ISSUED OCTOBER 24, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PRESTIGE STATIONS, INC. dba AM/PM 12122 Mariposa Road Victorville, CA 92392, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7484 File: 20-210313 Reg: 99045764 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: August 3, 2000 Los Angeles, CA

Prestige Stations, Inc., doing business as AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for its employee, Eric Paul Chirco ("Chirco"), a minor, having sold or furnished an alcoholic beverage to Kathleen Barnes ("Barnes"), a Department investigator, while engaged in the concurrent retailing of motor vehicle fuel, being contrary to the universal and generic public welfare and morals

[1]The decision of the Department, dated August 12, 1999, is set forth in the appendix.

provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §23790.5, subdivision (d)(6).[2]

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 14, 1988. Thereafter, the Department instituted an accusation against appellant charging that appellant's minor employee sold an alcoholic beverage to a Department investigator during hours during which such a sale by a person under the age of 21 was prohibited.

An administrative hearing was held on May 27, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Barnes concerning her observations of activity at the gas pumps on the premises during her approximately 10:50 p.m. visit, the purchase of

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[2] Business and Professions Code §23790.5 provides, in pertinent part:

"(d) Notwithstanding any other provision of law, establishments engaged in the concurrent sale of motor vehicle fuel with beer and wine for off-premises consumption shall abide by the following conditions:

...

"(6) Employees on duty between the hours of 10:00 p.m. and 2:00 a.m. who sell beer or wine shall be at least 21 years of age to sell beer and wine."

beer from Chirco, the statements made to her by Chirco that he knew he should not be selling alcoholic beverages at that hour, and her review of a California driver's license produced by Chirco, which showed him to be under the age of 21. Appellant presented no witnesses, but did lodge objections to Barnes' testimony, contending it was uncorroborated and inadmissible hearsay.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation. The decision rejected appellant's hearsay objections, stating:

> "The statements Chirco made to Barnes ... are exceptions to the hearsay rule under California Evidence Code Sections 1220 and/or 1222. As such, they are admissible and provide the basis for reliance on Barnes' later viewing of Chirco's driver's license, and her testimony based on it, as evidence of his exact age."[3]

Appellant has filed a timely appeal, renewing its hearsay objections to

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[3] Evidence Code §1220 provides:

"Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

Evidence Code §1222 provides:

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) the statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to order of proof, subject to the admission of such evidence."

Barnes' testimony, and, in addition, contending that there was no evidence of concurrent sales, as required by §23970.5, subdivision (d)(6), and that the Department abused its discretion with respect to the penalty. In view of our ruling on the evidentiary issue, we see no need to address appellant's remaining contentions.

DISCUSSION

The ultimate resolution of this appeal turns on the question whether two instances of hearsay evidence were properly admitted. For purposes of clarity, they will be addressed separately.

Statement by clerk to manager

Appellant contends that the hearsay statement attributed to Chirco by Barnes, that he had told his manager it was illegal for him to be selling alcoholic beverages while concurrently dispensing gasoline was uncorroborated hearsay, and should not have been admitted.

Barnes testified [RT 16] that Chirco said "he knew he wasn't supposed to be selling and that he told his manager." It was this testimony which formed the basis for Determination IV of the Administrative Law Judge that "a supervisor had been alerted by Chirco in advance of the sale in question that employing Chirco at that time to sell alcoholic beverages was a violation, that the violation was intentional, and that a penalty greater than the all-stayed penalty recommended by Department counsel was warranted.

At the administrative hearing, Department counsel argued that Chirco's statement regarding the illegal nature of what he was doing was an admission

binding on his employer, citing Evidence Code §§1220 and 1221.

Appellant contends that Evidence Code §1220 does not apply, since that section applies only to admissions of a party, and Chirco is not a party to the proceeding. Appellant further contends that Evidence Code §1222 also is inapplicable, since there is nothing in the record to establish the authority of Chirco to bind his employer by the statements attributed to him, citing O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal.App.4th 563 [69 Cal.Rptr.2d 389].

The Department makes no attempt to justify admissibility under Evidence Code §1220, which applies only when the declarant is a party.[4] Instead, it argues that Chirco's statements are admissible under Evidence Code §1222, because they were within the scope and course of his employment, citing W.T. Grant Co. v. Superior Court (1972) 23 Cal.App.3d 284 [100 Cal.Rptr. 179].

The Department concedes (Dept. Br., page 4) that Chirco would have lacked authority to make statements "relating to corporate pricing policy, lease agreements or things of that nature because these types of things are clearly outside the authority of a clerk." However, according to the Department, "statements ... regarding the sale of gasoline or alcoholic beverages" were in fact in the course and scope of his employment. (Ibid.)

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[4] We agree with appellant and, apparently, with the Department (see text, supra), that Evidence Code §1220 provides no support for the admission of Chirco's statements. That section means that a statement by a party is admissible against that party. That is a classic admission, which some scholars say does not even implicate the hearsay rule. Since Chirco is not a party to the administrative proceeding, the exception simply does not apply.

But the statement attributed to Chirco was not one relating to the sale of gasoline or alcoholic beverages, but instead was an expression of his agreement with the legal opinion posited by the Department investigator that he was engaged in an illegal transaction and his further, self-serving contention that he had told his manager so.

It is most unlikely that appellant would have authorized its retail clerk to bind it by an expression of his opinion on a relatively esoteric point of law - the concurrent sale of alcohol and gasoline by a minor after 10:00 p.m. The case is quite different from W.T. Grant Co. v. Superior Court, supra. There, the employee was the store manager, and his statements that the sale of repossessed television sets as new was a matter of "company policy" were found to be within the authority generally possessed by a person in his capacity as "principal executive on the scene" and the "company's directing arm." (See W.T. Grant Co. v. Superior Court, supra, at page 286.)

The Department, citing People v. Spearman (1969) 1 Cal.App.3d 898, 905 [82 Cal.Rptr.277], also contends Chirco's statements are admissible under Evidence Code §1240, which treats as an exception to the hearsay rule a statement purporting to narrate, describe, or explain an act or event perceived by the declarant, made spontaneously while the declarant was under the stress of excitement caused by such perception.

Spearman involved an incriminatory statement by a defendant - an admission. The statement was deemed spontaneous and voluntary, so would not have been barred under the "Miranda rule." (See Miranda v. Arizona (1966) 384

U.S. 436 [86 S.Ct.1602].) In the present case, Chirco's statement was clearly not spontaneous. It was made in response to a statement made by the investigator that what Chirco was doing was illegal [RT 13, 16]:

> Q. Investigator Barnes, when you contacted the clerk, Mr. Chirco, did you inform him that it was illegal to sell alcoholic beverages while concurrently dispensing gasoline after 10:00 p.m. if the individual is under the age of 21?
>
> A. Yes.
>
> Q. When you informed him of this, did he respond to you?
>
> ... [Colloquy and objections omitted]
>
> A. He stated he knew he wasn't supposed to be selling and that he told his manager."

Both appellant and the Department cite and rely upon the decision in O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal.App.4th 563 [69 Cal.Rptr.2d 389], an age-discrimination case which involved a hearsay statement attributed to the founder of, and senior managing director of the company and related entities, "about getting rid of managers over 40 and replacing them with younger, more aggressive managers." The decision reviews a number of California decisions, and notes that the question of an employee's authorization to make a given statement can present a tricky problem for a trial court, because the determination necessarily depends upon the particular facts and circumstances of each case viewed in the light of the substantive law of agency, as distinct from evidence. The determination requires an examination of the employee's usual customary authority, the nature of that statement in relation to that authority, and the particular relevance or purpose of the statement.

We seriously doubt that appellant ever vested Chirco with the authority to provide legal opinions to its management. Thus, his hearsay statement that he had informed his manager that what he was doing was illegal must be seen for what it was, a self-exculpatory statement made in an attempt to avoid or minimize personal blame. Chirco's statement should not have been ruled admissible, and provided no valid basis for the admission of additional hearsay evidence.

Investigator's testimony that Chirco was under the age of 21

The initial attempt by Department counsel to establish that Chirco was a minor - asking whether he had produced any identification from which Barnes could determine his age - was rebuffed when the ALJ sustained appellant's objection on hearsay grounds. [RT 11-13.] Department counsel then elicited the testimony concerning Chirco's statements to his manager, and his belief that what he was doing was illegal.

Department counsel then returned to the question of Chirco's age, asking Barnes if Chirco had produced any identification for her to review. Barnes said he had shown her his California driver's license. The transcript records what followed:

> Q. And when you looked at the California driver's license, did you determine his age from it?
>
> A. Yes, I did.
>
> Q. And what was his age?
>
> MR. SALTSMAN: Objection, your Honor.
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> THE COURT: Mr. Lewis?
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> MR. LEWIS: Hearsay is admissible, your Honor. This is an administrative hearing, and I believe it is admissible. Not sufficient in and of itself to

> sustain an accusation. However, it is admissible as far as supporting the other evidence that has been presented.
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> THE COURT: So you're offering it as administrative hearsay?
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> MR. LEWIS: Yes.
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> THE COURT: Overruled on that basis.

Following this exchange, Barnes was permitted to testify that the license showed Chirco to be 20 years old.

Government Code §11513, subdivision (c), provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. Evidence offered pursuant to this limited purpose exception is commonly referred to as "administrative hearsay."

It is essential that evidence which is to be supplemented or explained itself be admissible. Otherwise, the limited-purpose hearsay is being used to explain or supplement inadmissible hearsay, and by that means used, improperly, to prove an essential element of the charged violation - that Chirco was under the age of 21. That is what happened here.

There was no admissible evidence that Chirco was under the age of 21. Therefore, the accusation should not have been sustained, and the decision of the Department must be reversed.

ORDER

The decision of the Department is reversed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.