



INTERIOR BOARD OF INDIAN APPEALS

Jimmie Garnenez, Sr. v. Acting Navajo Regional Director, Bureau of Indian Affairs

60 IBIA 162 (03/30/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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JIMMIE GARNENEZ, SR.,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 13-001
ACTING NAVAJO REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	March 30, 2015

Jimmie Garnenez, Sr. (Appellant) appealed to the Board of Indian Appeals (Board) from an August 7, 2012, decision (Decision) of the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to cancel Appellant’s Business Lease No. SR-93-128 (Lease) for failing to pay rent to the Navajo Nation (Nation) as lessor, for violating other material terms of the Lease, and for failing to cure the breaches. Appellant does not dispute that he failed to cure all of the breaches and instead argues that he was denied due process and that the Decision contains errors and is unreasonable. We conclude that the Regional Director followed the regulatory process and did not err or abuse his discretion, and we therefore affirm.

Background

Appellant and the Nation entered into the Lease for a period of 25 years on December 30, 1992, and it became effective upon BIA’s approval on April 7, 1993. Lease at 1, 3, 21 (Administrative Record (AR) Tab 3(a)). The leased property is a 3.6-acre parcel of the Nation’s trust land in Shiprock, New Mexico. *Id.* at 2. The purpose of the Lease was for Appellant to develop and operate the premises for business uses, including office space rentals, appliance and furniture sales, and automotive repairs. *Id.* After a 3-year development period, the Lease required Appellant to make monthly rental payments of at least \$150.¹ *Id.* at 3-5; Lease Modification (AR Tab 6(a)). In addition to the rental

¹ The minimum monthly rental payment of \$150 represented 1/12th of the guaranteed minimum annual rental. The annual rental was the greater of \$1,800 or 4% of the gross receipts of businesses operated on the property. Lease at 3. Although it is not one of the

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requirements, the Lease also specifies that Appellant was to post a \$4,000 performance bond and to carry public liability insurance and fire and casualty insurance. Lease at 7, 13-14. The Lease provides that “[s]hould Lessee default in any payment of monies when due, fail to post a bond[,] or be in violation of any other provision of this Lease,” the violation may be acted upon by BIA “in accordance with [25 C.F.R. §] 162.14 . . . or any amendments thereto.”² *Id.* at 16.

On April 17, 2012, the Regional Director sent Appellant a notice that he was in default of the minimum rental, performance bond, public liability insurance, and fire insurance requirements of the Lease. Letter from Regional Director to Appellant at 1 (unnumbered) (Notice of Violation) (AR Tab 8). The Regional Director found that, as of January 9, 2012, Appellant owed \$10,350 in past rent to the Nation based on the guaranteed minimum annual rental.³ *Id.* The Regional Director advised Appellant that the Lease would be cancelled if Appellant did not comply with 25 C.F.R. § 162.618.⁴ *Id.*

Section 162.618 provides that within 10 business days of receipt of a notice of violation, the tenant “must: (1) Cure the violation and notify [BIA] in writing that the violation has been cured; (2) Dispute [the] determination that a violation has occurred and/or explain why [BIA] should not cancel the lease; or (3) Request additional time to cure the violation.” 25 C.F.R. § 162.618(b)(1)-(3).

(...continued)

grounds for BIA’s cancellation decision, at the time of the Decision, Appellant apparently had not provided statements of gross receipts to enable a determination of any higher annual rental owed under the Lease for several years. *See* Regional Director’s Answer Brief (Br.), July 3, 2013, Ex. A (Letter from Nation to BIA, June 19, 2013).

² In 2001, Part 162 of 25 C.F.R. was revised and replaced by new leasing regulations. 66 Fed. Reg. 7068, 7109-7126 (Jan. 22, 2001). The leasing regulations were again revised after the August 2012 lease cancellation Decision, in December 2012, but no party contends that those revisions are applicable or relevant to this appeal. Therefore, we cite to the regulations in effect at the time of the Decision. *See Los Alamos Self Storage v. Acting Southwest Regional Director*, 60 IBIA 1, 3 n.5 (2015).

³ Based on information submitted to the Board on appeal, Appellant apparently had not submitted a rental payment since June 29, 2010. *See* Letter from BIA to Board, Sept. 25, 2012, Attach. (Memorandum from Nation to BIA, Sept. 20, 2012).

⁴ Section 162.618 (What will BIA do in the event of a violation under a lease?) replaced former § 162.14 cited in the Lease. *See supra* note 2 and associated text.

Appellant received the notice of violation on April 26, 2012. Notice of Violation at 2 (unnumbered) (certified mail receipt).⁵ Within the time period for responding to the notice, Appellant requested a 30-day extension to “gather the information [r]equested” by BIA, including “paperwork” from his insurance agent relating to the bond, public liability insurance, and fire insurance requirements. Letter from Appellant to BIA, May 2, 2012 (AR Tab 10). Appellant also stated that he “will be working with the Navajo Nation Accounts Controller for the balance due on the rentals.” *Id.*

The Regional Director granted Appellant’s request and advised Appellant that the Lease would be cancelled if he did not take action to cure the violations on or before June 9, 2012. Letter from Regional Director to Appellant, May 16, 2012 (AR Tab 11).

Appellant submitted a separate written request to the Nation’s Controller for a longer extension of time, until July 15, 2012, to pay \$3,600 in back rent, and a further extension, until December 15, 2012, to pay the remaining balance due of \$6,750. Letter from Appellant to Nation, May 1, 2012 (AR Tab 9). According to Appellant, the Nation never responded to the request. Notice of Appeal, Sept. 8, 2012, at 2 (unnumbered); *see also* Regional Director’s Answer Br. at 4 (locating no response in the record).

Prior to the expiration of the 30-day extension granted by BIA, Appellant initially provided evidence of a recent application for a performance bond and proof of liability insurance. *See* Letter from Kysar Insurance Agency to Appellant, May 31, 2012 (AR Tab 12); Certificate of Liability Insurance, June 6, 2012 (AR Tab 13). Appellant then requested a second 30-day extension to continue to “gather the information [r]equested” by BIA. Letter from Appellant to BIA, June 6, 2012 (AR Tab 14). Appellant explained that his insurance agent was “looking into other options for a performance bond,” and that Appellant was “looking into other options with creditors from the banks.” *Id.* Appellant also reiterated that he “will be working with the . . . Controller for the balance due on the rentals.” *Id.* Appellant did not reference fire insurance, and there is no evidence in the record that Appellant ever obtained fire insurance, or the performance bond.

The Regional Director sent a letter to the Nation regarding the status of the notice of violation. Letter from Regional Director to Nation, June 25, 2012, at 1 (unnumbered) (AR Tab 15). The Regional Director stated that Appellant had cured the violation of the public liability insurance provisions of the Lease, but had not cured the remaining

⁵ While the notice states that a copy of § 162.618 was enclosed for Appellant, the copy of the notice in the record does not enclose the regulation. Appellant does not contend, however, that he did not receive a copy of the regulation. In the future, BIA should ensure that the record contains exact copies of its correspondence.

violations. *Id.* at 2 (unnumbered). He further explained that Appellant had requested a second 30-day extension to cure the remaining violations and that, pursuant to 25 C.F.R. § 162.619 (What will BIA do if a violation of a lease is not cured within the requisite time period?), BIA was consulting with the Nation regarding the request. *Id.*

Section 162.619 provides that, in the event that the tenant does not cure a lease violation within the requisite time period, BIA “will consult with the Indian landowners, as appropriate,” and determine whether the lease should be cancelled; whether any other remedies available under the lease should be invoked by BIA or the Indian landowners; or whether the tenant should be given additional time to cure the violation. 25 C.F.R. § 162.619(a)(1)-(4).

In the letter to the Nation, the Regional Director stated that BIA would proceed to cancel the Lease “unless” it received “written notice . . . advising of Lessee/Lessor action to address the lease violations” within 30 business days from the Nation’s receipt of the letter. AR Tab 15 at 2 (unnumbered). The return receipt for the letter was signed on June 29, 2012. *Id.* (certified mail receipt). BIA did not receive a formal response from the Nation.⁶

On August 7, 2012, the Regional Director notified Appellant that, due to his failure to cure the violations identified in the notice of violation, the Lease was cancelled.⁷ Decision at 1 (unnumbered) (AR Tab 18).

Appellant appealed the Decision to the Board. On receipt of the appeal, the Board notified Appellant that although the appeal had the effect of preventing the Decision from going into effect (unless the Board ordered otherwise), as long as the Decision remained without effect, Appellant was required by 25 C.F.R. § 162.621 to continue to pay rent and comply with the other Lease terms. Pre-Docketing Notice and Orders, Sept. 17, 2012, at 2. The Board ordered Appellant to pay the amount necessary to satisfy his outstanding minimum annual rental balance—\$12,000 through November 2012—by November 16,

⁶ While the Nation did not formally respond, a program manager in the Nation’s business development office did inquire with BIA via email as to when the Lease would be canceled based on a question that had arisen regarding a scrap metal operation on the leased premises. Email from Sells to BIA, July 20, 2012 (AR Tab 16). BIA replied that the Nation was being consulted on the Lease violations and that unless BIA received a response by July 29, 2012, it would proceed to cancel the Lease. Email from BIA to Sells, July 20, 2012 (AR Tab 17).

⁷ The Decision states, contrary to the Regional Director’s consultation letter to the Nation, that Appellant did not cure the failure to obtain public liability insurance. Decision at 1 (unnumbered).

2012, and ordered Appellant to pay \$150 monthly to the Nation during the pendency of the appeal. Notice of Docketing and Order for Compliance, Oct. 19, 2012, at 2-3.

Subsequently, BIA moved to dismiss Appellant's appeal for failure to comply with § 162.621 and the Board's order. Notice of Appellant's Non-Compliance and Motion to Dismiss, Jan. 16, 2013, at 1. The Board denied the motion to dismiss, as Appellant had apparently made some monthly rental payments, but because Appellant failed to pay the \$12,000 in rental arrears, the Board placed the Decision into immediate effect pursuant to 25 C.F.R. §§ 2.6 and 162.621, and 43 C.F.R. § 4.314(a). Order Placing Decision into Immediate Effect, May 2, 2013.

On the merits, in lieu of filing an opening brief, Appellant relied on the arguments contained in his notice of appeal. The Regional Director filed an answer brief. Appellant replied that he "disagree[d]" with the Decision and the answer brief, and stated for the first time that he was "still in the process" of seeking legal counsel. Letter from Appellant to BIA, received Aug. 23, 2013.

Discussion

Appellant never disputed that he was in violation of several material requirements of the Lease and that he failed, within the additional time granted by the Regional Director, to cure three of the four violations. Rather, Appellant argues that he was denied due process and that the Regional Director's decision is erroneous and an abuse of discretion. Notice of Appeal at 1-2 (unnumbered). Appellant argues that he was not afforded sufficient time to cure the violations; the Regional Director failed to consider his efforts to remedy the violations; and the Lease was cancelled without evidence that the Nation, as the Indian landowner, requested cancellation. *Id.* We reject Appellant's arguments and affirm the Decision.

I. Standard of Review

Appellant bears the burden of showing error in the Regional Director's decision to cancel the Lease. *Benally v. Acting Navajo Regional Director*, 57 IBIA 91, 94 (2013). Because the Regional Director's decision was discretionary, we review it to 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. *Id.* In reviewing BIA's discretionary decisions, the Board does not substitute its judgment for that of BIA, and instead determines whether the decision was unreasonable. *Los Alamos Self Storage*, 60 IBIA at 9. While the Board reviews *de novo* questions of law and the sufficiency of evidence to support a BIA decision, *id.*, the Board lacks authority to adjudicate challenges to the

constitutionality of laws and regulations, *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 13, 18 (2013).

II. Analysis

Appellant received all of the process and deliberation that was due. Due process required that BIA provide Appellant with notice and an opportunity to cure (or dispute) the Lease violations. *A C Building & Supply Company v. Western Regional Director*, 51 IBIA 59, 73-74 (2010) (reasoning that the 25 C.F.R. Part 162 regulations require BIA to notify the lessee of the violation and allow the lessee a period of time in which to either “respond to the notice by agreeing to cure and actually curing the lease breach,” or to dispute the existence of the default). Appellant does not argue that BIA failed to follow the procedures in its regulations.⁸ Nor does Appellant dispute that he failed to cure material requirements of the Lease, or show that the Regional Director erred or abused his discretion in cancelling the Lease.

After the Regional Director issued the notice of violation describing the four violations of the Lease, Appellant requested, and the Regional Director granted, a 30-day extension for Appellant to cure the violations. *See* 25 C.F.R. § 162.618(b)(3) (the lessee may request additional time “to cure” a violation). By the time of the new deadline for curing the violations, June 9, 2012, Appellant did not dispute that he had failed to cure the rental, performance bond, and fire insurance violations listed in the notice. Appellant provided evidence only that he had applied for a performance bond, and was researching other options for a bond, and he gave no indication of his efforts to obtain fire insurance. Appellant paid no back rent and instead proposed to the Nation’s Controller that the time frame for remitting the arrears be extended approximately 6 months more (i.e., from June 9, 2012, to December 15, 2012).⁹

While on appeal, the Regional Director concedes that the Decision mistakenly states that Appellant did not cure the public liability insurance violation, and the Regional Director maintains that the Decision is supported by the three uncured Lease violations.

⁸ To the extent, if any, that Appellant contends the regulations do not satisfy the requirements of due process, the Board does not have authority to adjudicate a challenge to the constitutionality of the regulations. *See Village of Hobart*, 57 IBIA at 18.

⁹ Under Appellant’s proposal, he was to make an initial payment of \$3,600 by July 15, 2012. In his notice of appeal to the Board, Appellant claimed that he had “now placed” the initial payment in a “separate bank account,” Notice of Appeal at 2 (unnumbered), thus confirming that he had made no rental payments to the Nation in the time between the notice of violation and the August 7, 2012, Decision.

Answer Br. at 14. For reasons we discuss further below, we agree that the remaining Lease violations supported cancellation and we therefore find the error is harmless.¹⁰ *See Benally*, 57 IBIA at 97 (stating that regardless of the appellant’s arguments regarding his arrears in loan payments, cancellation was supported by appellant’s failure to post a performance bond and provide copies of his insurance policies).

When Appellant did not cure the remaining violations of the Lease within the 30-day extension requested by Appellant and allowed by the Regional Director, the Regional Director reasonably consulted with the Nation regarding Appellant’s request for a second 30-day extension. Where, as here, a tenant does not cure a lease violation within the time period provided in 25 C.F.R § 162.618 (including any additional time allowed by BIA pursuant to § 162.618(b)(3)), the regulations provide that BIA will consult with the Indian landowners “as appropriate.” 25 C.F.R. § 162.619(a). Appellant’s argument that the regulations required the Nation to “request” lease cancellation, Notice of Appeal at 2 (unnumbered), is unsupported by the text of the regulations. Regardless, the Regional Director notified the Nation of the three uncured Lease violations and advised the Nation that BIA would cancel the Lease unless it responded to BIA with a desire to pursue a different remedy. The Nation did not respond, thereby impliedly consenting, and clearly not objecting, to cancellation as proposed by BIA.

Appellant admits that he never received a response from the Nation to his proposal for an extended payment plan. Notice of Appeal at 2 (unnumbered). Thus, he provides no evidence that the Nation was separately working with him to preserve the Lease and avoid cancellation. And, “any assistance in resolving lease disputes that BIA may give to lessees flows from BIA’s trust relationship with the landowners.” *Benally*, 57 IBIA at 96. “[I]f 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.” *Id.* at 97. Under the circumstances, in the absence of any response by the Nation that it did not want the Lease cancelled, and was willing to accept delayed rental payments, the Regional Director acted within his discretion in cancelling the Lease. *Cf. Los Alamos Self Storage*, 60 IBIA at 14 (BIA cannot force parties to negotiate). We conclude that the Regional Director followed the process, was under no obligation to

¹⁰ Appellant alleges that the Decision also mischaracterizes his response to the notice of violation by stating that “no response was received,” and that he “failed to take corrective action.” Notice of Appeal at 2 (unnumbered) (quoting Decision at 1 (unnumbered)). But the quoted language is accurate because, when read more fully and in context, the Decision states that (1) no response to BIA’s consultation letter was received from the Nation, and (2) Appellant did not cure the Lease violations. *See* Decision at 1 (unnumbered).

provide Appellant additional time or assistance or in curing the lease violations, and reasonably proceeded to cancellation.

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 7, 2012, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge