

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-9657**

File: 47-549751 Reg: 17085197

THE DISTRICT VAPOR LOUNGE, LLC,  
dba District Vapor Lounge & Bar  
19 East Citrus Avenue, Suite 101,  
Redlands, CA 92373-4763,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Appeals Board Hearing: May 3, 2018  
Los Angeles, CA

**ISSUED MAY 30, 2018**

Appearances: *Appellant*: David Kramer appearing on behalf of The District Vapor Lounge, LLC, doing business as District Vapor Lounge & Bar.  
*Respondent*: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

The District Vapor Lounge, LLC, doing business as District Vapor Lounge & Bar (appellant), appeals from a default decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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1. The Department's Decision Following Default, dated May 5, 2017, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

On January 5, 2017, the Department filed an accusation charging that appellant's employee sold an alcoholic beverage to a minor on August 11, 2016.

Appellant did not respond to notice of an accusation against it. Accordingly, on May 5, 2017, the Department issued a Decision Following Default imposing a penalty of 15 days' suspension.

Appellant then filed this appeal contending the illegal sale was a mistake and it has since been more diligent about verifying identification.

## DISCUSSION

Appellant contends the illegal sale was a mistake—that the employee checked the identification, but made a mathematical error. (App.Br., at p. 1.) Appellant further argues that since this episode, it has been more diligent about training its employees and has not had a similar violation. (*Ibid.*) Appellant does not explain its failure to respond to the accusation. (See *ibid.*)

In its response brief, the Department argues appellant failed to file a motion to vacate and has therefore forfeited its right to challenge the default decision on appeal. (Dept.Br., at pp. 2-3.)

As an initial matter, this Board has jurisdiction to review a Department decision even where no administrative hearing has taken place. (See Cal. Const., art. XX, § 22; see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1987) 195 Cal.App.3d 812, 919 [240 Cal.Rptr. 915] [Board's jurisdiction not limited to review of quasi-judicial decisions following formal hearings].)

Section 11520 of the Government Code outlines the procedure for filing a motion to vacate an agency's default decision:

Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause.

(Gov. Code, § 11520(c) [good cause includes, but is not limited to, mistake, inadvertence, surprise, excusable neglect, or failure to receive notice].)

The seven-day deadline for filing a motion to vacate, however, runs concurrently with the deadline for filing an appeal before this Board:

On or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered, any party aggrieved by a final decision of the department may file an appeal with the board from such decision. . . . The right to appeal shall not be affected by failure to seek reconsideration before the department.

(Bus. & Prof. Code, § 23081.) There is nothing in either provision that conditions the right to an appeal before the Board on the filing of a motion to vacate. (See Gov. Code, § 11520; Bus & Prof. Code, § 23081.) Because these deadlines run concurrently, requiring the licensee to first file a motion to vacate with the Department and await a response before resorting to appeal before the Board would effectively shorten the timeframe for appeal—in some cases, dramatically.<sup>2</sup>

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2. In cases where the Department issues a default decision "effective immediately," the licensee would be afforded only ten days in which to file an appeal before the Board. (See Bus. & Prof. Code, § 23081.) That ten-day deadline would run concurrently with the seven-day deadline for a motion to vacate. In such cases, a licensee who first filed a motion to vacate and awaited a ruling from the Department would be left with a mere three days—or less, depending on how quickly the Department rules—to file a notice of appeal before the Board, effectively eliminating the right to an appeal. In this case, there is nothing in the default decision to suggest it was effective immediately; however, most Department default decisions do include such language.

Moreover, the cases the Department cites do not support its position. Those cases address circumstances in which an appellant failed to raise an issue during the administrative hearing. They are unhelpful where, as here, the appellant challenges a default decision bypassing the administrative hearing altogether. (See *Wilke & Holzheiser* (1978) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23] [under Code Civ. Proc. § 1094.5, production of evidence in a mandate proceeding precluded where proponent failed to offer it before administrative agency]; *Hooks v. Personnel Bd.* (1980) 111 Cal.App.3d 572 [168 Cal.Rptr. 822] [due process issue not raised at hearing]; *Shea v. Bd. of Med. Examiners* (1998) 81 Cal.App.3d 564 [146 Cal.Rptr. 653] [First Amendment issue not raised at administrative hearing or before trial court]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1978) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167] [statute of limitations argument not raised at administrative hearing].)

We therefore conclude the Board has jurisdiction to review a Decision Following Default even where no motion to vacate was filed.

Review of a default decision, however, is strictly limited. Where a motion to vacate is filed, a default decision may only be set aside where the licensee shows good cause for its failure to respond to the notice of accusation. (Gov. Code, § 11520(c).) Good cause includes failure to receive notice (Gov. Code, § 11520(c)(1)) as well as mistake, inadvertence, surprise, or excusable neglect (Gov. Code, § 11520(c)(2)). Where good cause is found, the agency may vacate the decision and grant a hearing. (Gov. Code, § 11520(c).) Reviewing courts apply the same good-cause standard. (See, e.g., *Med. Bd. of Cal. v. Superior Ct.* (2018) 20 Cal.App.5th 1191, 1193-1194 [229 Cal.Rptr.3d 784].) We apply the same standard here. Where this Board finds good

cause, the remedy is remand to the Department for a hearing on the merits. (See Bus. & Prof. Code, § 23085.)

In this case, however, appellant does not allege good cause for default. (See generally App.Br.) In fact, appellant focuses only on evidence in mitigation: it argues, for example, that "the said employee did in fact check the ID of the individual but made a calculating error in math," and refers the Board to camera footage as support. (App.Br., at p. 1.) The Board, however, is not a trier of fact; it has no jurisdiction to review evidence or hear argument on the merits of the case, particularly following a default decision. Appellant has therefore shown no grounds for relief from the default decision.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
JUAN PEDRO GAFFNEY RIVERA, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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3. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

# **APPENDIX**

BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA

2017 SEP 15 AM 8:33

RECEIVED  
ABC APPEALS BOARD

IN THE MATTER OF THE ACCUSATION  
AGAINST:

THE DISTRICT VAPOR LOUNGE LLC  
DISTRICT VAPOR LOUNGE & BAR  
19 E CITRUS AVENUE  
SUITE 101  
REDLANDS, CA 92373-4763

} AB-9657  
} FILE: 47-549751  
} REG: 17085197

} DECISION FOLLOWING  
} DEFAULT

} under the Alcoholic Beverage Control Act.

This proceeding is conducted pursuant to Government Code section 11520. An Accusation against the above-referenced Respondent-licensee was registered by the Department January 5, 2017.

According to Department records the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery were served on Respondent-licensee on January 5, 2017.

According to Department records a letter ("warning letter") which advised the licensee that this matter was in default and warning that a Default Judgment would be entered if a response was not received within 15-days was mailed to Respondent-licensee on February 7, 2017.

According to Department records, no Notice of Defense has been filed. Accordingly, it is hereby found that Respondent licensee is in default and the Department makes the following Findings of Fact, Conclusions of Law, and Order:

Exhibits:

1. A true and correct copy of the Accusation registered in this matter is identified and admitted into evidence as Exhibit 1. Official Notice is taken of the license history as outlined in said Accusation.
2. A true and correct copy of the Proof of Service of Notice of Defense, Accusation, Department's Request for Discovery and Statement re Discovery, establishing service on Respondent-licensee, is identified and admitted into evidence as Exhibit 2.
3. A true and correct copy of the warning letter is identified and admitted into evidence as Exhibit 3.
4. A true and correct copy of the Department form ABC-333, Report of Investigation, and related documents are identified and admitted into evidence as Exhibit 4.

Findings of Fact:

1. Pursuant to Exhibits 2 and 3 as well as Government Code section 11505 and Miller Family Home, Inc. v. Department of Social Services (1997) 57 Cal.App.4th 488, it is found that Respondent-licensee was properly served with the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery in this matter. No Notice of Defense has been received.

2. Pursuant to Exhibits 1 and 4 it is found that Respondent-licensee did violate the Alcoholic Beverage Control Act.

Conclusions of Law:

1. Pursuant to Finding 1 above, Respondent-licensee has defaulted in this matter and the Department is authorized pursuant to Government Code section 11520 to conduct this default proceeding.

2. Pursuant to Finding 2 above, Respondent-licensee did violate the Alcoholic Beverage Control Act as alleged in said Accusation.

3. That by reason of the foregoing Findings of Fact and Conclusions of Law, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section(s) 24200(a) and (b) of the Business and Professions Code.

Order:

WHEREFORE, it is hereby ordered that the license be, and hereby is, suspended for a period of **15** days.

A representative of the Department will call on Respondent-licensee on or after JUN 28 2017 to pick up the license certificate.

Dated: 5-5-17



Matthew Botting  
General Counsel

Any Motion to Vacate this decision must be made in accordance with Government Code §11520.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:  DISTRICT VAPOR LOUNGE LLC, THE DISTRICT VAPOR LOUNGE & BAR THE 19 E CITRUS AVE STE 101 REDLANDS, CA 92373-4763  ON-SALE GENERAL EATING PLACE - LICENSE  under the Alcoholic Beverage Control Act.	File: 47-549751  Reg: 17085197  <b>DECLARATION OF SERVICE BY MAIL</b>
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The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control. I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On May 18, 2017, I served, by CERTIFIED mail (unless otherwise indicated) a true copy of the following documents:

**DECISION FOLLOWING DEFAULT**

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

DISTRICT VAPOR LOUNGE LLC,  
DISTRICT VAPOR LOUNGE &  
BAR THE  
19 E CITRUS AVE  
STE 101  
REDLANDS, CA 92373-4763

7036 0750 0000 7658 7717

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 18, 2017 at Sacramento, California.

\_\_\_\_\_  
Michael Clyde

RIVERSIDE DISTRICT OFFICE (INTEROFFICE MAIL)  
\_\_\_\_\_  
DIVISION OFFICE (INTEROFFICE MAIL)