

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

AB-9917

File: 48-485515; Reg: 20090465

GC BROTHERS ENTERTAINMENT, LLC,
dba The Palms
2540 North Palm Drive
Signal Hill, CA 90755-4009,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 15, 2021
Telephonic

ISSUED OCTOBER 19, 2021

Appearances: *Appellant:* Roger Jon Diamond, of the Law Offices of Roger Jon Diamond and F. Michael Ayaz, of Blake & Ayaz, as counsel for GC Brothers Entertainment, LLC,

Respondent: John P. Newton, as counsel for the Department of Alcoholic Beverage Control.

OPINION

GC Brothers Entertainment, LLC, doing business as The Palms (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking its license because appellant knowingly permitted its employees to sell, furnish or offer to sell a controlled substance, to wit: cocaine, within the premises, in violation of

¹ The Order on Motion to Vacate Default Decision, dated June 7, 2021, is set forth in the appendix, as is the Decision Following Default, dated November 23, 2020.

Health and Safety Code section 11352; appellant permitted persons to smoke or ingest cannabis within the premises, in violation of Health and Safety Code section 11362.3(a)(1); appellant exceeded its license privileges by permitting patrons to possess and consume alcoholic beverages in an unlicensed portion of the premises, in violation of Business and Professions Code sections 23300 and 23355; appellant's employees performed or simulated sex acts or touched sexualized areas of the body while on the licensed premises, and exposed various prohibited body parts to public view, while not on a stage 18 inches above floor level and at least six feet from the nearest patron, in violation of California Code of Regulations, Title 4, section 143.3(l)(a) through (c) and section 143.3(2); appellant's employees solicited the purchase or sale of drinks intended for their consumption, in violation of California Code of Regulations, Title 4, section 143; and, appellant's employees possessed with intent to deliver, furnish or transfer drug paraphernalia, in violation of Health and Safety Code section 11364.7(d).

FACTS AND PROCEDURAL HISTORY

Appellant's on sale general public premises license was issued on April 14, 2010. There is no evidence in the record regarding any prior departmental discipline.

On September 11, 2020, the Department instituted a forty-count accusation against appellant charging violations of Health and Safety Code sections 11352, 11362.3(a)(1), and 11364.7(d); Business and Professions Code sections 23300 and 23355; and California Code of Regulations, Title 4, sections 143, 143.3(l)(a)-(c), and 143.3(2) resulting from numerous undercover visits by Department agents to the premises between September 19, 2019 and January 30, 2020.

The accusation was sent by certified mail to appellant on September 11, 2020, along with the Notice of Defense, copies of Government Code sections 11507.5, 11507.6, and 11507.7, and the Department's Request for Discovery. USPS tracking information shows that the accusation was delivered to the licensed premises on September 14, 2020, at 10:05 a.m.²

Pursuant to Government Code section 11506(a) and Code of Civil Procedure section 1013(a), appellant had 15 calendar days, or until October 1, 2020, to file a Notice of Defense. No Notice of Defense was filed. As a consequence, Government Code section 11506(c) provides, in pertinent part: "Failure to file a notice of defense . . . shall constitute a waiver of respondent's right to a hearing."

On November 23, 2020, the Department issued a Decision Following Default. USPS tracking information shows that the accusation was sent to appellant via certified mail and delivered on November 28, 2020 at 9:51 a.m.³

Appellant filed a Motion to Vacate Default Decision on December 2, 2020. The motion was denied on June 7, 2021. Appellant then filed the instant appeal contending: (1) the Appeals Board erred by requiring appellant's opening brief at a certain date without ascertaining whether the record had been delivered to appellant, (2) the Appeals Board refused to provide an expedited copy of the record to appellant and refused to provide the documents Bates stamped, and (3) the Department erred when it denied appellant's Motion to Vacate Default Decision by improperly applying Government Code section 11520(c) and finding that good cause was not shown.

² USPS Tracking #70200640000073933453.

³ USPS Tracking #70190700000207494343.

DISCUSSION

I

NEWLY DISCOVERED EVIDENCE

After this matter was fully briefed, appellant submitted, on October 13, 2021 — two days prior to the Appeals Board hearing — two declarations and a Memorandum of Points and Authorities in support of those declarations, asking the Board to supplement the record with what it labels “newly discovered evidence.”

This Board’s scope of review is limited by the California Constitution and by statute. The Constitution provides:

Review by the board of a decision of the Department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(Cal. Const. art. XX, § 22.)

Additionally, the Constitution provides that “the board shall review the decision subject to such limitations as may be imposed by the Legislature.” Those limitations are articulated in section 23084 of the Business and Professions Code, captioned “Questions to be considered by the board on review”:

The review by the board of a decision of the department shall be limited to the questions:

- (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
- (b) Whether the department has proceeded in the manner required by law.
- (c) Whether the decision is supported by the findings.
- (d) Whether the findings are supported by substantial evidence in light of the whole record.

(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084.)

Business and Professions Code section 23084(e) requires new evidence to be “. . . relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the Department.” Whether or not a hearing was held is not relevant here, since the “newly discovered evidence” concerns mail delivery of the accusation. This would not have been relevant in a hearing about the underlying charges in the accusation.

Appellant requested that the Board hear testimony and accept evidence about the delivery of the certified mail. However, rule 198 limits the Board to remanding the matter to the Department if it determines the newly discovered evidence should be considered. The Board does not ever hear testimony or accept evidence.

Rule 198 provides:

(a) When the board is requested to remand the case to the department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department, the party making such request must, in the form of a declaration or affidavit, set forth:

- (1) The substance of the newly-discovered evidence;
- (2) Its relevancy and that part of the record to which it pertains;
- (3) Names of witnesses to be produced and their expected testimony;
- (4) Nature of any exhibits to be introduced;
- (5) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the department.

(b) Merely cumulative evidence shall not constitute a valid ground for remand.

(4 Cal.Code Regs, § 198.)

After consideration of the declarations and memorandum of points and authorities submitted by appellant, we find that the requirement of rule 198(a)(5) has not been met. Appellant has not satisfied us that such evidence could not, with due diligence, have been discovered and produced in a more timely fashion. This information was submitted well past the briefing deadline. Appellant's opening brief was due on August 16, 2021, and its closing brief on September 20, 2021. Appellant had more than ample opportunity to submit its arguments — particularly since the Board accepted a supplemental opening brief from appellant, in addition to the other required briefs — and this issue was not raised. Similarly, it was not raised in appellant's motion to vacate the default decision.

As the Department pointed out, reasonable diligence is not satisfied by waiting until two days before oral argument to submit a letter from the post office that could have been obtained at any time. The fact that the Department was forced to proceed by way of default does not give appellant a free pass to submit new evidence whenever it chooses.

Finally, this is not new information. The Department's argument, as stated in its reply brief, is that it properly mailed the accusation packet, and made multiple attempts to contact the absent licensee. Whether the mail was delivered to a "mail room/reception area" or whether it was placed in a mailbox which the licensee failed to check does not change the issues on appeal.

Appellant's request to remand the matter for consideration of this "newly discovered evidence" is therefore denied.

II

RECORD ON APPEAL

Appellant complains in its opening brief that the Appeals Board erred by asking for appellant's opening brief "without first making sure that the Record on Appeal requested by Appellant was prepared and filed with the Appeals Board." (AOB at p. 4.) Appellant also contends the Appeals Board refused to provide an expedited copy of the record or to provide the documents Bates stamped.

Appellant fundamentally misunderstands the roles of the Department and the Board. The Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board are **entirely separate** entities. Both are contained within the Business, Consumer Services, and Housing Agency. However, each has a separate Director/Executive Officer, separate staff, and separate missions. (See: <https://cold.govops.ca.gov/File/OrganizationalChart> .)

In regards to the preparation of the record, California Code of Regulations, Title 4, section 187 provides, in pertinent part (emphasis added):

When a Notice of Appeal has been filed with the Board, the Board shall request the Department to furnish appellant an itemized statement of the estimated cost of the record on appeal . . . Upon receipt of payment from appellant, **the Department shall forthwith arrange for the preparation and delivery of the record on appeal.**

As is clear from the regulations in sections 187 through 190, pertaining to the record on appeal, the documents that constitute the record are in the possession of, and under the complete dominion and control of the Department — not the Appeals Board. The record is assembled by the Department and subsequently delivered to the appellant by the Department once payment is received.

The Appeals Board takes no part in assembling the record. Nor does it exercise any control whatsoever over the format or content of the record prepared by the Department. We have no ability to “expedite” something we do not prepare — accordingly it is entirely false to allege that the Board refused to provide an expedited copy of the record in this matter. Furthermore, the Board has no authority to require the Department to Bates stamp the record, nor has it ever been the practice of the Department to Bates stamp the records it prepares.

As all appellants are notified — in the letter informing them of the procedures in section 187 through 190 — once the appellant makes payment to the Department, the record will be delivered to them by the Department. When the Appeals Board is informed that payment has been made, and the record has been sent out, it sends a briefing letter, informing the appellant of the due dates for its briefs. That procedure was followed in this matter. Unfortunately, the record was sent to a prior address for counsel for appellant. When that error was discovered, the briefing deadline was extended and appellant subsequently filed a Supplemental Opening Brief.

In that supplemental brief, appellant raises a new complaint, that [it] “believes the Appeals Board has been deliberate in making it more difficult to put together Opening Briefs.” (SOP, at p. 2.) As a result of this difficulty, it requests: “that the Brief that may be filed by the Department be stricken and disregarded.” (*Id.* at p. 3.) These new issues are entirely outside the scope of this appeal and are completely lacking in supporting facts outside appellant’s opinion. We will not address them here.

III

GOOD CAUSE

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. (Safeway)* (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].)

This Board's review of a default decision, however, is narrow and strictly limited. Where a motion to vacate is filed, a default decision may only be set aside where the licensee shows good cause. (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); also see *Ray Kizer Constr. Co. v. Young* (1968) 257 Cal.App.2d 766, 65 [Cal.Rptr. 267] [“[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.”].) Where good cause is found, the agency may vacate the decision and grant a hearing. (Gov. Code, § 11520(c).)

We do not address the merits of the underlying case when reviewing a Decision Following Default — the Board may ask only whether there is good cause to grant relief from the default judgment. Where good cause is shown, the Board may remand the case to the Department for a hearing on the merits. (*Ibid.*) 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]), as we apply here.

Appellant contends:

The record shows the Department filed an Accusation against the “Palms” club, but does not provide details regarding service of the Accusation. The facts are not clear because the subject business was closed for a substantial period of time including the time of alleged service. The closure was the result of governmental COVID-19 closure hours.

The licensee became aware of the Accusation after one of its employees went to the location at a time beyond the alleged service. The situation at the club was chaotic.

(AOB at p. 2.) Appellant further contends: “[t]he business had been closed for at least six (6) months and was closed when the mail might have been delivered.” (*Id.* at p. 5.)

The Evidence Code provides that “[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.” (Evid. Code, § 641.) The presumption, however, is rebuttable:

[I]f a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

(*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421-422 [100 Cal.Rptr.2d 818], emphasis and internal quotation marks omitted, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819 [113 Cal.Rptr. 790].)

Service of the accusation by certified mail was proper and effective under the Administrative Procedure Act pursuant to Government Code section 11505(c). Furthermore, the Department's regulations specifically require licensees to update their address with the Department:

For the purpose of subdivision (c) of Section 11505 of the Government Code, notices which are required to be served by registered mail may be served by certified mail pursuant to Section 8311 of the Government Code, and shall be mailed to the licensee at the premises for which his

license is issued. Any licensee who desires to have such notices mailed to him at an address other than his licensed premises shall file with the department a specific request for that purpose, and in such case notices shall be sent to the licensee at such address. Such licensee shall notify the department of a change in address, and specifically request the department to mail notices to the changed address.

(Cal. Code Regs., tit. 4, § 145.) Appellant filed no change of address with the Department during the time it was closed because of the pandemic.

In the instant case, appellant contends it did not receive the accusation, in spite of the USPS tracking receipt showing that it was delivered to the licensed premises on September 14, 2020. The exact same address was subsequently used for the delivery of the Decision Following Default, which the USPS tracking receipt shows was delivered on November 28, 2020. The receipt of this second document allowed appellant to file a timely Motion to Vacate Default Decision. If appellant had failed to receive both documents, the presumption that mail was delivered in the normal course of business might have been rebutted. But that is not the case here. It stretches credulity to believe that one document was received while the other was not.

Furthermore, there is no requirement that a licensee must sign for mail containing an accusation before service of process is effective. The postal service delivered the accusation to the address on file with the Department. This is all that is required. If licensees could avoid being served with an accusation by simply failing to pick up their mail, it is conceivable that no accusations would ever be served.

Appellant offered no factual basis to support the existence of good cause in its Motion to Vacate the Decision Following Default. Accordingly, it did not constitute an abuse of discretion, nor was it arbitrary or capricious, for the Department to deny that motion for the failure to make the requisite showing of good cause.

Here, although appellant timely requested to vacate the default decision, the Department properly denied the request, finding that appellant failed to establish good cause. We find no error.

Beyond a request for leniency, and an untimely request to remand for consideration of newly discovered evidence, no legal basis for the appeal of the Decision Following Default has been put forth, no arguments were presented in the briefs, and no legal authority has been cited by appellant to justify reversal.

The 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. Without such assistance, the Board may treat unsupported contentions as waived or forfeited.

Appellate briefs must provide argument and legal authority for the positions taken. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.] We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived. [Citations.]

(*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956-957 [124 Cal.Rptr.3d 78], internal quotation marks omitted.)

While we are sympathetic to the difficulties experienced by licensees during this pandemic, we have no alternative under the circumstances but to affirm the Department's Order on Motion to Vacate Default Decision.

ORDER

The Order on Motion to Vacate Default Decision is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

GC Brothers Entertainment LLC
The Palms
2540 N. Palm Dr.
Signal Hill, CA 90755

Licensee.

File No.: 48-485515

Reg. No.: 20090465

ORDER ON MOTION TO VACATE DECISION FOLLOWING DEFAULT

On November 28, 2020, the Department issued a Decision Following Default (“Default Decision”). Licensee filed a timely Motion to Set Aside Default (“Motion”). The Department opposes the Motion.

The sole reason stated in the Motion for seeking that the Decision be vacated is that the licensed premises was closed due to the COVID-19 pandemic and that no one collected the mail. Licensee subsequently submitted the declaration of George Cataliou, president of GC Brothers Entertainment, LLC. In his declaration, Mr. Cataliou makes various factual assertions, attacks the Department’s opposition, and presents legal arguments. Ultimately, the declaration argues simply that the Department should have made more effort to contact him regarding the disciplinary action.

It has not been asserted that the accusation was not properly served at the address on record with the Department. No good cause has been established to set aside the Decision.

The Motion is denied.

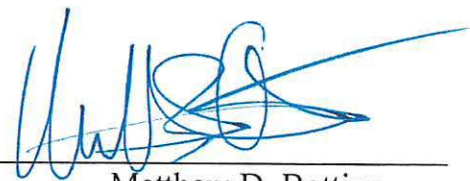
Sacramento, California

Dated: June 7, 2021

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JUN 09 2021

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

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Alcoholic Beverage Control
Office of Legal Services

IN THE MATTER OF THE ACCUSATION
AGAINST:

GC BROTHERS ENTERTAINMENT LLC
PALMS THE
2540 N PALM DR
SIGNAL HILL, CA 90755-4009

FILE: 48-485515

REG: 20090465

**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 on September 11, 2020.

According to Department records the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery were served on Respondent-licensee on September 11, 2020.

According to Department records, no timely 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 Packet served on Respondent-licensee, including the Cover Letter, Accusation, Stipulation & Waiver, Notice of Defense, Notice of Video Conference, Request for Discovery, and Proof of Service is identified and admitted into evidence as Exhibit 1.
2. A true and correct copy of the Accusation registered in this matter is identified and admitted into evidence as Exhibit 2. Official Notice is taken of the license history as outlined in said Accusation.
3. 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 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 Exhibit 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

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properly served with the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery in this matter. No timely Notice of Defense has been received.

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

Conclusions of Law:

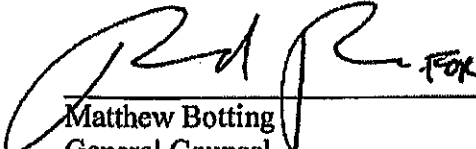
1. Pursuant to Finding 1 above, Respondent-licensee has defaulted in this matter and the Department is authorized pursuant to Government Code section 11520 to conduct this default proceeding.
2. Pursuant to Finding 2 above, Respondent-licensee did violate the Alcoholic Beverage Control Act as alleged 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 Respondent-licensee's license be, and hereby is, revoked.

This Decision Following Default is hereby adopted and is effective immediately. A representative of the Department will call on Respondent-licensee on or after DEC 07 2020 to pick up the license certificate.

Dated: 11/23/2020


Matthew Botting
General Counsel

Should you have any questions regarding the penalty imposed herein contact your local Alcoholic Beverage Control office.

Any Motion to Vacate this default decision must be made in accordance with Government Code section 11520, subdiv. (c), which states:

(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.

If you wish to file a Motion to Vacate this default decision, it must be directed to the General Counsel. In addition, any other parties in the matter, including the Department's Office of Legal Services, must be served. The Motion must be sent by mail, but you may also e-mail it. The addresses for filing and service are:

ABC General Counsel
c/o Administrative Records Secretary
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Department of Alcoholic Beverage Control
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Mark.Kinyon@abc.ca.gov

Lele.Mai@abc.ca.gov

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.