

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

AB-9704

File: 47-501110; Reg: 17086090

MCCARTHY'S BAR GROUP, INC.,
dba Tidal Bay Beach Bar
3522-24 East Anaheim Street,
Long Beach, CA 90804,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: n/a

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 20, 2018

Appearances: *Appellant:* Robert McCarthy, in propria personam,

Respondent: Kerry K. Winters, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

McCarthy's Bar Group, Inc., doing business as Tidal Bay Beach Bar, appeals from a Decision Following Default by the Department of Alcoholic Beverage Control¹ suspending its license for 30 days because it failed to comply with a request to examine its books and records, in violation of Business and Professions Code section 25616.

¹The Department's Decision Following Default, dated May 8, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on August 11, 2010, and there is one prior instance of discipline against the license.

The instant case is based on an investigation which began in December of 2015. Agents were assigned to investigate a complaint that appellant had received a free Bud Light cooler from its wholesaler, Anheuser-Busch, LLC. Department agents went to the licensed premises and asked the licensee how he obtained the cooler. Robert McCarthy, president of McCarthy's Bar Group, Inc. indicated to the agents that he rents the cooler from Anheuser-Busch for \$10 per month. The agents told appellant he would need to provide a copy of the lease documents and proof of payment for the cooler. Appellant was provided with a Notice to Produce Records. (See Investigative Report, Exh. 3.)

Appellant failed to provide the requested documents and, on February 16, 2016, a second Notice to Produce Records was sent by certified mail to the premises address on file. It was returned to the Department marked "undeliverable." The agent in charge researched the premises, found another address, and re-sent the notice on April 14, 2016. (*Ibid.*) Confirmation from the U.S. Postal Service indicated that someone signed for the certified mail at the premises.

The licensee still failed to produce the requested records. Thereafter, on January 23, 2017, a third Notice to Produce Records was sent to the premises. It was returned to the Department on March 24, 2017 marked "Return to Sender. Unclaimed." (*Ibid.*)

On June 26, 2017, the agent in charge asked Agent Gray to hand-deliver the Notice to Produce Records to the premises and to advise the licensee of the statute

requiring licensees to produce records requested by the Department and the potential penalty for failing or refusing to provide the requested records. (*Ibid.*) The next day, Agent Gray hand-delivered the Notice to Produce Records and advised an employee at the premises of the importance of responding to the letter. He asked her to have the licensee contact the Department within ten days. Appellant did not produce the requested documents. (*Ibid.*)

Thereafter, on November 1, 2017, the Department instituted an accusation against appellant charging that it failed to allow or refused to comply with a request to examine books and records, in violation of Business and Professions Code section 25616.

The accusation was served by on appellant on November 1, 2017, along with the Notice of Defense, Statement re: Discovery, and the Department's Request for Discovery. It was sent by certified mail to the address of record as required by California Code of Regulations, title 4, section 145. No response of any kind was received by the Department. Accordingly, on May 8, 2018, the Department issued a Decision Following Default and it was served on appellant on May 11, 2018. Appellant did not file a Notice of Defense, nor did it request relief from the default judgement.

Appellant then filed a timely appeal maintaining it now has copies of its original lease agreement and invoices documenting proof of payment for the cooler.

DISCUSSION

Under Government code section 11520(c), the recipient of a Decision Following Default is entitled to serve a written motion on the Department, requesting that the decision be vacated. The Department then has discretion to vacate the decision and grant a hearing — provided the respondent has demonstrated good cause.

"Good cause" includes (but is not limited to): failure to receive notice, mistake, inadvertence, surprise, or excusable neglect. "[A] default may not be set aside unless the moving party fulfills the burden of showing its entry through mistake, inadvertence, surprise, or excusable neglect." (*Ray Kizer Constr. Co. v. Young* (1968) 257 Cal.App.2d 766, 65 [Cal.Rptr. 267].)

Appellant did not request that the decision be vacated, nor did it demonstrate any of the permissible bases to establish good cause. Appellant merely stated that it communicated by phone and email with Department Agent Lee Riegler when the matter at hand came to its attention. Appellant provided no explanation for its failure to comply with the record-keeping requirement in section 25616.

Appellant's Notice of Appeal fails to put forth a basis for an appeal — it simply states that it now has copies of its original lease agreement and invoices documenting proof of payment for a cooler. It provides no rationale for why the Appeals Board should offer relief from the 30-day suspension imposed for failure to comply with Business and Professions Code section 25616 for nearly three years, nor does it contend that the Department erred in any way.

Business and Professions Code § 25616 provides that a misdemeanor is committed by:

"any person who refuses to permit the department or any of its representatives to make any inspection or examination for which provision is made in this division, or who fails to keep books of account as prescribed by the department, or who fails to preserve such books for the inspection of the department for such time as the department deems necessary or who alters, cancels or obliterates entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages . . ."

(Bus. & Prof. Code, § 25616.) In the instant case, it appears from the limited record

before the Board that appellant did not comply with this record-keeping and inspection requirement when requests were made on multiple occasions by the Department.

Written notice of the opportunity to file briefs in support of appellant's appeal was given on July 10, 2018. Appellant, however, did not file a brief.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was appellant's duty to show the Board that some error existed. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710]; *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880].) To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [126 Cal.Rptr.2d 178].)

Appellant has put forth no justification or basis for its appeal — other than its assertion that it now stands ready to provide the information first requested in 2015. This, unfortunately, is an insufficient ground for an appeal.

While our hands may be tied in regards to our ability to completely overturn the decision in this matter, we find scant evidence in the record to support the harsh penalty imposed. It has always been the Board's understanding that the Department suspends an alcoholic beverage license in order to encourage licensees to comply with the law relating to the sale of alcoholic beverages — for the overall protection of the general public.

As explained in *Yapp v. State Bar* (1965) 62 Cal.2d 809 [44 Cal.Rptr. 593], while the purpose of a criminal proceeding may be to punish a wrongdoer, the purpose of a disciplinary proceeding is to protect the public — not to punish. Similarly, in the

Department's Initial Statement of Reasons in support of the adoption of Rule 144, it states that disciplinary action is "for the protection of the public" and not to punish licensees. (Initial Statement of Reasons, CA Code Regs., tit. 4, § 144.) Here, as appellant explained at oral argument, the severe penalty will put him out of business.

We fail to see how a 30-day suspension in this matter encourages compliance or protects the public in any way. While some discipline is warranted, the Board would strongly encourage the Department to reduce the harsh discipline imposed here, which seems to be punitive rather than remedial in nature.

ORDER

The decision of the Department is affirmed, but with the reservations about the penalty expressed above.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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

RECEIVED

MAY 17 2018

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

Alcoholic Beverage Control
Office of Legal Services

IN THE MATTER OF THE ACCUSATION
AGAINST:

MCCARTHYS BAR GROUP INC
TIDAL BAY BEACH BAR
3522-24 E ANAHEIM ST
LONG BEACH, CA 90804

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FILE: 47-501110

REG: 17086090

**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 11/1/2017.

According to Department records the Accusation, Notice of Defense, Statement re: Discovery and Department's Request for Discovery were served on Respondent-licensee on 11/1/2017.

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 Department form ABC-333, Report of Investigation, and related documents are identified and admitted into evidence as Exhibit 3.

Findings of Fact:

1. Pursuant to Exhibit 2 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 3 it is found that Respondent-licensee did violate the Alcoholic Beverage Control Act.

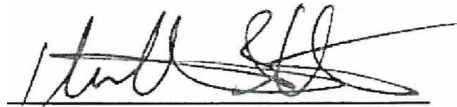
Conclusions of Law:

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 Respondent-licensee's license number 501110 be, and hereby is, suspended for a period of **30** days, to be followed by an indefinite suspension until compliance with the requirements of Section 25616 of the Business and Professions Code. This decision is hereby adopted and is effective immediately.

Dated: May 8, 2018



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, 1325 J Street, Suite 1560, Sacramento, CA 95814.