



INTERIOR BOARD OF INDIAN APPEALS

Dean Wallace v. Aberdeen Area Director, Bureau of Indian Affairs

26 IBIA 150 (08/02/1994)



# United States Department of the Interior

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

DEAN WALLACE

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-58-A

Decided August 2, 1994

Appeal concerning the bonding requirements for pasture leases on the Devils Lake Sioux Reservation.

Reversed in part; vacated and remanded in part.

1. Administrative Procedure: Generally--Appeals: Generally--  
Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:  
Administrative Appeals: Generally--Regulations: Generally

Although a Bureau of Indian Affairs Area Director has authority to place a Superintendent's decision into immediate effect under 25 CFR 2.6(a), an Area Director does not have authority to make his or her own decision final for the Department when Departmental regulations provide a right of appeal to the Board of Indian Appeals.

2. Administrative Procedure: Generally--Bureau of Indian Affairs:  
Administrative Appeals: Generally

Even in the case of a decision based on the exercise of discretion, the Bureau of Indian Affairs has a responsibility to explain the rationale and factual basis of the decision.

APPEARANCES: Dean Wallace, pro se; William C. Gipp, for the Area Director.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Dean Wallace seeks review of a December 21, 1993, decision issued by the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning bonding requirements for five pasture leases on the Devils lake Sioux Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision in part, and vacates and remands it in part for further consideration.

Background

Appellant submitted bids for certain leases of trust land on the reservation pursuant to a September 3, 1993, advertisement of lease availability. Among other things, the advertisement stated in paragraph G:

The right is reserved by the Superintendent to reject any or all bids and to disapprove any lease submitted on an accepted bid. The Superintendent reserves the right to establish performance bond requirements for successful bidders at an amount deemed necessary to protect the landowner(s).

Appellant was notified on October 22, 1993, that he had been awarded five leases, covering approximately 245 acres of pasture land. The letters further informed appellant that the Superintendent, Fort Totten Agency, BIA (Superintendent), had established performance bonds for the leases, apparently in the total amount of \$12,200. The letters stated that the leases were to be completed and returned to the Agency by November 23, 1993.

Appellant was apparently given an extension of time for signing the forms, providing the bond, and paying the fees and rent. 1/ Appellant did not comply with the extension, but instead appealed the amount of the bond to the Area Director on November 23, 1993. Appellant contended that rules regarding bonds were not consistent within the Aberdeen Area, and that the policy at Fort Totten was to require a bond equal to 30 percent, apparently of the first year's rent, for people who had no prior lease violations, and a bond equal to 100 percent for those with prior violations. He requested that his bond be reduced to 30 percent of the first year's rent. 2/

By letter dated December 21, 1993, the Area Director stated:

Whoever informed you that the bond rate is 30% of the rental for Fort Totten, is correct. However, that rate is for established operators, who have a history of leasing Indian owned lands through Fort Totten Agency. Furthermore, the Superintendent determines the bonding amounts on a case by case basis. You have no prior history of leasing Indian lands. You have not proven that you are a competent operator to lease Indian lands. Therefore, it is the Agency Superintendent's responsibility to set the bond at an amount to assure compliance with all the provisions

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1/ No documents evidencing this extension of time were included in the administrative record. The Board was informed of the extension in a telephone conversation with Agency personnel. The telephone conversation was necessitated by the fact that appellant's notice of appeal was insufficient to inform the Board of the status of the case.

2/ Appellant also raised several issues not relating to the decision from which he was appealing. The Board agrees with the Area Director's conclusion that these extraneous matters should not be addressed.

and stipulations of the lease contract. It is the [BIA's] responsibility to protect the Indian landowners' trust resources.

\* \* \* \* \*

25 CFR §162.5(c) provides that unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligation under the lease. Such bond may be for the purpose of guaranteeing: (3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

In view of the above we are hereby sustaining the decision of the Fort Totten Agency Superintendent, in his decision to determine the bond amounts.

Since you choose not to comply with the bonding requirements and for the protection of the Indian landowners natural resources, this decision is final.

(Letter at 1-2).

Appellant appealed this decision to the Board. Appellant filed a statement on appeal; the Area Director questioned the Board's jurisdiction in the memorandum transmitting the administrative record to the Board.

#### Jurisdiction

The Area Director has questioned the Board's jurisdiction to review his decision, stating his understanding that, under 25 CFR 2.6(a), his decision is final and not subject to further review. Section 2.6(a) provides:

No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

The Area Director's argument evidences a misunderstanding of the difference between a decision being final for the Department of the Interior, and being placed into immediate effect. A decision is final for the Department when there are no further administrative appeals within the Department, or the time for filing an appeal has passed without an appeal being filed. When a decision is final for the Department, a person aggrieved by that decision must look to Federal court for any further relief.

[1] Under 25 CFR 2.6(c) and 43 CFR 4.1(b)(2), decisions of the Assistant Secretary - Indian Affairs and the Board of Indian Appeals are final

for the Department. <sup>3/</sup> Decisions made by BIA Area Directors are normally not final for the Department because, under 25 CFR 2.4(e), those decisions are subject to a further right of appeal within the Department. <sup>4/</sup> An Area Director lacks authority to make his or her decision final for the Department, thereby cutting off the right of appeal, when the regulations provide for an appeal.

Although the word "final" appears in 25 CFR 2.6(a), which governs placing a decision into immediate effect, the entire phrase in which the word appears is "final so as to constitute Departmental action subject to judicial review." The word "final" cannot be read in isolation. When a decision is placed into immediate effect, it is implemented and the status quo is changed, even though there is still a right to appeal the decision within the Department. Under these circumstances, a person adversely affected by the decision may continue with the administrative appeal or may go to Federal Court and ask the court to prevent the Department from implementing the decision.

Under 25 CFR 2.6(a), a BIA decision can be placed into immediate effect by the official to whom an appeal is taken, when one or more of the conditions set forth in the section are met. Thus, an Area Director has authority to place a Superintendent's decision into immediate effect, and the Board can place an Area Director's decision into immediate effect. See, e.g., Northern States Power v. Minneapolis Area Director, 26 IBIA 1 (1994).

Here, although the Area Director could have determined that his responsibility to protect trust resources required him to place the Superintendent's decision into immediate effect, he did not have authority to cut off appellant's right to seek further review of that decision within the Department, or the Board's jurisdiction over any appeal appellant might file, by stating that his decision was final for the Department. Citation Oil & Gas, Ltd. v. Acting Billings Area Director, 21 IBIA 75, 85 n. 14 (1991). The Board reverses that part of the Area Director's decision which stated that the decision was final, and concludes that it has jurisdiction over this matter.

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<sup>3/</sup> 25 CFR 2.6(c) states that "[d]ecisions made by the Assistant Secretary - Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary - Indian Affairs provides otherwise in the decision." 43 CFR 4.1(b)(2) states that the Board "decides finally for the Department appeals \* \* \* pertaining to" certain enumerated Indian matters.

<sup>4/</sup> Section 2.4(e) states that "[t]he Interior Board of Indian Appeals \* \* \* [decides appeals] if the appeal is from a decision made by an Area Director \* \* \*."

The Board has discussed one Departmental regulation making Area Directors' decisions final for the Department. That regulation is 25 CFR 88.1, which deals with decisions approving, disapproving, or conditionally approving an attorney fee contract. See Welch v. Minneapolis Area Director, 17 IBIA 56 (1989).

### Discussion and Conclusions

[2] Although the Board's review authority over BIA discretionary decisions is limited, it has authority to review such decisions to ensure that all legal prerequisites to the exercise of discretion have been met. See, e.g., Rush v. Acting Navajo Area Director, 25 IBIA 198, 201 (1994). In particular, an Area Director's decision, even one based on the exercise of discretion, must show a reasoned basis for the decision reached. Bowen v. American Hospital Association, 476 U.S. 610, 626-27 (1986); ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 239-40 (1993), and cases cited therein.

The Area Director's decision indicates that the bond was established under 25 CFR 162.5(c)(3), which states:

Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing: \* \* \* An amount estimated to be adequate to insure compliance with any additional contractual obligations.

The Area Director conceded in his decision that the usual bond amount is 30 percent, apparently of the first year's rent, but stated that bonding decisions are made on a case-by-case basis, taking into consideration, inter alia, any past leasing history. He stated that appellant's bond requirement was higher than usual because appellant had no prior leasing history, and therefore had not proven that he is a competent operator.

Appellant agrees that he has no prior leasing history, but contends that other persons with little or no leasing history had their bonds set at 30 percent of the first year's rental. Based on this contention, appellant argues that BIA discriminated against him because of prior problems with his father.

The Board takes official notice of the existence of prior leasing disputes between appellant's father and BIA. It is quite possible that BIA was concerned about the kind of lessee appellant would be, considering that appellant appears to have worked with his father at a time when BIA believed appellant's father was not performing properly as a lessee. Problems BIA might have encountered with appellant's father are part of his father's leasing history. However, it is not an abuse of discretion for BIA to consider a potential lessee's prior exposure to an apparently improperly conducted leasing operation in setting bonding requirements. Under such circumstances, BIA could justify a higher than usual bond until appellant, or anyone else in a similar situation, proved he was a reliable and competent lessee.

Neither the administrative record nor the decision, however, shows this as the reason for what appears to be an extremely high bond amount. 5/

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5/ Appellant's bond appears to be approximately 3 times his total rent.

