INTERIOR BOARD OF INDIAN APPEALS

Michelle Kosechata v. Acting Anadarko Area Director, Bureau of Indian Affairs

33 IBIA 198 (03/11/1999)

United States Department of the Interior

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

MICHELLE KOSECHATA, Appellant	:	Order Affirming Decision
v.	:	Docket No. IBIA 98-118-A
ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	March 11, 1999

Appellant Michelle Kosechata appealed from a June 30, 1998, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling Business Lease No. 910028, between the United States and Appellant. The lease covered land jointly owned by the Kiowa, Comanche, and Apache Tribes. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

The Area Director has moved for expedited consideration of this appeal. The motion is granted.

The events leading up to the execution of this lease are succinctly set forth at pages 1-2 of the brief filed by the Area Director:

> Several years ago, the Anadarko Area Office, [BIA] executed a guaranteed loan totalling $3.1 million for the construction of the Native Sun Waterpark in Lawton, Oklahoma. The lender was Banc One, and the borrower was the Kiowa, Comanche, and Apache Intertribal Land Use Committee ("KCAILUC"). The KCAILUC constructed and operated the Waterpark for two and a half seasons but never made any payments on the guaranteed loan. Ultimately, Banc One held the loan in default and made demand upon KCAILUC to bring the loan current. KCAILUC was unable to do so, and the Banc One took possession of the Waterpark pursuant to an operating agreement signed as part of the guaranteed loan package. At the same time, Banc One called the loan guaranty. The BIA paid off the loan guaranty, and received an assignment of the operating agreement, the only collateral for the loan. [1/]

1/ BIA thus operates the Waterpark under 25 U.S.C. § 1496 (1994).

> The BIA authorized the Comanche Tribe to operate the Waterpark on its behalf for two years. Because the Comanche Tribe failed to make any payments on the loan, and because no financial information from the operation could be obtained, the BIA terminated that arrangement and advertised for a lessee for the Waterpark. The Appellant was the successful bidder.

The present lease was apparently signed by Appellant and the Acting Superintendent, Anadarko Agency, BIA (Superintendent), on June 16, 1995. It had a term of five years, with an option to renew for an additional five years.

The administrative record shows that, by early 1996, BIA had concerns about Appellant's performance under the lease. On May 6, 1997, BIA wrote Appellant concerning items which she was required to address prior to opening for the 1997 season. BIA inspected the Waterpark on May 9, 1997, and found what it considered to be numerous health, safety, and maintenance problems. Appellant stated at that time that she was still in the process of preparing the Waterpark for the upcoming season.

By letter dated May 9, 1997, BIA gave notice to Appellant that the lease would be cancelled in 60 days unless she obtained the full amount of insurance coverage required under the lease. The letter further instructed Appellant not to open the Waterpark or to allow the preparation and distribution of food until the deficiencies listed in the May 6, 1997, letter had been cured.

On June 13, 1997, an attorney from the Department's Tulsa Field Solicitor's Office wrote to Appellant's counsel stating that BIA was being advised to cancel the lease in ten days unless Appellant allowed inspections of the Waterpark and obtained the required insurance, or showed cause why the lease should not be cancelled.

When Appellant did not cure the violations and did not otherwise show cause why the lease should not be cancelled, the Superintendent cancelled the lease by letter dated October 29, 1997. As reasons for lease cancellation, the letter alleged several violations of the lease including Appellant's failure, over a three-year period, to provide certified audit reports of gross receipts; failure to obtain the required amount of insurance coverage; failure to pay water charges; failure to discharge a workman's lien, which resulted in a judgment against the Waterpark; failure to allow inspections; allowing the setup and operation of a fireworks stand on the leased premises; utilization of portions of the leased premises for parking for activities not covered by the lease; and failure to advise BIA of two different injuries that occurred on the leased premises during business hours. The Superintendent stated:

> Even though you have been notified verbally and in writing on numerous occasions and have been repeatedly provided assistance in attempts to help you meet the contract obligations, you have repeatedly ignored our notices and assistance,

> and consistently failed to comply with the conditions and other requirements of the lease contract.

Oct. 29, 1997, Decision at unnumbered 3.

Because of reports that Appellant and/or others were removing property from the Waterpark, on November 20, 1997, the Superintendent notified Appellant "that steps ha[d] been undertaken to minimize damage and loss of assets" from the Waterpark. Appellant was informed that she could contact BIA Law Enforcement to obtain access to the Waterpark to remove her personal effects. Nothing in the record or Appellant's filings indicates that she requested access for this purpose. Upon taking possession of the Waterpark, BIA discovered that extensive amounts of equipment were missing.

Appellant appealed to the Area Director on November 24, 1997. Although Clause 30 of the lease provided for arbitration of disputes arising under the lease, Appellant did not request arbitration, but instead asked that the dispute be mediated by a third-party mediator. In a letter dated December 8, 1997, the Area Director informed both Appellant and the Superintendent that BIA was willing to attempt a non-adjudicative resolution of the dispute, and stayed the appeals process for 45 days. The parties met on February 3, 1998. Appellant stated at that meeting that, if the lease was to be returned to her, she wanted an opportunity to inspect the Waterpark first. See Minutes of Feb. 3, 1998, Meeting at unnumbered 2.

Subsequent to the February 3, 1998, meeting, Appellant inspected the Waterpark. By letter dated March 3, 1998, she notified the Area Director that she "ha[d] made [a] decision to discontinue her participation under the subject lease agreement." However, on April 6, 1998, Appellant informed the Area Director that she nevertheless wanted "to exhaust her administrative remedies."

On June 30, 1998, the Area Director issued his decision affirming the cancellation of the lease.

Appellant appealed to the Board. Although advised of her right to do so, Appellant did not file a brief. Therefore, Appellant's reasons for appeal are limited to the statements in her Notice of Appeal.

Appellant's Notice of Appeal contains a section entitled "Statement of Case," which, for the most part, discusses the factual background of the case "in general terms." Notice of Appeal at 2. This section contains numbered paragraphs, as does another section of the Notice of Appeal. Numbered paragraphs in this section of the Notice of Appeal will be designated "SC Paragraphs."

In SC Paragraphs 1 and 4, and parts of 5 and 6, Appellant makes factual assertions which do not appear to be contested by BIA, but which are not relevant to the cancellation decision. In SC Paragraphs 2 and 7, she indicates her disagreement with factual assertions made by the Area

Director, but does not present other facts upon which the Board could base a decision in her favor. In SC Paragraphs 3, 8, 9, and 10, Appellant makes factual assertions for which she provides no support.

SC Paragraphs 2 and 3, and the remainder of SC Paragraphs 5 and 6, appear to contain factual assertions made in support of a claim for money damages against BIA. This issue is addressed below. SC Paragraphs 11, 12, 13, and 14 contain arguments of law, which are discussed below.

Appellant's Notice of Appeal also contains a section entitled "Statement of Reasons for Appeal." Numbered paragraphs in this section of Appellant's Notice of Appeal will be designated "SRA Paragraphs."

In SRA Paragraphs 1, 3, 6, and 10, Appellant alleges general error in BIA's actions and the Area Director's decision, but does not provide any supporting facts or legal arguments. The Board has frequently and consistently held that an appellant bears the burden of proving that a BIA decision was not supported by substantial evidence or was legally incorrect. See, e.g., Smith v. Acting Muskogee Area Director, 30 IBIA 104, 114 (1996), and cases cited therein. The Board finds that Appellant, by failing to provide any support for her allegations, has failed to carry her burden of proof in regard to the allegations raised in SRA Paragraphs 1, 3, 6, and 10.

It further finds that Appellant has failed to show any way in which the allegations and arguments raised in SRA Paragraph 4, even if true, are relevant to the cancellation of her lease.

In SRA Paragraphs 2 and 8; SC Paragraphs 2, 3, 5, and 6; and the section of her Notice of Appeal dealing with the relief requested, Appellant sets up a claim for, and seeks, an unspecified amount of money damages from BIA. As the Board has previously held, it is not a court of general jurisdiction and has only that authority which has been delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA. See, e.g., Toyon Wintu Center, Inc. v. Sacramento Area Director, 29 IBIA 290, 295 (1996), and cases cited therein.

In SRA Paragraphs 5 and 7, Appellant alleges that BIA violated the lease's arbitration clause by not submitting this dispute to arbitration. In previous discussions of lease arbitration provisions, the Board has held that a party must invoke an arbitration clause in a timely manner; i.e., prior to lease cancellation. See Franks v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 13 IBIA 231, 234 (1985). Here, Appellant, although on notice that the lease contained an arbitration clause, not only did not invoke that clause prior to lease cancellation, but, in her notice of appeal to the Area Director, implicitly rejected arbitration in favor of another dispute resolution mechanism which was not included in the lease. The Board concludes that BIA did not err in not submitting this dispute to arbitration.

In SRA Paragraph 9, Appellant alleges that the setting of an appeal bond in the amount of $545,000 "without * * * proof whatsoever that a major substantial financial loss will occur as

a direct result of the delay caused by the appeal is in violation of 25 C.F.R. §2.5 and is an abuse of discretion, arbitrary and capricious." Notice of Appeal at 7. Although there are several problems with this argument, the Board finds that it need discuss only one issue. There is absolutely no evidence in the record, and Appellant does not allege, that Appellant ever posted the appeal bond. Despite this fact, her appeal was considered by both the Area Director and the Board. Appellant cannot claim harm in regard to a requirement to which she was not held.

In SC Paragraphs 11, 12, and 13, Appellant contends that the Area Director was not apprised of all of the Superintendent's actions in regard to her exclusion from the Waterpark, and that he failed to determine whether the Superintendent's actions "were legal or illegal or in conformity to relevant federal regulations." Notice of Appeal at 4. She further contends that the Area Director's decision "was based upon the factual end result of the case that he was reviewing" and that "[t]he end result was that [Appellant] had been divested of the leased premises prior to any appeal process being instituted and prior to any termination proceedings under any federal regulation being instituted." Id.

Although the Area Director indicates that he considered the fact that BIA had taken possession of the Waterpark, he also mentions that Appellant had stated that she was "reluctant to participate further in the lease." June 30, 1998, Decision at unnumbered 15. The Board finds that the Area Director's reference to Appellant's position is overly generous. In her March 3, 1998, letter, Appellant in fact stated that she had decided "to discontinue her participation under the subject lease agreement." However, despite this, in her April 6, 1998, letter, Appellant stated that she wished "to exhaust her administrative remedies." Thus, the Area Director was issuing a decision in a case which Appellant had rendered moot by her own decision. The Board finds that, under the circumstances of this case, the Area Director's failure to discuss fully the legal arguments which Appellant references in SC Paragraphs 11, 12, and 13, is not sufficient to cause it to reverse the Area Director's decision.

In SC Paragraph 14, Appellant contends that her performance bond should have been returned to her, apparently at the same time as the lease was cancelled. Appellant misunderstands the purpose of a performance bond. Such a bond is posted to secure performance under the lease. Appellant failed to perform under the lease, resulting in the lease cancellation. BIA is not required to return a performance bond prior to a determination of what, if any, damages are due because of Appellant's failure to perform all of her responsibilities under the lease.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Anadarko Area Director's June 30, 1998, decision is affirmed.

//original signed	//original signed
Kathryn A. Lynn	Anita Vogt
Chief Administrative Judge	Administrative Judge