



INTERIOR BOARD OF INDIAN APPEALS

William C. Tuttle v. Acting Western Regional Director, Bureau of Indian Affairs

56 IBIA 53 (12/18/2012)

Related Board cases:

36 IBIA 254

Reconsideration denied, 36 IBIA 291

41 IBIA 74

46 IBIA 216

Judicial review of this case:

Affirmed, *Tuttle v. Jewel*, No. 13-CV-00365-RMC, 2016 U.S. Dist. LEXIS 31398
(D.D.C. Mar. 11, 2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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WILLIAM C. TUTTLE,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 10-135
ACTING WESTERN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 18, 2012

William C. Tuttle (Appellant) appealed to the Interior Board of Indian Appeals (Board) from a July 19, 2010, decision (Decision) of the Acting Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision affirmed a March 2, 2010, decision by the Colorado River Agency Superintendent (Superintendent) to cancel business lease No. B-509-CR between Appellant, as lessee, and the Colorado River Indian Tribes (Tribe), as lessor. We affirm the Decision because the record supports BIA’s findings that Appellant was not in compliance with the lease and failed to timely cure or excuse his noncompliance, and Appellant has not established that BIA’s decision to cancel the lease was unreasonable.

Background

I. Lease, Lease Modification, and *Tuttle*

In 1977, Appellant and the Tribe entered into the lease, covering 98.24 acres of tribal land, for a 50-year term. The parties executed the lease in connection with the settlement of litigation brought by the United States against Appellant (and others) to quiet title to certain lands in the name of the United States in trust for the Tribe. Lease (Administrative Record (AR) Tab 17).¹ Relevant to this appeal, the lease required

¹ The Superintendent approved the lease on March 31, 1977. On April 8, 1977, the U.S. District Court entered a judgment—stipulated and agreed to by Appellant—that the United States is the owner, in trust for the Tribe, of the property. See Judgment, *United States v. Brigham Young Univ., William C. Tuttle, and Robert E. Tuttle*, No. CV 72-3058-DWW (continued...)

Appellant to carry public liability insurance for personal injury and property damage in specified amounts of coverage, “to be written jointly to protect Lessee and Lessor,” and to furnish evidence of such coverage to BIA. *Id.* art. VI & Addendum art. 3.

In 1986, the Tribe and Appellant executed a modification to the lease. *See* Modification No. 1 (AR Tab 16).² First, the lease, as modified, required Appellant to pay the Tribe, in addition to base rent, 3% of the gross receipts of all business conducted on the leased premises. *Id.* (amending Lease art. IV). Second, in order to calculate this “percentage rent,” the lease was modified to require Appellant to submit annual “certified statements of gross receipts” for all business conducted on the leased premises. *Id.* (amending Lease art. IX). The statements must be prepared by an independent certified public accountant (CPA) in accordance with standard accounting procedures, and accompanied by an opinion rendered by the CPA. *Id.*

Appellant subsequently sought to challenge the 1986 lease modification, but the Board upheld BIA’s decision to recognize the modification as a valid agreement between the parties. *See Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 232-33 (2008).³ On another issue raised in *Tuttle*, which is tangentially related to the present appeal, we held in favor of Appellant regarding the calculation of interest on certain base rent he had paid. On remand, the Regional Director concluded that Appellant was entitled to a refund, credit, or offset in the amount of \$10,504.79. Letter from Regional Director to Appellant, Sept. 23, 2009 (AR Tab 18(5)).⁴

(...continued)

(C.D. Cal. Apr. 8, 1977) (1977 Judgment) (copy attached to Response of Appellee to Appellants’ Opening Br. (Regional Director’s Answer Br.)).

² The Superintendent approved the modification on June 10, 1986.

³ Three Board decisions, which involved procedural matters related to disputes between Appellant and the Tribe, preceded our 2008 decision. *See Tuttle v. Western Regional Director*, 41 IBIA 74 (2005) (appeal from BIA inaction); *Tuttle v. Western Regional Director*, 36 IBIA 254 (same), *recon. denied*, 36 IBIA 291 (2001). All citations to *Tuttle* in the present decision are to the 2008 decision, 46 IBIA 216.

⁴ The Regional Director’s table of contents to the record identifies item 18 as the entire administrative record for the Superintendent’s lease cancellation decision. The record for the Superintendent’s decision is contained in a separate binder, subdivided by tabs 1-10. For convenience, we refer to the Superintendent’s record as “AR Tab 18,” with the tabs within the Superintendent’s record indicated in parentheses. *E.g.*, AR Tab 18(1).

II. BIA's Notice of Default and Lease Cancellation Decision

On September 30, 2009, the Superintendent and the Tribe jointly issued a Default Notice notifying Appellant that he was in violation of several provisions in the lease. Default Notice at 2-5 (AR Tab 15). For one alleged violation—failure to pay base rent for the years 2005, 2006, and 2009—BIA and the Tribe agreed to deduct the amount owed (\$4420.80) from the amount credited to Appellant (\$10,504.79) for interest overpayments, as a result of the remand from *Tuttle*, and the Tribe agreed to waive this alleged default. Default Notice at 2-3; Lease art. IV. The Tribe declined, however, to waive the remaining three alleged violations, which eventually served as the grounds for BIA's decision to cancel the lease. Default Notice at 3-5.

First, the Superintendent and the Tribe found that Appellant had failed to pay the annual percentage rent based on gross receipts since the fiscal year ending March 30, 1991. Default Notice at 3. Second, they found that Appellant had failed to submit certified statements for the fiscal years 1992-2008 to document the amount of gross receipts. *Id.* at 4. Third, the Superintendent and the Tribe found that since 2005, the Tribe, as lessor and as agent of BIA, had not received evidence of a current public liability insurance policy jointly naming the Tribe as co-insured, and that fire and damage insurance documents on file with the Tribe were not current. *Id.* at 5.⁵

The Default Notice stated that Appellant had 10 business days to (1) cure the violations, (2) dispute the violations or otherwise explain why the lease should not be cancelled, or (3) request additional time to cure the violations. *Id.*⁶

Appellant responded to the Default Notice with a letter received by the Tribe on October 16, 2009. Letter from Appellant to Tribe, Oct. 14, 200[9] (AR Tab 14).⁷ On the percentage rent issue, Appellant stated that “[t]he average annual income from sublease payments is approximately \$11,000.00,” and based on that figure, Appellant calculated the percentage rent due since 1991 to be \$5600. *Id.* at 1. After subtracting the base rent owed

⁵ The Default Notice also stated that evidence previously provided by Appellant for the 2000-2005 period, consisting of an application for insurance, did not comply with the requirements of the lease. Default Notice at 5.

⁶ The Default Notice cited 25 C.F.R. § 162.118, but there is no such section, and it is apparent that the Superintendent and the Tribe intended to cite § 162.618 as the regulatory provision upon which they were relying for the notice of violation.

⁷ The letter was dated October 14, 2006, but that was a typographical error; the year was 2009. Appellant first sent an undated letter to the Tribe, received by the Tribe on October 13, 2009, stating that his response would follow shortly. *See* Letter from Appellant to Tribe, undated (Tribe's Answer Br., Ex. C).

(\$4420.80) and his estimate of the percentage rent owed (\$5600), from the interest overpayment credited to him, Appellant calculated that he still had a credit or refund due to him in the amount of \$483.99. Appellant also stated that the percentage rent was being “paid under protest” and that he intended to appeal *Tuttle* to Federal court. *Id.* In response to the allegation that he was in violation of the requirement to provide a certified statement from a CPA concerning the gross receipts, Appellant stated that he would “prefer not to incur the expense of having a [CPA] verify this simple information,” and he asked that this requirement be waived. *Id.* at 2. And finally, Appellant stated that he was enclosing the insurance verification information requested. Enclosed with his response was an invoice to Rio Valley Estates LLC showing a payment received on September 17, 2009, for a “Landowners General Liability” insurance policy for the subsequent year. *Id.*, Attach. The invoice did not identify the terms of the policy or identify the Tribe as an additional insured party. No copy of an actual policy was submitted. Appellant did not request additional time to address the violations.

On March 2, 2010, the Superintendent issued a decision terminating the lease, finding that Appellant had not cured the violations. Superintendent’s Decision at 1-2 (AR Tab 13). The Superintendent found that Appellant’s estimate of gross receipts did not conform to the reporting requirements in the lease because it was not compiled or verified by a CPA. *Id.* at 2-3. In the absence of a certified statement of gross receipts, the Superintendent also concluded that the amount of unpaid percentage rent could not be calculated, and thus could not be deducted from any remaining balance credited to Appellant for his interest overpayments. *Id.* at 3. Finally, the Superintendent found that the insurance invoice provided by Appellant did not fulfill the lease requirements because (1) it did not name the Tribe as jointly insured, (2) it did not state the amount of coverage, and (3) it did not show that Appellant had fire and damage insurance. *Id.* at 4. Because Appellant had failed to cure these three violations, the Superintendent terminated the lease. *Id.*

Appellant then notified the Regional Director that he wished to “cure all violations and do it as quickly as possible” and requested 45 days in which to do so. Letter from Appellant to Regional Director, Mar. 11, 2010 (AR Tab 12). Appellant stated that his insurance agent had been out of the office due to illness, and that his accountant would be available after April 15. Appellant also appealed the Superintendent’s decision to the Regional Director. Notice of Appeal to Regional Director, Apr. 1, 2010 (AR Tab 11).

On May 6, 2010, Appellant submitted a letter titled “Statement of Reasons,” in which he offered to send the requisite proof of insurance and stated that his accountant was working on the certified accounting statements. Letter from Appellant to Regional Director, May 6, 2010 (AR Tab 8). Appellant indicated that he would “send [BIA] a few thousand dollar check to show [his] good faith.” *Id.* He also stated that he had suffered a medical emergency on April 19, 2010. *Id.* BIA received a \$4800 check from Appellant

several days later. Copy of Check, received May 10, 2010 (AR Tab 9). The record does not indicate that Appellant ever sent the proof of insurance.

The Regional Director acknowledged receipt of the check, but stated that the “statement of reasons” had failed to explain how the Superintendent’s cancellation decision was erroneous. Letter from Regional Director to Appellant, May 17, 2010 (AR Tab 7). The Regional Director granted Appellant 10 days to submit a new statement of reasons, while noting that he was not providing Appellant additional time to cure the violations. *Id.* The Regional Director deposited the check into a “Special Deposit Account” pending completion of the appeals process and retained it pursuant to 25 C.F.R. § 162.621 (requiring continuing payment of rent and compliance with lease terms during appeals of cancellation actions). *Id.*; *see also* AR Tab 9.

Appellant then submitted a formal statement of reasons to the Regional Director on May 25, 2010. Statement of Reasons to Regional Director (AR Tab 6). Appellant argued that the lease violations had “largely been . . . resolved” and that the delays in curing the violations were caused by “health issues” and by the unavailability of his accountant. *Id.* at 1. He argued that any uncured violations were “so close to full and final resolution or so *de minimis non curat lex* that there is no legitimate basis for citing them as reasons for Lease termination.” *Id.* at 2.

Appellant included with his statement of reasons a CPA-prepared “Compilation Report” that had entries for 1995 and for 2002 through 2008. *Id.*, Attach. 1 at 2 (unnumbered). The cover letter from the CPA stated that the accompanying statement relied on information used by Appellant for Federal income tax purposes, “which is a basis of accounting other than U.S. generally accepted accounting principles.” *Id.* at 1. The CPA stated that he had not audited or reviewed the accompanying statement and, “accordingly, [did] not express [a]n opinion or any other form of assurance on it.” *Id.* According to the CPA, “[m]anagement has elected to omit substantially all of the disclosures required by generally accepted accounting principles.” *Id.* The CPA’s Compilation Report, based on the 8 years between 1992 and 2009 for which Appellant had provided information, estimated the percentage rent owed by Appellant as \$16,970.36. *Id.* at 2.

Appellant also attached to his statement of reasons a sheet of handwritten calculations, apparently done by Appellant, showing that he owed the Tribe a balance of \$5408.10 (after deducting the interest overpayment credit from the *Tuttle* remand, and the \$4800 payment made with his initial statement of reasons). Appellant enclosed a check for that amount. Statement of Reasons to Regional Director at 4 & Attach. 2. The Tribe submitted a brief that requested termination of the lease. AR Tab 5.

The Regional Director affirmed the Superintendent’s decision to cancel the lease. Decision (AR Tab 3). He first noted that during the cure period, Appellant had indicated

that he intended to challenge *Tuttle* and had asked for a waiver of the accounting requirements in the lease. The Regional Director also noted that no further response (or attempt to cure) was made “until long after the cure period provided for in the Lease had expired,” and only after Appellant had received the Superintendent’s cancellation decision. Decision at 4.⁸ The Regional Director found that, as of the date of the Decision, the violations had still not been cured. *Id.* at 5.

The Regional Director also found that, even taking the Compilation Report to be correct, the amount of percentage rent that Appellant owed the Tribe exceeded the total value of the remaining interest overpayment and the two checks. *Id.* The Regional Director concluded that if and when the termination of the lease became final, the two checks and the remaining interest overpayment would be applied to Appellant’s debt to the Tribe. *Id.*

III. Appeal to the Board and Arguments on Appeal

Appellant appealed the Decision to the Board. Appellant filed a statement of reasons and an opening brief, both the Tribe and the Regional Director filed answers, and Appellant filed a reply.

Appellant also filed a “Supplemental Reply Brief,” which the Regional Director and Tribe moved to strike. Appellant then sought leave to file another supplemental brief, which the other parties also opposed. We find the opposition to our consideration of these late-filed pleadings to be well-taken, and we strike them accordingly. We note, however, that these additional pleadings add little or nothing to the arguments already presented in some form by Appellant, and would not affect the outcome of this appeal even if they were considered.

In his notice of appeal, Appellant contends that the lease termination was erroneous because the disputes “have largely been addressed” and that “any remaining deficiencies either have been resolved at this time, are so close to full and final resolution or so [insignificant] that there is no legitimate basis for citing them as reasons for Lease termination.” Notice of Appeal at 1, 2. Appellant argues that his delays in responding to BIA resulted from health issues experienced by Appellant and the unavailability of his CPA.

⁸ The Superintendent’s Default Notice stated that Appellant had 10 days to cure the violations, but the lease itself provides a 30-day cure period for payment violations and a 60-day cure period for other violations. *See* Lease, Addendum, art. 17; Default Notice at 5. Although Appellant did not challenge the Superintendent’s decision based on a defective Default Notice, we note that the Regional Director correctly understood that the cure periods were governed by the terms of the lease itself.

Id. at 1. Appellant also contends that BIA lacked authority to terminate the lease because “[t]here has never been a lawful determination that the [leased premises are] eligible for [BIA] leasing on [the Tribe’s] behalf.” *Id.* at 2.

In his opening brief, Appellant does not repeat or expand on the assertions in his notice of appeal that the lease termination was erroneous, except to contend that “the record shows” that he cured the default “but [he] is being evicted solely to satisfy [the Tribe].” Opening Br. at 3. Appellant devotes the remainder of his opening brief to arguing that BIA could not lease the property “on behalf of” the Tribe because, according to Appellant, the land is not under the jurisdiction of BIA, but instead is under the jurisdiction of the Department of the Interior’s (Department) Bureau of Land Management (BLM).

The Regional Director and the Tribe respond to Appellant by arguing that he fails to address the facts and circumstances that led to BIA’s decision to cancel the lease, i.e., BIA’s findings that Appellant had not timely cured several violations of the lease. The Regional Director and the Tribe also argue that the Board may not or should not consider Appellant’s contentions that BIA lacked authority to lease the property on behalf of the Tribe or to cancel the lease.

In his reply brief, Appellant argues that the Tribe “should have consented to the late resolution of issues,” and reiterates his assertions that the disputes “have largely been addressed and [the] deficiencies resolved as of this date,” that he timely reported health issues (including his hospitalization for several days) and the unavailability of his CPA, and that any remaining deficiencies are so minimal that lease cancellation is not justified. Reply Br. at 1-2. Appellant also reiterates his assertion that the land is under the jurisdiction of BLM or the Department’s Bureau of Reclamation, and thus BIA could not terminate the “Federal Lease.” Reply Br. at 3.

Discussion

I. Standard of Review

Interpretations of lease provisions are questions of law, which the Board reviews *de novo*. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011), and cases cited therein. When a BIA decision involves the exercise of discretion, the Board will not substitute its own judgment for BIA’s, but will review *de novo* the sufficiency evidence to support BIA’s decision, and will also review the sufficiency of BIA’s explanation. *Id.* It is Appellant’s burden to prove that BIA’s decision was erroneous, was not supported by substantial evidence, or was an abuse of discretion. *See id.*

II. BIA's Authority to Cancel the Lease

Appellant's arguments that BIA did not have authority to lease the property on behalf of the Tribe, and thus did not have authority to cancel the lease, are raised for the first time on appeal. The Board does not ordinarily consider arguments that were not first raised before the BIA official whose decision is under review or issues that were not within the scope of the decision being reviewed. 43 C.F.R. § 4.318 ("An appeal will be limited to those issues that were before . . . the BIA official on review."); *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010) ("The Board has a well-established general rule that it will not consider arguments or issues raised for the first time on appeal to the Board."); *Trenton Indian Service Area v. Great Plains Regional Director*, 54 IBIA 298, 303 (2012) ("The scope of the Board's review ordinarily is limited to the issues addressed in the decision under review."). We see no reason to depart from that rule here, and thus we decline to consider this argument.⁹

III. Termination Decision

The Superintendent terminated the lease, and the Regional Director affirmed the termination, because Appellant had violated several lease provisions and had failed to cure them during lease's cure period. On appeal, Appellant does not dispute his failure to cure the violations within the cure period provided in the lease, nor does he argue that BIA violated any of his procedural rights, *see supra* note 8. Instead, Appellant argues that by the time he filed his briefs on appeal to the Board, he had largely cured the violations, and that any remaining violations are too minimal to justify lease cancellation.

⁹ We do note, however, that Appellant is factually incorrect in identifying the Department as a party to the lease. *See* Opening Br. at 1. BIA approved the lease, but only the Tribe is party to the lease as the lessor of the property, and the only rights obtained by Appellant, as lessee, were granted to him by the Tribe. Appellant's argument that the land is not held in trust for the Tribe is also inconsistent with the 1977 Judgment against Appellant—and agreed to by him—that the land *is* held in trust for the Tribe by the United States. *See supra* note 1; *see also* Findings of Fact, *United States v. Brigham Young Univ., William C. Tuttle, and Robert E. Tuttle*, No. CV 72-3058-DWW (C.D. Cal. Apr. 6, 1977), at 3 ("the United States is the owner in trust for the [Tribe] of the lands [subject to the lease], said lands having been reserved at all times as part of the Colorado River Indian Reservation") (Ex. A to Tribe's Answer Br.). Thus, Appellant's arguments are not only wrong, but are self-defeating as well. If, as Appellant argues, the land is not beneficially owned by the Tribe, but instead is public domain land, then Appellant obtained no right of occupancy through the lease with the Tribe, and he is and has been in trespass, unlawfully profiting from subleases of property to which he held no leasehold interest.

The record supports BIA’s findings that Appellant violated the terms of the lease and that he did not cure those violations within the time period prescribed by the lease. Appellant received notice of the violations on September 30, 2009, and the Superintendent found, 153 days later—well beyond the cure period provided by either the regulations or the lease—that Appellant had not cured those violations. The Regional Director affirmed the Superintendent, finding that the violations still had not been cured. Appellant’s assertion, on appeal, that his delay in curing the violations was “acceptable to the Department of the Interior,” Reply Br. at 2, is not supported by the record. To the contrary, the Regional Director made clear that the additional time he was providing Appellant to argue his case was *not* an extension of time to cure the violations. Moreover, the Regional Director’s finding that the violations had still not been cured is supported by the record. The Compilation Report provided by Appellant did not conform to the reporting requirements set forth in the lease and was missing several years of data. Without a proper accounting of gross receipts, the amount of percentage rent in arrears could not be calculated or paid. And Appellant apparently never submitted proof of insurance conforming to the lease requirements. Contrary to Appellant’s assertions, nothing in the record indicates that the violations were ever cured.

Nor has Appellant made any convincing argument why BIA’s decision to cancel the lease, in the face of the uncured violations, was an abuse of discretion. Appellant contends that he timely advised BIA of his health problems, but we note that these occurred long after the Superintendent had decided to cancel the lease. The same is true with respect to the purported unavailability of Appellant’s CPA, which occurred after the Superintendent’s March 2010 cancellation decision. In response to the Default Notice, Appellant stated that he did not wish to pay the expenses of a CPA and asked that the lease requirement be waived. Appellant has not shown, on the record in this case, that BIA abused its discretion in cancelling the 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 affirms the Regional Director’s July 19, 2010, decision.

I concur:

 // original signed
Steven K. Linscheid
Chief Administrative Judge

 //original signed
Debora G. Luther
Administrative Judge