

IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN  
MARIANA ISLANDS,

Petitioner,

v.

ABEL S. BARCINAS,

Respondent.

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Civil Action No. 98-135  
BPL Case no. 97-001

**ORDER ON PETITION  
FOR JUDICIAL REVIEW**

**I. PROCEDURAL BACKGROUND**

This matter came before the Court on September 15, 1998, in Courtroom A on Petitioner's Petition for Judicial Review. Thomas E. Clifford, Esq. appeared on behalf of Petitioner. Brien Sers Nicholas, Esq. appeared on behalf of Respondent Abel S. Barcinas. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

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**II. FACTS**

In 1962, Determination of Ownership No.487 (hereinafter referred to as "TD 487") was issued to Antonio Blanco Barcinas which formally recognized Mr. Barcinas as the owner of .13 hectares of land in Salu, Tatatchog, Rota. Antonio Blanco Barcinas was the father of Respondent Abel S. Barcinas

**FOR PUBLICATION**

(hereinafter referred to as “Respondent”).

In 1975, most of the island of Rota was designated as a Land Registration Area in preparation for an Asia Mapping Company survey of public land. TD 487 was within the designated area, and was one of the lots identified for preliminary hearing and boundary negotiations.

In 1983, a Rota survey was signed, certified, and stamped by an Anastacion P. Buccat. Mr. Buccat supervised the 1983 survey, which was officially approved and recorded as an official government survey. Respondent supervised the field work for the survey. The survey established the northern boundary line of TD 487, as well as two monuments thereto. It also established all of the boundaries of neighboring Lot 3026, also known as Public Land Tract 11-2.

In 1986, Respondent was issued a license by the Board of Professional Licensing (hereinafter referred to as “BPL”) as a professional land surveyor.

In 1988, Respondent conducted another Rota survey, which he signed, certified and stamped. Respondent not only supervised this survey, but it was officially approved and recorded as an official government survey. However, this survey was inconsistent with the Asia Mapping survey and the 1983 Buccat survey with respect to the northern, eastern, and western boundaries of TD 487. In fact, the 1988 survey disregarded what the two previous surveys had indicated as Public Land Tract 11-2, resulting in Public Land Tract 11-2 being incorporated into the 1988 survey of TD 487. Following the recording of the 1988 survey, Respondent sold TD 487 under what BPL described as “questionable circumstances”.<sup>1</sup>

In the course of its investigation into the growth of the number of private lots on Rota at the expense of adjoining public lands, the government obtained information that Respondent had allegedly [p. 3] engaged in surveying misconduct as to the 1988 Rota survey. In August 1996, the government filed charges against Respondent, alleging fraud and surveying misconduct. The charges also encompassed the government’s claim that Respondent had been improperly “grandfathered” as a professional land surveyor.

In April 1997, BPL issued an Order finding that since Respondent had not committed fraud or

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<sup>1</sup> See Decision, BPL Case No. 97-001, dated January 23, 1998, at page 7, ¶ 31.

deceit in obtaining his license, it would no longer entertain the “grandfather” issue.<sup>2</sup>

In January 1998, BPL issued a final Decision finding Respondent guilty of surveying misconduct and conflict of interest.<sup>3</sup> The final Decision incorporated BPL’s prior ruling as to the “grandfather” issue.<sup>4</sup> As a result of its findings, BPL suspended Respondent’s license for two years with eighteen months deferred.

Although the government agreed with BPL’s final Decision as to the findings of surveying misconduct and conflict of interest, the government filed the instant Petition for Judicial Review on the grounds that BPL’s Decision was, in other parts, legally erroneous and thus, required reversal

### III. ISSUES

1. Whether BPL’s failure to revoke Respondent’s license on the “grandfathering” issue was legally erroneous under 4 CMC § 3212?
2. Whether BPL’s failure to adopt all of Petitioner’s proposed findings of fact was legally erroneous under 1 CMC § 9110?
3. Whether BPL’s failure to find that Respondent had “poor character” was legally erroneous?
4. Whether BPL’s failure to permanently revoke Respondent’s license for surveying misconduct was legally erroneous?

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### IV. ANALYSIS

#### A. Judicial review

Under the Commonwealth Administrative Procedure Act (hereinafter referred to as the “APA”), the reviewing court shall decide all questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. See 1 CMC § 9112(f). With respect to an agency’s actions, findings or conclusions, the law empowers the reviewing court to hold and set aside the same if it determines that any of the six bases exist to warrant such a holding. See 1 CMC § 9112(f)(2)(i)-(vii). The standard of review is de novo. In re San Nicolas, 1 N.M.I. 329, 333 (1990).

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<sup>2</sup> See Order - Based on the 4/22/97 Status Conference in the Matter of Abel S. Barcinas, dated April 28, 1997, at ¶ 3.

<sup>3</sup> See Decision, supra, at page 1.

<sup>4</sup> See Decision, supra, at page 2, ¶ 3.

B. “Grandfather” issue

Petitioner contends that BPL’s failure to revoke Respondent’s land surveyor license on the grounds that Respondent was improperly grandfathered was erroneous under 4 CMC § 3212. As such, BPL’s decision as to this issue must be reversed.

As noted by Petitioner, there are two ways to become a registered land surveyor in the CNMI: (1) meet the educational and/or experience requirements and pass the qualifying examination,<sup>5</sup> or (2) become grandfathered under 4 CMC § 3216(a)(10). To be grandfathered under this section, one must have been a registered Trust Territory land surveyor. *Id.*

In the instant case, Respondent admitted at the hearing in this matter that he was not a registered Trust Territory land surveyor.<sup>6</sup> Moreover, it was BPL itself who informed Petitioner that Respondent had not met the requirements for grandfathering under 4 CMC § 3216(a)(10).<sup>7</sup> However, in deciding this issue, BPL ruled that since there was no fraud or deceit involved in Respondent obtaining his land surveyor license, it would not reverse the Board’s earlier decision regarding [p. 5] grandfathering. In its preliminary Order and in its final Decision on this issue, BPL cited the misconduct provision at 4 CMC § 3218(a).<sup>8</sup>

The Court finds that BPL applied an incorrect legal standard as Petitioner has not alleged that Respondent fraudulently or deceitfully obtained his license. Thus, 4 CMC § 3218(a) is inapplicable. The correct standard is whether Respondent has been “duly registered” under 4 CMC § 3212. This statute provides, in pertinent part, that:

In order to safeguard life, health and property, no person . . . shall practice professional . . . land surveying . . . in the Commonwealth unless such person is *duly registered* under this chapter.

4 CMC § 3212 (emphasis added).

Based on the foregoing it is evident that Respondent was not “duly registered” as a professional

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<sup>5</sup> See 4 CMC § 3216(a)(1)-(9),(11).

<sup>6</sup> See Testimony of Abel S. Barcinas, BPL transcript of hearing on September 15-16, 1997, at page 234:8 - 235:4.

<sup>7</sup> See letter from Francisco Q. Guerrero, BPL Chairman, to Thomas E. Clifford, dated September 9, 1996, attached as Exhibit 7 to certified record on appeal (Barcinas File).

<sup>8</sup> 4 CMC § 3218(a) provides, in pertinent part, that:

“The board may revoke or suspend the certificate of registration of any person hereunder who is found guilty of any fraud or deceit in obtaining the certificate . . .”

land surveyor as he had not satisfied the “grandfather” requirements in 4 CMC § 3216(a)(10).<sup>9</sup> As such, the Court finds that BPL’s refusal to revoke Respondent’s license was violative of 1 CMC § 9112(f)(2)(ii) as it exceeded BPL’s statutory authority. See Butcher v. Maybury, 8 F.2d 155, 159 (9<sup>th</sup> Cir.1925). Therefore, the Court reverses BPL’s decision as to this issue and remands this matter to BPL to issue an order revoking the license of Respondent unless and until he meets the statutory requirements expressed in 4 CMC § 3216.

C. Proposed findings of fact

Petitioner contends that it was erroneous and prejudicial for BPL not to adopt all of Petitioner’s proposed findings of fact pursuant to 1 CMC § 9110(b) and (c). As such, BPL’s decision must be reversed. [p. 6] 1 CMC § 9110(b) and (c), provides in pertinent part, that:

(b) Before a recommended initial order or decision, . . . the parties are entitled to a reasonable opportunity to submit for the consideration of the persons participating in the decision:

(1) Proposed findings and conclusions;

(c) The record *shall* show the ruling or decision on each finding, conclusion, or exception presented . . . .

1 CMC § 9110(b), (c) (emphasis added).

In the instant case, the Court finds nothing in the language of 1 CMC § 9110 that requires an administrative agency to adopt *all* of the proposed findings of fact submitted by a particular party. However, as Petitioner correctly points out, the agency is required to show a ruling or decision on each finding presented. This, BPL did not do.

In considering this issue, the APA requires reviewing courts to “take due account . . . of the rule of prejudicial error” in determining whether to set aside an agency’s action. See 1 CMC 9112(f)(2); Camacho v. Northern Marianas Retirement Fund, 1 N.M.I. 362, 374 (1990). The doctrine of harmless error is applicable to review of administrative decisions. In re San Nicolas, supra, at 335. It is always incumbent upon the aggrieved party to demonstrate the prejudicial effect of procedural irregularities in administrative proceedings. Camacho, supra, at 376.

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<sup>9</sup> The Court notes also that there is no evidence in the record to indicate that Respondent has met any of the educational and/or experience requirements for registration under 4 CMC § 3216.

In the case at bar, Petitioner contends that BPL's failure to either adopt its proposed findings or provide the required rulings was prejudicial as such action would have confirmed Respondent's intentional misconduct. However, despite its failure to provide rulings on Petitioner's proposed findings, BPL *did* unanimously find Respondent guilty of misconduct.<sup>10</sup> In light of this finding, the Court will not set aside BPL's Decision as to this issue since Petitioner has not demonstrated prejudicial error. [p. 7]

D. Poor character

Petitioner contends that BPL's failure to find that Respondent had "poor character" was erroneous. Thus, BPL's Decision as to this issue must be reversed and Respondent's license revoked pursuant to 4 CMC § 3216(c).

4 CMC § 3216(c) provides, in pertinent part, that:

[N]o person shall be eligible for registration as a professional . . . land surveyor . . . who is not of good character and reputation.

4 CMC § 3216(c).

"Character" is that which a person actually is, and it is usually expressed by qualities which distinguish him from others or which are peculiar to him. First National Bank of Worland v. Financial Institutions Board, 616 P.2d 787, 795 (Wyo.1980); see also, In re Capozzi, 289 N.Y.S. 869, 872 (N.Y.Sup.Ct.1936)(character consists of the qualities which constitute the individual). "Good character" is what is said about an individual by the public in the community in which he lives. Anderson v. State, 34 S.E.2d 110, 112 (Ga.Ct.App.1945).

In the case at bar, Court finds that BPL did not violate the APA by failing to find that Respondent had "poor character" under 3 CMC § 3216(c). As noted above, an individual's "good character" is expressed by his or her distinguishing qualities and is derived from perceptions of others in their community. The Court fails to find anything in the administrative record below to indicate that the business or social community in which Respondent resides expressed a belief that Respondent had "poor character". As such, the Court will not reverse BPL's Decision as to this issue.<sup>11</sup>

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<sup>10</sup> See Decision, dated January 28, 1998, at 1.

<sup>11</sup> The Court submits that a determination of Respondent's "good character" is best left to BPL if and when Respondent becomes eligible for registration as a professional land surveyor. See Monarski v. Alexandrides, 362 N.Y.S.2d 976, 985 (N.Y.Sup.Ct.1974)(the question of moral character is a necessary and legitimate prerequisite to the *granting* of a license).

E. Permanent license revocation

Petitioner contends that BPL abused its discretion by suspending, but not permanently revoking Respondent's license under 4 CMC § 3218(a) after finding him guilty of surveying misconduct. As such, BPL's decision on this issue must be reversed.

[p. 8] 4 CMC § 3218(a) provides, in pertinent part, that:

that "the board *may* revoke or suspend the certificate of registration of any person . . . who is found guilty of . . . misconduct in the practice of his profession . . .".

4 CMC § 3218(a)(emphasis added).

It is well settled that the word "may" in a licensing statute invests the licensing authority with discretion. See Commonwealth v. Gordon, 242 N.E.2d 399, 402 (Mass.1968)(the word "may" in licensing statute commonly imports discretion); Thriftway Marketing Corp. v. State, 844 P.2d 828, 830 (N.M.App.1992)(word "may" intended by legislature to invest governing body with discretion). However, an agency can be found to have abused this discretion if its own failure to follow the law is shown to be prejudicial. Sierra Club v. State Board of Forestry, 876 P.2d 505, 518 (Cal.1994).

As noted above, 4 CMC § 3218(a) invested discretion with BPL to either revoke or suspend Respondent's license based on their finding of surveying misconduct. As such, BPL's decision to suspend as opposed to revoke Respondent's license was well within the law. Moreover, in light of the Court's order above directing BPL to formally revoke Respondent's license, the issue of prejudice becomes moot.

Based on the foregoing the Court finds that BPL did not abuse its discretion in suspending, but not permanently revoking Respondent's land surveyor license based on its finding of surveying misconduct. As such, BPL's Decision as to this issue is affirmed.

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**V. CONCLUSION**

Based on the reasons stated above, the Court finds that Respondent was improperly grandfathered as a registered land surveyor in the CNMI under 4 CMC § 3216(a)(10). As such, the Court **REVERSES** the Decision of the Board of Professional Licensing as to this issue and directs the Board of Professional Licensing to issue an order revoking the license of Respondent unless and until Respondent meets the express statutory requirements for qualification as a registered land surveyor under 4 CMC § 3216. The Decision of the Board of Professional Licensing as to the other issues discussed above is

**AFFIRMED.**

So ORDERED this 09 day of February, 1999.

/s/ Timothy H. Bellas \_\_\_\_\_

TIMOTHY H. BELLAS, Associate Judge