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BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: **ADRIAN BROWN** **3079 Iroquois Avenue** **Long Beach, CA 90808,** **Applicant/Respondent**	Case No. 1H 2009 047 **DEFAULT DECISION AND ORDER** [Gov. Code §11520]

FINDINGS OF FACT

1. On or about January 20, 2009, the Respiratory Care Board, Department of Consumer Affairs ("Board") received an application from Adrian Brown ("Respondent") for a Respiratory Care Practitioner License. In that document, Respondent certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Board denied the application on August 3, 2009.

2. On September 16, 2009, Respondent requested a hearing, and on December 21, 2010, Stephanie Nunez, in her capacity as the Executive Director of the Board ("Complainant"), filed her Statement of Issues related thereto. On or about that date, Andrea Pina, an employee of the Board, served by Certified and First Class Mail a copy of the Statement of Issues, Statement to Respondent, Notice of Defense, Request for Discovery, and Government Code sections 11507.5, 11507.6, and 11507.7 to Respondent's address of record with the Board, which was and is 3079

Iroquois Avenue, Long Beach, CA 90808. A copy of the Statement of Issues, the related documents, and Declaration of Service are attached as **Exhibit A**, and are incorporated herein by reference.

3. Service of the Statement of Issues and related documents was effective as a matter of law under the provisions of Government Code section 11505, subdivision (c).

4. On or about January 21, 2011, the Board received a notice from the United States Post Office indicating that Respondent had failed to claim the certified mail delivery of the Statement of Issues and related documents. A copy of the notice returned by the Post Office is attached as **Exhibit B**, and is incorporated herein by reference.

5. On December 28, 2010, by written notice, Respondent withdrew his request for a hearing, but did not withdraw his application for licensure. He has not filed a response to the Statement of Issues and is now in default.

6. California Government Code section 11504 provides:

"A hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing and, in addition, any particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his or her official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation, except that, if the hearing is held at the request of the respondent, Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509.

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7. California Government Code section 11504.5 provides:

"In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required."

8. California Government Code section 11505 provides:.

"(a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon the respondent of the accusation, and that failure to do so will constitute a waiver of the respondent's right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 of the Government Code in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person). The hearing may be postponed for good cause. If you have good cause, you are obliged to notify

the agency or, if an administrative law judge has been assigned to the hearing, the Office of Administrative Hearings, within 10 working days after you discover the good cause. Failure to give notice within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires the respondent to file the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to the respondent at the latest address on file with the agency."

9. California Government Code section 11506 provides:

"(a) Within 15 days after service of the accusation the respondent may file with the agency a notice of defense in which the respondent may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain t hat the respondent cannot identify the transaction or prepare a defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

(b) Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all of these notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense, and the notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

(d) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505."

10. California Government Code section 11509 provides:

"The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense. The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the ____ day of ____, 19__, at the hour of ____, upon the charges made in the accusation served upon you. If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of the hearing. You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense.

You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to [here insert appropriate office of agency]."

11. California 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. 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."

12. Pursuant to its authority under Government Code section 11520, the Board finds Respondent is in default. The Board will take action without further hearing and, based on Respondent's express admissions by way of default and the undisputed evidence before it, contained in exhibits A and B, finds that the allegations in Statement of Issues and related documents in the instant matter are true.

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DETERMINATION OF ISSUES

1. Based on the foregoing findings of fact, Respondent Adrian Brown has failed to file a notice of defense to the Statement of Issues as required by statute, has withdrawn his request for hearing, and has therefore waived his right to contest the Statement of Issues filed by Complainant.

2. A copy of the Statement of Issues and related documents and Declaration of Service are attached.

3. The agency has jurisdiction to adjudicate this case by default.

4. The Respiratory Care Board is authorized to deny the application of Respondent for a license as a Respiratory Care Therapist based on the facts set forth in the Statement of Issues, including but not limited to undisputed evidence of conviction driving under the influence of alcohol in Arizona and California, Respondent's license as a respiratory care practitioner in Arizona being placed on probation due to failure to disclose a felony conviction, and evidence that Respondent has anger management difficulties which could materially impede his ability to practice as a respiratory care therapist in California.

ORDER

IT IS SO ORDERED that the application of Adrian Brown for licensure as a Respiratory Care Therapist is denied based on the facts set forth in the Statement of Issues and his default in these proceedings is entered.

Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

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This Decision shall become effective on July 22, 2011.

It is so ORDERED June 22, 2011.

Original Signed by: .
LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA