INTERIOR BOARD OF INDIAN APPEALS

Knecht Enterprises, Inc. v. Great Plains Regional Director, Bureau of Indian Affairs

37 IBIA 258 (05/31/2002)

Related Board case:
44 IBIA 87

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

KNECHT ENTERPRISES, INC., Appellant	:	Order Vacating Decisions and Remanding Case
v.	:	Docket Nos. IBIA 01-141-A IBIA 01-142-A
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	May 31, 2002

These are appeals from a December 19, 2000, decision issued by the Great Plains Regional Director, Bureau of Indian Affairs (BIA), and a May 11, 2001, decision issued by the Acting Great Plains Regional Director. 1/ The December 19, 2000, decision concerns the cancellation of 14 leases of allotted land on the Winnebago Reservation, Nebraska, and the assessment of liquidated damages under those leases. The appeal from that decision is docketed as IBIA 01-142-A. The May 11, 2001, decision concerns the cancellation of 12 leases on the same reservation for non-payment of rent for 2001. The appeal from that decision is docketed as IBIA 01-141-A. 2/ The Appellant here, Knecht Enterprises, Inc., is lessee under all the cancelled leases. For the reasons discussed below, the Board vacates the Regional Director's decisions and remands this matter to her for further proceedings.

On June 13, 2000, the Superintendent wrote to Appellant, stating that a field inspection of 14 of its leases had revealed violations of provisions (primarily crop rotation and no-till provisions) in the Plans of Conservation Operations incorporated into the leases. The Superintendent's letter listed the violations by tract and field and stated that Appellant owed a total of

---

1/ Both BIA deciding officials are referred to in this decision as "Regional Director."

2/ The leases cancelled by the December 19, 2000, decision are Lease Nos. 101439-98-03, 171023-98-03, 101603-99-04, 101619-99-04, 101851-00-05, 141867-00-05, 101770-00-05, 131861-00-01, 131747-00-01, 131772-00-01, 131775-00-01, 131756-00-01, 131755-00-01, and 131776-00-01.

The leases cancelled by the May 11, 2001, decision are Lease Nos. 101439-98-03, 101603-99-04, 101619-99-04, 101769-00-05, 101770-00-05, 101793-00-05, 101851-00-05, 141867-00-05, 131440-98-03, 131654-99-04, 131774-00-05, and 171023-98-03.

Seven leases, i.e., Lease Nos. 101439-98-03, 171023-98-03, 101603-99-04, 101619-99-04, 101851-00-05, 141867-00-05, 101770-00-05, were cancelled by both decisions.

$46,715.00 in liquidated damages. The letter then stated: "This letter will serve as your ten-day show cause notification. You will have ten days from receipt of this letter to show cause to our office why you should not be billed liquidated damages and your lease canceled for the above violations." Superintendent's June 13, 2000, Letter at 13.

Appellant's President, Vernon Knecht, visited the Agency on June 27, 2000, to discuss the matter. Nothing in the record shows what transpired at that meeting. On June 28, 2000, the Superintendent issued a decision cancelling the leases and holding that Appellant must pay $46,715.00 in liquidated damages.

Appellant appealed to the Regional Director, who affirmed the Superintendent's decision on December 19, 2000, but failed to inform Appellant of its right to appeal her decision to the Board.

On March 22, 2001, the Superintendent wrote to Appellant, stating that it owed a total of $32,825.34 in 2001 rent for 12 leases, including seven of the leases covered by the Regional Director's December 19, 2000, decision. The Superintendent's letter stated: "You are hereby given ten (10) days from receipt of this letter to make payment or show cause why your leases should not be canceled as per **25 CFR 162.14**." Superintendent's March 22, 2001, Letter at 1.

On April 9, 2001, the Superintendent issued a decision cancelling the 12 leases. Appellant appealed the Superintendent's decision to the Regional Director, who affirmed it on May 11, 2001. Again, the Regional Director failed to include appeal information in her decision. Instead she stated: "This decision is final for the Department of the Interior."

Neither the Superintendent's April 9, 2001, decision nor the Regional Director's May 11, 2001, decision required Appellant to pay overdue rent or informed Appellant that payment would be demanded from Appellant's surety. However, on April 12, 2001, the Superintendent wrote to Appellant's surety, demanding payment in the amount of $32,825.34. Further, according to Appellant, BIA again demanded payment from the surety by letter dated May 23, 2001. 3/ Under these circumstances, the demand for payment must be deemed a part of the Regional Director's decision on appeal here.

3/ Neither of the letters to the surety is included in the record. Appellant submits a copy of the Superintendent's Apr. 12, 2001, letter but not the May 23, 2001, letter. As the Regional Director has not refuted Appellant's statement concerning the May 23, 2001, letter, the Board accepts it as accurate.

It is not clear from Appellant's statements whether it received copies of the demand letters from BIA or whether it learned of them only from the surety.

On June 8, 2001, Appellant appealed the Regional Director's December 19, 2000, and May 11, 2001, decisions to the Board. The Board accepted both appeals as timely. 4/

Before the Board, Appellant admits the lease violations identified in the BIA decisions. It does not object to cancellation of its leases. It contends, however, that the liquidated damages assessed in the December 19, 2000, decision are an illegal penalty and that the rent assessed pursuant to the May 11, 2001, decision represents an improper measure of damages. Further, it raises procedural objections to both decisions, in particular, the May 11, 2001, decision.

The Board addresses the procedural issues first. There are several of these. Perhaps most troubling is what appears to be an intentional effort on the part of the Regional Director to deprive Appellant of information concerning its right to appeal her decisions.

Under both the former and the present leasing regulations, lease cancellation decisions are specifically made appealable under 25 C.F.R. Part 2. 25 C.F.R. § 162.14 (2000); 25 C.F.R. §§ 162.113, 162.252(c)(3) (2001). 5/ Under 25 C.F.R. Part 2, the Regional Director's decisions are appealable to this Board, 25 C.F.R. § 2.4(e), and are required to include appeal information. 25 C.F.R. §§ 2.7(c), 2.19(a). The Regional Director was well aware that her decisions are appealable to the Board, having had many of her prior decisions appealed. She was also well aware of the requirement for including appeal information in her decisions and has included them in prior decisions that have come before the Board. Nevertheless, she not only omitted that information from the decisions at issue here but defended the omissions in her memoranda transmitting the administrative records to the Board. 6/ It is apparent that the Regional Director's omission of appeal information from Appellants' decisions was deliberate.

Under the circumstances of this case, the failure to provide appeal information in the December 19, 2000, decision contributed to the situation which gave rise to the May 11, 2001, decision. As noted above, seven of the 14 leases cancelled by the December 19, 2000, decision,

---

4/ Under 25 C.F.R. § 2.7, a BIA decision which fails to include appeal information remains appealable until proper appeal information is provided.

5/ The present leasing regulations were published on Jan. 22, 2001, 66 Fed. Reg. 7109, and became effective on Mar. 23, 2001.

6/ The July 27, 2001, transmittal memorandum in Docket No. IBIA 01-142-A states: "Our decision of December 19, 2000, upholding the superintendent's decision did not include appeal rights because there was no dispute, therefore, nothing further to appeal." The July 26, 2001, transmittal memorandum in Docket No. IBIA 01-141-A states: "Our decision of May 11, 2001, upholding the Superintendent's decision, did not include appeal rights because there was no dispute for not paying the lease rental. Therefore, there is nothing to appeal."

were also cancelled in the May 11, 2001, decision for failure to pay 2001 rent. For these seven leases, rent for 2001 would have been due in February or March 2001, assuming the leases continued in force. 7/ Appellant indicates in this appeal that he believed cancellation of the 14 leases was effective on December 19, 2000, the date the Regional Director's decision was issued. Such a belief was reasonable given the language of the decision. Appellant can hardly be faulted for not paying 2001 rent on leases he reasonably believed had been cancelled in December 2000. 8/

Another serious procedural defect in the May 11, 2001, decision is that it was issued before Appellant's time for filing a statement of reasons had expired and, as further discussed below, without consideration of an April 30, 2001, statement filed by Appellant and a May 8, 2001, statement filed by Appellant's attorney.

Appellant's notice of appeal to the Regional Director was dated April 16, 2001, and was received in the Regional Director's office on April 23, 2001. The record copy of the Regional Director's May 11, 2001, decision shows that it was prepared by a BIA employee on April 26, 2001 (three days after receipt of Appellant's notice of appeal), and that it was reviewed by two BIA employees on April 26, 2001, by one employee on May 7, 2001, and by one employee on May 9, 2001.

Appellant furnishes the Board with copies of his April 30, 2001, statement and his attorney's May 8, 2001, statement, both addressed to the Regional Director. 9/ Neither of these documents is included in the administrative record submitted by the Regional Director. Given those omissions 10/ and the evidence in the record concerning the preparation and routing of the May 11, 2001, decision, the Board concludes that the Regional Director did not take Appellant's April 30, 2001, and May 8, 2001, statements—which were, in essence, its statement of reasons—into consideration when she issued her decision.

7/ The other seven leases cancelled by the Dec. 19, 2000, decision expired in February 2001 and thus no rent for 2001 would have been due.

8/ As indicated above, however, Appellant failed to pay 2001 rent on five additional leases that were not covered by the Dec. 19, 2000, decision.

9/ Appellant also furnishes a return receipt for certified mail which shows receipt of the attorney's statement in the Regional Office on May 10, 2001.

10/ In her memorandum transmitting the administrative record for her May 11, 2001, decision, the Regional Director certified that the record contained "all information utilized by [her] in rendering the decision being appealed."

The Great Plains Regional Director (whose former title was Aberdeen Area Director) has been reminded on numerous occasions that decisions must not be issued prior to the time allowed in 25 C.F.R. § 2.10 and 2.11 for parties to file their statements of reasons and answers. See Ziebach County, South Dakota v. Aberdeen Area Director, 33 IBIA 239, 244 n. 3 (1999); Laducer-Bercier v. Aberdeen Area Director, 32 IBIA 104, 106 n.3 (1998); Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, 28 IBIA 288, 293 and n.9 (1995); Scott v. Acting Aberdeen Area Director, 25 IBIA 115, 118 (1994); Meeks v. Aberdeen Area Director, 23 IBIA 200, 201-02 (1993); Jerome v. Acting Aberdeen Area Director, 23 IBIA 137, 138 n.1 (1993); Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103, 107 (1992). As the Board has previously noted, premature decisions deprive the parties of the rights given to them by the regulations and thus of their right to due process. E.g., Laducer-Bercier.

Two further procedural problems concern the mailing of the Regional Director's May 11, 2001, decision and the Superintendent's March 22, 2001, ten-day notice letter to Appellant. Appellant states that it did not receive either of these letters, even though both letters state that they were sent by certified mail.

After Appellant filed an objection to the record in these appeals, the Board ordered the Regional Director to supplement the record with the return receipts for these two letters. In a response dated September 17, 2001, the Regional Director conceded that her May 11, 2001, decision was not sent by certified mail and stated that the Superintendent's March 22, 2001, ten-day notice letter was sent by certified mail but was returned to the Agency unclaimed.

The Regional Director's May 11, 2001, decision states at the top: "CERTIFIED MAIL - RETURN RECEIPT REQUESTED - 7099 3220 0001 6562 3041." Even so, the Regional Director states in her September 17, 2001, memorandum: "Our records show that our May 11, 2001, letter was hand carried by the Winnebago Agency Superintendent for delivery to [Appellant] by BIA/Tribal Law Enforcement. Law Enforcement was unsuccessful in locating [Appellant]. Therefore, the decision was sent to [Appellant] by regular mail. The notice was not returned unclaimed." The Regional Director does not furnish a copy of the BIA records to which she refers.

25 C.F.R. § 2.19(b) provides: "A copy of the [Regional Director's] decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record."

The Regional Director failed to comply with this regulation and offers no explanation for her failure to do so. Further, as Appellant contends, the Regional Director has submitted a misleading record to the Board. The record indicates that the May 11, 2001, decision was sent to Appellant by certified mail when in fact it was not. Further, the record includes no reference

to, let alone any documentation or justification of, the alternative delivery method described in the Regional Director's September 17, 2001, memorandum. 11/

As noted above, Appellant states that it never received the Regional Director's May 11, 2001, decision. It further states that it did not become aware of the decision until its surety received the May 23, 2001, letter demanding payment. Upon the record here, it appears possible that the Regional Director did not send her May 11, 2001, decision to Appellant at all. In any event, it is clear that she failed to send the decision in accordance with the regulations.

Concerning the Superintendent's March 22, 2001, letter, the Regional Director's September 17, 2001, memorandum states: "The Superintendent's ten-day show cause notice of March 22, 2001, was sent by certified mail and was returned to the agency unclaimed by [Appellant]. Refusing to accept certified mail from [BIA] does not relieve [Appellant] of the responsibility for paying the lease rental." The Regional Director has not furnished a copy of the returned letter, either as a part of the administrative record or with her September 17, 2001, memorandum.

The Superintendent's April 9, 2001, decision letter stated: "A certified letter was mailed to you on March 22, 2001 that was returned to this Agency on March 28, 2001." Appellant contends that such a prompt return to the Agency would not have been possible under Postal Service regulations if the letter had been properly sent by certified mail. It reasons that the letter would have been returned that quickly only if it was incorrectly addressed or lacked sufficient postage.

The Regional Director states the letter was "unclaimed" but also suggests that it may have been affirmatively "refused." In the absence of a copy of the returned letter, it is not possible to determine the reason for return.

Neither the Regional Director nor the Superintendent indicated that any further efforts were made to reach Appellant after the March 22, 2001, letter was returned to the Agency. Therefore, the Board must conclude that Appellant did not receive the notice to which he was entitled under 25 C.F.R. § 162.14 (2000) and/or 25 C.F.R. § 162.251(a) (2001).

Additional procedural problems concern the regulatory requirement for notice to Appellant's surety. Appellant contends that, despite a "cc:" notation on the Superintendent's March 22, 2001, ten-day notice letter, indicating that a copy of the letter was sent to the

11/ The Board recognizes that it is sometimes necessary for BIA to deliver a decision by some method other than certified mail as, for instance, in a case where a party has repeatedly refused to accept certified mail. In such a case, however, it is incumbent upon BIA to document its efforts to deliver the decision in accordance with the regulations and the steps taken after BIA concludes that an alternative delivery method is necessary.

Nationwide Mutual Insurance Company (Appellant's surety), that company denies receiving a copy of the letter from BIA, either directly or through its local agent, the Northeast Nebraska Insurance Agency. Appellant contends that the first notice received by the surety was the Superintendent's April 12, 2001, letter, which was addressed to the Northeast Nebraska Insurance Agency and demanded payment based upon the Superintendent's April 9, 2001, cancellation decision.

The March 22, 2001, letter does not show the address to which the surety's copy was sent. Nor does the administrative record contain any proof that the copy was actually sent. In light of the several irregularities in BIA's procedures in this matter, the Board declines to give BIA the benefit of a presumption, on the evidence of the "cc:" notation on the March 22, 2001, letter, that the copy was sent to the surety at its correct address.

Although Appellant does not discuss the Superintendent's June 13, 2000, ten-day notice letter, the Board observes that that letter does not even include a "cc:" notation indicating that a copy was sent to the surety. Nor is there any other evidence in the record that a copy was sent to the surety. The Board must therefore conclude that no copy was sent to the surety.

25 C.F.R. § 162.14, which was in effect at the time both of the ten-day notice letters were issued, provided:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. The surety or sureties shall be sent a copy of each such notice. [12/]

The Board finds that the Superintendent failed to send Appellant's surety copies of either the June 13, 2000, ten-day notice letter or the March 22, 2001, ten-day notice letter.

In view of the nature and scope of the regulatory violations evident here, the Board finds itself compelled to agree with Appellant's contentions that BIA has repeatedly acted in an arbitrary and capricious manner and that the Regional Director has engaged in "a concerted effort * * * to mislead the Appellant as to its rights." Appellant's Opening Brief at 24. The Board finds that the actions of BIA, and in particular, those of the Regional Director, have resulted in a serious violation of Appellant's right to due process.

12/ The present regulations also require notice to the surety. 25 C.F.R. § 162.251(a) (2001) provides: "If we [i.e., BIA] determine that an agricultural lease has been violated, we will send the tenant and its sureties a notice of violation within five business days of that determination. The notice of violation must be provided by certified mail, return receipt requested."

In the first of its arguments on the merits, Appellant contends that the liquidated damages provisions in its leases are unenforceable as a penalty.

The subject of liquidated damages was addressed in Myers v. Muskogee Area Director, 32 IBIA 242 (1998). The Board there held that a provision for liquidated damages in a lease of Indian land cannot be enforced if it is determined to be a penalty. The Board further held that, in such a case, the landowner's recovery for breach by the lessee is limited to actual damages. Under the facts in Myers, the Board found a liquidated damages clause invalid when applied to a partial breach because it purported to make the lessee liable for the same amount regardless of the degree to which he had performed under the contract.

In this case, the leases call for damages to be determined on a "per-acre" basis (or on the basis of another unit of measure). A typical provision, and one which BIA found that Appellant had breached in several of its cultivated fields, appears in Paragraph 14.C of the leases' Plans of Conservation Operations. Paragraph 14 states: "LIQUIDATED DAMAGES FOR NON-COMPLIANCE WITH THE ROTATION REQUIREMENTS ARE AS FOLLOWS: * * * C. FAILURE TO NO-TILL WHERE REQUIRED: $100 PER ACRE." Provisions such as this allow for some degree of flexibility in assessing damages. Thus, the situation here is not precisely the one addressed in Myers.

Appellant contends, however, that the liquidated damages provisions in its leases are penalties because the amounts are excessive and are not reasonably related to the amount of damage that the described breaches would actually cause.

The general rule concerning contractual provisions for liquidated damages is set out in section 356 of the Restatement (Second) of Contracts (1981):

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

See also the other authorities cited in Myers, 32 IBIA at 248-49.

There are no facts in the present record that would allow a determination as to whether or not the liquidated damages provisions in Appellant's leases are reasonable in the circumstances of this case. As discussed below, this matter will be remanded to the Regional Director. If the parties are unable to resolve the matter through negotiation, the Regional Director will be required to issue a new decision, for which development of the relevant facts will be essential.

In its second argument on the merits, Appellant contends that BIA is not entitled to collect 2001 rent for leases it cancelled in 2000. Further, it contends that BIA was required to mitigate damages and apparently did so by issuing new leases for at least some of the property covered by Appellant's cancelled leases. Appellant states that it believes new leases were issued because crops were grown on some of the property during 2001. The Regional Director has not denied that new leases were issued.

The Board has held that BIA has a duty to mitigate damages resulting from the breach and cancellation of a lease. French v. Aberdeen Area Director, 22 IBIA 211, 215 (1992), and cases cited therein. In French, the Board noted that, because BIA's decisions are not effective while they are subject to appeal or while an appeal is pending, BIA should follow the procedures in 25 C.F.R. Part 2 for placing a decision into immediate effect, so that it may mitigate damages by re-leasing property subject to a cancelled lease. Id.

In this case, BIA did not follow the procedure discussed in French. Evidently, however, it re-leased property based upon the Regional Director's erroneous statement that her decisions were final. Thus BIA, albeit for incorrect reasons, took steps to mitigate damages. However, it failed to follow through by reducing the damages it attempted to collect from Appellant's surety.

The Board finds that BIA is not entitled to collect any part of the 2001 rent for the seven leases which were cancelled in the Regional Director's December 19, 2000, decision but which the Regional Director purported to re-cancel in her May 11, 2001, decision. The Board further finds that BIA is entitled to collect 2001 rent for the other five leases cancelled in the May 11, 2001, decision only to the extent that Appellant's rent for those leases exceeds 2001 rent received under new leases of the same property.

For the reasons discussed above, this matter will be remanded to the Regional Director for further proceedings.

Upon remand, the Regional Director shall attempt to resolve this matter through negotiation with Appellant and, for this purpose, shall request the assistance of the Field Solicitor, Twin Cities. If the matter cannot be resolved through negotiation, the Regional Director shall issue a new decision and, for this purpose, shall seek and abide by the advice of the Field Solicitor. If a new decision is required, the Regional Director shall take into consideration the arguments made by Appellant in these appeals. She shall make determinations of the reasonableness of the liquidated damages assessed against Appellant, with respect to each violation listed in the Superintendent's June 28, 2000, decision, and shall explain the reasons for her determinations. She shall recalculate damages for failure to pay 2001 rent subject to the following limitations: (1) she may not include rent for any of the leases that were cancelled in her December 19, 2000, decision, and (2) she shall reduce damages for the remaining five

leases subject to her May 11, 2001, decision by the amount of 2001 rent received under any new leases issued for the same property.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's December 19, 2000, and May 11, 2001, decisions are vacated, and this matter is remanded to her for further proceedings in accordance with the preceding paragraph. 13/

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

13/ All motions not previously addressed are denied.