ISSUED NOVEMBER 14, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K FOOD STORE dba Circle K Food Store #1212 600 Rio Tierra Avenue Sacramento, CA 95833, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7406 File: 20-230739 Reg: 98045226 Administrative Law Judge at the Dept. Hearing: Jeffrey Fine Date and Place of the Appeals Board Hearing: September 22, 2000 San Francisco, CA

Circle K Food Store, doing business as Circle K Food Store #1212 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 25 days, with 10 days thereof stayed, conditioned upon one year of discipline-free operation, for its clerk having sold an alcoholic beverage to a customer between the hours of 2:00 a.m. and 6:00 a.m., contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of

[1]The decision of the Department, dated April 22, 1999, is set forth in the appendix.

Business and Professions Code §25631.

Appearances on appeal include appellant Circle K Food Store, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 21, 1989. On December 8, 1998, the Department instituted an accusation against appellant charging that, on August 22, 1998, between the hours of 2:00 a.m. and 6:00 a.m., appellant's employee, Frederick E. Washbon, Jr.,[2] sold an alcoholic beverage (beer) to Jose D. Gutierrez ("Gutierrez"), in violation of Business and Professions Code §25631.[3]

An administrative hearing was held on February 23, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Sacramento police officers Vincent Porter ("Porter") and Jason Oliver ("Oliver"), and Department investigator Rodney Ciganovich ("Ciganovich"). Appellant presented no witnesses.

Porter testified that, on August 22, 1998, at 3:10 a.m., while on routine

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[2] The accusation refers to Frederick E. Washbon, Jr. The declaration which he executed indicates that is the correct spelling of his name. Throughout the hearing transcript, his name is spelled "Washborn."

[3] Section 25631 provides that any licensee or employee of a licensee who sells an alcoholic beverage between the hours of 2:00 and 6:00 a.m., or any person who knowingly purchases an alcoholic beverage during those hours is guilty of a misdemeanor.

patrol near appellant's premises, he observed two men, one of whom was Gutierrez, walking from the front door area of the store. Gutierrez was carrying, and appearing to attempt to conceal, a 12-pack of beer. While Oliver detained Gutierrez, Porter entered the store and interviewed the employee, Frederick Washbon. Porter testified that Washborn told him the two men had been at the store earlier, at 1:00 a.m., but without identification, so he did not sell them anything. When the two returned at 3:00 a.m., according to Washbon, he sold them the beer without checking any identification. Washbon told Porter the men had paid cash for the beer, and, when asked, provided Porter with the receipt for the transaction. The receipt (Exhibit 4), taken at face value, would appear to record a sale by the store of a 12-pack of Budweiser at 3:03 a.m. on August 22, 1998.

Oliver confirmed that the time was approximately 3:00 a.m. He first observed Gutierrez walking out of the store with the beer. Oliver detained Gutierrez and seized the beer. The containers were sealed, and cold to the touch. Oliver conceded that it would not have been illegal for Gutierrez simply to be carrying the beer at that hour, but it was his belief, having seen Gutierrez leaving the store with the beer that a further investigation was warranted.

Ciganovich testified that he interviewed both Washbon and Gutierrez a month later, and prepared witness affidavits from each of them regarding the circumstances surrounding the transaction. Both signed them. The affidavits (Exhibits 5 and 6) were admitted into evidence as administrative hearsay, over appellant's objection, and tended to confirm that the sale had occurred at the time

and in the manner Washbon had first described to Porter.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained, and this timely appeal followed.

In its appeal, appellant raises the following issues: (1) the decision is based solely upon uncorroborated hearsay as to which no exception to the hearsay rule applies; and (2) Government Code §11514 was violated by the admission into evidence of the two witness affidavits. The two issues will be addressed together.

DISCUSSION

Appellant contends that the decision is based solely upon hearsay and, therefore, cannot stand. It argues that neither Evidence Code §§1220 or 1224, cited in the decision, justify the reliance upon what appellant contends is purely hearsay evidence - the statements attributed to Washbon, and the affidavit signed a month later.

Appellant argues that the Department has improperly relied on hearsay evidence to establish the very foundation upon which the exception to the hearsay rule depends. Appellant cites City of Stockton v. Vote (1926) 76 Cal.App. 369 [244 P. 609], for the proposition that "it is one of the cardinal principles of an admission that the party speaking must be in a position of authority to speak."

Appellant's argument has more wrong with it than the fact that it asks the Board to disregard logic and common sense, and the reasonable inferences to be drawn from essentially undisputed evidence. It also ignores well-settled principles of the law of agency, pursuant to which the acts and statements of an agent may

be imputed to the principal. A brief review of the facts will demonstrate this.

The police officers detained a man seen leaving appellant's premises at approximately 3:10 a.m. carrying a 12-pack of sealed containers of beer cold to the touch. The clerk, pursuant to officer Porter's request, provided a register receipt purporting to show a sale of that same brand and quantity of beer moments earlier.

There really can be no dispute that Washbon was an agent of appellant - if not actual, then certainly an ostensible agent, with the same legal consequences for appellant.[4] There was no evidence that there was any employee other than Washbon on duty at the time. It is most unlikely that appellant's store would be open for business at 3:00 a.m. but with no employee on duty. Therefore, it was reasonable for the police officers to believe Washbon when he told them what had transpired, and his role in the transaction, and equally reasonable for the Department to rely upon those statements as proof of the violation and binding upon appellant.

Evidence Code §1222 provides, in pertinent part:

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

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[4]Civil Code §2298 states: "An agency is either actual or ostensible." Civil Code §2300 defines "ostensible agency" as: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (See also 2 Summary of California Law, Witkin, pages 52-53 for a full discussion of ostensible agency).

Thus, even in the unlikely event Washbon was not really an employee, appellant is responsible for creating the circumstances which led the police to consider him an employee.

(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."

We think that Washbon had the requisite authority to speak on behalf of appellant with respect to the circumstances of the transaction in question. Washbon, the only employee then on duty, was the logical and only person to represent appellant's interest and speak in its behalf. His statements were clearly admissible as exceptions to the hearsay rule.

Washbon made statements of fact to a police officer acting in the course of his public duty to enforce the law against after-hour sales of alcoholic beverages. The statements were factual, and were not an attempt to place blame or admit fault - they involved the circumstances of the sale and his identification of a cash register receipt.[5] They were made only moments after the sale in question. As noted earlier, Washbon was left in apparent charge of the premises, and had the apparent authority to act on appellant's behalf. This would have included the authority to provide the officers with the cash register receipt and explain what it meant.

Appellant also objected to the admission into evidence of the affidavits obtained by Ciganovich, on the ground it had not been given the requisite notice under Government Code §11514. That section requires that a ten-day notice be given of the intention to introduce an affidavit into evidence, and that an opposing party has seven days after such notice to request the right to cross-examine the

[5] Although the decision states that Washbon admitted culpability, it would have been more accurate to say that Washbon admitted facts which would support the conclusion of culpability.

affiant. In the absence of such a request, the affidavit is given the same effect as if the affiant testified orally. If the request to cross-examine is made, but the opportunity to do so not afforded, the affidavits may, nevertheless, be introduced, but given only the effect of hearsay evidence. While the ALJ apparently did acknowledge the contents of the affidavits as hearsay, we see no error in their admission, principally because they were merely cumulative. However, we think the Department was derelict in its obligation to inform appellant of its intent to utilize the affidavits, and suggest that the requirements of §11514 not be ignored in future cases, where the absence of any effect on the outcome may be more questionable.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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.