



FAIR POLITICAL PRACTICES COMMISSION

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MEMORANDUM

To: Chair Ravel, Commissioners Garrett, Eskovitz, Montgomery & Rotunda

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

Subject: Enforcement Division Response to a Motion to Vacate the Default Decision
In the Matter of Tim Foley, FPPC No. 10/117

Date: March 14, 2011

Background

On Thursday, February 25, 2011, a Motion to Vacate the Default Decision on behalf of Tim Foley, FPPC No. 10/117, was received by the Commission.

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 decision for Respondent Tim Foley be vacated and the Enforcement Division be directed to accept the untimely Notice of Defense for the Respondent and allow him 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 January 28, 2011 Commission hearing.

Mr. Wonderwheel contends that it is an "abuse of discretion" by the Commission 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 Commission, which are governed by the Administrative Procedures Act (APA) at Government Code section 11370 et seq. The APA provides the Commission, in Government Code 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.

Respondent's Argument 2:

Mr. Wonderwheel contends that the Commission incorrectly interpreted the meaning of "mistake, inadvertence, surprise, or excusable neglect" in Government Code section 11520(c). Mr. Wonderwheel argues that "[t]he mistaken act of failing to file a Notice of Defense was an unintentional act omission and error arising from Respondent's misplaced confidence in his own memory" (Respondent Tim Foley's Motion to Vacate the Default Decision, FPPC No. 10/117, page 7, lines 7-8). However, Mr. Wonderwheel fails to point out that the Commission has the discretion to determine if good cause is found, based on Government Code section 11520, subdivision (c).

Mr. Wonderwheel received the settlement offer from the Enforcement Division in this matter. Mr. Wonderwheel admittedly was properly served the Probable Cause Report and Accusation in this matter and failed to respond. Additionally, Mr. Wonderwheel received a phone call informing him that the Enforcement Division was going to prepare default documents in this matter and he should contact the Enforcement Division if he would like to settle the matter. Again, Mr. Wonderwheel failed to respond. Further, Mr. Wonderwheel received the Default documents approximately one month prior to the Commission hearing on November 12, 2010. Mr. Wonderwheel was clearly aware of the matter and received constant reminders of the impending resolution of the matter. Further, Mr. Wonderwheel states that he did not respond because he is a solo practitioner and he failed to properly manage this case. The APA provides the Commission with the discretion to determine good cause. The Commission used their discretion to determine whether or not good cause existed in this matter. The Commission had the authority to take such action.

Respondent's Argument 3:

Mr. Wonderwheel argues that there is no prejudice against the Enforcement Division's case against Mr. Foley if the default decision is vacated. Mr. Wonderwheel contends that only six months have passed since August 2010 when the Commission made a finding of Probable Cause in this matter and that if the Commission had granted a hearing, the matter would have likely been heard already. However, the Enforcement Division has not claimed prejudice against this case if the default is vacated. Additionally, the Commission acted within its discretion to approve the default decision in this matter.

Respondent's Argument 4:

Mr. Wonderwheel requests that the default decision be vacated due to his client's "mistake inadvertence, surprise or excusable neglect" due to his good faith reliance on his duty to timely file a Notice of Defense on his 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 Commission to refuse to vacate the decision. Once again, Government Code section 11520 provides, in subsection (c), that the Commission 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.

Government Code section 11520, subdivision (a), states, in part, "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." The Commission considered the facts and arguments presented at the November 12, 2010 hearing and did grant Respondent extra time to present mitigating evidence to the Commission in the matter. The Commission considered the evidence submitted to them on January 28, 2011, and did not grant Respondent's request at that time before approving Respondent's default decision. This decision was well within the discretion of the Commission.

Respondent's Argument 5(A) & (B):

A. Mr. Wondewheel contends that the Commission further abused its discretion by "prejudging the outcome of a fair hearing before a neutral hearing officer." He contends that the Commission should have limited its discussion at the November 12, 2010 hearing and the January

28, 2011 hearing solely to his request to have his client 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 Case No. 10/117, Tim Foley.

Mr. Wonderwheel presented his remarks during the public comment period of his client's default agenda items, where he requested the default decision 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 client competently and provided Mr. Wonderwheel with a continuance in order to provide mitigating evidence, the issue at hand was the default decision and proposed penalty.

Mr. Wonderwheel incorrectly states that the Default Decision was entered for the full fine of \$5,000 for a single count. In fact, the Default Decision was entered at a reduced penalty of \$4,500 for one count of violating the campaign money laundering provisions of the Political Reform Act¹ ("Act"). This fine is consistent with similarly situated violations of these provisions of the Act.

In considering the issue as properly placed on the agenda, the Commission had the authority under Section 11520, subdivision (a), to take 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 and Mr. Foley a continuance until the January 28, 2011 hearing to provide mitigating evidence. The statement from Mr. Foley's current doctor, submitted to the Enforcement Division on January 24, 2011, was considered by the Commission at the January 28, 2011 hearing. The Commission properly considered the default item as placed on the agenda and, in its discretion, also considered Mr. Wonderwheel's request and evidence presented. The Commission took action well within its authority.

B. Further, Mr. Wonderwheel argues that the Commission did not act as neutral hearing officers because they stated that the Enforcement Division counsel's work on the default documents would be wasted if they were to grant a hearing. However, Mr. Wonderwheel clearly misstates what the Commission actually said. The only reference to the Enforcement Division counsel's work in this case was in the context of the additional work Mr. Wonderwheel created by failing to competently represent his clients and by failing to respond to any contact from the Enforcement Division. None of the Commissioners stated that this would be a basis not to allow a hearing in this matter.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Respondent's Argument 6:

Mr. Wonderwheel contends that the default decision should be set aside because the Commission "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 this case to continue the default decision until the following Commission hearing to allow Mr. Wonderwheel to provide any mitigating evidence. At the January 28, 2011 hearing, the Commission considered the letter from Respondent's doctor as mitigating evidence and exercised its discretion not to allow a hearing in this matter due to the failure of Mr. Wonderwheel to file a 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. The Commission approved that request. 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 exercises its discretion consistent with the APA.

Enforcement Division Recommendation

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