

**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 Control¹ 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).

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.²

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.³

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

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.