BOARD OF INDIAN APPEALS

Francis Cahoon v. Portland Area Director, Bureau of Indian Affairs

17 IBIA 187 (07/17/1989)



United States Department of the Interior

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

FRANCIS CAHOON

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-40-A

Decided July 18, 1989

Appeal from a decision of the Portland Area Director, Bureau of Indian Affairs, dismissing an appeal of a lease cancellation as untimely.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 (1988) establish a 30-day period for filing notices of appeal.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Francis Cahoon seeks review of an April 17, 1987, decision of the Portland Area Director, Bureau of Indian Affairs (BIA), dismissing appellant's appeal of a lease cancellation on the grounds that the appeal was untimely. For the reasons discussed below, the Board affirms that decision.

Background

On June 18, 1984, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (tribe) and appellant executed Tribal Homesite Lease BA-002-84, pursuant to which a 1.54 acre parcel of tribal land was leased to appellant, a member of the tribe. The lease was for a term of 25 years with a rental of \$25 per year. It was approved by the Superintendent, Flathead Agency (Superintendent; agency), BIA, on June 21, 1984.

On July 3, 1984, the tribal council voted to cancel appellant's lease in order to allow the prior lessee of the tract, whose lease had been cancelled for nonuse, an opportunity to come into compliance with her lease requirements. The document cancelling appellant's lease was executed by tribal officials on July 11, 1984, and approved by the Superintendent on July 18, 1984. By letter of August 9, 1984, the agency realty clerk sent appellant a copy of the lease cancellation but did not inform him that he had a right to appeal the cancellation.

Sometime later, apparently in October 1984, appellant spoke to the Portland Area realty specialist concerning the cancellation. A memorandum from the realty specialist to the Superintendent, dated October 29, 1984, indicates that appellant called the realty office to discuss the cancellation and was, at that time, verbally advised of appeal procedures. He was apparently told, however, that the appeal was required to be filed within 30 days from the date of the decision, rather than 30 days from appellant's receipt of the decision.

On May 17, 1985, appellant was given a copy of the lease cancellation by the tribe's realty officer after stating that he had not received the copy mailed in August 1984.

On July 24, 1986, appellant filed a complaint in tribal court against the tribe and the agency, seeking damages and other relief for the lease cancellation. He was represented by an attorney in these proceedings. The tribal court dismissed the complaint on November 19, 1986. Appellant stated in his sworn complaint that he had received official notice of the lease cancellation on August 9, 1984.

On February 5, 1987, appellant wrote to the Superintendent requesting a copy of the lease cancellation and a copy of appeal procedures. On the same day, the Superintendent gave appellant a copy of 25 CFR Part 2 and a copy of materials in the agency files pertinent to the cancellation.

By letter of March 3, 1987, appellant filed a notice of appeal with the Area Director. Appellant stated that he had never been given written notice that he had a right to appeal the Superintendent's decision and had never been given any assistance even though he had asked for it. The Area Director dismissed the appeal on April 17, 1987, holding that it was untimely and therefore must be dismissed under 25 CFR 2.10(b) (1988). 1/

Appellant appealed the Area Director's decision to the Washington, D.C., office of BIA. On May 1, 1989, the appeal was transmitted to the Board for decision in accordance with new appeals regulations for BIA and the Board which took effect on March 13, 1989. 2/

The Board issued a notice of docketing on May 5, 1989, in which it gave appellant 15 days from his receipt of the notice to inform the Board whether he wished to make further arguments. The notice of docketing advised appellant that, if he did not so inform the Board, a decision would be rendered on the record as constituted. Appellant has filed nothing further. 3/

1/ At all times relevant to this appeal, the applicable provisions of 25 CFR Part 2 were the same as those which appear in the 1988 edition of the Code of Federal Regulations.

2/ See 54 FR 6478 and 6483 (Feb. 10, 1989).

3/ Although appellant stated in a telephone call to the Board that he was planning to file a request for an extension of time, he never filed such a request.

Discussion and Conclusions

Appellant argues that he never received proper notice of the lease cancellation and that his right to appeal continued until he received proper notice. He contends that the cancellation he received was not in the form of an administrative action; did not indicate it was a final decision, but instead implied that the cancellation might be temporary; 4/ and did not notify appellant of his right to appeal.

Appellant contends that the notice given to him did not comply with the requirements of 25 CFR 2.4 (1988), which provided:

Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

The period for filing a notice of appeal was set forth in 25 CFR 2.10(a) (1988), which provided: "The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant."

Unlike the present appeal regulations, 5/ 25 CFR Part 2 (1988) did not toll the running of the appeal period until notice of appeal procedures was given. Rather, under 25 CFR 2.10(a) (1988), the 30-day appeal period began to run upon the appellant's receipt of notice of the decision. Accordingly, the Board rejects appellant's argument that his right to appeal continued until he was given written notice of his right to appeal.

4/ Appellant quotes the explanation given on the cancellation document: "Per Council action July 3, 1984, the lease is cancelled to allow previous lessee thirty (30) days to come into compliance."

5/ Present 25 CFR 2.7, 54 FR 6481, provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day limit for filing a notice of appeal."

Appellant has made conflicting statements about when and whether he received notice of the decision. The Board finds most persuasive his sworn statement in his tribal court complaint. In that complaint, he stated that he was officially informed of the cancellation on August 9, 1984.

Appellant contends that the cancellation document did not make clear that it was an administrative action with potentially final effect. The nature of the decision is apparent from the document itself, upon which appears the Superintendent's signature indicating his approval, despite the fact that the document is not labelled as an administrative action or decision. Further, appellant's actions, in particular, his discussions of the matter with BIA personnel and his attempt to sue the agency in tribal court, are evidence that he was aware of the nature of the decision long before March 1987, when he filed his notice of appeal.

It is also apparent from the record that appellant was generally aware of appeal rights at least by October 1984, when he spoke to the Area realty officer. Assuming without deciding that the Superintendent's failure to give appellant written notice of his right to appeal, 6/ and BIA's misstatement concerning the appeal period, 7/ might excuse some delay in filing a notice of appeal, they cannot excuse a delay of 2-1/2 years.

[1] As noted above, 25 CFR 2.10(a) (1988) provided in relevant part: "The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant." 25 CFR 2.10(b) (1988) provided, "No extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed." The Board has held that BIA must dismiss an appeal when the notice of appeal is not timely filed. E.g., Henderson v. Portland Area Director, 16 IBIA 169, 175 (1988); Tanana Chiefs' Conference v. Juneau Area Director, 14 IBIA 87, 89-90 (1986).

Appellant has conceded that he received formal notice of the decision on August 9, 1984. The Board holds that his notice of appeal, which was not filed until March 3, 1987, was properly dismissed by the Area Director.

6/ Prior to the revision promulgated this year, 25 CFR Part 2 did not explicitly require that Superintendents' decisions include notice of the right to appeal, although it did require that Area Directors' decisions include such notice. See 25 CFR 2.18 (1988).

7/ As noted above, appellant was apparently told that the 30-day appeal period began to run from the date of the decision, rather than, as provided in 25 CFR 2.10(a) (1988), from the date of appellant's receipt of the decision. In this case, since the notice letter was dated Aug. 9, 1984, and appellant stated that he received the notice on the same date, the erroneous statement had no practical consequence and is therefore harmless error.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 17, 1987, decision of the Portland Area Director is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge