



INTERIOR BOARD OF INDIAN APPEALS

David L. Brown v. Acting Northwest Regional Director, Bureau of Indian Affairs

58 IBIA 49 (09/30/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

DAVID L. BROWN,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-013
ACTING NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	September 30, 2013

David L. Brown (Appellant) appealed to the Board of Indian Appeals (Board) from an August 19, 2011, decision (Decision) by the Acting Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director upheld a decision by BIA’s Spokane Agency Acting Superintendent (Superintendent),¹ cancelling a homesite lease between Appellant, as lessee, and the Spokane Tribe of Indians (Tribe), as lessor, for nonpayment of rent.²

We affirm the Decision. Appellant has not paid monthly rent since May 2010 and he was not entitled to “offset” his rent payments against the Tribe’s alleged failure to compensate him for work that he performed for the Tribe. Nor has Appellant identified any error(s) by BIA that constitutes grounds to vacate the Decision.

¹ The Superintendent’s decision is undated, but Appellant signed a certified mail receipt for it on March 8, 2011. Administrative Record (AR) Tab 3.

² The lease, no. 0252, recorded as 102-4603 and Realty Contract No. 2002520429, is for a 1.25-acre portion of allotment no. 102-T1003 on the Spokane Indian Reservation, for a term of 25 years. Lease at 1 & Attach. (legal description) (AR Tab 20); BIA Contract Status Report (AR Tab 19). At times, the parties have incorrectly identified the lease as no. 102 2002320429. *See, e.g.*, Decision at 1; Notice of Appeal to Regional Director, Apr. 6, 2011 (AR Tab 2).

Background

The homesite lease was executed by Appellant and the Tribe, and approved by BIA, in August 2004. Lease, Ex. A at 2. The lease is for \$25 per month, with rent payable to BIA for the Tribe.³ Lease at 1. From the start of the lease through April 2006, Appellant remitted no rent. As a result, on March 1, 2006, the Superintendent issued to Appellant the first of several notices of violation (NOVs) advising him that the lease was subject to cancellation for nonpayment. *See* First NOV (AR Tab 18). During March and April 2006, Appellant paid a total of \$400, which covered his rent through November 2005 only. *See* Lease Payments (AR Tab 19). After four more NOVs⁴ and no additional remittance, the Superintendent sent a letter to Appellant on December 17, 2009, stating that the lease was cancelled for nonpayment and that he could appeal the decision back to the Superintendent.⁵ Superintendent's First Decision to Cancel (AR Tab 12). However, the Superintendent's decision—the first of three decisions by the Superintendent to cancel the lease for nonpayment—was sent to Appellant's mother's address and was returned to BIA as unclaimed. *See id.*⁶

BIA found Appellant still residing on the homesite in May 2010 and sent him a notice to vacate the premises. Letter from Superintendent to Appellant, May 4, 2010 (AR Tab 11). Appellant and representatives of the Tribe and BIA met on May 25, 2010, and according to notes of the meeting, the Tribe offered to give up its claim to unpaid rent in acknowledgment of work that Appellant had performed for the Tribe. Meeting Notes (AR Tab 10). Although the record is not completely clear on this point, it appears that the parties may have orally agreed that Appellant's lease would not be cancelled and that he would keep the lease for the remainder of the 25-year term, but at a monthly rent of \$75

³ The lease also provides that the rent “shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR [Part] 162.” Lease at 2 ¶ 7 (“Rental Adjustment”).

⁴ Second NOV, Oct. 18, 2006 (AR Tab 17); Third NOV, Feb. 9, 2009 (AR Tab 16); Fourth NOV, Mar. 18, 2009 (AR Tab 14); Fifth NOV, Oct. 21, 2009 (AR Tab 13).

⁵ Pursuant to 25 C.F.R. § 2.4(a), the Superintendent should have instructed Appellant to appeal to the Regional Director.

⁶ Appellant was at times able to collect mail sent to his mother's address, as all of the NOVs were mailed to his mother's address and he signed certified mail receipts for the first, third, and fifth NOVs. *See* AR Tabs 13-14, 16-18.

beginning in June 2010.⁷ What is clear is that since May 2010, Appellant has remitted *no* rent.

On December 16, 2010, the Tribe mailed Appellant an NOV stating, “due to non-payment . . . we are cancelling your lease,” and giving him 10 days to show cause why the lease should not be cancelled. Tribe’s NOV to Appellant (AR Tab 7). On January 6, 2011, apparently in the absence of any response from Appellant to the Tribe, the Superintendent sent Appellant a letter stating that the lease was cancelled and that he could appeal the decision back to the Superintendent.⁸ Superintendent’s Second Decision to Cancel (AR Tab 6). Both the Tribe’s NOV and the Superintendent’s second cancellation decision were mailed to Appellant’s mother’s address. Appellant received the cancellation decision on January 7 and he received the Tribe’s NOV more than 10 days after its issuance but sometime prior to his timely appeal of the decision. *See* AR Tab 6 (certified mail receipt of decision); Notice of Appeal to Superintendent, Feb. 2, 2011 & Attach. 3, 4 (AR Tab 5). As grounds for that appeal, Appellant argued that the Tribe’s NOV and the second cancellation decision were sent to his mother’s address and that the cancellation decision did not contain a copy of the appeal regulations published in 25 C.F.R. Part 2. *See* Notice of Appeal to Superintendent.

On March 8, 2011, the Superintendent issued her third lease cancellation decision (including correct appeal instructions), which gave rise to Appellant’s appeal to the Regional Director and now to the Board. The Superintendent rejected Appellant’s claim that he did not receive adequate notice that the lease was subject to cancellation, because whatever confusion Appellant may have experienced, Appellant filed a timely appeal of the second cancellation decision. *See* Superintendent’s Third Decision to Cancel at 1 (unnumbered) (AR Tab 3). The Superintendent cancelled Appellant’s lease this time on the grounds that Appellant’s notice of appeal and statement of reasons “did not address whether [his] breach of contract would be corrected[,] . . . did not present evidence that [he] attempted to take corrective measures after receipt of” notice that Appellant was in breach of the lease, and “fail[ed] to furnish satisfactory reasons as to why [his] lease should not be cancelled” for nonpayment of rent. *Id.*

⁷ Previously, in 2006, the Superintendent sent a notice to Appellant that the Tribe decided to increase his rent to \$75 per month commencing July 2006. *See* Second NOV at 2. In response to the Superintendent’s third NOV issued to him in February 2009, Appellant notified BIA that he did not consent to the July 2006 increase. *See* Notes of Telephone Call from Appellant to BIA, Feb. 18, 2009 (AR Tab 15).

⁸ These appeal instructions were also incorrect. *See supra* note 5.

Appellant appealed to the Regional Director. Appellant essentially argued that (1) he did not receive the Tribe's NOV until after the 10-day period to show cause; (2) the Tribe still owed him for work that he had performed, even after subtracting both the amount credited by the Tribe and the amount of his unpaid rent since May 2010; (3) after he received the Tribe's NOV he went to the Tribal Council to pay the past due amount but it refused to accept payment and voted to cancel the lease;⁹ and (4) the rental adjustment to \$75 occurred during the second year and violated the terms of the lease. *See* Notice of Appeal to Regional Director & Attach. ("Additional Facts and Reasons") (AR Tab 2).

On August 19, 2011, the Regional Director issued the Decision from which Appellant appeals. The Regional Director rejected Appellant's arguments regarding the adequacy of notice on the basis that "the irregular process and communications used to cancel this lease did not prevent [Appellant] from having a fair opportunity to correct the alleged lease compliance issue or contest that conclusion." Decision at 4. The Regional Director stated that there was no indication, following Appellant's receipt of the Superintendent's second cancellation decision, that he "attempted to comply with the lease's rental payment obligations or that [he] contest[ed] the conclusion that [he had] not made any rental payments" after May 2010. *Id.*

The Regional Director also dismissed Appellant's contention that the Tribe refused to accept payment of his past due amount, because there was no evidence that Appellant attempted to pay rent to BIA and his communications "to the BIA do not include any suggestion that [Appellant was] willing to bring [the] past due rental amounts current." *Id.* at 5. The Regional Director noted that, "[i]nstead, [Appellant] continue[s] to assert that [his] obligations under the lease should be offset by what [he] assert[s] are funds due [him] from the Tribe." *Id.* The Regional Director found nothing in the lease allowing for the substitution of rental payments with work done for the Tribe and concluded, therefore, that "it is beyond the scope of the Regional Director's authority to consider these claims when administering this lease of tribal trust land." *Id.*

Lastly, the Regional Director rejected as "moot" Appellant's claim that his rent was prematurely increased by the Tribe during the second year of the lease, beginning July 2006 (i.e., contrary to ¶ 7 of the lease, which authorized rental adjustments by the Secretary at

⁹ It appears that Appellant offered payment only in the form of a rent offset. According to Appellant, the Tribal Chairman stated in response to his effort to pay the past due amount: "I did you a favor by taking some of your bill off on [the] Home Site Lease; if you want the rest of your bill you can take us to court." Notice of Appeal to Regional Director at 1.

not less than 5 year intervals), because “the Tribe offered [him] a means to ‘wipe away [his] past due amount’ thus, cancelling the rental adjustment imposed in 2006.” *Id.*¹⁰

This appeal followed. Appellant filed a timely notice of appeal and the Regional Director filed an answer brief.

Discussion

On appeal, Appellant asserts that because “the [Tribe] had refused to pay me for the work they requested I do, I refused to make payments for my home site.” Notice of Appeal to Board at 1. He argues that, following his meeting with the Tribe and BIA in May 2010, he never received an accounting of how much rent was owed at that time or a written settlement agreement to sign, and that the Tribe still owes him money for work that he performed. *Id.* at 2. Appellant also asserts that, “as a 1st line descendent of the [Tribe], I believe that [BIA] should have trust responsibilities to see that [I am] treated with respect and [due] process.” *Id.* Finally, he contends that “the Spokane Tribal Business Council *and Bureau* refused to take . . . payment without cancelling [the] lease.” *Id.* (emphasis added).

Appellant has not met his burden to show error in the Decision. As a matter of the lease terms and the law, Appellant was obligated to pay rent independent of whether the Tribe compensated him for work that he performed for the Tribe. Thus, Appellant’s failure to pay rent was grounds to cancel the lease. And BIA’s role was not to ensure that the Tribe dealt fairly with Appellant in its separate commercial transaction but rather was to assist the Indian landowner, i.e., the Tribe, in the enforcement of the lessee’s payment obligation under the lease. Appellant was afforded adequate opportunity to cure his default or show cause for his nonpayment, and he failed to do so. We decline to consider

¹⁰ The Regional Director also stated that the rent increase under the purported lease amendment, commencing June 2010, “arose not from a BIA decision to adjust the rental amount, but from a mutual agreement between [Appellant] and the Tribe to resolve issues related to unpaid rent and [Appellant’s] claim that the Tribe owed [him] money.” Decision at 5. He found “no indication in the administrative record that [Appellant] objected to the modifications to [the] lease, and [that] indeed [Appellant] requested information on where to send the future lease payments suggesting that [he] accepted this resolution of the lease dispute.” *Id.* at 2. The Regional Director further stated that the “Superintendent confirmed the terms of this new agreement with the Tribe by letter dated May 25, 2010.” *Id.*; see Letter from Superintendent to Appellant, May 25, 2010 (AR Tab 9). Appellant does not appear to dispute that an oral agreement was made to increase his monthly rent to \$75 commencing June 2010. However, there is no document in the record that purports to be an amended or modified lease that is signed by Appellant, the Tribe, and BIA.

Appellant's contention, raised for the first time on appeal, that BIA refused to take payment. Therefore, we affirm the Regional Director's decision.

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 of the 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.* The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director.

II. Analysis

A. Appellant's Offset

Appellant contends that he refused to pay any of his monthly rent since May 2010 due to his belief that a monetary claim against the Tribe may be used to offset his lease obligation to pay rent. But unless the lease provides or the parties agree otherwise, the tenant's obligation to pay rent is ordinarily independent of any claim he may have against the landlord. *See High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 39-44 (2013). Although the parties apparently agreed to offset Appellant's rent owed as of May 25, 2010, no such agreement was made for unpaid rent that accrued after that date. Consequently, Appellant's claim against the Tribe for breach of an employment agreement is not a substitute for Appellant's lease obligation to pay rent commencing June 1, 2010. *See id.*

BIA also had no obligation to address the Tribe's alleged failure to compensate Appellant. *See id.* at 44-46; *Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 230-32 (2008) (holding that the Department owed no duty to the lessee, whether under the lease or based on a fiduciary relationship, to adjudicate his contract claim against the tribe); *Burrell v. Acting Albuquerque Area Director*, 35 IBIA 56, 58 (2000) ("BIA does not have a trust duty toward a lessee of Indian land, even where the lessee is Indian"); *Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 13 IBIA 276, 289 (1985) ("Although BIA may attempt to advise individual Indians and tribes concerning proper conduct as lessors, it has no statutory or regulatory authority to take

action against an Indian lessor.”). Rather, BIA’s role was to assist the Indian landowner in the enforcement of the lessee’s payment obligation. *See* 25 C.F.R. § 162.108 (“We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions”). Thus, the alleged failure by the Tribe to compensate Appellant did not excuse Appellant from paying rent and BIA had grounds to cancel the lease.¹¹

B. Due Process

Appellant’s suggestion that he was denied due process, *see* Notice of Appeal at 2, is insufficient to satisfy his burden of showing error in the Decision. *See, e.g.*, 43 C.F.R. § 4.322(a) (“Each appeal must contain a written statement of the errors of fact and law upon which the appeal is based.”); *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012) (“Simple disagreement with or bare assertions concerning BIA’s decision are insufficient to carry this burden of proof.”). Even assuming that Appellant intended to raise to the Board the same arguments that he presented to the Regional Director, we reject the claim that he was not given adequate opportunity to cure the default or show cause why the lease should not be cancelled.

The timing of Appellant’s receipt of the Tribe’s NOV did not deny him due process. As a matter of law, Appellant’s delay in receiving the Tribe’s NOV simply extended Appellant’s time to reply to that notice. *See* 25 C.F.R. § 162.618(b) (“Within ten business days of the *receipt* of a notice of violation, the tenant must” cure the violation, explain why the lease should not be cancelled, or request additional time to cure the violation. Emphasis added.). As discussed *supra* at 51, Appellant received the Tribe’s NOV sometime prior to the Superintendent’s second cancellation decision, and that decision gave Appellant 30 days from its receipt to “appeal” back to the Superintendent. And so in practical effect, Appellant was afforded at least 30 days in which to explain to the Superintendent why the lease should not be cancelled. But in his appeal of the Superintendent’s second cancellation decision, Appellant alleged only that mailings were sent to the wrong address and that he did not receive a copy of the appeal regulations published in 25 C.F.R. Part 2. He failed to address the underlying substantive issue: his nonpayment of rent. At any rate, under

¹¹ Regardless of any dispute regarding the validity of an increase in the rent to \$75, either by the Tribe or as part of the 2010 *oral* agreement, *see* 25 C.F.R. §§ 162.101 (defining “Lease” to mean “a written agreement between Indian landowners and a tenant or lessee”), 162.604 (leases “shall be in the form approved by the Secretary and subject to his written approval”), it is undisputed that Appellant failed even to remit \$25 per month pursuant to his original rent obligation.

25 C.F.R. § 162.619(c)(3), BIA was only required to notify Appellant of his right to appeal under 25 C.F.R. Part 2. The regulations contain no requirement that a copy of the Part 2 regulations be enclosed with each BIA decision, however advisable that may be. And the Superintendent's third cancellation decision included correct instructions for a Part 2 appeal to the Regional Director. We agree with the Regional Director that, notwithstanding several procedural irregularities on the part of BIA, Appellant—despite being given adequate opportunity—failed to cure the default or state a valid reason why the lease should not be cancelled for nonpayment. This is the essence of the due process to which Appellant was entitled. Thus, we conclude that there was no due process violation by BIA.

C. Refusal to Accept Payment

Appellant's contention that the Tribe refused to permit him to cure the violation by accepting payment is not supported by the record. And his additional contention that BIA refused to take payment is raised for the first time on appeal. Ordinarily the Board will not consider arguments raised for the first time on appeal to the Board, *Kamb v. Acting Northwest Regional Director*, 52 IBIA 74, 84 (2010), and we find no cause to make an exception here. In any event, Appellant did not support this argument with any evidence and the allegation also lacks support in the record. Therefore, we reject his argument.

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 August 19, 2011, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge