



INTERIOR BOARD OF INDIAN APPEALS

C. E. McClurkin v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

44 IBIA 125 (02/06/2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

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| C. E. McCLURKIN, | : | Order Affirming Decision |
| Appellant, | : | |
| | : | |
| v. | : | |
| | : | Docket No. IBIA 05-42-A |
| EASTERN OKLAHOMA REGIONAL | : | |
| DIRECTOR, BUREAU OF INDIAN | : | |
| AFFAIRS, | : | |
| Appellee. | : | February 6, 2007 |

Appellant C. E. McClurkin appeals to the Board of Indian Appeals (Board) from a January 3, 2005 decision of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), upholding a penalty imposed on Appellant by the Acting Superintendent of the Osage Agency (Superintendent; Agency) for noncompliance with an order to correct lease deficiencies on lands described as the NW $\frac{1}{4}$ of Section 36, Township 29 North, Range 11 East, Osage County, Oklahoma. We conclude that Appellant has failed to satisfy his burden of proof because he relies on arguments raised for the first time on appeal and the Board has a well-established practice of not considering such arguments. Therefore, we affirm the Regional Director's decision.

Background

Appellant is the assignee of Oil and Gas Mining Lease Contract No. 14-20-G06-11220 (lease) between the Osage Tribe as lessor and Charles E. Gross III as lessee. The lease, approved by BIA in 1987, covers the NW $\frac{1}{4}$ of Section 36, Township 29 North, Range 11 East, Osage County, Oklahoma, containing 160 acres more or less. The lease incorporates provisions of 25 C.F.R. Part 226 setting forth standards for operating oil leases on the Osage Reservation. BIA approved Gross's assignment of his interest in the lease to Appellant on February 7, 1987.

On March 19, 2004, Mark Hendricks, a petroleum engineering technician for the Agency, Branch of Minerals, was notified of an oil and saltwater spill on the property covered by the lease. While investigating the spill, Hendricks noticed a number of lease infractions, and took photographs. On March 30, 2004, BIA mailed a Notice of Lease Inspection to Appellant. The Superintendent and Hendricks signed the Notice. The

Notice identified several lease deficiencies, including “sloppy” conditions at the well and the tank battery, the tank battery was not marked or fenced, the pit at the tank battery was not kept empty, the well was not marked, there was extra equipment on the site, the tanks were not numbered, and oil cans and trash were not picked up. The Notice instructed Appellant to take several steps to correct the lease deficiencies: “Remove all discarded and abandoned equipment, such as pumping units, electric motors, pumps, tanks, wiring and trash. Clean [the site of the spill] within 2 weeks of receipt of this notice. Empty all pits immediately. Clean tank battery area within 30 days.” The line for the completion date for all of the cleanup work was left blank.

By letter dated June 29, 2004, the Superintendent notified Appellant that a field inspection of the property revealed that the work requested in the March 30, 2004 Notice of Lease Inspection had not been completed. The Superintendent identified a number of items on the property that needed to be removed, including an abandoned pumping unit, a discarded motor, two abandoned gunbarrels, an abandoned saltwater pump, a small amount of junk iron, a joint of 2” tubing, pieces of pipe, and empty oil cans. The Superintendent also noted that a sign for one of the wells was illegible, the stock tank needed to be re-stenciled, and a fence needed to be constructed.

The Superintendent’s June 29 letter advised Appellant that failure to comply with orders of the Superintendent is a violation of 25 C.F.R. § 226.30. 1/ The Superintendent gave “Final Notice” to Appellant to correct all lease conditions listed on the March 30, 2004 Notice of Lease Inspection by August 20, 2004, and stated that “*[f]ailure to comply with this order shall result in penalties*,” which the Superintendent described as including possible cancellation of the lease or a fine of up to \$500 per day for each day in violation or noncompliance, or both. June 29, 2004 Letter from Superintendent to Appellant (italics in original) (citing 25 C.F.R. § 226.42). 2/ The letter advised Appellant of his right to appeal within 30 days to the Regional Director, and gave correct appeal information. The record shows that Appellant received the letter on July 8, 2004. There is no evidence in the record

1/ Section 226.30 provides in part: “Lessee shall comply with all orders or instructions issued by the Superintendent.”

2/ Section 226.42 of 25 C.F.R. provides in relevant part, “[v]iolation of any of the terms or conditions of any lease or of the regulations in this part shall subject the lease to cancellation by the Superintendent, or Lessee to a fine of not more than \$500 per day for each day of such violation or noncompliance with the orders of the Superintendent, or to both such fine and cancellation.”

that Appellant appealed the Superintendent's Final Notice or otherwise responded to BIA, either orally or in writing.

On August 31, 2004, Hendricks submitted a memorandum to Richard Winlock, Supervisory Petroleum Engineer Technician for the Agency, documenting an inspection of the property. Hendricks noted that the work required of Appellant was incomplete: one well was not properly marked, abandoned items and scrap items remained around the tank battery, a pit at the tank battery contained saltwater, a containment dike was leaking saltwater, and an emergency containment was full of water and was not fully contained. Photographs of the alleged lease violations were enclosed with the memorandum.

By letter dated September 1, 2004, the Superintendent advised Appellant that the August 31, 2004 inspection had revealed that Appellant still had not completed the work required by the March 30, 2004 Notice of Inspection and that, effective August 21, 2004, Appellant was being assessed a fine of \$200 per day for each day he failed to comply with the directives of the Superintendent. The Superintendent again cited 25 C.F.R. § 226.42 as authority for imposing the fine and again advised Appellant of his right of appeal to the Regional Director within 30 days of receipt of the letter. The administrative record shows that Appellant received the letter on September 2, 2004. There is no evidence in the record that Appellant appealed from the Superintendent's September 1, 2004 decision.

On September 9 and 13, 2004, Hendricks submitted memoranda to Winlock documenting two additional inspections of the properties. Hendricks noted that, although much of the cleanup work had been completed, a gunbarrel and tank lid remained near the tank battery and the stock tank had no identifying numbers or purchaser information.

On September 16, 2004, Appellant wrote to Hendricks and the Deputy Superintendent to request additional time to complete the work on the property. Appellant asserted that he had been unable to do any kind of labor for over a year because of injuries. He stated that he had undergone three surgeries in the past year, and was currently prevented from doing any kind of heavy work. Appellant noted that he had some "dozer" work done and that he had hired a man to move the excess heavy pumping units and "pipe off the lease." Appellant stated that he expected his condition to improve within the next few months and "hopefully can complete the work." That same day, Appellant met with the Deputy Superintendent and Winlock. His request for an extension of time was apparently denied at the meeting.

On September 20, 2004, Hendricks submitted a memorandum to Winlock stating that the latest inspection had revealed that all the work required of Appellant had been

completed. Hendricks noted that Appellant had had a “dozer dress the lease roads and work the spill areas with a ripper in an attempt to remediate.”

By letter dated September 28, 2004, the Superintendent advised Appellant that the latest inspection of the property revealed that all the cleanup work had been completed. The Superintendent noted that compliance with the March 30, 2004 directive did not relieve Appellant of the obligation to pay the fines assessed in the September 1, 2004 letter, and that Appellant owed a total of \$6,200 in fines — \$200 per day multiplied by the 31 days Appellant was in violation (August 21 - September 20, 2004). The Superintendent stated that payment was due no later than October 27, 2004. The letter again provided appeal rights.

Appellant appealed the Superintendent’s September 28, 2004 decision to the Regional Director. Appellant argued that when he first received notice of the lease deficiencies, he “immediately began trying to make arrangements to correct them.” Oct. 15, 2004 Letter from Appellant to Regional Director. He also argued that because of his three surgeries, he had been unable to do any work himself and had to depend on “getting help and equipment to do the work.” Id. Appellant noted the inspector’s September 20, 2004 report stating that the deficiencies had been corrected. Appellant did not dispute the Superintendent’s determination that, under the earlier September 1 decision, he remained liable for fines for the period between August 21, when penalties began to accrue, and September 20, when the deficiencies were completely cured. Instead, Appellant stated that he had no money to pay the fine and asked the Regional Director “to forgive this fine upon [his] promise that [he] will do [his] best to keep [the] leases operating according to * * * specifications.” Id.

On January 3, 2005, the Regional Director issued a decision affirming the Superintendent’s September 28, 2004 decision. The Regional Director concluded that the Superintendent gave Appellant “sufficient time” to correct the deficiencies. The Regional Director also noted that, under 25 C.F.R. § 226.30, Appellant was required to comply with all orders issued by the Superintendent, and that 25 C.F.R. § 226.42 provided that violations of the lease conditions or the regulations would subject the lessee to a fine or lease cancellation.

Appellant appealed to the Board, and included a statement of reasons with his notice of appeal. The Board did not receive any other pleadings.

Discussion

A decision under 25 C.F.R. § 226.42, supra note 2, whether to impose a fine (and if so, for how much) for failing to comply with the terms of a lease or an order of the Superintendent is committed to BIA's discretion. Cf. Delgado v. Acting Anadarko Area Director, 27 IBIA 65, 74-75 (1994). In reviewing discretionary decisions, the Board's role is limited to determining whether BIA's decision is in accordance with the law, is supported by the record, and is adequately explained. See Quaempts v. Acting Northwest Regional Director, 42 IBIA 272, 280 (2006). With respect to the exercise of discretion itself, the Board does not substitute its judgment for that of BIA. Id. Appellant has the burden to demonstrate that the Regional Director did not properly exercise her discretion in affirming the Superintendent's September 28, 2004 decision. See Novak Brothers v. Acting Aberdeen Area Director, 25 IBIA 104, 109 (1994).

We conclude that Appellant has failed to satisfy his burden of proof because he relies on arguments raised for the first time on appeal to the Board and the Board has a well-established practice of not considering such arguments.

On appeal to the Board, Appellant contends that “[a]ll junk and equipment not being used in the operation of the lease was removed or sold and removed within the stated time limit.” He asserts that, after the unused equipment was removed, he had “well pullers” work on three well sites. Appellant argues that “[t]here were a few joints of tubing at these well sites and one pumping unit, a saltwater pump to be rebuilt for further use, new fencing material with most installed.” He also contends that all of the equipment on the property was “pending either rigwork or installation,” and that he had permission from the landowner to use the areas around the well sites. Appellant further argues that, during the time period in which the \$200 per day fine was assessed, the “regular inspector,” who had been familiar with the work that had been done, did not inspect the site. Appellant asserts that another individual inspected the site, and that he “mistook new equipment for abandoned or unused equipment.” Appellant argues that the fine is a mistake, and should be forgiven.

None of these arguments, however, was presented to the Regional Director. The Board ordinarily does not consider arguments or evidence presented for the first time on appeal. See Estate of Jeanette Little Light Adams, 39 IBIA 32, 40 (2003); Joint Board of Control for the Flathead, Mission & Jocko Irrigation Districts v. Portland Area Director, 22 IBIA 22, 28 (1992). We see no reason to depart from this rule in this case.

Even if we were to consider Appellant's arguments, however, their weight in this appeal would at best be questionable. Appellant failed to appeal either the Superintendent's

June 29, 2004 or September 1, 2004 decisions, and therefore they became final for the Department. See 25 C.F.R. § 2.6. Thus, in reviewing the Superintendent's September 28, 2004 decision, the Regional Director might well have limited his review to deciding whether the Superintendent had (1) properly determined that Appellant's eventual compliance did not relieve Appellant from liability for the period of noncompliance, (2) properly determined the period of Appellant's continuing noncompliance following the August 21, 2004 effective date of the fine, and (3) correctly calculated the total fine. Appellant did not address any of these issues in his appeal to the Regional Director. Instead he sought to have the fine excused because of personal hardship. The Regional Director considered whether the fine for which Appellant was liable should nevertheless be excused based on arguments that would have been more appropriately raised in an appeal from either the June 29 or September 1 decisions of the Superintendent. Under these circumstances, Appellant would face a heavy burden on appeal to demonstrate that the Regional Director abused her discretion by declining to excuse the fine.

Conclusion

We conclude that Appellant has not met his burden to demonstrate that the Regional Director erred or abused her discretion in upholding the Superintendent's September 28, 2004 decision.

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 Board affirms the Regional Director's January 3, 2005 decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge