



INTERIOR BOARD OF INDIAN APPEALS

Cortina Integrated Waste Management, Inc. v.
Pacific Regional Director, Bureau of Indian Affairs

61 IBIA 339 (10/29/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CORTINA INTEGRATED WASTE)	Order Reversing Decision
MANAGEMENT, INC.,)	
Appellant,)	
)	
v.)	Docket No. IBIA 14-002
)	
PACIFIC REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	October 29, 2015

Cortina Integrated Waste Management, Inc. (Appellant) appealed to the Board of Indian Appeals (Board) from an August 19, 2013, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), cancelling a lease, which was entered into by the Cortina Band of Wintun Indians (Band) and Appellant. The Regional Director cancelled the lease on the grounds that Appellant violated a warranty regarding adverse litigation when it was sued by a third party in connection with a stock purchase agreement, and that in the course of the dispute and related settlements Appellant admitted in writing it was unable to pay its debts as they matured. We reverse the Decision because the lease and the administrative record do not support the Regional Director’s grounds for cancellation.

Background

I. The Lease

On April 29, 2003, the Band and Appellant, a wholly-owned subsidiary of Earthworks Industries, Inc. (Earthworks), executed a business lease, for an initial term of 25 years, for the purposes of developing and operating an integrated solid waste management facility on land within the Band’s Rancheria. Second Amended and Restated Business Lease (Lease) at 1, 7 (Administrative Record (AR) Tab 6). BIA approved the Lease on January 25, 2007.¹ See Approval of Business Lease No. 500101-07-32 (AR Tab 6). The facility is not yet operational. See, *e.g.*, Decision, Aug. 19, 2013, at 5 (AR Tab 31).

¹ The Board affirmed the Regional Director’s decision to approve an earlier version of the lease in *County of Colusa, California v. Pacific Regional Director*, 38 IBIA 274 (2003). After
(continued...)

As relevant to the Regional Director's expressed grounds for cancellation, Appellant warrants in the Lease that "[t]here are no claims or litigation, pending or threatened, known to [Appellant], that could materially and adversely affect" the Lease, the premises, or Appellant's ability to complete construction or meet its obligations. Lease ¶ 9(B)(5). Appellant further represents that its written warranties "(a) were true, correct, and complete in all material respects when furnished to the Band and as of the date made; and (b) are true, correct [sic] in all material respects as of the date on which this Lease is executed." *Id.* ¶ 9(B)(6). Default will occur if a written representation or warranty "shall prove to have been false or misleading in any material respect." *Id.* ¶ 23(A)(2). In addition, default will occur if Appellant "files a voluntary petition for bankruptcy, . . . is adjudicated a bankrupt or insolvent, . . . or admits in writing its inability to pay its debts as they mature." *Id.* ¶ 23(A)(4).

II. The Stock Purchase Agreement and Related Litigation and Settlements

On April 16, 2007, Earthworks, as seller, and North Bay Corporation and its subsidiary Cortina Landfill Company (collectively, North Bay), as buyer, entered into a stock purchase agreement, later amended on February 27, 2008. *See* Compromise and Settlement Agreement, Mar. 28, 2012 (First Settlement), at 1, ¶ A (AR Tab 15, Attach. A at 5).² The purchase agreement provided North Bay with the right to purchase 50% of the issued and outstanding shares in Appellant, as well as a period of time during which North Bay could investigate the landfill project and cancel the agreement if certain conditions were not satisfied. *See id.* ¶¶ C-D. During the investigation period, North Bay advanced monies to Earthworks/Appellant under the agreement. *Id.* ¶ F. North Bay timely elected to cancel the agreement. *Id.* ¶¶ E, G.

On March 28, 2012, Earthworks/Appellant and North Bay entered into the first of two settlements relevant to this appeal. According to the First Settlement, there was no dispute that a refund was due to North Bay, but there was a "disagreement . . . about the exact amount which [wa]s required to be refunded," and Earthworks/Appellant desired to extend the time for repayment. *Id.* at 2, ¶¶ H-I (AR Tab 15, Attach. A at 6). The parties agreed "without admitting any wrongdoing or fault of any kind, . . . to settle their differences and release all claims against each other arising out of" the stock purchase

(...continued)

a Federal court lawsuit concerning the lease approval was dismissed, the Band and Appellant entered into the Lease that is at issue in this appeal.

² The stock purchase agreement is not contained in the administrative record. A copy of the 2007 agreement is attached as an unmarked exhibit to Appellant's brief in reply to the Band's answer brief. *See* Reply Brief (Br.) to Band's Answer Br., Mar. 21, 2014.

agreement. *Id.* ¶ J; *see also id.* at 4, ¶ 9 (AR Tab 15, Attach. A at 8) (“No Admissions” clause). The First Settlement required Earthworks/Appellant to make installment payments to North Bay, with the first payment due on September 1, 2012. *Id.* at 3, ¶ J(4) (AR Tab 15, Attach. A at 7).

The first payment was not made timely and, on October 15, 2012, North Bay filed suit in the Superior Court of California against Earthworks/Appellant. *Cortina Landfill Company v. Earthworks Industries, Inc.*, No. 252521 (Petition to Confirm Contractual Arbitration Award), at 1-2 (AR Tab 15, Attach. A at 2-3). On April 11, 2013, a judgment confirming the First Settlement was awarded against Earthworks/Appellant. *See* Earthworks, “Judgment awarded against Earthworks and Cortina,” Apr. 16, 2013 (AR Tab 21).³ The judgment was not enforced by North Bay, because the parties reached a second settlement establishing a new payment schedule. *See* Compromise and Settlement Agreement, Aug. 5, 2013 (Second Settlement), at 1, ¶ D(1) (AR Tab 30). As security, Earthworks agreed to immediately place 100% of the shares in Appellant in escrow so that if the required payments were not made, North Bay would take ownership of Appellant. Second Settlement at 2, ¶ D(2). In addition, “to preserve the enforceability and integrity of the security,” Earthworks agreed to ensure that Appellant “shall incur no debt without the advance written permission of North Bay” *Id.* ¶ D(4)(d).

III. BIA’s Reasons for Cancelling the Lease

On March 29, 2013, the Regional Director issued a notice to Appellant that it was in default of the Lease, citing ¶¶ 9(B)(5) and 23(A)(4).⁴ Regional Director’s Notice of Violation at 2 (AR Tab 17). First, the Regional Director suggested that, because North Bay had filed a lawsuit against Appellant, Appellant violated the warranty statement contained in ¶ 9(B)(5) of the Lease. *See id.* at 1-2. The Regional Director stated that “[i]t could be argued that this warranty statement was applicable to the time period preceding the lease approval. However, as there has been no development [of the facility], we believe this warranty is still significant.” *Id.* at 2.

Next, the Regional Director reasoned that the First Settlement, coupled with North Bay’s then-pending lawsuit to enforce that settlement, appeared to constitute an admission,

³ The judgment is not included in the administrative record. The Band attached a copy of the judgment to its answer brief on appeal. *See* Band’s Answer Br., Mar. 5, 2014, Ex. A.

⁴ In her notice, the Regional Director also discussed several other issues that the Band had previously raised to BIA regarding Appellant’s compliance with the Lease. The Regional Director did not express any conclusion by BIA that those issues were grounds for cancellation at the time.

under ¶ 23(A)(4) of the Lease, that Appellant was unable to satisfy its debt to North Bay. *Id.* The Regional Director advised that, absent any evidence to the contrary, Appellant was in default of the Lease. *Id.*

Citing the Lease and BIA's business leasing regulations, 25 C.F.R. § 162.466 (What will BIA do about a violation of a business lease?), the Regional Director instructed Appellant that it had 10 days to cure the default, dispute BIA's determination that a default occurred, or request additional time to cure the default.⁵ *Id.* at 3.

Following the March 29, 2013, notice of violation, Appellant, the Band, and BIA met or corresponded by letter several times over the next 5 months.⁶ *See* Decision at 2-4. At the outset, Appellant disputed that any violation of the Lease occurred and requested additional time to "resolve the situation." Letter from Earthworks/Appellant to Regional Director, Apr. 9, 2013, at 1 (AR Tab 20). Appellant contended that the warranty it gave in ¶ 9(B)(5) of the Lease was valid and correct on the date the Lease was executed, and that the Lease does not make the warranty statement applicable to the time period after the Lease's execution. *Id.* at 2. Appellant also contended that, although it did owe monies to North Bay, Appellant had neither defaulted in the payment of its debts nor made an admission under ¶ 23(A)(4) that it was unable to pay its debts as they matured. *Id.* Appellant asserted that it was refusing to pay North Bay "pending resolution" of its allegation that North Bay was demanding more money than was owed. *Id.* at 1. Ultimately, after the judgment confirming the First Settlement was issued, Appellant advised BIA that the dispute with North Bay had been resolved by the Second Settlement and thus any default under the Lease (which it disputed) had been cured. Letter from Earthworks/Appellant to Regional Director, Aug. 9, 2013 (AR Tab 30).

⁵ The Lease incorporates by reference BIA's leasing regulations, 25 C.F.R. Part 162, including "any amendments thereto relative to business leases." Lease at 1; *see also* Final Rule, Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440, 72484 (Dec. 5, 2012). The Lease itself also includes provisions requiring notice and an opportunity to cure, in the event of a default. Lease at 48, ¶ 23(B)(1)-(4). We express no opinion on the sufficiency of BIA's notice.

⁶ After the Regional Director issued the notice of violation, she did not write to Appellant again until she issued the Decision cancelling the Lease. In the meantime, on May 31, 2013, the Band issued its own notice of default to Appellant. Band's Notice of Default (AR Tab 25). The Band did not allege any violation of ¶ 9(B)(5), but alleged defaults under ¶ 23(A)(4) and other Lease provisions. *See id.* at 1-4 (unnumbered). Thereafter, the Band continued to request that BIA cancel the Lease for the Band. *See, e.g.*, Letter from Cleghorn to Regional Director, June 28, 2013 (AR Tab 26).

On August 19, 2013, the Regional Director issued her decision to cancel the Lease. She stated that the Lease was “hereby cancelled for defaults under lease paragraphs 9B(5) and 23A(4).”⁷ Decision at 6. In response to Appellant’s position that the warranty was not applicable to the lawsuit filed in 2012 by North Bay, the Regional Director reiterated her interpretation that the warranty was “still significant” because there had been “no development” of the facility. *Id.* at 2. And, regarding Appellant’s assertion that its dispute with North Bay did not constitute a written admission that it was unable to pay its debts, the Regional Director stated that it appeared Appellant’s failure to make payments under the First Settlement “was not merely based on [Appellant’s] disagreement as to the amount.” *Id.* at 4. The Regional Director explained that she “fail[ed] to understand why [Appellant] executed the [First Settlement] if [it] disagreed with the amount” owed. *Id.* After finding sufficient reason to cancel the Lease based on the two foregoing alleged defaults, the Regional Director rejected Appellant’s contention that the Second Settlement cured any prior default, finding instead that it further supported cancellation. *See id.*

IV. Appeal to the Board

Appellant appealed to the Board and included arguments with its notice of appeal. Appellant also filed an opening brief. The Band and the County of Colusa, California (County) filed answer briefs in opposition to Appellant. Appellant filed briefs in reply to the answer briefs, in which Appellant noted that neither the Band nor the County addressed the alleged violation of ¶ 9(B)(5), and that the County did not address the alleged default under ¶ 23(A)(4). *See* Reply Br. to Band’s Answer Br. at 1-2; Reply Br. to County’s Answer Br., Mar. 21, 2014, at 2-3. Rather, the Band and County argue for cancellation largely on other grounds.⁸ The Regional Director filed no briefs in this matter.

⁷ The Regional Director noted that the Lease contains provisions for the Band to cancel the Lease and that the Band had notified Appellant “of what it considered as defaults” under the Lease. Decision at 5. She stated that her decision was in response to the Band’s request that BIA exercise its discretionary authority to cancel the Lease. *Id.* at 6.

⁸ Due to our ruling on the merits of Appellant’s challenge to BIA’s grounds for cancelling the Lease, we need not and do not reach the issue of whether the County is an interested party to this proceeding, within the meaning of the regulations. *See* 25 C.F.R. § 2.2 (definition of “interested party”); *see also* 43 C.F.R. § 4.313 (Amicus curiae; intervention).

Discussion

I. Standard of Review

The Board reviews *de novo* questions of law, which include interpretations of lease provisions. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). When construing a lease, the Board considers whether the language is clear, complete, and unambiguous, and if so, the Board gives effect to the expressed intent of the lease. *Black Weasel v. Rocky Mountain Regional Director*, 59 IBIA 258, 261 (2014); *High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 39 (2013). We also review the sufficiency of evidence to support a BIA decision *de novo*. *Seminole Tribe of Florida*, 53 IBIA at 210. The Board reviews a regional director's discretionary decision to determine whether it is supported by the administrative record, comports with applicable law, and provides a reasonable explanation for the decision that is neither arbitrary nor capricious. *Garnenez v. Acting Navajo Regional Director*, 60 IBIA 162, 166 (2015); *Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 264 (2013). In reviewing a BIA discretionary decision, we do not substitute our judgment for that of BIA, *High Desert Recreation*, 57 IBIA at 38, and instead determine whether BIA's decision was unreasonable, *Hall v. Great Plains Regional Director*, 59 IBIA 136, 142, 144 (2014). An appellant bears the burden of proving that BIA's decision was in error. *Hawkey*, 57 IBIA at 264; *see also Seminole Tribe of Florida*, 53 IBIA at 210.

II. Analysis

The Regional Director cancelled the Lease on the grounds that Appellant breached the warranty regarding litigation in ¶ 9(B)(5) and defaulted under ¶ 23(A)(4) by admitting in writing that it was unable to pay its debts as they matured. Decision at 6. We reverse the Decision for the reasons that it is contrary to the plain meaning of the Lease and is not supported by the administrative record.

First, the language of the Lease is clear and contradicts the Regional Director's determination that Appellant breached the warranty in ¶ 9(B)(5). The Lease required Appellant to represent that there "are no claims or litigation, pending or threatened, known to [Appellant]," that could adversely affect the Lease, the premises, or Appellant's ability to complete construction. Lease ¶ 9(B)(5). Appellant argues, and we agree, that the warranty statement applies to conditions known to Appellant at the time the representation was made, and does not comprise a warranty regarding "unknowable future developments." Opening Br., Feb. 3, 2014, at 4.

Immediately following ¶ 9(B)(5) on which the Regional Director relies, the Lease specifies that all of Appellant's written representations made in connection with the Lease

must be true when: (1) “furnished to the Band and as of the date made,” and (2) “as of the date on which this Lease is executed.” Lease ¶ 9(B)(6). Another Lease provision, which was not discussed by the Regional Director, makes it an “event of default” under the Lease for Appellant to have made a written representation or warranty that “shall prove to have been false or misleading in any material respect.” *Id.* ¶ 23(A)(2). Considered together, the foregoing Lease provisions could support a finding of default if the record showed that, at the time Appellant made the warranty statement in ¶ 9(B)(5), Appellant failed to disclose a pending or threatened lawsuit then known to it. But these Lease provisions do not support cancellation based on North Bay’s lawsuit filed in 2012, several years after the Lease’s execution and approval. Because the Regional Director did not make any finding, nor does the record show, that the warranty statement in ¶ 9(B)(5) was untrue or misleading based on Appellant’s knowledge at the time Appellant made the representation, her conclusion that Appellant violated ¶ 9(B)(5) is erroneous. And, although the Regional Director believes that the warranty statement in ¶ 9(B)(5) is “still significant” based on the status of the facility’s development, Decision at 2, her position is not grounded in the terms of the Lease. *See also* Decision at 5 (stating that “cancellation of the [L]ease for . . . lack of timely development would be inappropriate”). Notably, neither the Band nor County argue in support of cancellation on the basis of ¶ 9(B)(5). Thus, we conclude that the Regional Director erred in concluding that the Lease should be cancelled for violation of ¶ 9(B)(5).⁹

Second, the Regional Director’s finding that Appellant defaulted by admitting in writing that it was unable to pay its debts is not well-founded. In short, Appellant’s acknowledgement that it owes monies to North Bay cannot be transformed into a finding that Appellant “admit[ted] in writing its inability to pay its debts as they mature” under ¶ 23(A)(4) of the Lease. This provision requires an admission of Appellant’s actual inability to pay its debts; it is insufficient to show a likelihood of future inability, or a failure to pay for reasons other than lack of resources. *See Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp.*, 2010 U.S. Dist. LEXIS 103272, at *21-26 (S.D.N.Y. 2010) (holding that an “inability to pay” clause does not apply prospectively, and distinguishing it from a “fails to pay” clause, which “leaves open the possibility that the entity has the resources to pay its debt, but is choosing not to”). Giving power to the specific language of the Lease, nothing cited by the Regional Director is an admission that Appellant was unable to pay its debt to North Bay.

⁹ While the Band argued, in the prior proceedings and on appeal, that the Lease should also be cancelled for failure by Appellant to give the Band timely *notice* of the lawsuit under ¶ 17(A)(7) of the Lease, *see* Band’s Answer Br. at 11, and Appellant responded to the argument, *see* Reply Br. to Band’s Answer Br. at 5-6, it does not appear that the Regional Director expressed any final decision regarding the merits of the argument. Thus, we consider it no further. *See also infra* note 11.

According to the Regional Director’s decision, the First Settlement, alone or in combination with the subsequent litigation regarding the settlement, represents an admission of this nature. *See* Decision at 2-4. The Decision does not pinpoint where Appellant made such an admission, and instead cites the Band’s opinion. *See id.* The Band argues that the Regional Director reasonably relied on statements in the First Settlement that Appellant “is indebted” to North Bay; that North Bay is “entitled to a refund,” which is “due and payable”; and that the money owed to North Bay is “presently due and owing.” Band’s Answer Br. at 8 (citing First Settlement at 2, ¶¶ H, J(1)(a) & (c) (AR Tab 15, Attach. A at 6)); *see also* Letter from Band to Regional Director, Mar. 14, 2013, at 1 (AR Tab 15) (citing the same statements). But our examination of the First Settlement does not reveal an admission by Appellant that it was unable to pay its debts as they matured. To the contrary, the settling parties stipulated that there was a dispute over the amount that was owed, and they agreed to resolve their differences “without admitting any wrongdoing or fault of any kind.” First Settlement at 2, ¶¶ H, J; *see also id.* at 4, ¶ 9 (“No Admissions” clause).

Further, given the explicit requirement of the Lease that there be a written admission of inability to pay, we are unwilling to assume that because Appellant did not comply with the First Settlement, it was unable to pay its debts. To the extent the Decision relies on the subsequent lawsuit and judgment confirming the First Settlement, the Regional Director does not explain how they support her finding of the requisite admission under the Lease. As we explained above, ¶ 23(A)(4) of the Lease does not make non-payment of debts to third parties, for reasons other than inability to pay, an event of default.

We have also considered the Second Settlement, and find that it does not support the Regional Director’s decision. Like the prior settlement, the Second Settlement sets forth a new payment schedule for Appellant to pay North Bay, and contains no express admission that Appellant was previously unable to pay its debts when due. In her Decision, the Regional Director attaches importance to ¶ 4(d) of the Second Settlement—in which Earthworks agreed to ensure that Appellant “shall incur no debt without the advance written permission of North Bay”—and finds that Appellant’s condition has “substantially changed.” Decision at 5. This provision expressly applies to future debts and does not constitute an admission that Appellant is unable to satisfy its existing obligations.¹⁰ Further, to the extent the Regional Director may be invoking ¶ 9(B)(5) of the Lease, which includes

¹⁰ On appeal, Appellant submitted a declaration from a North Bay representative that, under an unspecified agreement between North Bay and Appellant, Appellant may incur debt without any requirement of approval by North Bay, and that North Bay supports Appellant’s fundraising efforts to ensure the viability of the project and repayment to North Bay. *See* Salyers Declaration, Jan. 31, 2014, at 2 (Opening Br., Attach.).

a warranty against any known basis for a “material adverse change in the condition of [Appellant],” we have already explained that the warranty does not cover circumstances unknown to Appellant at the time the warranty statement was given.

For all of the foregoing reasons, we conclude that the grounds on which the Regional Director cancelled the Lease are unsupported by the terms of the Lease and the administrative record.

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 reverses the Regional Director’s August 19, 2013, decision.¹¹

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

¹¹ As matters apart from our decision that the Regional Director’s expressed grounds for cancelling the Lease are insufficient, we do not reach the merits of other Lease compliance issues that were raised in the proceedings before the Regional Director or on appeal, but which the Regional Director did not identify in her notice of violation and the Decision as her reasons for cancellation. *See McCann Resources, Inc. v. Eastern Oklahoma Regional Director*, 53 IBIA 278, 284 (2011) (“If the reasons for the proposed action change after the notice has been given or new reasons added, the lessee must be given both notice of the newly added or changed reasons and a new opportunity to respond before any decision is made to impose the proposed action.”); *Blackmore v. Billings Area Director*, 30 IBIA 235, 240 (1997) (explaining that it would constitute an abuse of discretion and a violation of due process to decide a matter based on reasons not communicated to the appellant).