



INTERIOR BOARD OF INDIAN APPEALS

Novak Brothers et al. v. Acting Aberdeen Area Director, Bureau of Indian Affairs

25 IBIA 104 (01/05/1994)



United States Department of the Interior

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

NOVAK BROTHERS ET AL.

v.

ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-66-A

Decided January 5, 1994

Appeal from a decision not to approve leases of Indian land.

Affirmed.

1. Indians: Leases and Permits: Generally

The fact that a prospective lessee of Indian land has been granted extensions of time in which to submit its lease documents and to make its initial rental payment does not grant it the right to receive further extensions.

2. Board of Indian Appeals: Jurisdiction--Indians: Leases and Permits: Generally

Decisions concerning whether or not to approve a lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

3. Administrative Procedure: Burden of Proof--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Leases and Permits: Generally

When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

APPEARANCES: Terry L. Pechota, Esq. , Rapid City, South Dakota, for appellants; Mariana R. Shulstad, Esq., Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Acting Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Novak Brothers, Tom Novak, Gerald Novak, and Leonard Novak seek review of a March 5, 1993, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to approve farming/haying leases of Allotments OS-450 and OS-472 on the Pine Ridge Indian Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Appellants originally leased Allotments OS-450 and OS-472 for the 5-year period beginning January 1, 1988, and ending December 31, 1992. In March 1992, they notified the Pine Ridge Agency, BIA (Agency), that they wanted to negotiate new 5-year leases with the landowners. In May 1992, they furnished proof that they had made payments to the landowners under their existing leases, thereby enabling the Agency to begin processing their applications for new leases. In June 1992, appellants' bonding company informed the Agency that it would cancel appellants' bonds on July 31, 1992. The Superintendent, 1/ notified appellants that they would be in violation of their existing leases unless they obtained a new bond by August 1, 1992. He also stated that BIA could not process appellants' new leases until the bond matter was resolved. In July 1992, the bonding company notified the Agency that appellants' bonds would remain in place until the end of 1992.

On September 14 and 15, 1992, the Superintendent sent appellants' lease forms for their proposed leases of Allotments OS-450 and OS-472. The forms stated that the 1993 rentals were due on December 1, 1992. The Superintendent's transmittal letters concluded:

It is important that the contract forms be fully completed and returned
* * * WITHIN 30 DAYS FROM THE DATE OF THIS LETTER. Failure to
complete and return the form within the time specified will nullify the proposed
lease and render the allotment available for leasing to other individuals.

When appellants had not responded by October 16, 1992, the Superintendent wrote to them by certified mail, stating: "If you do not return the contract forms within ten (10) days from receipt of this letter, the land will be considered available for leasing to other individuals. You will not be contacted again." Appellants did not return the forms. However, Leonard Novak (Novak) advised the Agency on October 20, 1992, that appellants were having difficulty in securing a bond and, on November 24, 1992, he stated that they were unable to obtain bonds for a 5-year period, but

1/ Except where otherwise noted, the title "Superintendent" refers to either the permanent Superintendent or an acting Superintendent.

only for 1 year at a time. By letter of November 27, 1993, the Superintendent informed appellants that this would be satisfactory. He also stated that 1993 rentals would be due and payable by close of business on January 4, 1993.

On December 18, 1992, the Agency presented Novak with bills for collection covering the 1993 rentals on the two proposed leases. Each bill stated: "BILL AND CONTRACT ARE TO BE RETURNED BY CLOSE OF BUSINESS DECEMBER 31, 1992." On December 31, 1992, Novak returned the lease forms, submitted bonds, and paid the lease fees.^{2/} However, he requested an extension of time in which to pay the 1993 rentals. He was given until close of business on January 11, 1993, to make the rental payments. When the payments were not received by January 12, 1993, the Acting Superintendent wrote to appellants, informing them that the two leases would not be approved and that the allotments would be advertised at an upcoming lease sale. The Acting Superintendent's letter was hand-delivered to Novak on January 13, 1993, when he came to the Agency and attempted to make the rental payments.

The leases were advertised on January 19, 1993. Appellants were the high bidders and were awarded the leases. The rentals they pay under these leases are higher than the rentals they would have paid under the original negotiated leases.^{2/}

Appellants filed a notice of appeal from the Acting Superintendent's January 12, 1993, letter. The Superintendent treated it as a request for reconsideration and, on February 9, 1993, confirmed the Acting Superintendent's decision. Appellants then appealed to the Area Director. On March 5, 1993, the Area Director affirmed the Superintendent's decision.

Appellants' notice of appeal from the Area Director's decision was received by the Board on April 8, 1993. Both appellants and the Area Director filed briefs.

Discussion and Conclusions

Appellants make a number of arguments on appeal. They contend: (1) since they had submitted bonds on December 31, 1992, there was no need for BIA to worry about payment of the rentals because the bonds guaranteed payment; (2) BIA was dilatory in sending appellants the lease forms, leaving them without enough time to secure financing; (3) appellants had

^{2/} The lease fees were \$127.20 for Allotment OS-450 and \$67.66 for Allotment OS-472. Bills for collection covering these fees were sent to appellants on Sept. 15, 1992.

^{3/} Appellants' annual rental under the negotiated lease for Allotment OS-450 was \$7,220 and under the advertised lease is \$8,880.50. Their annual rental under the negotiated lease for Allotment OS-472 was \$3,132.75 and under the advertised lease is \$4,146.

planted wheat on the allotments upon the assurances of a BIA employee that there would be no problem with their new leases; (4) BIA failed to follow the lease cancellation procedures in 25 CFR 162.14; (5) BIA was arbitrary and capricious in not accepting the late rental payments because it had given appellants extensions in the past and because appellants had previously communicated with the Superintendent, who was aware of appellants' difficulties in securing financing.

Appellants' primary contention appears to be that they were entitled to another extension of time in which to submit their lease payments. They state that, on January 11, 1993, Novak called the Superintendent to report that he would bring in the payments within a couple of days. However, the Superintendent was not in the office, and Novak therefore left a message with the Superintendent's secretary. Appellants suggest that the Superintendent, had he been in the office on January 11 and 12, would have granted another extension. They evidently believe that the Acting Superintendent issued the January 12 letter only because he was unaware of appellants' prior communications with the Superintendent.

Appellants ignore the fact that the Superintendent himself confirmed the Acting Superintendent's decision. ^{4/} The Superintendent clearly had the opportunity to reverse the original decision, based upon his own understanding of appellants' situation. However, he declined to do so.

[1] Appellants suggest that, because of the previously granted extensions, they had some right to expect another extension on time in which to make their rental payments. ^{5/} The Board has held that a lessee has no right to expect that breaches of a lease, such as the failure to make timely rental payments, will continue to be forgiven simply because past breaches had been forgiven. E.g., French v. Aberdeen Area Director, 22 IBIA 211 (1992); Mast v. Aberdeen Area Director, 19 IBIA 96 (1990). The same principle is applicable in the case of prospective lessees, such as appellants. The fact that BIA had allowed late submission of lease documents, and had

^{4/} The Board assumes that the Superintendent undertook to review the Acting Superintendent's decision because of appellants' allegations concerning their previous communications with him. Because an Acting Superintendent has the same authorities as a Superintendent, an appeal from an Acting Superintendent's decision would ordinarily be transmitted directly to the Area Director.

^{5/} The initial extension, although not identified as such, was granted in the Superintendent's Nov. 17, 1992, letter, which stated that the payments would be due on Jan. 4, 1993, more than a month after the date shown on the leases. The second extension, to Jan. 11, 1993, was apparently granted orally by the Superintendent.

Although, as appellants point out, there were some discrepancies in BIA statements concerning due dates (e.g., the Dec. 18, 1992, bills for collection stated that payment was due on Dec. 31, 1992), all parties agree that the last extended payment date was Jan. 11, 1993. Appellants do not contend that they misunderstood the deadline.

granted previous extensions for payment of the initial rental, did not grant appellants the right to receive yet another extension for the payment of rental.

Appellants contend that the late mailing of lease documents to them made it difficult to secure financing in a timely manner. According to appellants, the Agency normally sends out lease forms in April or May of the year before the lease term is to begin.^{6/} The Area Director argues, *inter alia*, that there is no evidence that the mailing of appellants' lease documents in mid-September "was much if any later than standard practice" (Area Director's brief at 6). The Board cannot tell, from the materials in the record, whether or not the September mailing was unusually late. The Board agrees with the Area Director, however, that appellants have made absolutely no showing that the fact that the lease documents were not mailed to them until September 1992 prevented them from securing financing and making their rental payments by January 11, 1993. Rather, they make only the barest allegation that this was the case. Such unsupported allegations are insufficient to carry appellants' burden of proof in this case. *See, e.g., Schwan v. Aberdeen Area Director*, 23 IBIA 10 (1992); *French, supra*.

Appellants also appear to contend that BIA was obligated to accept their late rental payments and approve their new leases because a BIA employee had advised them there would be no problem with their new leases and that they could therefore plant wheat while their old leases were still in effect. No BIA employee has authority to commit BIA to approve a lease in a case where the prospective lessee fails to meet the basic requirements of the lease and/or BIA's leasing regulations. Therefore, even assuming a BIA employee purported to make a commitment as broad as appellants describe, it would not help them. *See, e.g., D.G. & D. Logging Co. v. Billings Area Director*, 20 IBIA 229 (1991) (Unauthorized acts by a BIA employee cannot serve as the basis for conferring rights not authorized by law). The Board concludes that BIA was not obligated to accept appellants' late payments and approve appellants' leases, regardless of whether a BIA employee made the commitment described by appellants.

Appellants' remaining arguments may be rejected summarily. Appellants suggest that, because they had obtained a bond which guaranteed payment of the rental, they were somehow relieved of their responsibility to pay rental in a timely manner. This is clearly not the case. Two distinct obligations are involved here. The fact that appellants had performed one of these obligations did not relieve them of their duty to perform the other.

^{6/} However, appellants also state that, in 1991, the forms for another lease were not prepared by the Agency until Dec. 23, 1991, even though the lease was to begin on Dec. 1, 1991. Supplement to Appellants' Statement of Reasons before the Superintendent.

Finally, appellants contend that BIA should have, but did not, follow the lease cancellation procedures in 25 CFR 162.14. Appellants' leases had not been approved at the time of the Acting Superintendent's January 12, 1993, decision. Accordingly, there was no need to cancel them.

[2, 3] The decision on appeal here is a decision not to approve the leases. The Board has held on several occasions that the decision whether to approve a lease is committed to BIA's discretion. E.g., Rathkamp v. Billings Area Director, 21 IBIA 144 (1992). The Board has only limited jurisdiction to review discretionary decisions of BIA officials. It does not substitute its judgment for that of BIA but reviews BIA decisions to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. Further, the burden is on an appellant to show that BIA did not exercise its discretion properly. Ross v. Acting Muskogee Area Director, 21 IBIA 251 (1992). See also Schwan, supra; French, supra. Appellants here have failed to carry their burden.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Aberdeen Area Director's March 5, 1993, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

Z/ See, e.g., leases at paragraph 15: "It is understood that this lease shall be valid and binding only after approval by the Secretary."