IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

PREMIER INSURANCE CO., INC.,
Petitioner-Appellant,

v.

COMMONWEALTH DEPARTMENT OF LABOR,
Respondent-Appellee.

SUPREME COURT NO. 2011-SCC-0032-CIV
SUPERIOR COURT NO. 09-0323E

Cite as: 2012 MP 16

Decided December 18, 2012

Michael W. Dotts, Saipan, MP, for Petitioner-Appellant Premier Insurance Co., Inc.
Meredith Callan, Office of the Attorney General, Saipan, MP, for Respondent-Appellee Commonwealth Department of Labor.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tem.

CASTRO, C.J.:

¶ 1 Petitioner-Appellant Premier Insurance Co., Inc. ("Premier"), appeals the trial court's order affirming a decision of Respondent-Appellee Commonwealth Department of Labor ("DOL"), which found Premier liable for bond claims filed by Angel's International School of Dance ("Employer"). On appeal, Premier claims the trial court's order should be set aside because: (1) DOL violated Premier's due process by providing notice of an administrative hearing only via publication; and (2) the trial court improperly held that, assuming Premier received inadequate notice, the defective notice constituted "harmless error." For the reasons stated herein, we REVERSE the trial court's order and hold that: (1) DOL violated Premier's due process rights by providing notice solely via publication; and (2) DOL's failure to provide adequate notice does not constitute "harmless error."

I

¶ 2 In 2004, Premier provided the Employer two bonds related to two of its employees, Ryan C. Isidro and Rommel C. Isidro (collectively, "Employees"). Later that year, the Employees filed labor claims with DOL, alleging that the Employer refused to pay the Employees for unpaid wages and other expenses in violation of their employment contracts. Apparently recognizing Premier's interest in the labor claims as the company that bonded the two employment contracts, DOL sent Premier a notice in 2004 ("2004 Notice") regarding the Employees' claims.[1] In 2007—three years after the initial notice—DOL scheduled hearings on the Employees' claims. DOL did not send individualized notices as it had in 2004. Instead, DOL simply posted a notice of the hearing in a newspaper twice ("2007 Notice").[2] In March 2007, DOL conducted a hearing on the Employees' claims, attended by the Employer and the Employees, but not by Premier. At the conclusion of the hearing, DOL's hearing officer granted the Employees' claim for unpaid wages.

¶ 3 When the Employer refused to comply with the hearing officer's order, the Employees registered as bond claimants with DOL, and DOL issued notices of claim to Premier. After a hearing on these bond claims in 2009, DOL's hearing officer found in favor of the Employees. Premier appealed to the Secretary of DOL ("Secretary").

¶ 4 On appeal to the Secretary, Premier argued that it should not be bound by the 2007 DOL decision against the Employer because DOL failed to provide adequate notice of the hearing to Premier. Premier also contested the merits of the hearing officer's decision to enforce the bonds against Premier. The Secretary ultimately rejected Premier's arguments and affirmed the hearing officer's decision.

¶ 5 Thereafter, Premier challenged DOL's decision in the Superior Court. Premier contended that DOL's method of providing notice solely by publication, in spite of DOL's knowledge of Premier's mailing address, violated Premier's due process rights under: (1) article I, section 5 of the NMI Constitution; (2) the Commonwealth Administrative Procedure Act ("APA"), 1 CMC §§ 9101-9115; (3) former 3 CMC § 4444 (repealed 2007); and (4) former DOL regulation NMIAC § 80-20.1-824 (repealed 2007). The trial court held that DOL's notice by publication in 2007 satisfied due process, citing 3 CMC § 4945. Regarding Premier's claim that it was unreasonable to require Premier to check the newspaper every day for three years to determine the date of the hearing on the Employees' claims, the trial court

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[1] The 2004 notice is not in either party's Appendix to the Briefs or the trial court's file, leading us to conclude that DOL never included it in the administrative record certified for this matter.

[2] The 2007 Notice is also not part of the record. Because this matter centers on the adequacy of the notice DOL provided, it is troubling that neither party produced either of the notice documents. DOL must review its administrative record preparation policies to ensure that in the future, such egregious omissions do not re-occur.

adopted the Secretary's reasoning, which required on-notice defendants to check regularly for notices in relevant newspapers:

Once [Petitioner] was on notice that specific claims had been filed against an employer bonded by it, [Petitioner] had an obligation to check newspaper notices published with respect to the times and dates of the hearings on those claims . . . . [Petitioner] was free to ignore published notices or to fail to check theses [sic] notices for cases for which it had already received notice of claims. Notice by publication in a newspaper of general circulation is permitted in every jurisdiction, particularly under circumstances such as existed in 2007 where the Commonwealth was affording many hearings in long-delayed cases under conditions of severe budget constraints. The Commonwealth is not required to use an extensive method of accomplishing notice when a more efficient and effective method of giving notice is available. Both the employer and the workers appeared for the hearing in response to the published notice. [Petitioner's] [sic] could have done likewise. The argument about the form of notice is particularly unpersuasive in the case of a sophisticated corporation, served by counsel, experienced in claims and litigation, that had ready access to the information it needed to protect its interests.

Premier Ins. Co. v. Dep't of Labor, No. 09-0323 (NMI Super. Ct. Nov. 18, 2011) (Order Affirming the Secretary of Labor's Order on Appeal at 5) ("Order") (alteration in original) (quoting Secretary's Order on Appeal; Premier App. at 17). The court also stated that the "harmless error" standard would apply in this case even if the notice was deficient because Premier failed to allege prejudice in not attending the 2007 hearing. Order at 6 (citing *Camacho v. N. Marianas Retirement Fund*, 1 NMI 362, 376 (1990)).

II

¶ 6 We have jurisdiction over this appeal pursuant to 1 CMC § 9113, which grants "aggrieved parties" standing to appeal trial court decisions reviewing administrative matters. *J.G. Sablan Rock Quarry, Inc. v. Department of Public Lands*, 2012 MP 2 ¶ 16 (Slip Opinion, Mar. 30, 2012) (citation omitted) (internal quotation marks omitted).

III

A. Notice by Publication and Due Process

¶ 7 On appeal, Premier renews its argument that DOL's service of the 2007 Notice by publication, despite DOL's knowledge of Premier's mailing address, violated Premier's due process rights under: (1) article I, section 5 of the NMI Constitution; (2) 1 CMC §§ 9101-9115 of the APA; (3) former 3 CMC § 4444 (repealed 2007)[3]; and (4) former DOL regulation NMIAC § 80-20.1-824 (repealed 2007). DOL counters that Premier's due process rights were satisfied and that the trial court did not err in applying 3 CMC § 4945 rather than former 3 CMC § 4444. Whether an agency's conduct satisfies constitutional and statutory due process protections is a question of law reviewed de novo. *J.G. Sablan,*

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[3] As mentioned at oral argument, Premier's briefing in this matter repeatedly attacked the integrity of the trial court. *See* Premier Opening Br. at 8 ("The lower court makes a snide comment . . . ."); *id.* at 10 (footnote omitted) ("[I]n 2011, the lower court ignorantly applied a new law . . . to legitimize the due process violations . . . ."); *id.* at 12 ("This is the most offensive portion of the *Lower Court Order* . . . ."); *id.* at 16 ("The lower court had little interest in this case and did not notice that Premier had asserted it was prejudiced."); *id.* ("And before this Court is a 6 page . . . decision . . . that took almost 14 months . . . to write, that evidences that the lower court just did not care about this case."). In addition to being highly disrespectful, these statements run afoul of ABA Model Rule of Professional Conduct 8.2(a), which states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

We admonish counsel for Premier to refrain from making unfounded attacks on judicial officers.

2012 MP 2 ¶ 17 (Slip Opinion, Mar. 30, 2012) (citing *In re Hafadai Beach Hotel Extension*, 4 NMI 37, 41 (1993)). Because we find that DOL's actions violate both the NMI Constitution and the APA, we will only address these two sources of due process.[4]

1. Constitutional Due Process

¶ 8 The due process clause of article I, section 5 of the NMI Constitution requires notice and an opportunity to be heard prior to the deprivation of a life, liberty, or property interest. *Feliciano v. Superior Court*, 1999 MP 3 ¶ 36.[5] Premier alleges that DOL's service by publication of the 2007 Notice violated Premier's due process rights. We addressed the sufficiency of service by publication last year in *Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11. In *Estate of Ogumoro*, we held that a plaintiff may only use service by publication after first exercising reasonable diligence to serve the defendant directly:

When a plaintiff serves the defendant by publication, the central inquiry into the validity of service is whether the plaintiff exercised reasonable diligence in attempting to locate the defendant. It is axiomatic that 'if a defendant's name and address are known or may be obtained with reasonable diligence, service by publication will not satisfy the requirements of due process.' Service by publication does not realistically afford a defendant actual notice of the lawsuit, and thus, should only be used as a last resort, when service by other methods is not reasonably practicable.

2011 MP 11 ¶ 23 (citations omitted) (quoting *SEC v. Tome*, 833 F.2d 1086, 1094 (2nd Cir. 1987)). In sum, because it "does not realistically afford a defendant actual notice" of proceedings, service by publication should only be used as a "last resort" when other methods of service have proved fruitless. *Id.* (citation omitted).

¶ 9 In this case, it is undisputed that DOL knew Premier's address since it served the 2004 Notice by mail. This case perfectly illustrates the inadequacy of service by publication recognized in *Estate of Ogumoro*. Service by publication of the 2007 Notice did not provide Premier notice of the hearing. Indeed, Premier did not discover that the hearing had occurred until after the decision became final. Because DOL knew Premier's address but still chose to serve the 2007 Notice solely by publication, we hold that DOL's service of the 2007 Notice violated Premier's constitutional right to due process.

2. Due Process Pursuant to the APA

¶ 10 Section 9109(a)(1) of the APA states, "Persons entitled to notice of an agency hearing shall be timely informed of: (1) [t]he time, place, and nature of the hearing . . . ." 1 CMC § 9109(a).[6]

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[4] While we do not reach the issue, our discussion of the propriety of service by publication in *Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11, discussed next, calls into question the constitutionality of 3 CMC § 4945, which presently gives DOL carte blanche to serve *all* notices by publication. 3 CMC § 4945 [N: I can't seem to find this statute anywhere, but after a quick Google search, the following is an accurate quotation.] ("Service of process for any notice of any kind required for any proceeding conducted by the Administrative Hearing Office may be made by . . . publication in any English-language newspaper of general circulation in the Commonwealth, at the discretion of the Administrative Hearing Office.").

[5] To be entitled to due process protection, a party must show interference with a life, liberty, or property interest. *J.G. Sablan*, 2012 MP 3 ¶ 18 ("To determine if [a claimant's] constitutional right to due process has been violated, we must 'first determine if a due process interest is implicated . . . .'" (quoting *Hafadai Beach Hotel Extension*, 4 NMI at 44-45 (1993)) [N: assuming text and footnote citations are treated as a whole, and not separately]. We assume, without deciding, that Premier had a property interest in the administrative proceedings because DOL waived the ability to challenge Premier's interest by failing to contest Premier's property interest in its opposition brief. *I.G.I. Gen. Contractor & Dev., Inc. v. Pub. Sch. Sys.*, 1999 MP 12 ¶ 16 (citation omitted) ("Generally, where a party does not discuss issues in its brief, they are treated as waived.").

[6] While 1 CMC § 9109(a) only applies to "[p]ersons entitled to notice of an agency hearing," DOL conceded that Premier was a person entitled to notice through numerous actions. First, DOL sent Premier the 2004 Notice via mail regarding the labor claims. If Premier was not an interested party, DOL would have had no reason to send them

Premier argues, and DOL does not dispute, that the 2004 Notice did not disclose the time or place of the hearing. As such, the only notice that might satisfy 1 CMC § 9109(a) is the 2007 Notice.

¶ 11 Another section of the APA, however, requires that agencies must afford interested parties "reasonable notice" of hearings. 1 CMC § 9108(a). In this case, DOL issued a 2007 Notice containing the hearing date and time, three years after the initial 2004 Notice of labor claims. The trial court stated that it was reasonable to force Premier to check the newspaper every day for three years to determine the hearing date. Order at 5 ("Petitioner had an obligation to check newspaper notices published with respect to the times and dates of the hearings on those claims" after receiving the 2004 Notice (quoting the Secretary's Order on Appeal, Premier App. at 17)).

¶ 12 We find that notice by publication does not constitute "reasonable notice" under the circumstances of this case. Our decision is based both on the long lag between the 2004 Notice and the 2007 Notice as well as DOL's reliance on service by publication, despite knowledge of Premier's mailing address, which, as discussed above, violated Premier's constitutional right to due process. *Estate of Ogumoro*, 2011 MP 11 ¶ 23 ("It is axiomatic that if a defendant's name and address are known or may be obtained with reasonable diligence, service by publication will not satisfy the requirements of due process." (citation omitted) (internal quotation marks omitted)). Though the result might be different if Premier alleged that DOL had to provide a costly method of service, Premier merely contends that individualized notice through U.S. mail was necessary to provide "reasonable notice." 1 CMC § 9108(a). On the facts of this case, we agree.

B. Due Process and the "Harmless Error" Standard

¶ 13 The trial court held that any deficiency in DOL's notice to Premier was "harmless error" and that Premier alleged no prejudice from not receiving the 2007 Notice. Order at 6. On appeal, Premier argues that DOL's violation of Premier's due process rights was per se arbitrary and capricious as well as an abuse of discretion. Premier Opening Br. at 12-13. Premier claims it suffered prejudice from not being able to attend the 2007 hearing because it could have raised affirmative defenses to liability that the Employer did not raise. In support of its argument that the 2009 hearing was too late to raise affirmative defenses, Premier notes that the hearing officer's decision after the 2009 hearing dismissed the arguments raised by Premier in 2009 by stating that Premier should have raised them at the 2007 hearing. Premier Reply Br. at 5 (quoting Premier App. at 12, 14). DOL urges this Court to affirm the trial court's finding that Premier did not allege prejudice in not being able to attend the 2007 hearing.[7] DOL argues that because DOL's 2007 Notice was adequate, there is no due process violation that could constitute prejudicial error.

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the notice. Second, DOL's opposition brief does not contest Premier's claim that it was an interested party who had a property interest related to the 2007 hearing. By failing to contest Premier's status as a personal entitled to notice, DOL waived the ability to contest Premier's status as an interested party. *I.G.I. Gen. Contractor & Dev., Inc. v. Pub. Sch. Sys.*, 1999 MP 12 ¶ 16 ("Generally, where a party does not discuss issues in its brief, they are treated as waived."). Third, at oral argument, counsel for DOL explicitly conceded that Premier was an interested party.

[7] All but one sentence of the first paragraph of DOL's argument section on this point is plagiarized from the trial court's Order. *Compare* DOL Opp'n Br. at 6 *with* Order at 6. We discovered, upon closer inspection, that DOL plagiarized nearly one-third of its opposition brief directly from the trial court's Order. This is totally unacceptable conduct. Plagiarism—a form of misrepresentation—violates ABA Model Rule of Professional Responsibility 8.4, which states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Prof'l Conduct R. 8.4(c). We also note that counsel's disengaged oral argument suggests an improper lack of preparation. As the legal representatives of the Commonwealth, *See* NMI Const. art. III, § 11, the Office of the Attorney General must hold itself to the highest standards of integrity and professionalism, which includes accurate and well-supported work product. DOL's conduct in this matter fell well short of these standards.

¶ 14 Pursuant to the APA, courts must "[h]old unlawful and set aside agency action[s] . . . found to be . . . [c]ontrary to [a] constitutional right . . . [or] [w]ithout observance of procedure required by law." 1 CMC §§ 9112(f)(2)(ii), (f)(2)(iv). Because we hold that DOL's 2007 Notice ran afoul of both the NMI Constitution and the APA, 1 CMC § 9112 mandates reversal of DOL's decision regardless of whether Premier demonstrated prejudice in its absence at the 2007 hearing. Simply put, a violation of a fundamental constitutional right is not "harmless error." *See KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 657 (N.D. Ohio 2010) (holding that failure to provide notice and a meaningful opportunity to respond prior to deprivation of property violated the Fifth Amendment to the U.S. Constitution and was prejudicial error requiring remand). For these reasons, we reverse the trial court's holding that DOL's deficient notice constituted "harmless error."

IV

¶ 15 For the foregoing reasons, we REVERSE the trial court's order affirming the Secretary's order and REMAND this matter to the trial court for further proceedings consistent with this opinion.

SO ORDERED this 18th day of December, 2012.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice Pro Tem