

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

AB-8852

File: 42-433270 Reg: 07065777

ENEDINA VASQUEZ DE SERRANO, dba Rincon Latino
3256 East Gage Avenue, Huntington Park, CA 90255,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: September 4, 2008
Los Angeles, CA

ISSUED DECEMBER 18, 2008

Enedina Vasquez de Serrano, doing business as Rincon Latino (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her license, following default, for permitting her employee to possess, for the purpose of sale, illegal drugs while in the premises in violation of Health and Safety Code sections 11351 and 11378.

Appearances on appeal include appellant Enedina Vasquez de Serrano, appearing through her counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated February 27, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on January 5, 2006. On May 22, 2007, the Department filed an accusation against appellant charging that she permitted her employee to violate provisions of the Health and Safety Code prohibiting the possession for sale of illegal drugs.

The Department mailed the accusation and accompanying documents (the accusation package) to appellant at her address of record, but the package was returned to the Department as "unclaimed." By a letter dated August 23, 2007, the Department advised appellant that it would issue a default judgment against her if she did not file a stipulation and waiver or a notice of defense within 20 days. A copy of the accusation was enclosed with the letter.

Appellant did not respond to the letter and on February 27, 2008, the Department issued a default order revoking appellant's license. The order stated that it was "effective immediately" and that "any Motion to Vacate . . . must be made in accordance with Government Code §11520."

On March 24, 2008, appellant's counsel filed a Motion to Vacate and a Petition for Reconsideration. On April 7, 2008, the Department issued an order² denying the motion and the petition on the ground that both were untimely. The order stated that it was effective immediately.

On April 3, 2008, appellant filed an appeal with this Board from the default order of February 27, 2008. On April 16, 2008, appellant appealed from the April 7, 2008,

²The Department's Order Under Government Code Section 11520(c), dated March 27, 2008, and issued April 7, 2008, is also included in the Appendix.

order denying the motion and petition.³ In her appeal, appellant contends: (1) the default judgment was an abuse of discretion and denied appellant due process because the Department did not provide proper notice of the pending action, (2) the summary denial of appellant's Petition for Reconsideration and Motion to Vacate was erroneous and an abuse of the Department's discretion, and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends the Department abused its discretion and denied her due process when it entered the default judgment because the accusation mailed to her was returned to the Department as "unclaimed," yet the Department made no further attempt to deliver the package to her. The Appeals Board is unable to consider appellant's contention because the default judgment became final well before appellant filed this appeal.

The effective date of a decision is "30 days after it is delivered or mailed to respondent unless: a reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted." (Gov. Code, § 11519, subd. (a).) In this case, the Department made the decision effective immediately, i.e., as of February 27, 2008.

By making the decision effective immediately, the Department eliminated the opportunity for appellant to petition for reconsideration. (Gov. Code, § 11521; *Ginns v. Savage* (1964) 61 Cal.2d 520, 525-526 [393 P.2d 689; 39 Cal.Rptr. 377]; *Moran v.*

³Although filed separately, we consider these appeals as one.

Board of Medical Examiners (1948) 32 Cal.2d 301, 305 [196 P.2d 20]; *Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 402-403 [184 P.2d 323].) Eliminating the reconsideration period resulted in appellant having only 10 days to file an appeal with this Board. (Bus. & Prof. Code, § 23081.)

Appellant's appeal was filed more than a month after the default order was issued. Therefore, the appeal was untimely, and this Board does not have jurisdiction to hear and decide the appeal. The appeal from the default order must be dismissed. Therefore, we do not consider the issue raised by appellant concerning the penalty.

II

Appellant contends that the Department's summary denial of appellant's Petition for Reconsideration and Motion to Vacate was erroneous and an abuse of the Department's discretion. Instead, appellant asserts, the Department should have exercised the discretion it has pursuant to Government Code section 11520 and granted a hearing.

Government Code section 11520 provides:

(a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties. . . .

(c) 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. As used in this subdivision, good cause includes, but is not limited to, any of the following:

- (1) Failure of the person to receive notice served pursuant to Section 11505.
- (2) Mistake, inadvertence, surprise, or excusable neglect.

Appellant purports to rely on subdivision (c), above, but *excludes from her argument the first three words, "Within seven days."* Appellant's Motion to Vacate was filed with the Department *almost a month* after the decision was issued. There can be no abuse of discretion on the part of the Department where it is appellant who has failed utterly to comply with the requirements of the statute. Appellant's appeal from the Motion to Vacate must also be dismissed.

ORDER

The appeal is dismissed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.