



## INTERIOR BOARD OF INDIAN APPEALS

Susan Hawkey v. Acting Northwest Regional Director, Bureau of Indian Affairs

57 IBIA 262 (08/13/2013)



# 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

SUSAN HAWKEY,	)	Order Reversing Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 11-150
ACTING NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	August 13, 2013

In a decision dated June 27, 2011 (Decision), the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirmed the decision of BIA’s Puget Sound Agency Superintendent (Superintendent) to adjust the rent on Lease No. 8585 from \$4,800 per year to \$5,000 per year, effective April 1, 2011. Appellant Susan Hawkey is one of the lessees on Lease No. 8585 and she seeks review of the Regional Director’s decision from the Board of Indian Appeals (Board). We reverse and hold that BIA was premature in adjusting Appellant’s rent in 2011.

## History

On or about March 21, 2001, Appellant and two other individuals entered into a 25-year lease, Lease No. 8585, to commence April 1, 2001, for unimproved trust land, identified as Lot 5, Block 1, of the Hermosa Point Summer Homesites, on the Tulalip Reservation in Washington State (Snohomish County). Lease No. 8585 at 1 (Administrative Record (AR) Tab 2). The terms of the lease provide that the annual rental amount, initially set at \$3,600, “shall be subject to review and adjustment . . . at not less than five-year intervals in accordance with the regulations in 25 CFR 162.” *Id.* ¶ 7. The lease also provides that the yearly rental shall be due on April 1, 2001, “and upon each successive an[n]iversary date of the lease thereof for the term of the lease.” *Id.* at 1.

On April 22, 2008, the Superintendent issued a notice informing Appellant of her first rental increase under the terms of the lease. The notice informed Appellant that her annual rent would be adjusted to \$4,800 retroactive to the 5-year anniversary of her lease on April 1, 2006. Appellant appealed the decision to the Regional Director, who affirmed. On appeal to the Board, we affirmed in part and reversed in part. *Hawkey v. Acting Northwest Regional Director*, 52 IBIA 86 (2010) (*Hawkey I*). We affirmed the amount of

the rental increase but, with respect to the 2006 effective date of the increase, we reversed. We held that “any rent adjustments for Appellant’s leasehold commence on the date she receives notice of a rent adjustment from BIA.” *Id.* at 90.

On March 28, 2011, the Superintendent notified Appellant that her annual rent would increase to \$5,000 effective April 1, 2011. Appellant appealed the increase as well as its effective date to the Regional Director.<sup>1</sup> She argued that her last rent adjustment was in 2008 and therefore no rent adjustment was due again until 2013. The Regional Director disagreed and affirmed the Superintendent’s decision on June 27, 2011. The Regional Director explained the rent increase by asserting that Appellant

entered into a 25-year lease that is subject to adjustment “at not less than five-year intervals in accordance with the regulations in 25 CFR 162.” In a 25-year lease, that provision has long been interpreted to mean that your rent will be adjusted four times; in your case, in 2006, 2011, 2016 and 2021.

Decision at 4.<sup>2</sup> The Regional Director gave no citation to support his assertion that the quoted provision “has long been interpreted to mean that [the] rent will be adjusted four times” and in specific years. *Id.*

This appeal followed.

### Discussion

Appellant maintains that her rent was adjusted in April 2008 and therefore cannot be adjusted again until 2013. We agree. The plain language of both the lease and the applicable regulation makes clear that the *rent adjustment* cannot take place at “less than five-year intervals.” Lease ¶ 7; 25 C.F.R. § 162.607 (2001).<sup>3</sup> Therefore, BIA cannot

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<sup>1</sup> The Superintendent’s decision also confirmed that Appellant had funds on deposit that would be applied towards her annual rent. Appellant appealed the amount that was credited and she states that that portion of her appeal was resolved to her satisfaction by the Regional Director.

<sup>2</sup> The Regional Director did not identify the source of the quoted provision, but this language appears in ¶ 7 of Appellant’s lease.

<sup>3</sup> Appellant’s lease became effective on April 1, 2001, so we cite to the regulation in effect at that time. In January 2013, new leasing regulations became effective. *See* 77 Fed. Reg. 72440 (Dec. 5, 2012). For ground leases used for residential purposes, the applicable  
(continued...)

undertake another rental adjustment until 5 years after the last adjustment, which was in 2008. For this reason, we reverse the Regional Director's decision.<sup>4</sup>

An appellant bears the burden of showing error in the Regional Director's decision. *Hawkey I*, 52 IBIA at 90. When an appeal comes before the Board, we review BIA's discretionary decisions to determine whether they comport with the law, whether the relevant facts are supported by the record, and whether a reasonable explanation is provided for the decision. *Id.* at 89-90.

Both the lease and the regulation are consistent with respect to adjustments in Appellant's rent: They both provide that the rent review *and* any rent adjustment *shall* take place "at not less than five-year intervals." Lease ¶ 7; 25 C.F.R. § 162.607. The plain meaning of this provision is that a minimum of 5 years must elapse between each rent review and adjustment. Thus, BIA has no discretion to review and adjust the rent in the first 5 years of a lease or the first 5 years following a rent adjustment; its discretion kicks in *after* 5 years has elapsed from the effective date of the lease or last rent adjustment.<sup>5</sup> Second, the manifestation of the exercise of that discretion is notice to the lessee. As we explained in *Hawkey I*, in the absence of notice to the lessee, "there is insufficient notice . . . either of *when* a rent adjustment will occur or *how* any adjustment may be calculated." 52 IBIA at 90 (quoting *Mize v. Northwest Regional Director*, 50 IBIA 61, 67 (2009)). With notice to the lessee of the rent adjustment, the lessee then knows that her rent is fixed for the next 5 years. The Regional Director appears to suggest that a discrepancy arises when, as occurred here for the first rent adjustment, an appraisal is done at the time of the fifth anniversary but the notice of rent adjustment is "delayed" for 2 years. Answer Brief (Br.) at 6. We do not see any discrepancy: The 5-year interval between rent *adjustments* is triggered by the adjustment itself, which is manifested in written notice to the tenant of the decision, not by the date of the appraisal or even a purported "decision" that has not been conveyed to the tenant.

The Regional Director also tries to rewrite the terms of the lease. He states that "[t]he terms of Appellant's lease subject the rental amount to review and adjustment . . . *on*

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(...continued)

regulation now requires "a review of the adequacy of rent . . . at least every fifth year, in the manner specified in the lease." *Id.* at 72478 (new § 162.328(c)).

<sup>4</sup> Given our disposition of this appeal, we need not reach Appellant's challenge to the amount of the rent adjustment.

<sup>5</sup> Of course, nothing precludes BIA from *commencing* a rental "review" at or prior to the 5-year anniversary. But the "review and adjustment" process is complete only when BIA issues a decision that gives notice to the tenant.

every five-year anniversary of [the] lease unless BIA exercises [its] discretion to lengthen the review interval.” Answer Br. at 4 (emphasis added). The Regional Director argues that this interpretation of the lease provision is reasonable, and that the rent is subject to review and adjustment on a fixed, 5-year schedule that began with the commencement of the lease, i.e., 2006, 2011, 2016, etc. *Id.* at 5. We disagree. Such a reading of the terms of the lease is plain error.

In *Frye v. Acting Southern Plains Regional Director*, 54 IBIA 183 (2011), we construed an identical rent review and adjustment clause in a residential lease. BIA and the lessee in *Frye* had executed a lease pursuant to which no rent would be charged for at least the first 5 years. BIA then attempted to impose rent on Appellant in year 2 of the appellant’s lease, retroactive to the effective date of the lease. We explained that “Appellant ha[s] an approved lease . . . to reside on 1.82 acres . . . without paying rent during the first 5 years of her lease and for so long thereafter *until such time as BIA determines . . . to adjust her rent and notifies her thereof* . . .” 54 IBIA at 186 (emphasis added.). And it is that affirmative exercise of discretion to adjust the rent, which occurs upon notification to the lessee, that triggers the start of the 5 year “interval” before the next rent adjustment can take place. Lengthening the interval between adjustments does not require an exercise of discretion by BIA because BIA is not *required* to act every 5 years, it is only *permitted* to do so.

In arriving at our decision, we are mindful that BIA well knows how to draft a lease to say clearly that rent reviews and adjustments shall be done *on* each 5-year anniversary. For example, pursuant to Appellant’s lease, the annual rent payments commenced on April 1, 2001, and thereafter are due “upon each successive an[n]iversary date of the lease . . . for the term of the lease.” Lease at 1. In *Thompson v. Acting Aberdeen Area Director*, 23 IBIA 261, 262 (1993), the lease provided that “[i]t is understood and agreed that the leased acres shall be re-evaluated at the end of each five year period, beginning October 1, 1974.” And in *Peall v. Acting Portland Area Director*, 16 IBIA 163, 164 (1988), the lease states that “the first rental adjustment will be made on the seventh (7th) year of the lease . . . . Thereafter, the rental reviews will be made at five year intervals.” Had BIA intended to draft Appellant’s lease to include rental adjustments at fixed, 5-year intervals, it could have drafted the lease to so state. It did not.

One final argument deserves mention. The Regional Director argues that “[b]ecause [¶] 7 of the lease has no language [that] gives . . . Appellant a right to a five-year interval between . . . [rent] adjustment[s], the lease supports the BIA’s tenth anniversary rental adjustment in this case. Any other interpretation of [¶] 7 amounts to a de facto lease amendment.” Answer Br. at 6. Again, the Regional Director errs. Appellant’s lease *does* give her that right. In very plain language, the lease states that the rent may be adjusted in *no less than* 5 year intervals. “No less than 5 years” means that Appellant can receive a rent

adjustment on the fifth year anniversary or any time thereafter at BIA's discretion but no sooner than 5 years after the lease is signed or after a rent adjustment has been made. Therefore, Appellant does have "a right to a five-year interval between . . . [rent] adjustment[s]." And, as we have stated, the rent is adjusted when notice of the adjustment is delivered to the tenant. *Hawkey I*, 52 IBIA at 90; *Mize*, 50 IBIA at 67 ("rental increases may not be implemented or collected prior to notice to the lessee.").

We conclude that BIA erred in increasing Appellant's rent a second time, just 3 years after notifying her of her first rent increase. 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 reverses the Regional Director's June 27, 2011, decision increasing Appellant's annual rent to \$5,000.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge