



## INTERIOR BOARD OF INDIAN APPEALS

Cynthia Frye v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

54 IBIA 183 (12/20/2011)

Reconsideration denied:

54 IBIA 246



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

CYNTHIA FRYE,	)	Order Reversing Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 10-052
ACTING SOUTHERN PLAINS	)	
REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	December 20, 2011

The Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), by decision dated December 18, 2009, canceled the residential lease of Appellant Cynthia Frye for breaching a “modification” to the lease that no party, including Appellant, ever signed, and which BIA had no unilateral authority to impose. Given the absence of any legal or factual support for the decision, we reverse the Regional Director, vacate each of the notices sent to Appellant by BIA demanding that she pay rent and holding her responsible for arrears, and hold that Appellant has an approved lease to reside on her leasehold rent-free for at least the first 5 years and so long thereafter until BIA adjusts her rent in accordance with the provisions of the lease.

## Background

In 2003, Appellant entered into residential lease No. 14-20-0208-5659 for 1.25 acres on Allotment MK 67 (MK 67),<sup>1</sup> in which she owns a 1 percent interest. The lease recites, “Lessors waive[] all rental.” Lease No. 14-20-0208-5659 at 1 (Administrative Record (AR) Tab 1). The lease was signed by Appellant and 29 of her 41 co-owners, including Benito Barbachan (Barbachan); the Regional Director signed on behalf of the unprobated estate of one deceased owner, Sara Chanez (Chanez). Phyllis Johnson Fairbanks (Fairbanks) did not sign the lease. The Regional Director approved the lease on August 19, 2004. *Id.*; see also letter from BIA to the Housing Authority of the Kickapoo Tribe of Oklahoma (Housing Authority), Apr. 8, 2005 (AR Tab 3) (lease “approved”);

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<sup>1</sup> This leasehold consisted of the S/2 NE/4 NE/4 SE/4 NE/4 of Section 23, Township 12 North, Range 1 East, Indian Meridian, Oklahoma County, Oklahoma.

letter from BIA to Appellant, Apr. 8, 2005 (AR Tab 4) (same). It was anticipated that Appellant would reside in a house already located on the leasehold, but a storm destroyed the home in 2004.

Appellant applied to the Housing Authority for assistance, and, the Housing Authority arranged for a new home to be built for Appellant on her leasehold. However, when the concrete footing was poured, Appellant recognized that the new home did not appear to be located, in whole or in part, on her leasehold. She notified BIA, and Appellant's suspicions apparently turned out to be well founded: BIA determined that Appellant's leasehold would need to be enlarged and a new lease signed, presumably to include the area on which her new home now rested.<sup>2</sup> In 2005, the Housing Authority obtained a survey for a 1.82-acre homesite on MK 67 for Appellant, and BIA obtained an appraisal of the rental value of the enlarged homesite. The appraiser opined that the annual market rent for the surface area of the leasehold was \$84.00.

Appellant obtained the signatures of 33 of her 40 co-owners<sup>3</sup> on her new lease, No. 14-200208-5685,<sup>4</sup> and executed the lease in November 2005; on behalf of the Chanez and Barbachan estates,<sup>5</sup> the Regional Director signed the lease. Fairbanks did not sign the lease. The lease recites that the leasehold will be used to construct a home and appurtenances for Appellant with financial assistance from the Department of Housing and

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<sup>2</sup> Nothing in the record shows the location of the new house built by the Housing Authority. Notwithstanding, Appellant does not contend that it is located on her original leasehold.

<sup>3</sup> The list of lessors is identical for both of Appellant's leases, except for the name of Jose Angel Oscar Chanez, which does not appear on the new lease.

<sup>4</sup> The new lease describes the leasehold as  
commencing at the SE/corner of . . . SE/4 NE/4 of . . . Section 23; thence  
North along the East line of . . . SE/4 NE/4, a distance of 915.19 ft to the  
point of beginning; thence N 88°32'48" West, a distance of 329.94 ft;  
thence North a distance of 240.00 ft; thence South 88°32'48" East, a  
distance of 329.94 feet to the East line of . . . SE/4 NE/4; thence South along  
. . . East line a distance of 240.00 ft to the point of beginning.

<sup>5</sup> Benito Barbachan apparently died after signing the first lease.

Urban Development (HUD). The new lease, which is for a term of 25 years,<sup>6</sup> states “rental waived;” however, ¶ 7 of the lease provides that Appellant’s rent is “subject to review and adjustment by the Secretary at not less than five-year intervals.” Lease No. 14-20-0208-5685 (AR Tab 7).

On October 24, 2005, Appellant executed a cancellation of her original lease.<sup>7</sup> On March 3 and May 1, 2006, BIA’s Shawnee Field Office and Southern Plains Regional Realty Office, respectively, recommended approval of the new lease by the Regional Director. Two days later, on May 3, 2006, the Regional Director approved the new lease.<sup>8</sup> On May 8, 2006, the lease was recorded at the Southern Plains Land Titles and Records Office (LTRO).

Two years later, the Regional Director sent Appellant a lease modification agreement (Modification) for her signature. BIA explained in its cover letter to Appellant that Fairbanks objected to BIA’s approval of the lease. According to the Regional Director, Fairbanks “wishes to be paid,” and her share of the annual appraised rent is \$24.82 annually. Letter from Regional Director to Appellant, May 20, 2008 (AR Tab 8).<sup>9</sup> In

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<sup>6</sup> The lease also contains a provision for automatic renewal for 25 years at the expiration of the initial lease term. According to BIA, when HUD finances the construction of homes on Indian trust lands, any land lease where the house is to be built is required to be for a term of not less than 25 years with an automatic 25-year renewal. *See* BIA Memorandum, May 3, 2008 (AR Tab 7); *cf.* 25 U.S.C. § 4211(b) (Where the Secretary of the Interior (Secretary) exercises his discretion to approve a lease of trust or restricted lands for housing development and residential purposes, the term of the lease shall not exceed 50 years).

<sup>7</sup> The lease cancellation form states that Appellant executed the cancellation on October 24, 2006. However, the year appears to be an error inasmuch as a BIA memorandum dated April 3, 2006, states that Appellant had executed the cancellation by that date. We presume Appellant executed the cancellation in 2005 when her new lease was signed by her co-owners.

<sup>8</sup> Although the lease was actually signed by or on behalf of the owners who collectively owned 68 percent of MK 67, the Regional Director approved it in the form of “granting” the lease. There is no dispute in this case — and the record makes clear — that the Regional Director’s “grant” of the lease was the actual approval necessary to render the lease valid and effective.

<sup>9</sup> The record does not contain any letters from Fairbanks, notes of telephone conversations with Fairbanks, or any other documentation of communications between Fairbanks and BIA concerning Appellant’s lease.

addition, the Regional Director now demanded payment on behalf of the Barbachan and Chanez estates in the aggregate annual amount of \$4.74. Finally, the Regional Director demanded that Appellant pay the rent retroactive to 2005 when the lease was originally signed, a total of \$118.24.<sup>10</sup>

Appellant did not sign the Modification nor did the Regional Director or Fairbanks.

Although she did not agree to the Modification, Appellant paid \$100.00 in May 2009, which left a balance “due” — under the unsigned Modification — of \$18.24. On August 11, 2009, BIA sent a letter to Appellant to inform her that she had a balance due of \$18.24, and that her lease would be canceled if she failed to pay this balance or, alternatively, failed to show cause within 10 days why her lease should not be canceled. BIA received no response from Appellant.

On December 18, 2009, the Regional Director canceled Appellant’s lease for nonpayment of the past due balance of \$18.24 and for nonpayment of the annual rent (\$29.56) due November 14, 2009.

This appeal followed. Appellant filed an opening brief in which she argues that the lease approved by BIA controls and therefore the lease cannot be cancelled based on alleged violations of a “modification.” BIA has not filed a response.

### Discussion

We conclude that, absent Appellant’s consent to the Modification, BIA had no grounds to enforce the unexecuted Modification to collect rent from Appellant, much less any grounds to cancel her lease. Therefore, we reverse the Regional Director’s decision.

Residential leases of trust or restricted land must be approved by the Secretary or his designee. 25 U.S.C. §§ 415(a), 4211(a); 25 C.F.R. § 162.604(a). When the Secretary (or his designee) approves a lease of trust land, the lessee obtains a leasehold interest in the property and the lease is *binding* on all parties. 25 U.S.C. § 2218(d)(1). Appellant had an approved lease to construct a home and reside on 1.82 acres of MK 67 without paying rent during the first 5 years of her lease and for so long thereafter until such time as BIA determines, after due consideration of appropriate factors, to adjust her rent and notifies her thereof through a decision that includes appeal rights. *See* Lease No. 14-20-0208-5685, ¶ 7

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<sup>10</sup> The proposed Modification itself only sought payment of \$4.74 per year to the Chanez and Barbachan Estates; rent to Fairbanks was not included on the Modification.

(AR Tab 7); 25 C.F.R. § 162.607. *See generally Kamb v. Northwest Regional Director*, 52 IBIA 74 (2010). In its letters to Appellant demanding rent and canceling her lease, BIA relied exclusively on the unsigned Modification as authority; the Regional Director has not submitted a brief in this appeal to argue that any other authority exists for her decision to cancel Appellant's lease. Neither Appellant's lease nor the regulations provide BIA with unilateral authority to "modify" an approved lease to require the payment of rent during the first 5 years. Thus, we agree with Appellant that the proposed "modification" gave rise to no obligation on her part to pay rent, much less could a violation of this unexecuted Modification serve as grounds to cancel her 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 Board reverses the Regional Director's December 18, 2009, decision and vacates BIA's letters to Appellant that demand that she pay rent.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge