



INTERIOR BOARD OF INDIAN APPEALS

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

57 IBIA 214 (07/15/2013)

Denying Reconsideration of:
57 IBIA 91



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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DINEH BENALLY,)	Order Denying Reconsideration and
Appellant,)	Denying Stay of Decision
)	
v.)	
)	Docket No. IBIA 11-112-1
ACTING NAVAJO REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	July 15, 2013

On May 30, 2013, the Board of Indian Appeals (Board) affirmed a decision by the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to cancel a business lease, Lease No. SR-05-189 (Lease), between Appellant Dineh Benally and his partner as lessees (Lessees) and the Navajo Nation (Nation) as lessor for land owned by the Nation. 57 IBIA 91. We affirmed the decision because, while Appellant made arguments to *excuse* his noncompliance with the terms of his lease, he did not show any *error* by the Regional Director in his decision to cancel the lease. Appellant now seeks reconsideration of our affirmance and seeks a stay of our decision, pending his appeal of our decision to a Federal court. We are not persuaded by Appellant's Petition for Reconsideration (Petition) and we deny reconsideration. Without reaching the issue of whether the Board may grant a stay that extends beyond reconsideration, we deny his request for a stay because it is unsupported.

Reconsideration of a Board decision will be granted only in extraordinary circumstances. 43 C.F.R. § 4.315(a); *Gardner v. Acting Western Regional Director*, 46 IBIA 105 (2007); *Jacobs v. Great Plains Regional Director*, 43 IBIA 272, 272 (2006). Ordinarily, we need not consider arguments raised for the first time in a petition for reconsideration. *Gardner*, 46 IBIA at 105. Appellant has not shown the requisite extraordinary circumstances warranting reconsideration, and we therefore deny his petition for reconsideration.

Appellant maintains that extraordinary circumstances support his Petition, arguing that the Lease was cancelled without written or verbal notice to him, without a hearing, and without sufficient opportunity to develop and make beneficial use of the leasehold. He

further argues that the rental and delinquent fees are inequitable, and that the Nation will be unjustly enriched by certain improvements that have been made by Appellant to the leasehold, the deprivation of which occurred without due process and violated the equal protection of the law. Finally, Appellant speculates that an unfair and fraudulent business practice may have occurred because the Lease did not specify (or he was not informed) that Appellant's repayment of a \$400,000 business loan by the Nation¹ was one of the obligations of the Lease. None of Appellant's arguments supports a finding of extraordinary circumstances.

In our affirmance, we addressed Appellant's argument concerning the repayment of the business loan. 57 IBIA at 97. Appellant now presents no new legal or factual argument that was not previously considered, much less extraordinary circumstances warranting reconsideration, and therefore we decline to reconsider our decision on this issue.

We also considered Appellant's allegation that his lease was canceled without notice to him, and we concluded that Appellant received the notice to which he was entitled under the regulations. See 57 IBIA at 94-96. In short, Appellant received a Notice of Violation that specifically informed him that in the absence of curing four specific violations or otherwise complying with 25 C.F.R. § 162.618, BIA "will be forced to cancel[] your lease for cause." Notice of Violation at 2 (Administrative Record (AR) Tab 6). And § 162.618, a copy of which was enclosed with the Notice of Violation sent to Appellant, specifically provides that, within 10 business days of receipt of the Notice of Violations, Appellant may "[d]ispute [BIA's] determination that a violation has occurred and/or explain *why* [BIA] *should not cancel the lease*." 25 C.F.R. § 162.618(b)(2) (emphasis added). Thereafter, if Appellant fails to cure the violations or otherwise convince BIA that no further (or different) action should be taken, BIA may cancel the lease after consulting with the landowner. *Id.* § 162.619. Thus, the Notice of Violations is, in fact, a notice of proposed cancellation and afforded Appellant the constitutional notice and opportunity to respond to which he was entitled.²

¹ According to the Lease, the loan amount was \$350,000, and repayment was scheduled to be interest-free and spread over a period of 20 years, beginning in year 4 of the Lease. Lease, Part I, at 3 (AR Tab 2). It appears that the loan payments were in lieu of rent for the first 23 years of the Lease, at the end of which time the rent would be re-negotiated. *Id.*

² Appellant argues that he was entitled to a "hearing," perhaps believing that the "hearing" would be an adversarial proceeding in a court-like setting. Appellant errs. The "hearing" to which he is entitled is the opportunity to present a written response to the Notice of Violations and to have that written response "heard" (i.e., considered) by BIA. Appellant presents no law in support of his argument for a trial-type hearing, and we know of none.

For the first time in his petition for reconsideration, Appellant raises a claim of unjust enrichment and deprivation of property. Although we need not consider these two related arguments because they are untimely presented, we briefly address his constitutional concerns. Appellant claims that he “made about [a] \$300,000 improvement investment” in the property that consists of infrastructure such as a restroom, visiting room, parking area, storage building, waterlines, and electrical lines.³ Petition at 3, 4 (unnumbered). The Lease itself specifies that “all buildings and improvements, excluding removable personal property and trade fixtures, . . . shall remain on said property after termination of this Lease and shall thereupon become the property of the Lessor.” Lease, Part I, at 4 (AR Tab 2). And if the lessee fails to remove personal property and trade fixtures prior to termination of the lease, they too shall become the property of the lessor. *Id.* Thus, when Appellant received the Notice of Violation, he thereby received notice that he was risking the loss of the improvements he claims to have made to the property.

Finally, Appellant argues for the first time and in conclusory terms that the rental and delinquent fees are inequitable and that he was not provided sufficient opportunity to develop the business. Appellant does not elaborate on these claims by offering any factual or legal support, and, without more, they fail to show extraordinary circumstances warranting reconsideration. Therefore, we decline to consider these arguments further.⁴

³ Appellant provides no evidence in support of his assertions concerning improvements to the property or how they were financed.

⁴ In Appellant’s Motion for Stay of our affirmance, which accompanied the Petition, Appellant argues that the Board’s affirmance “conflicts” with an earlier decision by the Board in *McKensley v. Navajo Area Director*, 4 IBIA 162 (1975). Although he did not raise this argument in his Petition, we briefly address it. The facts in *McKensley*, which involved a farm lease governed by 25 C.F.R. Part 131 (1975), are distinguishable from the facts in Appellant’s case and, thus, the two decisions are not in conflict. In *McKensley*, we reversed BIA’s cancellation of the farm lease because it was apparent that a decision had been made to cancel the lease barely 3 months into the lease term and because the appellants had been notified by the Nation that more than half of the land comprising their leasehold was, in fact, going to be leased to someone else. Given this conflict in the status of the leased land, we concluded that BIA’s basis for canceling the lease—that appellants had “fail[ed] to develop and make beneficial economic use of the farm”—was unjustified. 4 IBIA at 166. In the present appeal, Appellant’s business lease was *not* canceled for failure to develop the leasehold but for failure to make the loan payments due under the lease and for failure to carry insurance and post a bond. Therefore, our decision in *McKensley* is not in conflict with our affirmance.

We turn now to Appellant’s Motion for Stay of our affirmance pending judicial review of our decision, which Appellant apparently has not yet pursued. Appellant argues, *inter alia*, that he will be irreparably harmed if we do not stay the effect of our decision. He does not provide any evidentiary support for his assertions. Assuming without deciding that the Board has jurisdiction—beyond its decision on a petition for reconsideration—to stay its decision pending judicial review, *see* 5 U.S.C. § 705; 43 C.F.R. § 4.315(c),⁵ we see no reason to do so here. We are aware of no case in which we have stayed the effectiveness of a Board decision pending judicial review, and we see no reason to do so here. We have only Appellant’s unsupported assertions that he has invested time and money to develop the leasehold. He does not aver that he has ever tendered payment at any time for the use of the Nation’s land, either in the form of rent or in the form of payment on the business development loan and, moreover, he admits that he canceled all insurance, which he is required to carry under the terms of the Lease. Thus, considering the record as a whole, we conclude that the circumstances of this case are not so compelling that we would grant Appellant’s motion for a stay of our decision.

In summary, none of the arguments raised in Appellant’s Petition or Request to Stay our affirmance convinces us that reconsideration of the Board’s affirmance is warranted or that a stay of our affirmance should be granted.

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 denies Appellant’s Petition for Reconsideration and Denies the Motion for Stay of Decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁵ Section 705 provides, “When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” Section 4.315(c) provides, “The filing of a petition [for reconsideration] will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.”