

ALBERT F. PORFILIO

IBLA 90-307

Decided May 22, 1992

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying class I petition for reinstatement of oil and gas lease C 44568.

Affirmed.

1. Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Termination

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to pay rent timely is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1988) must be rejected.

APPEARANCES: Albert F. Porfilio, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Albert F. Porfilio has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 19, 1990, denying his petition for class I reinstatement of oil and gas lease C 44568. The original lease, C 39827, was issued effective February 1, 1985. On November 1, 1986, BLM approved an assignment of 41.35 acres within lease C 39827 from Petroleum Research Corporation to Albert F. Porfilio and Francis A. Porfilio. The lands within this assignment were thus segregated into lease C 44568. The lease anniversary date for C 44568 remained February 1.

The 1990 annual rental payment for lease C 44568 was not received until February 12, 1990. By notice dated February 20, 1990, BLM notified appellant that C 44568 had automatically terminated on its anniversary date of February 1, 1990, because the rental payment was not received on or before that date. BLM's notice also informed appellant of his right to petition for reinstatement of the lease under 30 U.S.C. § 188(c) (1988) (class I reinstatement) and 30 U.S.C. § 188(d) and (e) (1988) (class II reinstatement). The notice set forth the conditions to be met for reinstatement under both class I and class II. Appellant requested class I reinstatement, but BLM denied it in a March 19, 1990, decision. This appeal followed.

There are four conditions that must be met in order for a lease to be reinstated under class I reinstatement. Three of the four conditions are: (1) that the rental due is received within 20 days of the anniversary date of the lease; (2) that the petition for reinstatement is filed within 60 days of the notice of termination along with a \$25 filing fee; and (3) that no new lease has been issued for any of the lands affected by the terminated lease. See 43 CFR 3108.2-2. These three conditions present no obstacle to class I reinstatement of C 44568.

The fourth condition for class I reinstatement requires appellant to show reasonable diligence in mailing the payment or a justifiable cause for the failure to exercise reasonable diligence in payment. 43 CFR 3108.2-2(a)(2). In its March 19, 1990, decision denying class I reinstatement, BLM determined appellant had failed to show either reasonable diligence or a justifiable cause for failure to do so and, therefore, failed to meet the requirements for class I reinstatement.

[1] Section 31(b) of the Mineral Leasing Act (MLA), as amended, 30 U.S.C. § 188(b) (1988), provides in part that "upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law." Timely payment requires that the rental be received in the proper office by the lease anniversary date (or, if the office is closed on that date, by the next day on which the office is open). See 43 CFR 3108.2-1(a). As the rental payment in this case was not received until February 12, BLM clearly acted properly in issuing the lease termination notice to appellant.

However, as noted above, section 31(c), 30 U.S.C. § 188(c) (1988), provides that where a lease has terminated and the lessee has paid the full rental within 20 days after the lease anniversary date, the Department may, under certain circumstances, reinstate the lease, if the lessee shows that the failure to pay on or before the anniversary date was justifiable or not due to a lack of reasonable diligence. See 43 CFR 3108.2-2(a); Seth & Alice Swift, 109 IBLA 270 (1989); Nyle Edwards, 109 IBLA 72 (1989); Ann L. Rose, 92 IBLA 308 (1986). The burden of showing that the failure to pay on

or before the anniversary date was justified or not due to a lack of reasonable diligence is on the lessee. 43 CFR 3108.2-2(b). See Seth & Alice Swift, 109 IBLA at 272; Leo M. Krenzler, 82 IBLA 205, 207 (1984); Anthony F. Hovey, 79 IBLA 148, 149 (1984).

The regulations make clear that "reasonable diligence shall include any rental payment which is postmarked \* \* \* on or before the lease anniversary date." 43 CFR 3108.2-2(a)(2). It is well established that mailing a rental payment after the lease anniversary date does not constitute reasonable diligence. Denise M. White, 120 IBLA 163, 164 (1991); Seth & Alice Swift, 109 IBLA at 272; Clarence Souser, 108 IBLA 59 (1989); Anna L. Rose, 92 IBLA at 310. Here the rental payment was due on February 1, 1990. The rental payment was received on February 12, 1990, in an envelope bearing a February 8, 1990, postmark. Thus, appellant's untimely submission did not constitute reasonable diligence.

Failure to exercise reasonable diligence may be considered justifiable if it is demonstrated that, at or near the anniversary date, there existed extenuating circumstances outside of the lessee's control which affected his actions in failing to make timely payment. Denise M. White, 120 IBLA at 164; Clarence Souser, 108 IBLA at 60. The key component of this test is that the factors which caused the late payment must be outside the control of the lessee. See Ram Petroleum, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981); Ramaco Inc. v. Andrus, 649 F.2d 814 (10th Cir. 1981), cert denied, 454 U.S. 1031 (1981). Appellant presents as his reasons a persistent dental problem requiring frequent Saturday visits to his dentist and preparation for his daughter's birthday party. Neither of these are factors outside appellant's control which would justify a late payment as he was still in a position to schedule the use of his time in order to make a timely payment.

Appellant argues that he did have a system to ensure timely payment and the fact that it failed once did not diminish the purpose of its existence. However, the failure of appellant's payment system does not constitute circumstances outside his control which justify late payment. <sup>1/</sup> When the failure to pay the rental on time is due to negligence, forgetfulness, or inadvertence, the failure is not justifiable. Denise M. White, 120 IBLA at 164; Edgar B. Stern, 86 IBLA 72, 75 (1985).

The circumstances alleged by appellant do not justify the late payment, nor has he shown that his failure to timely submit the payment was not due to a lack of reasonable diligence. Thus, BLM properly denied appellant's petition for class I reinstatement.

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<sup>1/</sup> Similarly, contrary to appellant's argument on appeal, the fact that appellant had a system for ensuring timely payment does not establish reasonable diligence in situations such as the present where the payment was mailed well after the lease anniversary date. As noted above, mailing a rental payment after the lease anniversary date does not constitute reasonable diligence.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

