



INTERIOR BOARD OF INDIAN APPEALS

Los Alamos Self Storage v. Acting Southwest Regional Director, Bureau of Indian Affairs

60 IBIA 1 (02/04/2015)



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

LOS ALAMOS SELF STORAGE,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-045
ACTING SOUTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	February 4, 2015

Los Alamos Self Storage (Appellant) appealed to the Board of Indian Appeals (Board) from an October 20, 2011, decision (Decision) of the Acting Southwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed a decision by BIA’s Northern Pueblos Agency Superintendent (Superintendent) to cancel a commercial lease between Appellant, as lessee, and the Pueblo of San Ildefonso (Pueblo).¹ The Regional Director and the Superintendent concluded that Appellant was in violation of the lease because it had failed over a period of years to make annual rental adjustments and pay the correct amounts, and, on notice of the violation, had failed to cure the violation or provide adequate grounds to avoid cancellation.

Appellant questioned the applicability of the rent increase provision in the lease on which the violation was based, but eventually conceded that it owed additional rent, though it continued—and continues on appeal—to dispute the amount of additional rent owed. Appellant also suggested that it be allowed to pay the arrears over an unspecified period of time, but the Pueblo consistently pressed BIA to cancel the lease. We conclude that BIA did not abuse its discretion in cancelling the lease based on Appellant’s uncured violation. Appellant takes issue with various findings and assertions made in the Decision, but we are not convinced that it has met its burden of proof to demonstrate an abuse of discretion by BIA. Thus, we affirm the Decision.

¹ The Lease is identified as Lease No. 5700239207 (Lease). Lease, Dec. 3, 1992, at 1 (unnumbered) (Administrative Record (AR) Tab 18). The Lease authorized Appellant’s use of the property to construct, operate, and maintain a storage unit rental business. *Id.* The Lease identifies Appellant as a partnership of Rollin Jones (Jones), Bob Dingler, and Dave Jones. Jones signed the Lease on behalf of Appellant. *Id.* at 3 (unnumbered).

Background

I. Appellant's Rental Obligations

Because Appellant's arguments are based in part on what it contends was confusion over different versions of the lease, we begin by describing several provisions in what apparently was the initial version of the Lease, which was prepared and circulated in April 1992. The draft provided that monthly rent would be \$200/month (with the exception of the first and last months of the lease). Unsigned Lease dated April 1992 (Draft Lease) at 1 (unnumbered) (Appellant's Brief-in-Chief (Opening Br.), Mar. 17, 2012, Ex. 1). Paragraph 16A, which was one of several lease-specific paragraphs added by the parties to BIA's form lease, provided that Appellant would construct one storage building. *Id.* ¶ 16A. The draft also included boilerplate language contained in BIA's lease form for rental adjustment *Id.* ¶ 7.

As finalized by the parties on November 25, 1992, and approved by BIA on December 3, 1992, the Lease included the \$200 monthly rental rate based on the construction of one storage building. Lease at 1, 3 (unnumbered) (AR Tab 18).² In language added to ¶ 16A, the Lease also authorized Appellant to construct a second storage building. *Id.* ¶ 16A. If a second building was constructed, the Lease provided that "the rental will increase to \$300.00 per month." *Id.* The Lease also contained a new provision, ¶ 38, titled "Rental Adjustment," in lieu of the boilerplate rental adjustment language. *Id.* ¶ 38. Paragraph 38 provided:

The rental shall be increase (sic) by five (5) percent annually. Lessee agrees to calculate the rental adjustment and submit the adjusted sum to the Lessor on or before the beginning of each year without any notification from the Lessor.

Id. The Lease provided that if any installment of rent was not paid within 30 days after becoming due, interest at a rate of 6% per annum would apply.³ *Id.* ¶ 5. The Lease had an initial term of 15 years, and gave Appellant the option to renew for an additional 15 years

² At the top of the signature page, the date of "April" 1992 was apparently entered while the Lease was still unsigned in draft form, and the parties apparently failed to correct the date when they signed the Lease. *Compare* Lease at 3 (unnumbered), *with* Draft Lease at 10 (unnumbered).

³ The Draft Lease provided for 12% interest. Draft Lease ¶ 5.

on the same terms and conditions.⁴ *Id.* ¶ 35. The Lease included boilerplate language that the parties understood and agreed that violations of the Lease would be acted upon pursuant to BIA's leasing regulations.⁵ *Id.* ¶ 9.

II. The Rental Adjustment Dispute

Appellant constructed two storage buildings, as authorized by the Lease, and upon construction of the second building by 1994, began paying \$300 monthly rent. Opening Br. at 2-3; Letter from Superintendent to Appellant, Oct. 17, 2007, (First Notice) at 1 (unnumbered) (AR Tab 25). Appellant did not, however, pay any increased rent to the Pueblo as required pursuant to ¶ 38. First Notice at 1 (unnumbered).

In 2007, a dispute arose between Appellant and the Pueblo regarding whether Appellant had timely exercised its option to renew the Lease for an additional 15-year term, the deadline for which would have been in 2006. *See* Letter from Jones to Pueblo, July 27, 2005 (July 2005 Letter) (AR Tab 75 (CD AR), Doc. 8);⁶ *see* Facsimile date-stamped

⁴ The Draft Lease was silent on the length of a renewal term, and provided that the terms and conditions of a renewed term would be negotiated by the parties. Draft Lease ¶ 35. Paragraph 35 apparently was added as part of the negotiations in which the Pueblo agreed to allow Appellant to renew the Lease for an additional 15 years on the same terms and conditions.

⁵ The Lease included an out-of-date citation to BIA's leasing regulations at 25 C.F.R. Part 131. Lease ¶ 9. That part had been redesignated as Part 162 in 1982. *Warr v. Portland Area Director*, 30 IBIA 174, 176 (1997). In 2001, Part 162 was revised, amended, and replaced by new leasing regulations that by their terms applied to leases in effect when the new regulations were promulgated, but did not, unless otherwise agreed by the parties, affect the validity or terms of any existing lease. Final Rule, Trust Management Reform, 66 Fed. Reg. 7068, 7079 (preamble), 7111 (new 25 C.F.R. § 162.100(c) (2001)). The leasing regulations were again revised in December 2012, but no party contends that the 2012 revisions are applicable or relevant to this appeal.

⁶ The Regional Director initially submitted a hard copy of the administrative record, tabbed 1 through 74. After Appellant objected that certain documents referenced by the Regional Director were not in the record, and upon the Board's further review, the Board ordered the Regional Director to supplement the record with missing documents. The Regional Director submitted a compact disc containing additional documents that had been submitted by the Pueblo during the proceedings below. The Board provided Appellant with an opportunity to respond to the Regional Director's supplementation of the record. Appellant did not do so, although with its briefs, Appellant has submitted copies of

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“received May 10, 2007” (copy of July 2005 Letter and Lease) (CD AR, Doc. 7). The Pueblo, which contended that the Lease had not been renewed, sent a letter to BIA asking it to take whatever steps were necessary to terminate the Lease and return the premises to the Pueblo. *See* Letter from Pueblo to Superintendent, July 6, 2007 (AR Tab 23).

Later that year, the Pueblo notified BIA that starting in 1994, Appellant failed to make the rental adjustments required by ¶ 38. Letter from Pueblo to Acting Superintendent, Oct. 15, 2007, at 1 (unnumbered) (AR Tab 24). According to the Pueblo, Appellant owed \$19,535.44 in additional rent, plus interest in the amount of \$6,812.74. *Id.*

On October 17, 2007, the Superintendent notified Appellant that it was in violation of the Lease because it failed to “calculate the annual rental adjustment, notify either [BIA] or the [Pueblo] of such adjustments[,] and make the increased rental payments.” First Notice at 1 (unnumbered). The Superintendent stated that Appellant owed \$26,348.18 in rental payments and interest. *Id.* at 2 (unnumbered). Citing BIA’s leasing regulations, 25 C.F.R. § 162.618 (2007), the Superintendent instructed Appellant that it had 10 days to cure the violation, dispute BIA’s determination that a violation occurred, or request additional time to cure the violation. *Id.* at 1 (unnumbered).

Appellant responded through Jones, expressing surprise at the notice of violation. Letter from Jones to Acting Superintendent, Oct. 28, 2007, at 1 (unnumbered) (AR Tab 28). Appellant asserted that it “assumed” that the 5% increase was related to the possibility, discussed at one time by the parties, that Appellant would add two additional buildings, at which time rent would increase 5% per year. *Id.* Appellant also stated that “the contract does not say that the rent increase would be compounded so it should have been just a 5% increase of the base rent,” which “didn’t go larger than \$300 because additional buildings were never built.” *Id.* Appellant stated that it would very much like to continue the lease and would like to work out a payment plan. *Id.* Appellant did not propose details for a payment plan. BIA did not respond to Appellant’s letter.

Over the next two and a half years, the Pueblo contacted BIA asking it to collect Appellant’s overdue payments and terminate the Lease.⁷ The Pueblo returned Appellant’s

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documents that are not in the Regional Director’s record, at least in the form submitted by Appellant. The Board accepts Appellant’s supplementation of the record.

⁷ *See* Letter from Pueblo to Superintendent, May 27, 2008 (AR Tab 29); Letter from Pueblo to Superintendent, July 24, 2008 (AR Tab 32); Letter from Pueblo to Acting Superintendent, Jan. 29, 2009 (AR Tab 33); Letter from Pueblo to Superintendent, (continued...)

rental payment, dated May 27, 2008, and requested that Appellant's monthly payments be put on hold until a decision was made. Letter from Pueblo to Appellant, May 30, 2008 (AR Tab 30). The Pueblo continued to press its argument that the Lease had terminated, asserting that renewal of the Lease had required the Pueblo's consent. *See id.*

Appellant disputed the Pueblo's argument concerning the terms of renewal, sending the Pueblo a partial copy of the Lease that included ¶ 35 to show that Appellant had a unilateral right to renew the Lease.⁸ Letter from Appellant to BIA, Pueblo, June 6, 2008, (June 2008 Letter) at 1, 4 (unnumbered) (AR Tab 31). As relevant to the rental adjustment dispute at issue in the present appeal, Appellant's enclosure included a copy of ¶ 38 of the Lease, with the 5%-annual-increase provision. *Id.* at 4 (unnumbered). Appellant argued that the parties' disagreement concerned whether the 5% increase was compounded or not. *Id.* at 1 (unnumbered).

On May 21, 2010, the Superintendent issued a "Second Notification" to Appellant, taking the position that the Lease had expired, that Appellant was in trespass, and that Appellant owed a delinquent balance of \$26,348.18 to the Pueblo. Letter from Superintendent to Appellant, May 21, 2010, (Second Notice) at 1 (unnumbered) (AR Tab 38). The record contains no evidence that Appellant responded to the Second Notice.

In August 2010, however, the Solicitor's Office sent a memorandum to the Regional Director and the Superintendent, advising BIA that the option to renew the Lease was not dependent upon approval by the Pueblo or BIA, and that the renewal option was not made void or terminable on the grounds that Appellant had not paid rent. Memorandum from Umshler to Regional Director, Aug. 18, 2010, at 1-2 (Regional Director's Answer Br., Ex. C). The memorandum concluded that the Superintendent's 2007 and 2010 notices to Appellant were not legally sufficient, and that if agreement could not be reached with Appellant, and lease cancellation was the only option because Appellant would not pay the appropriate overdue rental payments and interest, "that should be the only basis of lease termination." *Id.* at 3.

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Nov. 6, 2009 (AR Tab 34); Letter from Pueblo to Superintendent, Mar. 1, 2010 (AR Tab 35).

⁸ In the First Notice, the Superintendent had advised Appellant that failure to cure the violation could result in cancellation of the Lease or "refusal to allow exercise of the option to renew the Lease." First Notice at 2.

Subsequently, the Superintendent issued another notice of violation to Appellant, based solely on delinquency of payment for the annual 5% rental rate adjustment and accrued interest. Letter from Superintendent to Appellant, June 10, 2011 (Third Notice) (AR Tab 50). The Third Notice stated that Appellant owed \$19,353.44 in delinquent rent and \$6,812.74 in interest, totaling \$26,166.18, for the period from January 1995 to September 2007.⁹ *Id.* at 1-2 (unnumbered). Invoking 25 C.F.R. § 162.618 (2011), the Superintendent stated that Appellant

now has ten (10) business days after receipt of this notice to cure the violation and notify us in writing that the violation has been cured. [You] also ha[ve] the option to provide notification that you are planning to dispute our determination that a violation has occurred or you may also request additional time to cure the violation.

. . . . [I]f the violation is not cured within the required ten (10) business days, pursuant to 25 CFR Part § 162.619, we will proceed with the appropriate course of action. If you are to request additional time to cure the violation and are granted the additional time, you must proceed diligently to cure the violation within the specified time frame as agreed upon. If we do not hear from you within the specified ten (10) working days, our option is to cancel the lease. . . .

Id. at 2 (unnumbered).

Appellant responded to the Third Notice, disputing the amount of the increase that was due, arguing that the 5% annual rental increase was to be calculated each year in relation to the \$300 initial rent for the two buildings, rather than in relation to the then-existing adjusted rent, i.e., compounded. Letter from Appellant to Superintendent, June 22, 2011, (June 2011 Letter) at 1-2 (unnumbered) (AR Tab 51). Appellant provided a spreadsheet showing its monthly lease payment calculations, based on its interpretation “of the original intent.” *Id.* According to Appellant, the amount of delinquent rent it owed through 2007 was \$16,380, and the total additional rent owed through 2011 was \$38,310. *Id.* Appellant stated that it “would like to start by paying \$555” for its July 2011 rent (the amount due for the month based on Appellant’s interpretation of the 5% rental adjustment provision), and “\$1,000 towards our past due account.” *Id.* at 2 (unnumbered). Appellant also asserted that it was not obligated to pay interest for the previous months because the Pueblo was not accepting Appellant’s rental payments during that time, but that it would

⁹ The First and Second Notices stated that Appellant owed “\$19,535.44” in delinquent rent, which accounts for the discrepancy in the overall totals between the Notices. *Compare* First Notice, and Second Notice, *with* Third Notice.

start paying interest in the future. *Id.* Appellant noted that it hoped “to resolve this in a timely and fair manner.” *Id.*

On July 5, 2011, the Superintendent cancelled the Lease for nonpayment of rent. Letter from Superintendent to Appellant, July 5, 2011 (Superintendent’s decision) (AR Tab 55). The Superintendent concluded that Appellant failed to comply with 25 C.F.R. § 162.618, by notifying BIA that the Lease violation had been cured in full, disputing the violation, or by requesting more time to cure the violation within the 10-day deadline. *Id.* at 1 (unnumbered). Appellant appealed the Lease cancellation to the Regional Director. Notice of Appeal to Regional Director, July 27, 2011 (AR Tab 56).

On appeal to the Regional Director, Appellant argued that the difference between the (unsigned) April 1992 draft of the lease, and the Lease as finalized had created confusion,¹⁰ and that Appellant had understood that any 5% rental increase would only come into play if additional buildings were constructed, e.g., a third building. Statement of Reasons, at 2 (AR Tab 56). Appellant argued that there was an issue with respect to whether any rent increase should be compounded on an annual basis, or calculated each year from the base rent. *Id.* Appellant asserted that even though it “disagree[d] with the 5% yearly increase as being part of the initial agreement,” Appellant “[was] willing to *consider* paying the 5% increase . . . if it [was] calculated solely on the initial base rate and not compounded over 15 years.” *Id.* (emphasis added). Appellant also disputed that it should be required to pay interest, given the fact that the Pueblo never demanded the increased rent until 15 years into the Lease. *Id.* In one place in its Statement of Reasons, Appellant stated that it “ha[d] always been ready, willing and able to pay all past due arrearages *that could be agreed upon*,” *id.* at 3, and in another place Appellant stated that it “[was] ready, willing and able to pay whatever amounts are *determined to be owed*,” *id.* at 5 (emphases added).

Appellant conceded that “[t]here is no question that money is owed,” but asserted that “it is just a matter of how much and what period of time should be given in order to make up any arrearages.” *Id.* at 4. Appellant asserted that it has continued to make payments on the lease, but that the Pueblo had continued to return its checks. *Id.* Appellant also argued that the Pueblo’s failure to assert the rental adjustment sooner constituted a waiver of its rights, and that both parties’ failure to act on the rental adjustment clause for 15 years reflected a mutual mistake as to the amount to be paid. *Id.* at 4-5.

¹⁰ Appellant referred to them as though there were two “leases,” but did not contend that the April 1992 draft lease had any legal effect, only that the changes made from the first version to the final version had created confusion. *See* Statement of Reasons, at 2.

On October 20, 2011, the Regional Director issued the Decision, affirming the Superintendent's decision to cancel the Lease. Decision (AR Tab 72). The Regional Director concluded that Appellant had failed to comply with the rental adjustment provision in the Lease. *Id.* at 3. In construing the rental adjustment clause to provide for a 5% annual increase, compounded, the Regional Director relied on a document titled Computation of Rental Adjustment at 5% Increase Per Annum (Computation Sheet), which had been recorded by BIA as part of the Lease. *See id.* The calculations of rental adjustments on the Computation Sheet were based on compounding the 5% annual increase. *Id.* The Regional Director rejected Appellant's argument that the 5% annual rental adjustment was dependent on the construction of additional buildings. *Id.* The Regional Director noted that the Lease placed the burden of calculating the adjustments on Appellant and not the Pueblo. *Id.*

Addressing Appellant's professed confusion over the terms of the Lease, the Regional Director stated that the July 27, 2005, and June 6, 2008, letters sent by Appellant demonstrated that Appellant had a copy of the Lease containing the 5% rental adjustment provision. *Id.* The Regional Director also noted that the Pueblo would not accept partial payment of Appellant's overdue rental obligation, and concluded that Appellant had not put forth a good faith effort to resolve the dispute. *Id.*

III. Appeal to the Board

On appeal to the Board, Appellant argues: (1) The Decision is based on the erroneous factual assumptions that Appellant did not dispute the violation and did not request more time to cure the violation; (2) the terms of the Lease were ambiguous with respect to when the 5% rental increase term would apply, the Decision relies on the erroneous assumption that the Computation Sheet (reflecting compounding of the 5% increases) was part of the Lease, while in actuality the parties never agreed to calculating such an increase based on compounding; (3) the Pueblo waived its rights under the Lease to receive payment of rental increases and interest by failing to assert those rights for over 15 years, thus warranting a reduction in the amount owed, or at least an opportunity for Appellant to pay an adjudicated and/or agreed amount in full and have the Lease reinstated; (4) the failure of either party to notice the 5% rental increase provision earlier reflects a case of mutual mistake of material fact by the parties, thus warranting reformation of the Lease; and (5) Appellant should not be found in breach of the Lease because there remains a factual issue as to the amount owed. Appellant also objected to the Regional Director's administrative record as incomplete, and as not properly certified or "authenticated." Opening Br. at 6.

The Regional Director and the Pueblo filed answer briefs in opposition to Appellant. Appellant filed a reply brief.

After reviewing the parties' briefs, the Board ordered the Regional Director to complete the administrative record. *See supra* note 6. Subsequently, the Regional Director filed a supplement to the record, and certified the record, as supplemented, as complete. Following the Regional Director's submission, the Board provided Appellant with the opportunity to file a response. Appellant did not file a response, and we do not consider its objections further.¹¹

Discussion

I. Standard of Review

An appellant bears the burden of showing error in a regional director's decision. *Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 264 (2013); *see also Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). The Board reviews questions of law and the sufficiency of evidence to support a BIA decision *de novo*. *Seminole Tribe of Florida*, 53 IBIA at 210 (stating that interpretations of lease provisions are subject to *de novo* review). On the other hand, the Board reviews BIA's discretionary decisions to determine whether they are in accordance with applicable law, supported by the administrative record, and are not arbitrary and capricious. *Hawkey*, 57 IBIA at 264. In reviewing BIA discretionary decisions, the Board does not substitute its judgment for that of BIA, *High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 38 (2013), instead determining whether BIA's decision was unreasonable, *see Hall v. Great Plains Regional Director*, 59 IBIA 136, 142, 144 (2014).

II. The Decision is Not Premised on a Mistaken Factual Assumption Regarding Appellant's Response to the Third Notice of Violation

The Regional Director stated, in a "Facts" section of the Decision, that Appellant "did not cure the violation, dispute the violation, or request more time to cure the violation." Decision at 2; *see also* Superintendent's Decision at 1-2 (same). Appellant contends that the Regional Director incorrectly found or assumed, as facts, that Appellant had not disputed the violation and had not requested an extension of time to cure the violation.

¹¹ The Pueblo correctly argues that Appellant's objection to the administrative record was untimely, although the Board found it necessary to order the Regional Director to complete the record based on the Board's own review of the parties' merits arguments and documents relied on by the parties in their briefs.

It is true that Appellant disputed the violation in relation to the total amount owed to cure the violation. It is less clear that Appellant, at least in the proceedings before the Regional Director, disputed *that a violation had occurred*, because it conceded that “[t]here is no question that money is owed.” Statement of Reasons at 4. Considering the Regional Director’s discussion of Appellant’s arguments about the amount owed, we have no doubt that the Regional Director understood, as a factual matter, that some issues regarding the violation remained in dispute. Thus, we are not convinced that the Regional Director’s “factual” characterization on this issue demonstrates that he affirmed the cancellation of the Lease based on a mistaken belief that there were no disputed issues regarding the violation.

Appellant also argues that the Regional Director erroneously assumed, as a fact, that Appellant did not request more time to cure the violation. But to the extent Appellant’s response to the Third Notice could be construed as a request for additional time, it was, at best, incomplete and vague. Appellant stated that it hoped “to resolve this in a timely and fair manner.” June 2011 Letter at 2 (unnumbered). Appellant also stated that, at least for the amount that it conceded was owed (\$16,380 through 2007; \$38,310 through 2011), it “would like to start” by paying the increased monthly rent for July (as calculated using Appellant’s interpretation of ¶ 38), and “\$1,000 towards our past due account.” *Id.* And in conceding on appeal to the Regional Director that “money is owed,” Appellant stated that it was “just a matter of how much and what period of time should be given in order to make up any arrearages,” without committing to or even proposing any timetable. Statement of Reasons at 2-4 (stating that appellant “is willing to consider” paying the 5% increase if it is not compounded and that Appellant “has always been ready, willing and able to pay all past due arrearages *that could be agreed upon*” (emphasis added)).

In giving notice of the violation to Appellant, the Superintendent specifically advised Appellant of its right to request additional time, and stated that “[i]f you . . . request additional time to cure . . . and are granted the additional time, you must proceed diligently to cure the violation within the specified time frame.” Third Notice at 2. Whether or not Appellant’s interest in being granted more time can be inferred from its expressed interest to resolve the matter in a “timely” manner, and from its statements on appeal that it is just a matter of “what period of time should be given,” Appellant did not make any request for a specific amount of additional time to pay off even the amount it conceded was owed. Appellant argued to the Regional Director that it “needed time to pay such a large amount,” but never specified what time was needed. *See* Statement of Reasons at 5. Nor can a proposed timeline be inferred from Appellant’s proffer to “start” by paying \$1,000 to cure the back rent owed. Appellant offered no proposal for the recurrence of \$1,000 payments or a date by which the balance owed would be paid.

The Regional Director acknowledged Appellant’s professed interest in resolving the dispute, *see* Decision at 3, which undoubtedly reflects an understanding that Appellant

wanted additional time. And, the Regional Director acknowledged the checks proffered by Appellant, including the \$1,000 payment toward back rent owed. But in light of Appellant's failure to propose any specific extension, and its nonspecific and open-ended statements about curing the violation, we are not convinced that it was unreasonable for the Regional Director to characterize Appellant's actions as insufficient to constitute a request for an extension of time in which to cure the violation. Thus, we are not convinced that the Regional Director's statement that Appellant did not request more time to cure the violation reflects a mistaken assumption of fact, and we reject Appellant's argument that the Regional Director affirmed the cancellation of the Lease based on such a mistaken assumption.

III. Paragraph 38 of the Lease Requires that the 5% Annual Rent Increase Be Compounded

We next consider whether BIA's decision was incorrectly premised on a misinterpretation of the 5%-annual-increase provision in the Lease.¹² We conclude that BIA did not misinterpret the effect of that provision.

Paragraph 38 of the Lease provides that "the rental shall be increase (sic) by five (5) percent annually." Appellant first argues that it does not remember ¶ 38 as being part of the Lease, or if it was included, it believed "that it would only be a calculation used later to arrive at a rental amount when the [L]ease was renewed." Opening Br. at 2. This argument is without merit. Appellant undoubtedly had a copy of ¶ 38 as finalized, as evidenced by its enclosure in correspondence with the Pueblo in 2008. *See* June 2008 Letter at 4 (unnumbered). Nothing makes the 5% annual increase dependent on the construction of additional buildings, and the language is neither confusing nor ambiguous with respect to when it is triggered. Whether Appellant failed to adequately review or remember the provision, or misunderstood it, does not demonstrate that the terms of the Lease were unclear or that the rental adjustment should not be enforced. *Dumbeck v. Acting Great Plains Regional Director*, 47 IBIA 39, 48-49 (2008) (declining to set aside gift deed because any mistake that may have occurred was "unilateral only" and the appellant identified no special circumstances making deed voidable).

¹² The dispute over the 5%-annual-increase provision would not affect Appellant's concession that it owes back rent, but if we agreed with Appellant that BIA misinterpreted the legal effect of the provision, it would change the magnitude of Appellant's violation, and thus arguably would require a remand to BIA for reconsideration of its exercise of discretion.

In addition, although ¶ 38 does not use the word “compounded” to describe the effect of the increases, we are not convinced that its failure to do so renders the language ambiguous, and thus our interpretation does not consider extrinsic evidence. We think that the language is clear in its meaning and effect in requiring compounding. First, the language makes no reference to the “initial” or “base” rent as determined by the number of buildings constructed, as the benchmark for calculating each 5% annual rental increase. In our view, the most logical and reasonable reading of the language is that a 5% increase is applied each year to the rent as it then stands. Second, to express the annual increase as a percentage of the initial or base rent would seem to be a peculiarly complicated way for the parties to dictate a fixed increase each year—either an additional \$10/month if a single building was constructed or an additional \$15/month if two buildings were constructed. Indeed, similar annual rental increase language has been interpreted as unambiguous in requiring compounding, in the absence of explicit language to the contrary. *See Gardner v. Gilreath*, 1990 Tenn. App. LEXIS 646, at *4 (Ct. App. 1990).

Because we conclude that ¶ 38 can be construed by looking solely at the language of the Lease, we need not consider the relevance, if any, of the Computation Sheet cited by the Regional Director as evidence of the parties’ intent that the 5% increases be compounded. *See* Decision at 2; Lease ¶ 38. That said, the fact that Appellant, through Jones, denies having received or seen the Computation Sheet, does not mean that it would not be relevant, were it necessary to resort to extrinsic evidence. Assuming Appellant had no notice of the Computation Sheet, the document undoubtedly is still evidence of the Tribe’s intent in agreeing to ¶ 38, and of BIA’s understanding in approving the Lease. Thus, it is far from clear how Appellant would be aided, in defending against cancellation of the Lease, if the language were ambiguous and the extrinsic evidence demonstrated that parties lacked a meeting of the minds in their understanding of the language of ¶ 38. As addressed further below, and contrary to Appellant’s argument that the language “should have been subject to negotiations,” Appellant’s Reply Br., May 11, 2012, at 6, neither BIA nor the Board would have authority to require the Tribe to negotiate a modification of the Lease, and the failure of a material term might be grounds to set aside the Lease.

IV. No Equitable Doctrines Precluded BIA from Cancelling the Lease

Appellant cites several equitable doctrines—waiver, laches, mutual mistake—to argue that the Lease should not be cancelled or that Appellant should be provided another opportunity to cure the Lease violations. Opening Br. at 10-13; Appellant’s Reply Br. at 6-7. We are not persuaded that equitable doctrines precluded BIA from cancelling the Lease in this case.

Appellant argues that the Pueblo waived its entitlement to the rental adjustments and corresponding interest for late payments because it waited “an unreasonable length of

time” before requiring Appellant to make these payments. Opening Br. at 10. Appellant’s argument assumes that the Pueblo had a duty to notify Appellant of its underpayments and that the Pueblo was required to provide such notice within a certain timeframe. The Lease, however, places the burden on the *lessee* to “calculate the rental adjustment and submit the adjusted sum to the Lessor on or before the beginning of each year without any notification from the Lessor.” Lease at ¶ 38. In addition, the Lease requires the payment of interest regardless of whether the lessee received notice that interest is due. *Id.* ¶ 5. Thus, the Lease makes clear that it was Appellant’s responsibility to calculate and pay the rental adjustments and any interest necessary without any notice from the Pueblo.¹³

Nor has Appellant shown that the Pueblo intentionally relinquished its right to the rental adjustments and interest. *See Id.* at 89-90 (quoting 28 Am. Jur. 2d Estoppel and Waiver § 183 (2014) (“A ‘waiver’ . . . is the voluntary and intentional relinquishment of a known right.”)); *Sunny Cove Development Corp. v. Cruz*, 3 IBIA 33, 43 (1974) (stating that waiver requires the intentional relinquishment or abandonment of a legal right). Accordingly, Appellant has not established that the Pueblo waived its right to be paid the rental adjustments and interest.

Similarly, we are not convinced that the doctrine of laches relieved Appellant of its liability for the increased rental payments, or precluded BIA from cancelling the Lease. Even assuming that the Pueblo’s delay in seeking to collect the increased rent was “inexcusable,” Opening Br. at 11, Appellant does not articulate how it was prejudiced by the delay. *See* 27A Am. Jur. 2d Equity § 124 (2014) (listing three elements to establish laches, including prejudice to the adverse party). Appellant did not contend to the Regional Director that it would have been impossible to pay the amount owed within 10 days, nor, as discussed earlier, did Appellant propose any terms for an extension, e.g., justified by what Appellant considered necessary to avoid undue hardship or prejudice. Under the circumstances, we are not convinced that the doctrine of laches provides a basis for us to find that that BIA’s decision to cancel the Lease when it did was unreasonable.

Lastly, Appellant fails to demonstrate that the Lease should be modified to allow it “to avoid termination and to provide payment to the Pueblo.” Opening Br. at 12. Even if Appellant, itself, was unaware of the rental adjustments required by the Lease, it has not shown that there was a mutual misunderstanding about this requirement. 13 Am. Jur. 2d Cancellation of Instruments § 29 (A mutual mistake must “concern a basic assumption on

¹³ Even when the lessor has an obligation to notify the lessee of a rental adjustment, the Board has concluded that the “mere failure of the lessor to provide notice of a rental increase in the timeframe stated in a lease should not be considered a waiver of the increase.” *Dobbins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 89 (2014).

which both parties made the contract.”). More importantly, the Pueblo has made clear that it objects to any modification of the Lease and that it will not agree to a payment plan allowing Appellant to make partial payments. Pueblo’s Answer Brief, Apr. 20, 2012, at 19; Letter from Pueblo to Superintendent, June 24, 2011 (AR Tab 53). Accordingly, neither BIA nor the Board can impose the relief that Appellant seeks. *Frye v. Acting Southern Plains Regional Director*, 54 IBIA 183, 187 (2011) (reasoning that BIA’s regulations do not provide it with unilateral authority to modify a lease); *Racquet Club Properties, Inc. v. Acting Sacramento Area Director*, 25 IBIA 251, 256-57 (1994) (stating that BIA and the Board lack the authority to unilaterally modify a lease and they cannot order the parties to negotiate).¹⁴

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 Decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

¹⁴ Because we reject Appellant’s equitable arguments, we do not agree with its suggestion that a factual determination is necessary by the Board to determine the amount of back rent and interest owed. *See* Opening Br. at 13.