



INTERIOR BOARD OF INDIAN APPEALS

Dineh Benally v. Acting Navajo Regional Director, Bureau of Indian Affairs

57 IBIA 91 (05/30/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

DINEH BENALLY,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 11-112
ACTING NAVAJO REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	May 30, 2013

Appellant Dineh Benally appeals from a March 29, 2011, decision (Cancellation Decision) of the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), that canceled a business lease between Appellant and his partner as lessees (Lessees), and the Navajo Nation (Nation) as lessor. The Regional Director canceled the lease because the Lessees breached four material lease terms and the breaches were never cured nor did Appellant provide any explanation for the breaches. On appeal, Appellant makes arguments to excuse his noncompliance, but does not show any error in the Cancellation Decision. Therefore, we affirm.

Background

Appellant and a partner, Carlyle Harvey,¹ entered into Lease No. SR-05-189 with the Navajo Nation on April 11, 2004. Lease (AR Tab 2). The Nation granted the Lease on July 28, 2004, and BIA approved it on September 28, 2005. *Id.* Part I at 8. The Lease covered approximately 32.25 acres of the Nation's trust land, and was for the purpose of developing and operating a recreational vehicle (RV) park. *Id.* at 2. In lieu of rental payments, the Lease permitted the Lessees to repay a loan from the Nation that had been used for Phase I construction of the RV park. *Id.* at 3. Repayment was waived for the first

¹ Harvey did not appeal the Cancellation Decision.

3 years of the Lease, with the first payment due on September 28, 2008.² *Id.* The monthly payments were \$833.33 for the first 5 years and the amount would increase every 5 years thereafter. *Id.* The Lease stated that failure to make these payments would be a breach of the Lease that could be cause for cancellation. *Id.* The Lease also required the Lessees to invest at least \$400,000 of their own funds to improve the premises, to post a \$4700 performance bond (which requirement was also waived for the first 3 years), and to carry general commercial liability insurance and fire and casualty insurance. *Id.* at 4, 5, 7; *id.* Part II at 5-7.

On May 26, 2009, an internal Nation memorandum stated that the Lessees had failed to make any loan payments as of that date. AR Tab 4. The Nation apparently gave the Lessees a deadline of July 15, 2009, to pay the arrears, and Appellant apparently responded on July 16, asking for an extension of time. *See* Letter from Nation to Appellant, July 22, 2009 (AR Tab 5). The Nation extended the payment deadline until October 20, 2009. *Id.*

In the meantime, the Regional Director sent the Lessees a Notice of Violation,³ dated August 12, 2009. AR Tab 6. The Notice was sent by certified mail on August 17, 2009, and Appellant signed for it on August 21, 2009. AR Tab 7. The Notice informed the Lessees that the Lease was in default on four material provisions: (1) Failure to remit the loan payments; (2) failure to post the performance bond; (3) failure to provide evidence of commercial general liability insurance; and (4) failure to provide evidence of fire and casualty insurance. AR Tab 6 at 1 (unnumbered). The Notice contained the following provision:

[I]n view of the above [defaults] and in accordance with the provisions of 25 CFR 162.618 entitled, “What will BIA do in the event of a violation under a lease?” (copy enclosed), you are hereby given ten (10) days from the date of your receipt of this notice in which to take corrective action to cure said defaults or otherwise comply with 25 CFR 162.618. Should you fail to take corrective action to cure the breach or provide substantial evidence that

² The Lease stated that the 3-year waiver period ended on May 1, 2007, but that date was apparently pushed back to accommodate the time it took for BIA to approve the Lease.

³ The Notice itself does not refer to “violations” but instead refers to the Lease being in “default.” Because the pertinent regulation, 25 C.F.R. § 162.618, refers to BIA’s duty to send a “notice of violation,” we will refer to the August 12 notice as a Notice of Violation or Notice.

you can cure the breach on a timely basis[, w]e will be forced to cancel[] your lease for cause.

Id. at 2 (unnumbered).

On August 29, 2009, Appellant sent BIA a letter requesting an extension until September 28, 2010, to remit payment and post the bond, and stating that he could submit proof of general liability insurance. Letter from Appellant to BIA, Aug. 29, 2009 (August 29 Letter) (AR Tab 8).⁴ The Nation granted Appellant 30 additional days to cure the breaches. Letter from Nation to Lessees, Sept. 15, 2009 (AR Tab 10). The Nation notified BIA on October 30, 2009, that the Lessees had “exceeded” the time for rectifying their delinquent account and requested BIA to ask Lessees to “show cause why they are not adhering to their . . . Lease agreement.” AR Tab 12. The Regional Director canceled the Lease on March 29, 2011.⁵

Appellant appealed the Cancellation Decision to the Board and filed an opening brief. The Regional Director submitted an answer brief, to which Appellant did not file a reply.

Discussion

We affirm the Cancellation Decision. Appellant does not dispute that he and his partner materially breached the Lease and failed to cure the breaches. Instead, Appellant argues that (1) the Lease was canceled without notice and due process; (2) no one responded to his request for an extension of time, (3) he has invested in the property and has not yet received any return on his investment, which he asserts is a violation of his equal protection rights, the Navajo Bill of Rights, and the Constitution; (4) he was misled by the Nation because tribal loan funds were never expended and the improvements on the property were funded by donations and grants of State and Federal funds; (5) he had no control over the loan funds, and the Nation’s Controller’s office “did not initially have [the] business on file”; and (6) he carried commercial liability insurance and casualty and fire

⁴ Appellant’s letter was silent about providing evidence of fire and casualty insurance.

⁵ The record is devoid of documentation between the Nation’s letter of October 30, 2009, and an email from BIA dated March 18, 2011, that informed the Nation that a lease cancellation letter had been forwarded from the Superintendent’s office to the Regional Director’s office for signature. No explanation is offered by the parties for the apparent gap in communication between Appellant and BIA from August 2009 until the Cancellation Decision in March 2011.

insurance, but let the policies lapse after he received the Cancellation Decision. Notice of Appeal at 1-2 (unnumbered). He did not address his failure to provide a performance bond. We reject Appellant's due process claim because he was given notice of the violations and an opportunity to cure them or explain why he should not be liable; we reject his claim that BIA did not respond to his request for additional time because the burden is on Appellant, as the lessee who wants to keep his lease, to pursue the matter with BIA; and we reject Appellant's remaining arguments because they are raised for the first time on appeal.

I. Standard of Review

Appellant bears the burden of showing error in the Regional Director's Cancellation Decision, *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011), but ordinarily, we will not consider arguments made for the first time on appeal, *Iron v. Acting Rocky Mountain Regional Director*, 51 IBIA 264, 267 (2010), *McClurkin v. Eastern Oklahoma Regional Director*, 44 IBIA 125, 129 (2007). Where, as here, the Regional Director's decision is discretionary, we will determine whether it is supported by the record, comports with the law, and provides a reasonable explanation for his decision that is neither arbitrary nor capricious. *Tuttle v. Acting Western Regional Director*, 56 IBIA 53, 59 (2012); *Seminole Tribe of Florida, supra*.

II. Due Process

Appellant argues that the Lease was canceled without due process and that he was entitled to "notice." Appellant is correct on the law. But the record shows that he *did* receive notice, albeit notice that gives the Board some pause. Appellant has not shown that he was materially misled by the Notice of Violation and therefore we do not find that the Cancellation Decision denied Appellant due process.

Appellant received notice on August 21, 2009, that there were multiple Lease violations that must be cured or the Lease would be canceled. This Notice pointedly advised Appellant that his choices were (1) to cure the breaches within 10 days, (2) provide "substantial evidence" that the breaches would be cured "on a timely basis," or (3) "otherwise comply with" 25 C.F.R. § 162.618, a copy of which was enclosed. AR Tab 6 at 2 (unnumbered). In its entirety, § 162.618 provides:

What will BIA do in the event of a violation under a lease?

- (a) If we determine that a lease has been violated, we will send the tenant and its sureties a notice of violation within five business days of that

determination. The notice of violation must be provided by certified mail, return receipt requested.

- (b) Within ten business days of the receipt of a notice of violation, the tenant must:
- (1) Cure the violation and notify us in writing that the violation has been cured;
 - (2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or
 - (3) Request additional time to cure the violation.

The Notice of Violation sent to Appellant makes no mention of (b)(2), i.e., the Lessees' right to dispute the Lease violations or explain why the Lease should not be canceled. That fact alone does not make the Notice deficient as a matter of law because § 162.618—unlike, e.g., § 166.704—does not expressly state what a notice of violation must contain. But, where BIA is not required to do so and elects to inform persons of their rights in, e.g., a notice of violation, fairness dictates that BIA accurately and completely set forth those rights.⁶

We also note that the Notice of Violation asserts that the Lessees must present “substantial evidence” to show that the breaches can be timely cured. That language is simply not found in the regulation: The regulation itself does *not* require lessees to support a request for additional time by providing *any* evidence within 10 days. Whether it precludes BIA, as an exercise of discretion, from demanding that a request for additional time be supported by evidence of an ability to cure on a timely basis is an issue we need not decide.

While we are troubled by the language in the Notice of Violation,⁷ we conclude that Appellant's due process rights were not violated because (1) the Notice specifically

⁶ Alternatively, BIA may include a copy of the regulation and, in its notice, simply refer the recipient to the enclosed regulation without attempting to set forth the rights. In the body of its letter, BIA should also identify the regulation by its full citation, e.g., 25 C.F.R. § 162.618.

⁷ Under new leasing regulations that went into effect on January 4, 2013, § 162.466 requires notices of violation of business leases to advise the lessee of each of their rights in responding to the notice of violation unless the only violation is for nonpayment of rent. *See* 77 Fed. Reg. 72440, 72493 (Dec. 5, 2012). However, at the time of Appellant's Notice of Violation, § 162.618 did not require the notice to inform the Lessees of their rights.

informed Appellant that he could “otherwise comply with 25 CFR 162.618,” (2) a copy of § 162.618 was enclosed with the Notice, (3) Appellant does not claim that he was misled by the Notice or by its enclosure (i.e., by the regulation enclosed with the Notice of Violation), and (4) Appellant does not explain how his due process rights were violated. And Appellant did respond immediately to the Notice by requesting 13 months to pay the arrears and post the performance bond; he also stated that he would be able to produce evidence of current general liability insurance. *See* August 29 Letter. Although the *Nation* responded to the Lessees and granted them additional time, the record contains no record of a written response by BIA to Appellant’s request for additional time. And it appears that Appellant failed to take any steps over the ensuing months to cure the violations: The record contains no written communications from Appellant until BIA canceled the Lease in March 2011. Therefore, we conclude that while BIA’s notice to Appellant of his rights under § 162.618(b) was imperfect, it was not constitutionally insufficient.⁸

III. Lack of Response from BIA to Appellant’s Response to Notice of Violation

Appellant contends that he never received a response from BIA to his request for additional time to cure his breaches. Appellant’s contention is supported by the record: As we previously noted, there is no record of any contact between BIA and Appellant between BIA’s receipt of Appellant’s August 2009 request for additional time and BIA’s cancellation of the Lease in March 2011. But, while BIA certainly should have responded to Appellant’s request, we cannot say that BIA owed Appellant any specific duty to respond nor did an absence of response operate to waive or offset the Lessees’ breaches of the Lease or otherwise estop BIA from enforcing the terms of the Lease against the Lessees. As we have previously explained in *Cooper v. Acting Southern Plains Regional Director*, 41 IBIA 58, 60 (2005)—in which a lessee had defaulted on rental payments and had requested additional time from BIA to pay the arrears, and to which BIA did not respond—any duty that may be owed to the lessee is “derived from [BIA’s] duty toward the Indian landowners,” rather than any direct duty to the lessee. That is, in its relationship with lessees of Indian trust lands, BIA acts for and on behalf of the Indian landowners. Thus, any assistance in resolving lease disputes that BIA may give to lessees flows from BIA’s trust relationship with the landowners.

⁸ Appellant also claims that it is a violation of his Tribal and Federal constitutional rights not to earn a return on his investment in the business. We cannot address Appellant’s Tribal constitutional rights, but there is no Federal constitutional right to a return on investment. The Lessees’ investment was required by the Lease, and coexists with the other terms of the Lease with which the Lessees are in breach. Compliance with one Lease provision does not offset breaches of other Lease terms.

Ultimately, if a delinquent lessee wants to keep his lease, it is *his* responsibility to cure the breaches, explain why no breaches exist or are not his responsibility, or to make appropriate arrangements with BIA and the lessor. *See id.* In this regard, Appellant simply did nothing after he requested additional time. He did not pursue the matter with the Nation. He did not pursue the matter with BIA. He did not cure the breaches. He now seeks relief from this Board when, after the passage of some 19 months with no curative action by Lessees, BIA finally canceled the Lease. Regardless of whatever BIA should have done in response to Appellant's request for additional time to cure, the absence of a response from BIA simply does not excuse Appellant from his failure to comply with the terms of the Lease.

IV. Appellant's Remaining Arguments

We reject Appellant's remaining arguments, which are raised for the first time on appeal to the Board. These arguments attempt to show that Appellant should not be liable for the loan payments, including the arrears. The time for Appellant to have raised these arguments was in response to the Notice of Violation when BIA formally notified him of the arrears, not in response to the Cancellation Decision. Therefore, we need not consider these arguments.

And regardless of whether and how we might consider Appellant's arguments concerning the loan payments, these arrears are but one of four breaches of the Lease. Appellant has never contested his liability, under the terms of the Lease, for carrying fire and casualty insurance as well as commercial liability insurance. Similarly, he has never contested his liability for posting a performance bond. And he offers no explanation for his failure to provide proof of insurance or post the bond. Thus, at the end of the day, Appellant still has never complied with the insurance or bond provisions of the Lease by providing copies of his policies and posting the bond.⁹

⁹ Appellant claims that he provided evidence of commercial liability insurance, but the record contains no such evidence. He also claims that he carried all of the required insurance until he received the Cancellation Decision. Even assuming he did have insurance coverage, which he does not provide a copy of, the cancellation of the policies during the appeal process would be grounds for dismissing his appeal. *See* 25 C.F.R. § 162.621 (2011) ("While a cancellation decision is ineffective, the tenant must continue to . . . comply with the . . . terms of the lease."); *see also Cooper*, 41 IBIA at 61-62 (appellant could not appeal cancellation decision *and* discontinue rent payments during appeal).

Conclusion

Appellant has failed to carry his burden of showing that the Regional Director's Cancellation Decision was erroneous, was not supported by substantial evidence, or was an abuse of discretion. 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 March 29, 2011, Cancellation Decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge