

WILLIAM R. BARTHOLD

IBLA 87-304

Decided July 20, 1987

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-49331-AU.

Affirmed.

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

The Secretary of the Interior may reinstate a terminated oil and gas 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 pay timely was justifiable or not due to a lack of reasonable diligence. Under 43 CFR 3108.2-1(a), a remittance 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 is timely filed. However, that regulation does not alter the anniversary date and where the rental payment arrives within that time period, but in an envelope postmarked after the anniversary date, even though the anniversary date fell on a day on which the proper office to receive payment was closed, the lessee did not exercise reasonable diligence.

APPEARANCES: William R. Barthold, Cassadaga, New York, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On May 18, 1984, the Alaska State Office, Bureau of Land Management (BLM), issued noncompetitive oil and gas lease AA-49331 to Arctic Oil and Gas Corporation (Arctic), with an effective date of June 1, 1984. The lease covered 10,240 acres. On March 29, 1985, BLM approved an assignment of 40 acres of lease AA-49331 to William R. Barthold, effective February 1, 1985. The assignment received serial No. AA-49331-AU.

Rental for AA-49331-AU was received by the Minerals Management Service on June 5, 1986, in an envelope postmarked June 2, 1986. On December 19, 1986, BLM issued an oil and gas termination notice stating that Barthold's

lease had terminated on the lease anniversary date, June 1, 1986, for failure to pay the rental in a timely manner. BLM also informed Barthold 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). The notice set forth the conditions for reinstatement under each class.

Barthold filed a timely petition for class I reinstatement which was rejected by BLM decision dated February 2, 1987. Barthold timely appealed.

June 1, 1986, was a Sunday. On appeal, Barthold asserts that since Sunday is not a normal business day, it is not proper to require him to treat it as one. He contends that "I acted in reasonable dilligence [sic] by assuring my payment was postmarked the next business day." He states that Sunday mail at his local post office "must be deposited before 1:00 PM to be postmarked * * * [a]fter 1:00 PM it must wait until the following day." ^{1/}

[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 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 (1984); Leo M. Krenzler, 82 IBLA 205, 207 (1984); Kay Fink, 81 IBLA 381, 382 (1984).

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 June 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

^{1/} Appellant does not allege that he mailed the rental payment in time to be postmarked on Sunday, June 1. What he states is that he mailed the payment in order to assure it would be postmarked June 2.

ground for satisfying the reinstatement criterion of reasonable diligence. William F. Branscome, 81 IBLA 235 (1984); Anthony F. Hovey, 79 IBLA 148, 151 n. 1 (1984) (Grant, A.J., concurring).

In order to take advantage of the mailing provision of 43 CFR 3108.2-1(a), the envelope containing appellant's rental would have to have been postmarked on or before the June 1, 1986, anniversary date. That provision does not alter the anniversary date, and mailing the rental payment after the lease anniversary date does not constitute reasonable diligence. Melvin P. Clarke, 90 IBLA 95, 98 (1985); Dena F. Collins, 86 IBLA 32, 35 (1985). 2/

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. Here, rental was due on June 1, 1986, the anniversary date. Payment received on Monday, June 2, 1986, would have been timely; however, mail postmarked on that date was mailed after the anniversary date. Appellant's rental payment, enclosed in an envelope postmarked June 2, was not delivered until June 5. Such action cannot constitute reasonable diligence. BLM properly rejected the petition for reinstatement.

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.

Bruce R. Harris
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge.

2/ Clearly, if appellant mailed his payment on June 2, 1986, and somehow it was delivered on that same date, payment would have been timely under that part of 43 CFR 3108.2-1(a) which provides that if the proper office for payment is closed on the anniversary date, "payment received on the next day the office is open to the public shall be deemed timely filed." See 30 U.S.C. § 188(c) (1982).

ADMINISTRATIVE JUDGE ARNESS CONCURRING:

While I agree with the majority that the Bureau of Land Management's (BLM) decision must be affirmed, my agreement is predicated upon a different reason for denying appellant reinstatement of his lease. The majority construe the statutory requirement of the Mineral Leasing Act, 30 U.S.C. § 188(c) (1982), that there should be "reasonable diligence" shown in order to entitle a late-paying lessee to reinstatement, to mean, in this instance, that there must be compliance with Departmental regulation 43 CFR 3108.2-1(a). Since, according to the provisions of this regulation, such compliance would amount to timely payment, the holding seems somewhat anomalous. Admittedly, the Board has taken the position that 43 CFR 3108.2-1 is not a valid regulation because it is contrary to the provisions of 30 U.S.C. § 188 (1982). See Melvin A. Clarke, 90 IBLA 95 (1985); William F. Branscome, 81 IBLA 235 (1984); Anthony F. Hovey, 79 IBLA 148, 151 note 1 (1984) (Grant, A.J., concurring). ^{1/} Rather than rejecting the regulation as invalid because of this conflict, however, the Board has now interpreted it so as to conform the application of the disapproved rule to a proposed rule which was supplanted by the current version of 43 CFR 3108.2-1 when the regulations at 43 CFR Part 3100 were finally promulgated. See discussion of this circumstance in Nancy Wohl, 91 IBLA 327, 333 (1984) (Burski, A.J., concurring).

By what process an invalid regulation can be transformed into an altogether different rule on the premise that it ought to have been written in another way escapes me. While it might have been better to promulgate the rule as proposed, so that it established rules for deciding how to allow reinstatement of a lease following late payment, that was not done. The rule provides simply that mailing on a certain date constitutes payment. It does not deal with reinstatement of terminated leases.

I agree also that the rule as proposed during rulemaking may have been a useful adjunct to the rules respecting reinstatement which have been established by the decisions of this Board. And I certainly agree that we could fashion such a rule if we wished to do so and could, if we so chose, even establish that reinstatement could be allowable for payment mailed on the due date for payment, rather than on the anniversary date of the lease, for the reason that such a payment would not be unreasonable, just as appellant argues.

Were we to revise our rules respecting reinstatement of leases following late payment, we would not be bound by the proposals for rulemaking made by BLM while it was rewriting 43 CFR Part 3100: we should then look to the

^{1/} For a discussion of the Board's authority to declare a regulation to be invalid see the concurring opinion of A. J. Burski in George E. Krier, 92 IBLA 101, 103-106 (1986). (Regulation in conflict with statute not "duly promulgated"). But see Proposed Rulemaking, Oil and Gas Leasing, Geothermal Resources Leasing; Clarifying Amendments, 52 FR 22592, 22594 (June 12, 1987).

language of the statute to determine whether the words "reasonable diligence" describe the conduct of this appellant. In this case, it is clear payment was received two days late. It was due on Monday, June 2, but was received on Thursday, June 5. While payment would ordinarily have been required on the lease anniversary, the 1st (a Sunday) was not a business day, and as appellant explains, "[i]t was my assumption that since my anniversary date fell on a Sunday (June 1, 1986) the mailing and subsequent postmark of the next business day would satisfy on time receipt of payment." Letter dated Jan. 2, 1987, from appellant to BLM. Thus, appellant seems to rely upon the same premise as the disapproved regulation, 43 CFR 3108.2-1. That is, he equates mailing with payment, and assumes that holidays could be excluded for purposes of determining whether payment is made timely. While, as it turns out, this is a mistake, it is not unreasonable. The Department's rulemakers made exactly the same mistake in promulgating 43 CFR 3108.2-1(a). Logically, if the disapproved rule providing for timely payment by mail is now to govern our review of reinstatement applications, the existence of an intention similar to that expressed by Departmental rulemakers should entitle the lessee to favorable consideration for purposes of lease reinstatement, at least.

We must recognize, however, that the phrase "reasonable diligence" has been parsed by this Board in the strictest possible manner, and that a late payment caused by reasonable mistake is not sufficient to move the discretion of the Department so as to obtain reinstatement. See, e.g., Louis Samuel, 8 IBLA 268 (1972); Nancy Wohl, supra at 329. Clearly also, our prior decision in Melvin A. Clarke, supra, is controlling here. In Clarke, the lease payment was also mailed on the due date for payment, a Monday following a Sunday lease anniversary. ^{2/} Our decision denied class I reinstatement, finding that Clarke had not been reasonably diligent. A dissenting opinion by A. J. Mullen in Clarke points out that this interpretation of the statutory phrase is, in the context of a reinstatement application, contrary to the plain meaning of the statute. While this may be logically correct, it overlooks the past interpretation of section 188(c) by this Board, continuously observed for at least 15 years. Thus, while the view expressed by the dissenter in Clarke has the merit of giving the statutory phrase "reasonable diligence" its plain meaning, it ignores our prior decisionmaking which has limited reinstatement in late payment cases under class I to late payments caused by circumstances beyond the control of the lessee such as injury, illness, or death. See discussion in Wohl, supra at 329. Since late payment

^{2/} A similar situation was present in Nancy Wohl, supra, where the lessee's check was dated on June 30, a Saturday, her payment envelope was postmarked July 2, a Monday, and was received by BLM on July 9, following a July 1 anniversary date which fell on a Sunday. Wohl, however, contended that her payment was timely, and did not seek class I reinstatement of her lease because, according to her, the lease had not terminated. This was clearly not correct, since 30 U.S.C. § 188 (1982) requires receipt by the Department of payment on the anniversary date (sec. 188(c)) or on the next business day if the lease anniversary does not come on a business day (sec. 188(b)).

caused by reasonable mistake in reliance upon customary business practice is not an acceptable foundation for class I reinstatement under the prior decisions of the Board, I concur in the result reached by the majority opinion. I do so despite the fact that, in this case, the justification for the late payment tracks exactly the reasoning of the drafters of the Department regulation which arguably, if applied to this case, would make the payment timely, and thus avoid the need for reinstatement altogether.

Franklin D. Arness
Administrative Judge

