



**FAIR POLITICAL PRACTICES COMMISSION  
ENFORCEMENT DIVISION**

**MEMORANDUM**

**To:** Chairman Schnur, Commissioners Garrett, Hodson, Montgomery & Rotunda

**From:** Gary S. Winuk, Chief of Enforcement  
Bridgette Castillo, Commission Counsel, Enforcement Division

**Subject:** Enforcement Division Response to Motions to Vacate Default Decisions  
In the Matter of Michelle Berman, FPPC No. 10/115 and  
In the Matter of Adrienne Lauby, FPPC No. 10/116

**Date:** November 22, 2010

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**Background**

On Friday November 19, 2010 at 4:15 p.m., Motions to Vacate the Default Decisions on behalf of Michelle Berman, FPPC No. 10/115, and Adrienne Lauby, FPPC No. 10/116, were submitted to the Commission personally by Alan Wonderwheel. Mr. Wonderwheel delivered the documents to the FPPC before receiving service of the default, but the Enforcement Division staff accepted the motion despite this procedural error rather than forcing Mr. Wonderwheel to re-submit at the appropriate time.

**Respondents' Request for Relief**

Mr. Wonderwheel requests relief, based on Government Code section 11520, which states:

11520. (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. If the agency and administrative law judge make conflicting orders under this subdivision, the agency's order takes precedence. The administrative law judge may order the respondent, or the respondent's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the respondent's failure to appear at the hearing.

(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.

Mr. Wonderwheel requests the default decisions for both Respondents, Michelle Berman and Adrienne Lauby, be vacated and the Enforcement Division be directed to accept the untimely Notice of Defense for each Respondent and allow them to have a hearing before an Administrative Law Judge.

### **Enforcement Division Responses to Respondent's Law and Argument**

#### *Respondent's Argument 1:*

Mr. Wonderwheel requests the Commission to vacate the default decision due to his "mistake, inadvertence, surprise or excusable neglect." This issue was considered by the Commission before issuing the default decision at the November 12, 2010 Commission hearing.

Mr. Wonderwheel contends that it is an "abuse of discretion" by the FPPC to deny his request, based on California Code of Civil Procedure (CCP) 473 (b), which requires a court to vacate a civil default judgment upon a showing of good cause, which includes the mistake, inadvertence, surprise or excusable neglect of a respondent's attorney. However, CCP 473 (b) is inapplicable to the proceedings of the FPPC, which are governed by the Administrative Procedures Act (APA) at Government Code Section 11370 et seq. The APA provides the Commission, in Section 11520 with the discretion as to whether or not to grant a hearing for good cause when a respondent is in a default setting.

Further, no new facts have been presented by Mr. Wonderwheel since the November 12, 2010 hearing, where the Commission considered these issues before approving a default decision.

*Respondent's Argument 2:*

Mr. Wonderwheel requests that the default decisions be vacated due to his client's "mistake inadvertence, surprise or excusable neglect" due to their good faith reliance on his duty to timely file a Notice of Defense on their behalf under Government Code Section 11520. Similar to his argument in *Respondent's Argument 1*, Mr. Wonderwheel argues that it is an "abuse of discretion" by the FPPC to refuse to vacate the decision. Once again, Section 11520 provides, in subsection (c), that the FPPC retains the **discretion** to vacate a default decision, if good cause is shown. The Commission is not required to and may exercise its judgment as to whether or not to grant the motion. The Commission considered the facts and arguments presented at the November 12, 2010 hearing and did not grant Respondents' request at that time before approving a default decision for each Respondent.

Further, no new facts have been presented by Mr. Wonderwheel since the November 12, 2010 hearing on this issue.

*Respondent's Argument 3:*

Mr. Wondewheel contends that the FPPC further abused its discretion by "prejudging the outcome of a fair hearing before a neutral hearing officer." He contends that the FPPC should have limited its discussion at the November 12, 2010 hearing solely to his request to have his clients be granted a hearing before an Administrative Law Judge.

However, Mr. Wonderwheel completely misunderstands the character of the proceedings which the Commission was undertaking. The item that was on the Commission's agenda was whether to approve, modify or disapprove the proposed default decision and order and accompanying exhibit for FPPC Cases No. 10/116 (Lauby) and FPPC 10/115 (Berman).

Mr. Wonderwheel presented his remarks during the public comment period of his client's default agenda items, where he requested the default decisions not be entered. However, under Government Code Section 11520, a motion to vacate a default judgment is not timely filed until after the default decision is entered. Thus, although the Commission generously discussed Mr. Wonderwheel's issues related to his misconduct in failing to represent his clients competently, the issue at hand was the default decision and proposed penalty itself.

In considering the issue as properly placed on the agenda, the Commission had the authority under Section 11520 (a) to take action based upon the respondents' express admissions or upon other evidence. The Commission properly took action based on the Respondent's express admissions, the evidence detailed in the Exhibit, the Respondent's own public comments at the Commission hearing, and the evidence presented by the Enforcement Division. The Commission, although not required to, further generously allowed Mr. Wonderwheel, Ms. Berman and Ms Lauby to provide any documents or statements they wished. Neither provided any exculpatory evidence or statement of any type. Both were permitted to present any mitigation factors they wished for the Commission's consideration.

Mr. Wonderwheel's motion tries to turn the November proceedings on their head by suggesting that, because of his misconduct, the Commission hearing should have been altered, with no notice to either the public or the FPPC staff, to discuss his untimely motion only and not consider the properly scheduled agenda item. The Commission rightly considered the item as placed on the agenda and, in its discretion, also considered Mr. Wonderwheel's request. The Commission then took action well within its authority.

Additionally, the Respondents had months to provide the Enforcement Division with any exculpatory or mitigating evidence and have failed to do so. They also have had the intervening period between the November and December Commission hearings to provide such information and have failed to do so.

*Respondent's Argument 4:*

Mr. Wonderwheel contends that the default decision should be set aside because the FPPC "abused its discretion" by establishing a policy that does not allow the granting of hearings at the default stage for any reason. However, he makes completely false statements about the Commission's position and "policy" with regard to the exercise of its authority and discretion under Section 11520.

At the November 12, 2010 hearing the Commission exercised its discretion in these two cases to not allow Respondents a hearing due to the failure of their attorney to file their Notice of Defense within the timeframe established by the APA. The Commission did not vote on, give direction to staff or make any statement that no future requests for a showing of good cause under Section 11520 would be considered, or that such a policy existed or would be considered. Any statements made simply identified the need of the Commission to be cognizant of treating similarly situated respondents consistently and fairly as one factor in the decision-making process.

In fact, the Enforcement Division at the September 2010 hearing requested a default agenda item be pulled from the agenda in order to provide an Administrative Hearing for the Respondent in that case. However, the factual circumstances involved there, a question as to whether respondent received proper notice of the hearing, were different from those at issue here. The Commission has thus demonstrated by its actions

that it does not have a blanket policy of rejecting any requests for hearings for default items on the agenda, but rather properly exercises its discretion consistent with the APA.

**Enforcement Division Recommendation**

While the Commission has the discretion to vacate the Default Decisions, the Enforcement Division recommends that these requests be denied for the reasons previously detailed.