INTERIOR BOARD OF INDIAN APPEALS

High Desert Recreation, Inc. v. Acting Western Regional Director,
Bureau of Indian Affairs

52 IBIA 30 (07/26/2010)

Related Board case:
57 IBIA 32

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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HIGH DESERT RECREATION, INC., Appellant,	)	Order Docketing and Dismissing Appeal
v.	)	
ACTING WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Docket No. IBIA 10-118
	)	July 26, 2010

High Desert Recreation, Inc. (Appellant), has appealed to the Board of Indian Appeals (Board) from a May 27, 2010, decision of the Acting Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA), regarding a commercial lease (No. B-237) ("Lease") between Appellant (as lessee) and the Pyramid Lake Paiute Tribe (as lessor).[1] The Regional Director vacated a decision by the BIA Western Nevada Agency Superintendent (Superintendent)[2] to cancel the Lease based on Appellant's nonpayment of rent. The Regional Director found that the Superintendent had failed to address Appellant's argument that Article 13 of the Lease lawfully excuses Appellant's nonpayment of rent.[3] The Regional Director remanded the matter to the Superintendent for further

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[1] Appellant's appeal was filed through its President, Thomas J. Bobella, and the Board received it on July 6, 2010.

[2] The Superintendent's decision was dated February 12, 2010.

[3] Article 13 of the Lease is titled "Destruction of Premises," and provides that in the event of partial destruction of the premises during the term of the Lease, the Tribe shall repair the premises and Appellant "shall be entitled to a proportionate reduction of rent while such repairs are being made, based upon the extent to which the making of such repairs shall interfere with the business of [Appellant] on the premises."

Appellant apparently stopped submitting rent checks to the Tribe in November of 2009 based on past problems with a leaking roof and road damage. Appellant suggests there is no disagreement between it and the Tribe on the amount of basic monthly rent owed

(continued...)

proceedings, instructing the Superintendent that if, upon consideration of Appellant's arguments (and those of the Tribe), the Agency decided to proceed with cancellation of the Lease, Appellant must be given further notice and an additional 10-day period to cure any default. The Regional Director also advised Appellant, relying on 25 C.F.R. § 162.621,[4] that any further appeal would be "conditioned on the continued payment of Basic Rent," with any disputed amounts to be held by BIA in a special deposit account pending final resolution of the appeal.

Appellant agrees with the Regional Director's decision to vacate the Superintendent's decision, but appeals from the decision to remand the matter, arguing that the Regional Director should have foreclosed any further proceedings by directly deciding the merits of Appellant's argument that it is not in default for nonpayment of rent. Appellant also appeals from the Regional Director's "conditioning" of future appeals on "continued payment" of rent, which Appellant contends requires it to make double payment.

We dismiss the appeal for lack of standing because the Regional Director's decision was not a final decision that adversely affected Appellant, and therefore Appellant lacks a right of appeal to the Board.

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[3](...continued)
($2,750.00), but Appellant also contends that Article 13 gives it a right of "offset" for lost use of the premises and for direct costs incurred as a result of the previous roof leaks and road damage. Thus, apparently claiming a 100% "offset" each month, Appellant contends that it "has been correctly paying $2,750.00 per month," Notice of Appeal at 6, without making any actual remittances to the Tribe. The Tribe contends that neither the roof leak nor the road damage constituted "destruction of the premises," within the meaning of Article 13, and that even if Article 13 applies, the types of losses covered are more limited than those claimed by Appellant and that in any event Appellant has not documented a justification for a 100% proportionate reduction of rent.

[4] Section 162.621 provides that a BIA decision to cancel a lease remains ineffective if the tenant files an appeal, but while a cancellation decision is ineffective, the tenant must continue to pay rent and comply with the other terms of the lease.
By its language, section 162.621 applies to decisions involving "agricultural" leases, but that reference is an obvious error because the provision is located in Part 162, Subpart F – *Non-Agricultural* Leases. A substantively identical provision is found at section 162.254, under Subpart B – Agricultural Leases, and it appears that the drafters of section 162.621 failed to conform the language of section 162.621 to refer to non-agricultural leases instead of agricultural leases. We construe section 162.621 as applying to non-agricultural leases.

In order to have standing to appeal from a BIA decision to the Board, an appellant must have been adversely affected by a final BIA decision. *See* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested Party"); 43 C.F.R. § 4.331 (appeal may be taken from a final administrative action or decision of a BIA official). In the present case, the Regional Director's decision to vacate the Superintendent's lease cancellation decision was favorable to Appellant, as Appellant recognizes. The Regional Director's decision to remand the matter allows the Superintendent to correct the procedural error he committed in his vacated decision (failure to consider Appellant's Article 13 argument and related arguments that it is not in default). The Regional Director left it for the Superintendent to decide whether or not to cancel the Lease. Appellant objects that the Regional Director did not directly address and decide the merits of its arguments about the application of Article 13, and objects that the remand will cause delay. But the delay caused by a remand prompted by a favorable procedural decision for Appellant does not "adversely affect" any legally cognizable interest of Appellant. *See Carufel v. Midwest Regional Director*, 49 IBIA 282 (2009). And, unless or until a new lease cancellation decision is issued, and Appellant's appeal rights are exhausted, the Lease remains in effect.[5]

Additionally, to the extent that Appellant seeks an interlocutory appeal to have the Board "assume jurisdiction," Notice of Appeal at 3, and decide its Article 13 argument, the Board lacks jurisdiction over appeals from non-final BIA administrative action, i.e., interlocutory appeals. *See* 43 C.F.R. § 4.331; *Interim Executive Council of the United Auburn Indian Community v. Acting Sacramento Area Director*, 28 IBIA 197, 198 (1995); *see also Saupitty v. Anadarko Area Director*, 26 IBIA 167, 168 (1994) (in order to provide for an orderly decision making process, the Board does not consider issues that are still pending before an appropriate BIA official); *LaPlante v. Billings Area Director*, 19 IBIA 261, 262

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[5] Appellant contends that lack of resolution of the dispute between it and the Tribe has interfered with its business, but the consequences of that dispute do not constitute an adverse effect caused by final action of BIA, and only the latter gives rise to a right of appeal. Neither BIA nor the Board have general authority to adjudicate lease disputes between a tribe and its lessee. *See Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 231-32 (2008).

We note that Appellant submitted with its notice of appeal a copy of a June 18, 2010, "show cause" letter from the Superintendent re-initiating lease cancellation proceedings. The Board has not been advised that the Superintendent has taken any final action purporting to again cancel the Lease, and in any event this appeal divested BIA of jurisdiction over the matter and thus the Superintendent would lack authority to issue a decision until this appeal is resolved. *See Spicer v. Eastern Oklahoma Regional Director*, 50 IBIA 328, 332 n.5 (2009).

(1991) (dismissing appeal where Area Director remanded matter to Superintendent for followup action and additional deliberation, but did not direct the Superintendent to reach a particular decision on remand).

For the same reasons, we dismiss Appellant's appeal from the Regional Director's decision purporting to "condition" future appeals on the "continued payment of rent." Appellant has not been adversely affected by this condition and it would be premature for the Board to consider the condition unless and until the Regional Director takes action on it. The Superintendent has not issued a new decision regarding the lease, no appeal has been taken to the Regional Director, and the Regional Director has not actually purported to implement 25 C.F.R. § 162.621 in the context of this case by making a demand for payment. Thus, we dismiss this claim as well.[6]

Conclusion

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 dockets but dismisses this appeal.

I concur:

// original signed	// original signed
Steven K. Linscheid	Debora G. Luther
Chief Administrative Judge	Administrative Judge

[6] We note that Appellant apparently takes the position that, by operation of Article 13, its rent has been proportionately reduced in its entirety until Appellant has recouped certain amounts it claims for lost use of the premises and other direct costs. *See supra* note 3. Appellant argues that by virtue of the reduction under Article 13, it has been paying rent (albeit with no actual remittance). Appellant contends that the Regional Director's condition would make it pay rent twice — once through the proportionately reduced rent by operation of Article 13 (with no actual remittance) and a second time through an actual remittance. To the extent that the Regional Director's consideration of a future appeal may depend upon a determination whether Appellant is in compliance with section 162.621, it appears that the Regional Director may well be required to consider and to address Appellant's merits arguments, in whole or in part, thus mitigating the alleged effect of the "condition."