



INTERIOR BOARD OF INDIAN APPEALS

Paul Tafoya v. Acting Southwest Regional Director, Bureau of Indian Affairs

46 IBIA 197 (01/25/2008)



United States Department of the Interior

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

PAUL TAFOYA,)	Order Affirming Decision, as Modified
Appellant,)	
)	
v.)	
)	Docket No. IBIA 06-11-A
ACTING SOUTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	January 25, 2008

Appellant Paul Tafoya appeals from the September 14, 2005, decision (Decision) of the Acting Southwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), cancelling Lease No. 716-002-99 (prime lease) between the Santa Clara Pueblo (Pueblo) as lessor and Appellant as lessee. The Regional Director determined that Appellant had not negotiated a new lease, had not paid the “adjusted rental payment” based on BIA’s appraisal, and, thus was in violation of the prime lease. Because the prime lease expired by its own terms in January 2004 and because Appellant has not obtained a new or renewed lease, we affirm the Regional Director’s order to Appellant to vacate his former leasehold. However, we affirm on different grounds than those relied upon by the Regional Director, and as modified herein.

Facts

Since at least 1982 and until January 2004, Appellant has had a lease with the Pueblo for 1.248 acres on tribal trust land in the City of Espanola, New Mexico, on which Appellant operates a tobacco shop (smokehouse).¹ The initial term of the lease, and for each subsequent lease, was for five years. Each lease apparently contained a renewal clause, subject to the renegotiation of the rent. Appellant consistently exercised the renewal option and, with each lease renewal, the amount of the monthly rent increased after negotiations between the Pueblo and Appellant.

¹ The land is described in the prime lease as “[a] tract of land located in Sec. 2, T.20 N., R. 8 E., NMPM, within the Santa Clara Pueblo Grant.” Prime Lease at 1.

In 1999, the Pueblo and Appellant entered into the most recent lease, Lease No. 716-002-99. The term of the prime lease, which commenced on January 20, 1999, was five years and rent was set at \$800.00 per month. The prime lease also included provisions for its renewal, provided that Appellant gave written notice of his intent to exercise the renewal option “6 months prior to the expiration date of the prime lease.” Prime Lease ¶ 31. The prime lease also provides for the renegotiation of the rent as follows:

31. . . . Adjustment to the rent due for the option period shall be determined by an appraisal as may be performed by [BIA] or by other means addressing the market values of the business areas within the City of Espanola and not necessarily on Tribal Lands or buildings.

. . . .

35. Rental rate for the option period will be based on a BIA appraisal, both parties agree that the market rental value of the appraisal will be the beginning point for negotiating the option period rent.

On November 30, 2003, Appellant gave written notice to the Pueblo of his intent to exercise the renewal provision of the prime lease. The Pueblo immediately requested an appraisal of the property from BIA. The Pueblo also notified Appellant that he should continue to pay the rental amount set forth in the prime lease, if the BIA appraisal were not completed prior to the expiration of the prime lease. On April 20, 2004, BIA transmitted its appraisal for the property to the Pueblo, in which it appraised the monthly market rental value to be \$2,941.67 per month. By letter dated June 1, 2004, the Pueblo provided Appellant with a copy of BIA’s appraisal and requested that he review and respond to the appraisal within ten days.

Thereafter, negotiations ensued between Appellant and the Pueblo. Although Appellant attempted to involve BIA in the lease negotiations, BIA declined. After a year of negotiations, the Pueblo apparently concluded that the parties would be unable to come to an agreement on a new or renewed lease. On May 17, 2005, the Pueblo’s Tribal Council passed a resolution in which the Council found that Appellant refused to pay rent in the amount appraised by BIA, refused to accept the Pueblo’s compromises, refused to conduct his own rent appraisal, and had refused to pay any rent since January 2005. Resolution No. 05-12. The Council voted unanimously to “request[BIA] to take such steps as are required by [F]ederal law to cause the expeditious termination of the . . . Tafoya lease, Lease No. 716-002-99, on the ground of the lessee’s failure to pay the required rent since January 21.” *Id.*

On May 23, 2005, the Governor of the Pueblo issued a demand to Appellant to vacate the Pueblo's land by June 10, 2005. The Governor stated that Appellant had no lease to occupy the Pueblo's land, had rejected all options afforded him by the Pueblo, and had paid no rent since March 2005. On June 7, 2005, apparently after consulting with BIA, the Pueblo issued another letter, which superseded its May 23 letter. In the June 7 letter, the Pueblo gave Appellant written notice that he was in violation of the prime lease because the lease negotiations were unsuccessful and because he did not pay the amount reflected in BIA's appraisal. He was given ten days to "cure the violation" by paying the BIA-appraised amount of \$2,941.67 per month or explaining why the prime lease should not be canceled or both. Letter from the Pueblo to Appellant, June 7, 2005, at 2. The notice also observed, apparently for the first time, that Appellant had failed to give timely notice of his election to renew the prime lease.

Appellant objected to the cancellation of his Lease in an undated submission to the Pueblo, a copy of which was received by the Regional Director on June 21, 2005. He argued that the Pueblo should have objected sooner to his late exercise of the lease renewal option and, in any event, the prime lease did not state that lease cancellation would occur if the lease renewal option were not timely exercised. Appellant argued that he had continued to pay the \$800 monthly rent under the prime lease during the parties' negotiations. He claimed that the prime lease could not be canceled without his consent. He also objected to BIA's appraisal because it was based on the selling price of the property,² rather than on comparable rents, and was based not only on real estate sales in the non-tribal portions of Espanola but also on real estate sales in Albuquerque and Santa Fe. The remainder of Appellant's objections were devoted to his perceptions of and responses to the Pueblo's lease negotiations with him.

On September 14, 2005, the Regional Director decided to cancel the prime lease for violations of its "terms and conditions." Decision at 1. First, the Regional Director rejected Appellant's argument concerning his delayed exercise of the lease renewal option. The Regional Director stated that paragraph 31 of the prime lease clearly stated that the

² BIA appraised the annual market rental value of the property by determining the value of the land ("sales comparison approach"), applying the rate of return that could be earned if the land were sold at value and proceeds invested ("income approach"), and calculating the product of these two numbers. The annual market rent was then divided by 12 for the monthly market rent.

renewal option should be exercised six months prior to the expiration of the prime lease.³ Next, the Regional Director addressed Appellant’s arguments concerning BIA’s appraisal and concluded that the parties agreed that the appraisal would be based, as it was, on “the market values of the business areas within the City of Espanola and not necessarily on Tribal lands or buildings.” *Id.* at 2 (quoting Prime Lease ¶ 35). The Regional Director also reviewed the history of the lease negotiations between Appellant and the Pueblo. She explained that if the parties did not agree upon a new rental rate for the new lease term, “then the option period cannot be exercised and [the prime] lease will expire by its own terms.” *Id.* at 3. Ultimately, the Regional Director concluded that because Appellant had “not negotiated a new rental rate nor made the adjusted rental payment based upon the new [BIA] appraisal,” he had not “cured this violation” of his prime lease and, therefore the “[prime] lease is hereby cancelled.” *Id.* Appellant was instructed to vacate the property upon receipt of the letter.

This appeal followed. Appellant submitted a detailed statement of reasons, followed by an opening brief. The Pueblo and the Regional Director submitted a joint answer brief. No reply brief was received.

Discussion

We conclude that while the Regional Director erred in treating her decision as one to “cancel” the prime lease, she did not err in ordering Appellant to vacate the property when negotiations for a new or renewed lease were unsuccessful. Appellant does not dispute that the prime lease has expired by its own terms nor does he dispute that he lacks a current lease to occupy the Pueblo’s land. Instead, he complains about the Pueblo’s conduct in the lease negotiations and about BIA’s appraisal, but neither argument overcomes the facts that the prime lease expired and negotiations for a new or renewed lease collapsed. Therefore, Appellant is not entitled or authorized to occupy the Pueblo’s trust land and, on these grounds, we affirm the Regional Director’s decision to the extent that she orders Appellant to vacate the Pueblo’s property.

On appeal to the Board, Appellant bears the burden of showing error in the Regional Director’s decision. *See Hardy v. Midwest Regional Director*, 46 IBIA 47, 53 (2007); *St. Mary Lake Lessees v. Acting Billings Area Director*, 27 IBIA 261, 266 (1995). Appellant has failed to meet this burden.

³ The Regional Director did not explain whether — and if so, how — Appellant’s late exercise of the renewal option was relevant to her decision.

With certain exceptions not relevant here, it is well-established that occupancy of Indian trust or restricted lands requires a lease approved by the Secretary of the Interior or his authorized delegate. *See* 25 U.S.C. § 415(a); *Lambert v. Rocky Mountain Regional Director*, 43 IBIA 121, 125 (2006). Subject to BIA’s approval, the Pueblo is authorized to grant leases of tribal trust lands, 25 C.F.R. § 162.602(d), and to negotiate the terms of any such leases, *id.* § 162.605(a). Where BIA determines that parties are actively negotiating for a lease or lease renewal, BIA — in its discretion — may refrain from taking action to recover possession of the trust lands for the landowners. *Id.* §§ 162.106(a), 162.623. However, once a landowner informs BIA that negotiations have ended and that the parties were unable to agree on the terms of a new or renewed lease, BIA has an obligation to recover possession of the trust land for the landowner. *Id.* §§ 162.106(a), 162.623.⁴

As stated above, Appellant does not dispute the material facts and legal conclusions that compel BIA to recover possession of the leasehold and order Appellant to vacate the property: The prime lease expired by its own terms in January 2004, Appellant does not have a lease at the present time to occupy the Pueblo’s land,⁵ Appellant’s right of renewal was dependent on reaching agreement with the Pueblo on the rental terms for the option period, and Appellant has no other legal right to occupy the Pueblo’s land. Any right Appellant may have had to continue in possession of his former leasehold after the expiration of the prime lease and during the negotiations for a new lease, evaporated when negotiations ended unsuccessfully.⁶ Given these undisputed findings and conclusions,

⁴ Section 162.623 provides in its entirety,

If a tenant remains in possession after the expiration or cancellation of a lease, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the tenant is engaged in negotiations with the Indian landowners to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.

Sections 162.622-.623 inadvertently were omitted from publication in the Code of Federal Regulations from 2002-2005. However, both provisions were duly promulgated in 2001, *see* 66 Fed. Reg. 7068, 7126 (Jan. 22, 2001), were listed in the table of contents for Part 162 at all times, and remained in effect throughout their period of nonpublication.

⁵ Because we have not been advised otherwise, we presume that no new lease has been negotiated. If so, this appeal arguably would be moot. *See Goodwin v. Pacific Regional Director*, 44 IBIA 25, 27 (2006).

⁶ The Regional Director and the Pueblo characterize Appellant’s post-expiration occupancy as a “holdover tenancy,” which suggests perhaps that they believe Appellant had a

(continued...)

Appellant currently is a trespasser and the Regional Director properly instructed Appellant to “remove any and all of [his] personal property and vacate the premises upon receipt of this letter.” Decision at 3. Simply put, Appellant has no legal right to occupy the Pueblo’s trust land.

To the extent that the Pueblo and the Regional Director both informed Appellant that he was in violation of the prime lease and could “cure” the violation by remitting the BIA appraised rental amount, they misinterpreted the prime lease. That lease, and its provisions, had expired. Nothing in the prime lease created any liability in Appellant to pay BIA’s appraised rental value, and his failure to pay this rent (or any other rental amount), cannot be predicated on the prime lease.⁷ So long as the parties were in negotiations for a new lease, it was within BIA’s discretion — pursuant to 25 C.F.R. § 162.623 — to refrain from recovering possession of the leasehold from Appellant after the expiration of the prime lease. In addition, as long as the parties were negotiating, it may have been possible for the parties to agree upon either a lease renewal or a new lease. However, once the Pueblo requested BIA to recover possession of its trust land from an unauthorized occupant, BIA’s responsibility was to do so.

Appellant argues that the Pueblo’s conduct as well as the lease negotiations themselves were unfair to Appellant. He claims that the Regional Director must evaluate the course of dealings between Appellant and the Pueblo dating back to their first lease as well as his allegations of breach of the covenant of good faith and fair dealing by the Pueblo. None of these arguments is relevant to Appellant’s lack of legal right to occupy the Pueblo’s land.

BIA is not an arbiter of disputes between pueblos and their members or between Indian lessors and lessees in negotiating the terms for a lease renewal that is dependent on an agreement between the parties. Appellant cites us to no authority for such a proposition and we know of none. It is undisputed that BIA was not a party to the lease negotiations and that the Pueblo negotiates leases of Pueblo trust lands, not BIA. *See* 25 U.S.C.

⁶(...continued)

permissive right of occupancy during the parties’ negotiations. We need not address this issue, deciding only that when the negotiations failed, the Regional Director did not err in ordering Appellant to vacate the property.

⁷ We express no opinion on whether a later agreement was created or is enforceable between the Pueblo and Appellant with respect to the amount of rent to be paid by Appellant during the time the parties were in negotiations for a new or renewed lease.

§ 415(a) (“Any restricted Indian lands, whether tribally, or individually owned, may be leased *by the Indian owners*, with the approval of the Secretary of the Interior.” (Emphasis added)); *see also* 25 C.F.R. § 162.605(a). BIA’s duty, as trustee of Pueblo trust lands, flows to the landowner — in this case, the Pueblo — and not to lessees or those negotiating for a lease of trust lands, regardless of whether the lease is an agricultural lease, *Burrell v. Acting Albuquerque Area Director*, 35 IBIA 56, 58 (2000), an oil and gas lease, *see Citation Oilfield Supply and Leasing, Ltd. v. Acting Billings Area Director*, 27 IBIA 210, 223 (1995), business lease, *Great Western Casinos, Inc. v. Acting Pacific Regional Director*, 36 IBIA 115, 122 (2001), farming and grazing lease, *see Cooper v. Acting Southern Plains Regional Director*, 41 IBIA 58, 60 (2006), residential lease, *Hardy*, 46 IBIA at 55, or whether the lessee or intended lessee is Indian, *id.*

Appellant next argues that BIA’s appraisal of the property’s rental value was flawed. He essentially argues that if the appraisal had not been flawed, it would have been lower and he might have succeeded in negotiating a new lease with the Pueblo. Again, this argument is irrelevant to the Regional Director’s decision and Appellant’s lack of legal right of occupancy. Appellant also appears to argue that the appraised rental rate is, in fact, a rent adjustment imposed by BIA. Appellant errs for two reasons: (1) BIA did not decide or impose the rental amount and (2) a “rental adjustment” presumes a valid, existing lease that provides for periodic adjustments in the rent during the life of the lease, *see, e.g., Yakima Ridgerunners, Inc. v. Acting Northwest Regional Director*, 44 IBIA 72, 81 (2007). As we have explained, Appellant’s lease had expired. Appellant’s right of renewal was dependent upon the parties agreeing to rental terms for the option period. When the lease expired without such an agreement, Appellant no longer had a valid lease. Thus, we cannot construe Appellant’s dispute as a rent adjustment matter.

Finally, to the extent that Appellant appeals the appraisal independent of the Regional Director’s decision, he fails to state a claim because the appraisal, standing alone, is not an appealable decision but an informational document. Appealable actions under the Department of the Interior’s regulations are those actions that result in (or cause) injury to an individual. 25 C.F.R. § 2.3(a). As set forth in section 2.3(a), administrative review is available, with certain exceptions not relevant here, for “all . . . *decisions* made by officials of [BIA to] persons who may be adversely affected by such decisions.” (Emphasis added.) Therefore, while section 2.3(a) is broadly written, *Chouteau v. Acting Muskogee Area Director*, 34 IBIA 57, 59 (1999), it nevertheless limits the reach of administrative review to “decisions” that “adversely affect” appellants.

BIA made no decision to impose its rent appraisal on Appellant. That decision was made by the Pueblo. BIA provided the rent appraisal pursuant to the request of the Pueblo

and the terms of the prime lease, as information for the negotiation of a new rental amount for a new or renewed lease. Appellant recognizes this distinction, as he argues that the terms of the prime lease “clearly state[] that the appraisal . . . is not the final word on the subject [of the rental amount for a new or renewed lease].” Opening Brief at 8 (citing Prime Lease ¶ 31). The Regional Director agreed, and observed in her Decision that “[t]he Pueblo is . . . free to negotiate a higher or lower amount than indicated in the appraisal.” Decision at 3. At some point in the negotiations, the Pueblo made the decision to adopt the appraised amount as one of the final options it offered to Appellant: If Appellant declined to renegotiate any other provisions of the prime lease, he could renew on the same terms as the prime lease and the monthly rent would be \$2,941.67. To the extent that the Regional Director reiterates the position of the Pueblo in her Decision, it does not then become the decision of the Regional Director for purposes of appeal rights.

Consequently, we conclude that BIA’s appraisal is not an appealable action or decision within the meaning of 25 C.F.R. § 2.3(a). The appraisal was a service performed for the Pueblo at its request and pursuant to the terms of the prime lease, terms to which Appellant agreed.

In summary, we conclude that the Regional Director’s order to Appellant to vacate the Pueblo’s land is correct, but on the grounds that Appellant no longer has authority to occupy the property: The prime lease has expired and Appellant has no current lease. Therefore, we affirm the Regional Director’s decision to the extent it orders Appellant to vacate the Pueblo’s land but for these alternate reasons. We further conclude that BIA does not owe any duty to Appellant to monitor or evaluate the lease negotiations between Appellant and the Pueblo. Finally, we conclude that the appraisal prepared by BIA for the lease negotiations is not an appealable action within the meaning of 25 C.F.R. § 2.3(a).

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 decision of the Regional Director to order Appellant to vacate his former leasehold, as modified herein.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge