

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bruce E. Zoeller) ASBCA No. 54205
)
Under Contract No. DACA41-1-99-532)

APPEARANCE FOR THE APPELLANT: Mr. Bruce E. Zoeller

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
David J. Benson, Esq.
Engineer Trial Attorney
U.S Army Engineer District
Kansas City, MO

OPINION BY ADMINISTRATIVE JUDGE COLDREN

This appeal was taken from termination of a portion of a lease of land granted to appellant for agricultural purposes on the Fort Leavenworth Military Installation, Fort Leavenworth, Kansas. Appellant contends that the Lease does not permit a partial termination and that the contracting officer lacked authority to terminate a portion of the Lease. He further claims that the Government took this portion of the leased land prior to the notice of termination without notice or providing just compensation.

The Government responds that the Lease provides that the Lease is revocable at will, that this revocation provision covers a partial termination, and that the contracting officer had the authority to take this action. A two day hearing was held in Kansas City, Missouri. Only the validity of the partial termination is at issue.

FINDINGS OF FACT

1. On 22 June 1999, the Secretary of the Army (Government) leased three parcels of land, Lease Units AA, FW, and FE, for agricultural or grazing purposes on Fort Leavenworth Military Installation, Fort Leavenworth, Kansas, for five crop years with the lease expiring on 31 December 2003 at an annual rent of \$247.18. Lease Unit AA was for native plant seed production; and Units FW and FE for hay. The Government executed the Lease pursuant to 10 U.S.C. § 2667. The Lease was signed by appellant and Charles B. Barton as Chief of the Real Estate Division. (R4, tab 3)

2. Paragraph 1 of the Lease entitled "TERM" provides that "[s]aid premises are hereby leased for a term of five hay-crop years, beginning **MAY 20, 1999**, and ending

December 31, 2003, but revocable at will by the Secretary” (R4, tab 3 at 1). Paragraph 4 states that any reference to “Secretary” includes the Secretary’s duly authorized representatives (*id.* at 2).

3. Paragraph 11 of the Lease entitled “RENTAL ADJUSTMENT” provides as follows:

In the event the United States revokes this lease or in any other manner materially reduces the leased area or materially affects its use by the Lessee prior to the expiration date, an equitable adjustment will be made in the rental paid or to be paid under this lease. Where the said premises are being used for farming purposes, the Lessee shall have the right to harvest, gather and remove such crops as may have been planted or grown on said premises, or the District Engineer may require the Lessee to vacate immediately and, if funds are available, compensation will be made to the Lessee for the value of the remaining crops. . . .

(R4, tab 3 at 4)

4. By a memorandum dated 2 December 2002, the Director of Installation Support, U.S. Army Combined Arms Center and Fort Leavenworth requested that the District Director of the Kansas City District, U.S. Army Corps of Engineers, terminate appellant’s Lease in its entirety due to security or force protection issues, new family housing construction, new Red Cross building, and other projects which currently and will continue to infringe upon the lessee’s agricultural pursuit (R4, tab 6).

5. By a letter dated 21 February 2003, entitled in part “Transmittal of termination of portion of lease,” the Chief of the Military Branch, Real Estate Division, Kansas City District, U.S. Army Corps of Engineers, Gary Dye, informed appellant that two of the three Lease Units were terminated, stating in part as follows:

Please be advised that, in accordance with paragraph 1 of lease DACA41-1-99-532, this is your official notice of the removal of two areas from your lease, FE and FW. Due to the removal of these areas, your rent for this year has been reduced from \$247.18 to \$222.68. Because you have already sent a check in the amount of \$247.18, a check for the amount of \$24.51 for the difference in the actual amount due versus what was paid has been processed in our office and sent to Millington Tennessee to be mailed to your address.

.....

Also please be advised that because these two areas have been removed from the lease, you will not be authorized to access them. Any cost you incur on these two areas will be at your own expense and will be considered a trespass.

(R4, tab 2)

6. By a letter dated 21 May 2003, appellant filed an appeal with this Board contending that the Government did not properly terminate the Lease in part because only the entire Lease can be revoked under the terms of the Lease and then only by the Secretary of the Army (R4, tab 1). Appellant reserved the right to “make a future claim” relating to Unit FW.

7. The Secretary of the Army at Paragraph 3-1 of Army Regulation 405-80 provides as follows:

The CG, USACE [Commanding General, U.S. Army Corps of Engineers] and the USACE Director of Real Estate are delegated the authority to issue, execute, manage, renew, supplement or revoke outgrants, authorizing the use of Army real property, and are authorized, as appropriate, to redelegate this authority to USACE Division or District Commanders, or the USACE division or district Chiefs of Real Estate.

(Ex. A-1)

8. The USACE Director of Real Estate redelegated the authority described in finding 7 by Paragraph 3 of a memorandum dated 16 December 1997 as follows:

As authorized by Chapter 3, AR 405-80, I hereby redelegate the authority to issue, execute, manage, renew, supplement or revoke outgrants authorizing the use of Army real property to all USACE Division Commanders, and the division Chiefs of Real Estate, with the authority to redelegate to their division Chiefs, Management and Disposal, who meet the attached qualifying standards (Encl 2).

(Ex. G-2)

9. In enclosure 2 to a memorandum dated 25 January 1999, the Chief of the Northwestern Division of the USACE redelegated the authority stated in finding 8 as follows:

As authorized by the delegation, authority is hereby redelegated to District Chiefs of Real Estate within the Northwestern Division, to issue, execute, manage, renew, supplement or revoke outgrants authorizing the use of Army real property in accordance with AR 405-80.

District Chiefs of Real Estate are authorized to redelegate the authority to issue, execute, manage, renew, supplement or revoke outgrants to individuals currently assigned as the District Chief, Management and Disposal, who meet the qualifying standards contained in enclosures to the 16 December 1997, memorandum from CERE-M.

(Ex. G-1)

10. The District Chief Real Estate Division of the Kansas City District of the USACE through Paragraph 2 of a memorandum dated 15 October 2002 delegated the authority described in finding 9 as follows:

Effective 15 October 2002, the following individuals are hereby delegated authority to issue, execute, manage, renew, supplement or revoke outgrants, within the established guidelines:

....

b. Gary R. Dye, Chief Military Branch, Real Estate Division

(Ex. G-3)

DECISION

Appellant argues that the Lease cannot be revoked in part because the language at finding 2 only states that the Secretary of the Army can revoke the Lease at will, pointing out that it does not state “in whole or in part.” This revocation language is required by 10 U.S.C. § 2667(b)(3), which provides as follows:

(b) A lease under subsection (a)-

....

(3) shall permit the Secretary to revoke the lease at any time, unless he determines that the omission of such a provision will promote the national defense or be in the public interest;

It is also well established that conditions on the exercise of this Government right of revocation will not be implied. *United States v. 93.970 Acres of Land*, 360 U.S. 328 (1959); *Arnold V. Hedberg*, ASBCA No. 31747, 90-1 BCA ¶ 22,577.

No limitations on the Government's right to revoke at will are expressed in the Lease nor has appellant pointed out any such limitations. In addition, the Rental Adjustment provision of the Lease quoted in finding 3 makes it clear that the revocation can be for less than the entire lease when it provides for adjustments for revocation or other actions resulting in the reduction in the amount of leased land. Thus, we hold that the term "revocation" includes partial revocations and reject appellant's argument.

We turn now to appellant's argument that the Chief of the Military Branch, Real Estate Division, Kansas City District, U.S. Army Corps of Engineers lacked the authority to partially revoke its lease since the revocation provision quoted at finding 2 states that the Lease is "revocable at will by the Secretary" not the Chief of the Military Branch. Appellant's argument cannot be accepted. The Secretary was the party awarding the Lease to appellant but Charles B. Barton as Chief of the Real Estate Division signed the Lease on the Secretary's behalf. We have carefully traced the delegation of authority to revoke the Lease from the Secretary to the Chief of the Military Branch (findings 7 to 10). Clearly, the Secretary authorized the partial revocation and appellant's position must be rejected.

We turn now to appellant's argument that it is entitled to just compensation for the seizure of its leased crops. This claim is not before us as appellant elected to only challenge the propriety of the termination in its appeal (finding 6).

The appeal is denied in its entirety.

Dated: 12 December 2003

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54205, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals