



INTERIOR BOARD OF INDIAN APPEALS

Linda Clingan and Michael Templeton v. Northwest Regional Director,
Bureau of Indian Affairs

56 IBIA 185 (02/14/2013)

Related Board case:
52 IBIA 74



United States Department of the Interior

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LINDA CLINGAN AND MICHAEL)	Order Affirming Decisions
TEMPLETON,)	
Appellants,)	
)	
v.)	Docket No. IBIA 11-044
)	
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	February 14, 2013

The Board of Indian Appeals (Board) affirms the two decisions appealed to the Board in this second appeal by Appellants Linda Clingan and Michael Templeton concerning a protracted dispute over the rent adjustment for their residential ground lease (Lease) on the Swinomish Reservation. First, in an October 29, 2010, decision (Remand Decision) by the Northwest Regional Director, Bureau of Indian Affairs (BIA), BIA responded to a concern raised by the Board in Appellants’ first appeal. *See Kamb v. Acting Northwest Regional Director*, 52 IBIA 74 (2010). In *Kamb*, we remanded two appeals—one by Thomas Kamb (Kamb) and the other by Appellants—for consideration of an argument raised by Kamb but not addressed by the Regional Director: Kamb argued that a nearby property was substantially identical to his and that the rent was adjusted at the same time by BIA, but adjusted to a lower rate than Kamb’s, which raised a question, if true, of whether the rent adjustments were arbitrary or capricious. We found that Appellants’ rental circumstances were virtually identical to Kamb’s,¹ we consolidated Kamb’s appeal and Appellants’ appeal for purposes of our decision, and *sua sponte* directed the Regional Director on remand to apply the outcome of his consideration of Kamb’s argument to Appellants’ appeal. That is, if on remand the Regional Director had determined that the rents were disparate and that they should not be, any adjustment made to Kamb’s rent should also be made to Appellants’ rent unless their circumstances were, in fact, materially dissimilar. In his Remand Decision, the Regional Director explained that the rent adjustment for the nearby neighbor was the same as the adjustment for Appellants’ property

¹ Both Kamb’s and Appellants’ rental properties are located in the same neighborhood, share substantially similar characteristics, and received the same rent adjustment to \$9000 at the same time.

(\$9,000 per annum), and reaffirmed Appellants' rent increase. When Appellants received the Remand Decision, they sought rehearing and reconsideration, asserting that they had "new evidence" of disparate rents that they wanted to present and have considered, and they requested a hearing before the Regional Director. In the second decision appealed by Appellants to the Board, the Acting Northwest Regional Director² denied Appellants' request that he rehear and reconsider the Remand Decision. Reconsideration Decision, November 10, 2010. He found it neither appropriate nor necessary to hold a hearing.

We affirm both of the Regional Director's decisions because the issues on remand were narrow, were fully addressed in the Remand Decision, and the Regional Director did not abuse his discretion by limiting his review to the issues in our remand order. While nothing precludes the Regional Director from choosing to expand the scope of his reconsideration on remand, nothing requires him to do so. Thus, the optimum time for Appellants to have presented their evidence of disparate rents—and to preserve that issue for review before the Board—was at the time of their first appeal to the Regional Director, not on remand. Further, nothing in our decision required the Regional Director to hold a hearing, either on the limited purpose for remand or on the expanded basis argued by Appellants.

Background

I. History

Appellants' predecessor-in-interest entered into the Lease on December 1, 1997, and subsequently assigned the Lease to Appellants in October 2006. The Lease, which does not include improvements, is a 50-year ground-only lease for Lot 53 of the Cobahud Waterfront Tracts in the Pull and Be Damned area on the Swinomish Reservation in the state of Washington. Under the terms of the Lease, the annual rent is subject to adjustment at not-less-than 5-year intervals. Lease, §§ 1.2-1.3 (Administrative Record (AR) Tab 13(11)).³ The second adjustment, due on the tenth anniversary of the Lease's effective date, was to be based on an appraisal of the fair market rent for the property. *Id.* § 1.3. In 2006, BIA, through the Office of the Special Trustee for American Indians (OST), obtained an

² We will refer in our decision to both the Northwest Regional Director and the Acting Northwest Regional Director as the Regional Director.

³ Included in the administrative record for this appeal were the complete administrative records for both Kamb's and Appellants' earlier appeals to the Board. *See* AR Tabs 12 and 13, respectively. Tab 13 is further divided into tabs 1 through 13. For ease of reference, citations to documents in Tab 13 will be followed by a parenthetical containing the "subtab" number, e.g., "AR Tab 13 (10)."

appraisal of the property from GPA Valuation (GPA), reviewed GPA's appraisal, made certain adjustments, and determined that the annual fair market rent for Appellants' lot was \$9000. 2006 Appraisal and Review Report at 1 (AR Tab 13(10)); *see also Kamb*, 52 IBIA at 76-78 (detailed discussion of the 2006 appraisal of Appellants' property).

The Superintendent notified Appellants by letter dated December 18, 2007, that their rent was adjusted to \$9000. Superintendent's Decision (AR Tab 13(8)). The effective date of the adjustment was December 1, 2007. *Id.* Appellants appealed the rent adjustment decision to the Regional Director.

The Regional Director affirmed the adjustment. Initial Decision, June 30, 2008 (AR Tab 13(3)). Appellants appealed the Initial Decision to the Board. Appellants did not raise any issue in either their appeal to the Regional Director or to the Board concerning any disparity in rents among their neighbors in the Pull and Be Damned area. Instead, Appellants focused their arguments exclusively on the appraisal received by OST from GPA. *See Kamb*, 52 IBIA at 79.

On a very narrow ground, the Board vacated the Initial Decision. Appellants' appeal came under active consideration by the Board at the same time as an appeal by Kamb, a neighbor of Appellants who also challenged his rent adjustment. The Board determined that the issues raised in the two appeals were similar and that the two rental properties were substantially similar as well, and consolidated the two appeals for purposes of its decision. The Board remanded BIA's decisions in both appeals to the Regional Director to consider an argument raised by Kamb⁴ but not addressed by the Regional Director: Kamb had asserted that at nearly the same time that BIA adjusted Kamb's rent, BIA also adjusted the rent for Kamb's neighbor, Patricia Person (Person), to a lower amount than Kamb's adjustment, even though both rental properties are substantially similar. According to Kamb, Person's rent was adjusted to \$8000, while Kamb's (and Appellants') rent had been adjusted to \$9000, which Kamb argued was arbitrary and capricious. Because Kamb's and Appellants' lots were also substantially similar, because their rent adjustments occurred one week apart, and because both appeals came before the Board for consideration at the same time, the Board *sua sponte* remanded the decision in Appellants' appeal "for consideration of Kamb's assertion that [Person's] leasehold is comparable in material respects but her rent was adjusted at or about the same time by BIA to a lower amount than Kamb's [and

⁴ Kamb's appeal was initiated by his predecessor-in-interest. During the pendency of the appeal before the Board, Kamb purchased his lease and improvements and thereby succeeded to the appeal filed by the seller, including the arguments raised by her. For ease, we will simply refer to the appellant in *Kamb* as Kamb without distinguishing between Kamb and his predecessor-in-interest.

Appellants’]. . . . As to Appellants’ remaining arguments, they have been considered and are rejected.” *Id.*, 52 IBIA at 84.⁵

II. Remand Decision and Second Appeal to the Board

On remand, the Regional Director reviewed the records for Person’s rent adjustment, and informed Appellants that Person’s “annual rent [was increased] to \$9000.” Remand Decision at 2.⁶ Thus, the Regional Director determined that Person’s adjusted rent amount was the same as Kamb’s and Appellants’—there was no disparity. The Regional Director then reaffirmed Appellants’ rent adjustment to \$9000, and changed its effective date in accordance with the Board’s instructions. Remand Decision at 1-2. Appellants immediately sought “rehearing and reconsideration” of the Regional Director’s decision, arguing that the Board had “ruled that new evidence of disparity in rent amounts is relevant to this appeal,” and that Appellants in fact had new evidence to present to BIA. Motion for Rehearing and Reconsideration, Nov. 5, 2010, at 1 (AR Tab 4). Appellants requested an evidentiary hearing to present this new information. The Regional Director denied Appellants’ request, explaining that the Board did not instruct him to hold a hearing nor did he find it appropriate or necessary to do so. Reconsideration Decision, Nov. 10, 2010. Thereafter, Appellants appealed both decisions to the Board.

Appellants filed an opening brief, the Regional Director filed an answer, and Appellants filed a reply. The matter is now ripe for decision.

Discussion

We affirm both of the Regional Director’s decisions. The Regional Director’s Remand Decision is consistent with the Board’s instructions for remand, it is amply supported by the record, and there is no evidence therein of any disparity in rent: Appellants’ and Person’s annual rent were both adjusted to \$9000. As to the Regional Director’s denial of reconsideration, we find no abuse of discretion. Appellants never sought to present evidence of disparate rents during either of their appeals to the Regional Director, and cannot now make arguments that should have first been presented to the Regional Director.

⁵ We also directed the Regional Director to change the effective date of the adjustment to Appellants’ and Kamb’s rent so that it would not be retroactive. 52 IBIA at 84.

⁶ According to the record, Person’s rent adjustment was based on an August 2006 appraisal by GPA that appraised the rental value at \$12,600. This appraisal subsequently was revised to \$9000 by a review appraiser with OST’s Office of Appraisal Services.

I. Standard of Review

We review the Regional Director's decisions to determine whether they comport with the law, are supported by substantial evidence, and are not arbitrary or capricious. *See Kamb*, 52 IBIA at 80. We apply a *de novo* standard when reviewing the sufficiency of the evidence. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011), and cases cited therein. Appellants bear the burden of demonstrating error in the Regional Director's decisions. *See Kamb*, 52 IBIA at 80.

II. Merits

Appellants argue that on remand they “had no opportunity to provide evidence” and “[t]he Regional Director conducted a private investigation with no submissions or arguments from either side.” Opening Br. at 8. In their reply brief, they argue that they were denied the opportunity to comment on records concerning the adjustment to Person's rent that were added to the record. We reject Appellants' arguments. Aside from these arguments, Appellants make no effort to show error in either of the Regional Director's decisions in their opening brief. Instead, Appellants reiterate their original arguments, which we rejected in *Kamb*, and attempt to raise new arguments that should have been presented in the first instance to the Regional Director.

A. Scope of Remand

Appellants argue that the Regional Director's interpretation of the Board's remand instructions was too narrow. They argue that he erred in refusing to “reopen the record, hold a hearing and allow the parties to conduct discovery.” Opening Br. at 7. They also claim that the Regional Director should have *sua sponte* investigated other nearby properties' rent adjustments in addition to the one identified by *Kamb*. *Id.* Appellants assert that the Board must “either concur with [BIA] and conclude that the Regional Director did exactly, and only, what was required on remand, or rule that the purpose of remand was to determine whether rents are inequitable and arbitrary [in the Pull and Be Damned area].” Reply Br. at 1. We confirm that the Regional Director properly interpreted the remand instructions.⁷

⁷ Although Appellants appealed both the Remand Decision and the Reconsideration Decision, Appellants did not separately argue error in either decision. Instead, Appellants seek the complete overhaul of the rental system in the Pull and Be Damned neighborhood and view this Board as the appropriate means to order BIA accomplish this goal. *See* Opening Br. at 10 (“[Appellants] respectfully request this Board to order [BIA] to assemble a spreadsheet with each leased parcel in Pull & Be Damned, its rent amount, lease

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The Board instructed the Regional Director to take two discrete actions in its remand of Appellants' case: First, the Board directed the Regional Director to change the effective date of the rent adjustment so that it would not be retroactive. Second, the Board ordered the Regional Director to consider on remand a claim—raised not by Appellants but by Kamb—that Person's leased property was materially identical to Kamb's, that Person's rent was adjusted at about the same time as Kamb's, and that Person's adjusted rent was lower than Kamb's. If, as a result of his review on remand, the Regional Director determined that Kamb's rent should be reduced, the Regional Director should also then consider whether Appellants' property was similarly situated and whether it was appropriate to reduce their rent. The Board specifically stated that all of Appellants' other arguments "have been considered and are rejected," leaving only the two specific issues to be addressed on remand. *Kamb*, 52 IBIA at 84.

The Regional Director followed the remand instructions: He adjusted the effective date of Appellants' rent adjustment and he investigated the claim concerning Person's rent adjustment in response. He found that Person's rent had been adjusted to \$9000, the same amount as Appellants' adjusted rent. Remand Decision at 2. He therefore rejected the claim that Person's rent adjustment was evidence of arbitrary action because there was no disparity between the adjustments. *Id.*⁸

Nothing in the Board's remand order required the Regional Director to restart Appellants' appeal, permit briefing and new evidence, or hold a hearing. Nor do Appellants direct our attention to any law that would require the Regional Director to do so. The Board's remand order simply directed the outcome of the Regional Director's consideration of Kamb's argument to be applicable to Appellants' appeal. The Board's remand

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anniversary date, and location. . . . A fair adjudication of rents requires discovery of the rent amounts and an open hearing for all sides to present their arguments to the Regional Director."); Reply Br. at 1 ("[Appellants] respectfully request that the Board use their appeal as the means to examine and remedy the systemic failures in [BIA's] leasing program at Pull & Be Damned."). As we explained in *Drew v. Acting Northwest Regional Director*, 56 IBIA 132, 144 n.15 (2013), the Board lacks general supervisory authority over BIA. We can neither demand that BIA produce such a spreadsheet nor can we demand that BIA hold a hearing where none is otherwise required by law.

⁸ It appears that Person appealed her rent adjustment, and she, her co-lessees, and the Indian landowners reached a settlement of their dispute. Lease Modification (Person), Aug. 8, 2010 (AR Tab 7). Appellants also attempted to resolve their appeal with BIA prior to the Board's decision in *Kamb*. However, no settlement was reached.

instructions in *Kamb* did not require the Regional Director to do more. We therefore reject Appellants' claim that the Regional Director erred in his interpretation or execution of our remand instructions, and we affirm the Remand Decision and the Reconsideration Decision.

B. Issues Already Rejected or Not Preserved for Appeal

Any claim or argument that an appellant wishes to raise before the Board must first be raised before the official whose decision is under review, and it must be within the scope of the decision being appealed. 43 C.F.R. § 4.318; *see also, e.g., Tuttle v. Western Regional Director*, 56 IBIA 53, 60 (2012). Appellants now seek to raise arguments before the Board that were never presented to the Regional Director, and which are beyond the scope of the remand. *See* Opening Br. at 9-11; Reply Br. at 6-8. Other arguments were previously rejected in *Kamb*, *see* 52 IBIA at 83-84. *See* Reply Br. at 6-8. These arguments are beyond the scope of this appeal.

For these same reasons, we also decline to consider Appellants' proffers of new evidence, which they submitted in three discrete segments to the Board: with their opening brief, with counsel's affidavit filed after the opening brief, and, finally, with their reply brief. This new evidence is outside the narrow scope of the remand and it could have been, but was not, first presented to the Regional Director. We thus reject these additional arguments and evidence.

C. Application of *South Dakota*

Appellants argue that the Regional Director violated their due process rights by relying on Person's rent adjustment documents for the Remand Decision without first circulating the documents among the interested parties. *See South Dakota v. Department of the Interior*, 787 F. Supp. 2d 981 (D.S.D. 2011); 25 C.F.R. § 2.21(b).⁹ We disagree.

In *South Dakota*, the district court held that a regional director violated 25 C.F.R. § 2.21(b)¹⁰ when he decided an appeal from a superintendent's decision by considering

⁹ Appellants did not raise this issue in their opening brief, but *South Dakota* was decided less than one week before Appellants submitted their opening brief. In addition, the Regional Director raised the issue in his answer brief. Therefore, we will consider Appellants' response.

¹⁰ Section 2.21(b) provides in pertinent part, "When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal,

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documents outside the administrative record without distributing these extraneous documents to the interested parties for their comments prior to his decision. 787 F.Supp. 2d at 996-99. The court held that the error was not harmless:

When an agency's violation of a procedural rule precludes an interested party from presenting certain colorable arguments to the ultimate decision maker, courts have found that the agency's error was more than harmless.

...

This is not a situation where [the appellants] already had knowledge or possession of all such documents, where the documents would be unquestionably subject to judicial notice or where the documents avail themselves of only one interpretation and application to matters at issue.

Id., 787 F.Supp. 2d at 997. In *South Dakota*, the issue before the Regional Director was whether to take land into trust on behalf of an Indian tribe, which is a discretionary decision reserved to BIA. *Id.* at 998. The Regional Director obtained, considered, and relied upon 23 documents that were not previously part of the administrative record. Thus, in withholding the extraneous documents from the parties, the Regional Director foreclosed consideration of the arguments that the parties would have made concerning the information contained in the documents. And, on appeal, the parties set forth several arguments that they would have made before the regional director had the documents been known to the parties. *Id.* at 996 & n.6. Because the Board is not vested with *de novo* review authority over discretionary decisions, such as land-to-trust acquisition decisions, the district court held that an appeal to the Board—and an opportunity to review and argue the extraneous documents before the Board—was not an adequate substitute in *South Dakota*.

Appellants' case is distinguishable from *South Dakota* for three reasons. First, Appellants have not identified *any* arguments that they would have made, had they seen Person's rent adjustment documents before the Regional Director issued his Remand Decision.¹¹ Second, the critical document at issue is the BIA letter that established Person's

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the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided.”

¹¹ Appellants appear to suggest that these documents were not made available to them in the course of this appeal. *See* Reply Br. at 2 (“The [Regional] Director opened the record and added new information [concerning Person's lease], [which is] *still undisclosed*. . . .” Emphasis added.). Upon its receipt of the administrative record from the Regional Director, the Board informed the parties, including Appellants, that the record was available
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rent adjustment. That document states that, effective in 2006, Person's rent was adjusted to \$9000 per annum. This document is susceptible to no other interpretation. Finally, the Regional Director's Remand Decision, insofar as Person's rent is concerned, consists of his determination that that her rent was increased to \$9000, as was Appellants'. Our review of this determination is *de novo*: whether it is supported by the record. See *Seminole Tribe*, 53 IBIA at 210 (sufficiency of the evidence reviewed *de novo*). In *South Dakota*, our review was deferential to allow for the exercise of discretion by the Regional Director in determining whether to accept land into trust for an Indian tribe. Here, we are not constrained in our review, and Appellants could have raised any challenge to the Regional Director's determination concerning Appellants' rent vis-à-vis Person's rent, but they did not. Therefore, while we agree with Appellants that 25 C.F.R. § 2.21(b) might ordinarily require the Regional Director to disclose Person's rent adjustment documents to Appellants for their consideration and response prior to the Remand Decision, we conclude that any error was harmless.

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 affirms the Regional Director's October 29, 2010, Remand Decision and his November 10, 2010, Reconsideration Decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

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for inspection and copying both at the Regional Director's office and at the Board's office. See Notice of Docketing and Order Setting Briefing Schedule, Jan. 24, 2011, at 1. Appellants did not request a copy of the record from the Board nor did they inform the Board that they had attempted unsuccessfully to obtain a copy from the Regional Director.