

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying petition for class I reinstatement of oil and gas lease AA-48572-AN.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases:  
Termination

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

2. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases:  
Termination

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable because he was moving from Texas to California a month before the payment was due and there was a delay in receipt of the rental billing notice.

APPEARANCES: Melvin P. Clarke, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Melvin P. Clarke appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 22, 1984, denying his petition for

class I reinstatement of noncompetitive oil and gas lease AA-48572-AN. The decision also notified him of the opportunity to seek class II reinstatement and the terms and conditions under which that reinstatement would be available.

The original lease covering 7,040 acres was issued to Alaska Capital Corporation, effective on April 1, 1983. On June 10, 1983, Alaska Capital Corporation assigned 40 acres of the lease to appellant and BLM approved the assignment effective July 1, 1983.

BLM forwarded appellant an oil and gas lease termination notice dated April 27, 1984, stating that AA-48572-AN terminated on the anniversary date of the lease, April 1, 1984, for failure to pay the rental in a timely manner. The envelope in which appellant mailed his rental was postmarked April 2, 1984. BLM received the payment on April 4, 1984. BLM also informed appellant of his right to petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) (1982) (class I reinstatement) and pursuant to 30 U.S.C. § 188(d) (1982) (class II reinstatement). BLM's lease termination notice set forth the conditions for reinstatement under both class I and class II. 1/

1/ Those conditions were as follows:

"I. Class I (30 U.S.C. 188(c); 43 CFR 3108.2-1 (c))

"Your lease may be reinstated under these provisions only if: (1) the rental due is paid or tendered to this office within 20 days after the anniversary date of the lease, and it is shown to the satisfaction of the authorized officer that failure to pay was either justifiable or not due to a lack of reasonable diligence, (2) that a petition for reinstatement, together with a nonrefundable filing fee of \$ 25 and the required rental, is filed in this office within 15 days after receipt of this Notice, and (3) that a new oil and gas lease has not been issued for any of the lands included in the terminated lease. If these conditions are met, your lease will be reinstated with the original lease terms and conditions, effective on the date of the termination. If one or more of the above conditions are not met, your lease may be eligible for a Class II reinstatement. However, to qualify for a Class II reinstatement, the following conditions must be met.

"II. Class II (30 U.S.C. 188(d) and (e); P.L. 97-451, Sec. 401(d))

"Your lease may be reinstated under these provisions only if: (1)(a) the rental is paid within 20 days after the anniversary date of the lease, and it is shown to the satisfaction of the authorized officer that failure to pay on the anniversary date was due to inadvertence, or, (b) if the rental is not paid within 20 days after the anniversary date, it is shown to the satisfaction of the authorized officer that failure to pay was either justifiable or not due to a lack of reasonable diligence or due to inadvertence, (2) that a petition for reinstatement, together with a nonrefundable filing fee of \$ 25 and the rental and royalty due from the date of termination to the date of petition and payable at the rates set out below, is filed in this office within 60 days after receipt of this Notice, and (3) that a new oil and gas lease has not been issued for any of the lands included in the terminated lease.

"If these conditions are met, you will have to meet certain other requirements for reinstatement as follows:

"1. You will be required to pay a reinstatement processing fee of \$ 500 or as provided in regulations in effect at the time the petition is submitted,

In his petition for reinstatement, appellant explained that he retired from the Air Force in January 1984, and moved from Texas to California; that as a result of the move, his mail took some time to "catch up" with him; that upon receipt of BLM's notice of rental due on April 2, 1984, he called Minerals Management Service (MMS) and was informed that if he put the check in the mail that day, everything would be "alright"; that he did in fact mail the check on April 2, 1984. Appellant requested reinstatement of the lease, but stated that he could not afford the \$ 500 processing fee and increased rental fee required for a class II reinstatement.

BLM, citing Louis Samuel, 8 IBLA 268 (1972), denied appellant's petition for class I reinstatement because he did not show that the failure to timely pay the rental was either justifiable or not due to a lack of reasonable diligence, as required by 43 CFR 3108.2-1(c)(1)(ii) (1983). However, BLM did find that appellant's failure to timely pay was inadvertent and that the lease could be reinstated pursuant to class II reinstatement terms and conditions. The decision offered reinstatement with acceptance of those terms and conditions, allowing appellant until July 5, 1984, 60 days from receipt of the termination notice, to meet the conditions, and stated that if he failed to do so, class II reinstatement would be denied without further notice.

In his statement of reasons, appellant elaborates on the information in his petition for reconsideration. Appellant states that he left immediately for California after selling his house in Texas on February 28, 1984, without leaving a forwarding address with the post office. He requested the post office to hold his mail until further notice. Appellant estimates that he spent about 5 days traveling and another 5 days looking for housing before moving into an apartment. He states he then advised the post office to forward his mail. He cannot recall whether he received the notice of rental due on March 31, or April 2, 1984. However, he does recall telephoning MMS on April 2, 1984, and being told that the situation with his lease would be "OK," if the payment were postmarked on April 2, 1984. Appellant contends that this constitutes reasonable diligence.

[1] Section 31 of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(b) (1982), provides that when the lessee fails to pay rentals on or

as well as the cost of publishing a Notice of Proposed Reinstatement in the Federal Register, and,

"2. You must agree to new lease rental and royalty terms:

"(a) For reinstated noncompetitive leases, rental shall be \$ 5.00 per acre or fraction thereof per year, and royalty shall be payable at a rate of 16 2/3 percent.

"(b) [f]or reinstated competitive leases, rental shall be \$ 10.00 per acre or fraction thereof per year, and royalty shall be payable at a rate of 16 2/3 percent, computed on a sliding scale 4 percentage points greater than the competitive royalty schedule attached to the lease.

"If all these requirements are met, your lease may be reinstated with the amended terms and conditions, effective on the date of termination."

before the anniversary date of the lease, and where no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law. If the lessee has paid the full rental within 20 days after the lease anniversary date, and the lessee shows that the failure to pay on or before the anniversary date was justifiable or not due to lack of reasonable diligence, the Department may, under certain circumstances, reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982) and 43 CFR 3108.2-2(a) (class 1). E.g., Harry L. Bevers, 84 IBLA 158, 160-61 (1982); Leo M. Krenzler, 82 IBLA 205, 207 (1984); Kay Fink, 81 IBLA 381, 382 (1984); Arthur M. Solender, 79 IBLA 70, 72 (1984).

Regulation 43 CFR 3108.2-2(b) provides: "The burden of showing that the failure to pay on or before the anniversary date was justified or not due to lack of reasonable diligence will be on the lessee." Leo M. Krenzler, *supra* at 207; Anthony F. Hovey, 79 IBLA 148, 149 (1984).

April 1, 1984, was a Sunday. Under 43 CFR 3108.2-1(a), if the anniversary date of a lease falls on a day the proper office is closed, payment received on the next business day is deemed timely filed. If appellant's rental had been received on April 2, it would have been timely. That regulation further provides that a remittance which is postmarked by the U.S. Postal Service on or before the anniversary date and received in the proper office no later than 20 days after such anniversary date will be considered a timely filed remittance. The implication from the regulation is that the lease does not terminate in such a situation. That result, however, is contrary to 30 U.S.C. § 188(b) (1982), which provides that a lease terminates by operation of law "upon failure of a lessee to pay rental on or before the anniversary date." (Emphasis added.) Thus, the Board has interpreted that provision as providing a ground for satisfying the reinstatement criterion of reasonable diligence. William F. Branscome, 81 IBLA 235 (1984); Anthony F. Hovey, *supra* at 151 n. 1 (Judge Grant concurring).

In this case the anniversary date of the lease was April 1, 1984. The remittance would have had to have been postmarked on or before that date to take advantage of the 43 CFR 3108.2-1(a) mailing provision. That provision does not change the anniversary date of leases.

It is well established that mailing a rental payment after the lease anniversary date does not constitute reasonable diligence. Dena F. Collins, 86 IBLA 32, 35 (1985); James P. Felt, 84 IBLA 205, 207 (1984). In Leo M. Krenzler, *supra* at 209, the Board stated, "[m]ailing the payment 1 day after it is due does not constitute reasonable diligence." Reasonable diligence normally requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of mail. Leo M. Krenzler, *supra* at 209; Anthony F. Hovey, *supra* at 149. In the instant case, the rental was due on April 1, 1984. 2/ Appellant

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2/ Under 30 U.S.C. § 188(b) (1982) and 43 CFR 3108.2-1(a), payment received on Monday, Apr. 2, 1984, would have constituted timely payment. Mailing on that date, however, was mailing after the anniversary date.

did not mail the rental payment until April 2, 1984. Thus, appellant's untimely mailing did not constitute reasonable diligence. <sup>3/</sup>

[2] Late payment of an annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. <sup>4/</sup> Harry L. Bevers, *supra* at 162; William F. Branscome, 81 IBLA 235, 237 (1984); Larry M. Ferguson, 81 IBLA 167, 169 (1984).

Appellant contends that his payment was late due to the fact that he did not receive his rental billing notice on time because of his move. The Board, on numerous occasions, has held that travel, either for business or pleasure, does not ordinarily prevent a diligent individual from making payment or arranging for others to make payment in his or her absence. Anthony F. Hovey, *supra* at 150; James M. Chudnow, 62 IBLA 13, 15 (1982). Likewise, the Board has held that late payment was not justified where the lessee was in the process of moving its corporate offices. NP Energy Corp., 72 IBLA 34 (1983). Appellant's claim that he was moving from Texas to California in early March is not sufficient to show that his delay in paying the rental was justifiable. See Kay Fink, *supra* at 383; Donald L. Darrow, 69 IBLA 62, 64 (1982). Further, it is well established that delay in receipt of the rental billing notice will not justify a late payment. See Kay Fink, *supra* at 383; Melbourne Concept Profit Sharing Trust, 46 IBLA 87, 91 (1980).

Appellant asserts that he was advised by a MMS employee on April 2, 1984, that his lease situation would be "OK" if he mailed the payment on that date. Assuming that assertion to be true, reliance on the erroneous advice of Government employees is not sufficient to relieve appellant of an obligation imposed by statute. Peter R. Buehler, 67 IBLA 242, 244 (1982).

Appellant has failed to carry his burden of proving that his failure to timely pay the required rental was justifiable or not due to a lack of

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<sup>3/</sup> The dissent concludes based on the facts in this case that appellant demonstrated "sufficient reasonable diligence to warrant a class I reinstatement." Reasonable diligence is an objective test. Louis Samuel, *supra*. Mailing payment postmarked on or before the anniversary date will satisfy the reasonable diligence standard. William F. Branscome, *supra*. There is no question appellant failed to mail the rental on or before the anniversary date. The reasonable diligence standard could not have been met. If there were any basis for reinstatement, which there is not, it would be grounded on the subjective "justifiable" standard.

<sup>4/</sup> Appellant inquires as to what circumstances justify a late rental payment. The Board has held that a death in the family is a justifiable excuse if it occurred at a time which would disrupt the timely payment of the rental. Billy Wright, 29 IBLA 81 (1977). Natural disasters may also provide a justifiable excuse if they are the proximate cause of the failure to pay timely. Kenneth F. Santor, 13 IBLA 208 (1973); Louis Samuel, *supra* at 274. Illness of a friend whom the appellant visited on an out-of-town business trip, stayed with, and cared for until Nov. 1, 1977, the lease anniversary date, was a circumstance which justified a late rental payment. C. H. Winters, 34 IBLA 350 (1978).

reasonable diligence. We therefore conclude that appellant's petition for reinstatement was properly rejected. 5/

BLM advised appellant in the notice of termination and again in the decision appealed from that a reinstatement petition could be filed under 30 U.S.C. § 188(d), (e) (1982). However, appellant implied that he would not petition for reinstatement under that provision because he could not afford to do so. Therefore, we do not address that issue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge.

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5/ Appellant inquires concerning further avenues of review. The decision of this Board constitutes the final decision of the Department of the Interior. Any further review must be initiated in the courts. See 30 U.S.C. § 226-2 (1982).

## ADMINISTRATIVE JUDGE MULLEN DISSENTING:

At the outset I must point out that my dissent is predicated on a very narrow set of facts. In order to limit the scope of this dissent I will first discuss the points of agreement with the majority opinion.

There is no disagreement regarding the fact the lease automatically terminated by operation of law. There is also no disagreement with the majority opinion that appellant's actions up and until April 2, 1982, afford appellant no basis for class I reinstatement. The matter of failure to mail rentals during a move from one address to another and posting a letter after the due date has been before the Board on a number of occasions, and the majority has cited a number of cases affirming a denial of class I reinstatement in those circumstances. Thus, for example, if appellant had mailed the rental by a letter postmarked April 3, there would be no question that the decision should be affirmed.

However, there is a set of facts present in this case which causes me to conclude that this appellant exercised sufficient reasonable diligence to warrant the reinstatement of his lease. For emphasis, I will set forth these facts in numerical sequence: (1) April 1, 1984, the anniversary date of appellant's lease was a Sunday and the BLM offices were closed; (2) according to appellant, on Monday, April 2, appellant called the MMS-BRASS office to determine how payment should be made; (3) the regulations governing payment of rentals clearly state payment was not due until Monday, April 2, 1984. See 43 CFR 3108.2-1(a); (4) the regulations also provide that, if payment is mailed before the anniversary date and received within 20 days, a rental payment is considered to have been filed in a timely manner. See 43 CFR 3108.2-1(a); and (5) the rental payment was received on April 4, 1984, well within the 20-day period.

In a quote from previous cases, the majority holds that "[m]ailing the payment one day after it is due does not constitute reasonable diligence" (emphasis added). However, it must be remembered that the Board is not being called upon to make a determination whether BLM properly found the lease to have terminated. It clearly has. What we are determining is whether the appellant has exercised reasonable diligence. All other requirements for a class I reinstatement have been met.

Appellant received the notice of rental due on Friday or Monday. The delay was clearly his own doing and demonstrated a lack of reasonable diligence. However, after noting the rental was due on Sunday, he called MMS seeking advice. According to appellant, he was told that if the payment was mailed on Monday it would be accepted. <sup>1/</sup> I find no reason to doubt appellant's statement. Although incorrect, it is possible to interpret

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<sup>1/</sup> Recognizing there is not sufficient information to ascertain whether, after his call on Apr. 2, appellant could have wired the payment in time for it to have been received by MMS on that date, one can speculate that, if he had been advised that payment must be received on the 2nd, appellant might have been able to do so.

43 CFR 3108.2-1(a) to provide that if the anniversary date falls on a day BLM's offices are closed, a letter postmarked on the following day should be timely. While a closer reading of this regulation does not support this determination, a combination of the existence of the possible misinterpretation of 43 CFR 3108.2-1(a) and the fact appellant appears to have called MMS to seek advice establishes a sufficient basis for me to find that, on April 2, 1984, appellant demonstrated sufficient reasonable diligence to warrant a class I reinstatement. Further, upon a close reading, it is not contrary to the citation in the majority opinion. The check was mailed on the due date.

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R. W. Mullen  
Administrative Judge

