

1-1964

Hearsay under the Administrative Procedure Act

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Recommended Citation

Stephen D. Natcher, *Hearsay under the Administrative Procedure Act*, 15 HASTINGS L.J. 369 (1964).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol15/iss3/13

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quirement.³³ The difficulty is that not infrequently legislation is procured by special interest groups to further their own interests rather than the public interest.³⁴ As this legislation accumulates, the right and liberty of the individual to work in a chosen occupation becomes increasingly curtailed.³⁵ Admonishing one who has been deprived of his occupational license to resort to the polls rather than the courts for protection against legislative abuses may well lead him to conclude that his right to work and earn a living does not enjoy a very high status.³⁶

*Roger Kensil**

³³ 219 A.C.A. at 584, 33 Cal. Rptr. at 354, quoting from *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955).

³⁴ See Dykstra, *Legislative Favoritism Before the Courts*, 27 IND. L.J. 38 (1951); Duane Lockard (a Connecticut state senator), *The Tribulations of a State Senator*, THE REPORTER May 17, 1956, pp. 24-27.

³⁵ See GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 105 (1956); Hanft & Hamrick, *Haphazard Regmentation Under Licensing Statutes*, 17 N.C.L. REV. 1 (1938).

³⁶ This is a reference to the famous quotation from *Munn v. Illinois*, 94 U.S. 113, 134 (1876): "For protection against abuses by legislatures, the people must resort to the polls, not to the courts," quoted in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, and in the *Doyle* case, 219 A.C.A. at 584, 33 Cal. Rptr. at 355.

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HEARSAY UNDER THE ADMINISTRATIVE PROCEDURE ACT

An extrajudicial statement offered in court to prove the truth of the matter asserted constitutes hearsay, and is inadmissible as evidence in judicial proceedings unless subject to one of the recognized exceptions to the hearsay rule. The exclusionary hearsay rule is based upon the lack of opportunity for the adversary to cross-examine the extrajudicial declarant, and is designed to safeguard the jury from being misled by incompetent evidence.¹ Exceptions to the rule excluding hearsay are based on the presence of some safeguard which will insure the veracity and accuracy of the proffered testimony despite the absence of the adversary's right to cross-examine.² In proceedings before administrative agencies this safeguard takes the form of the expertise which each agency develops in its particular field, thereby becoming less likely to be misled by untrustworthy evidence.³ For this reason, the Federal Administrative Procedure Act⁴ and similar state enact-

¹ McCORMICK, *EVIDENCE* 459 (1954); 5 WIGMORE, *EVIDENCE* § 1361 (3d ed. 1940).

² See 5-6 WIGMORE, *EVIDENCE* §§ 1420-764 (3d ed. 1940), for an exhaustive compilation and discussion of the exceptions to the hearsay rule. See also, McCORMICK, *EVIDENCE* 480-625 (1954); WITKIN, *CALIFORNIA EVIDENCE* §§ 246-309 (1958).

³ Davis, *Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 371-416 (1941).

⁴ 60 Stat. 241 (1946), 5 U.S.C. §§ 1001-11. This statute provides for rule making power, adjudication power, and judicial review. The evidence provision of the act appears in 5 U.S.C. § 1006(c):

Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or un-

ments⁵ allow the liberal admission of hearsay in administrative proceedings.

In California the rule of liberal admissibility in administrative proceedings conducted under the Administrative Procedure Act is embodied in section 11513(c) of the Government Code.⁶ The only restriction on admissibility is that the evidence be relevant and of the sort "on which responsible persons are accustomed to rely in the conduct of serious affairs."⁷ Unlike provisions in many states, however, section 11513(c) expressly provides that hearsay which does not come within one of the recognized exceptions to the hearsay rule is not in itself sufficient to sustain a finding.⁸ This limitation on the sufficiency of hearsay came into California law prior to the enactment of section 11513(c)⁹ in the case of *Walker v. City of San Gabriel*.¹⁰ No witnesses were called to testify; the only evidence offered to support the city

duly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . .

See 2 DAVIS, ADMINISTRATIVE LAW § 14.08 (1959).

⁵ See, e.g., KANSAS GEN. STAT. 44-523 (1949) (technical rules of procedure do not apply); MASS. GEN. LAWS ANN. ch. 30A § 11(2) (1959) (agencies covered need not observe the rules of evidence required by the courts); N.Y. EDUC. LAW § 6515(5) (liberality in admitting hearsay in suspension of license proceedings); OHIO REV. CODE ANN. tit. 1, § 119.09 (Anderson 1953) (same). But see N.D. REV. CODE § 28-32-06 (1960) (rules of evidence in civil courts applicable in administrative proceedings).

⁶ The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

CAL. GOV. CODE § 11513(c).

CAL. GOV. CODE § 11501(b) lists more than fifty agencies directly subject to the Act; also there are some fifty other agencies made subject to the Act by statutes in their respective Codes. See OFFICE OF ADMINISTRATIVE PROCEDURE, THE ADMINISTRATIVE PROCEDURE ACT 23-25 (1963), and Bobby, *An Introduction to Practice and Procedure Under the California Administrative Procedure Act*, 15 HASTINGS L.J. — n.4 (1964) (*supra* this issue).

⁷ CAL. GOV. CODE § 11513(c). The proposition that hearsay is admissible has been well settled by the courts: *Moyer v. State Bd. of Equalization*, 140 Cal. App. 2d 651, 295 P.2d 583 (1956) (hearsay testimony identifying bartender); *Mast v. State Bd. of Optometry*, 139 Cal. App. 2d 73, 293 P.2d 148 (1956) (affidavit); *Dyer v. Watson*, 121 Cal. App. 2d 84, 262 P.2d 873 (1953) (testimony as to what was said to prospective renters by persons at the property as to its occupancy admissible); *Manning v. Watson*, 108 Cal. App. 2d 705, 239 P.2d 688 (1952) (judgment of conviction in federal court); *Stuck v. Board of Medical Examiners*, 94 Cal. App. 2d 751, 211 P.2d 389 (1949) (narration of conversation between doctor and patient when doctor referred patient to an unlicensed person for an abortion).

⁸ Apparently New York has a similar provision with regard to the sufficiency of hearsay evidence stated expressly in the code. N.Y. EDUC. LAW § 6515(5).

⁹ Cal. Stat. 1945, ch. 867 § 1, p. 1626.

¹⁰ 20 Cal. 2d 879, 129 P.2d 349, 142 A.L.R. 1383 (1942).

council's revocation of respondent's license to conduct an auto wrecking business was a letter from the police chief enumerating violations of city ordinances. The California Supreme Court held that for the board to revoke the license on the basis of hearsay alone was an abuse of discretion.

The clear prohibition of the statute was most recently given effect in *Sunseri v. Board of Medical Examiners*.¹¹ The court reversed on five of six counts sustained by the board:

There is no direct evidence of appellant's participation in the events charged in counts A, B, C, D, and E. Since respondent's finding and order as to counts A, B, C, and D rests on hearsay evidence only and count E is without any support in the evidence, its order as to these counts cannot be sustained.¹²

This express language of section 11513(c) creates a limitation in administrative proceedings not found in civil actions. In a civil action if admissible hearsay is not objected to it can of itself support a finding,¹³ while in administrative proceedings hearsay is limited to supplementing direct evidence,¹⁴ and no right is given to object on the sole ground that the evidence is hearsay.¹⁵ The reason for this difference becomes apparent when the parties to the actions are considered. Parties in a civil action generally are represented by counsel and are therefore charged with the responsibility of knowing the rules of evidence. Failure to object is considered a waiver of the rule. In administrative proceedings, respondents generally are not represented by counsel.¹⁶ To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.

Although the district court of appeal in 1952 clearly pointed out this

¹¹ 224 A.C.A. 413, 36 Cal. Rptr. 553 (1964). Dr. Sunseri was found by the board to have violated section 2399.5 of the California Business and Professions Code on six counts. He filed a petition for mandamus under CAL. CODE CIV. PROC. § 1094.5.

¹² *Id.*, at 421, 36 Cal. Rptr. at 558.

¹³ 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940) states as a general rule that failure to object to incompetent evidence or failure to appear is a waiver of objection to its competency and the evidence may be of probative force. For a California rule holding that hearsay admitted without objection is sufficient to support a finding or judgment see the following cases: *Powers v. Board of Public Works*, 216 Cal. 546, 15 P.2d 156 (1932); *Estate of Ballard*, 210 Cal. App. 2d 799, 26 Cal. Rptr. 832 (1962). See also *Annot.*, 79 A.L.R. 2d 890 (1961); *Annot.*, 104 A.L.R. 1130 (1936).

¹⁴ CAL. GOV. CODE § 11513(c).

¹⁵ Nowhere in the Act is there provision for objection to hearsay evidence; however, such a privilege is given by the hearing officer, probably as a carry-over from civil actions, and to aid in exclusion of irrelevant evidence. Interview with Jerome P. Herst, Hearing Officer in Charge of San Francisco Office, October 5, 1963.

¹⁶ See TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 21-23 (1944) for a discussion of the then proposed section 11513(c). The council relied on the fact that it would unduly penalize a respondent, appearing without counsel, to adhere to the exclusionary rules of the common law. The council also pointed out that these proceedings were civil and not criminal in nature. This proposition has been well settled by the courts: *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 110 P.2d 992 (1941); *United Liquors, Inc. v. Department of Alcoholic Beverage Control*, 218 A.C.A. 474, 32 Cal. Rptr. 603 (1963).

distinction between civil actions and administrative proceedings,¹⁷ peripheral language in at least two subsequent cases shows that some confusion has existed. In the often cited case of *Swegle v. State Board of Equalization*,¹⁸ Justice Dooling emphasized in a concurring opinion that in his view the decision did not extend the consequences of failure to object in a civil action to hearings before administrative boards or hearing officers. However, the court in discussing the introduction of hearsay testimony by a police officer said that counsel for the respondent should have either made an objection to each offer of hearsay, clearly stating that the objection would run to the entire line of testimony, or made a motion to strike at its conclusion. In the subsequent case of *Griswold v. Department of Alcoholic Beverage Control*,¹⁹ the court in upholding the suspension of respondent's liquor license stated that if no objection were offered, it was waived and the objectionable evidence would be considered in support of a finding.²⁰ The court found that no objection was made when the hearsay evidence was presented in the hearing, but that the evidence was relevant and strongly supported other *direct* evidence. The case in fact follows section 11513(c), although language of the opinion reflects confusion as to the role of objections to admission of hearsay evidence in administrative proceedings.

In spite of the confusing language of these cases, the recent case of *Bendetti v. Department of Alcoholic Beverage Control*²¹ appears to state most clearly what *Swegle* and *Griswold* did not. In *Bendetti* the court held that since hearsay was admissible under section 11513(c), there could be no effective objection interposed. Therefore, the court concluded, hearsay evidence admitted under section 11513(c) could only be used to supplement direct evidence, whether objected to or not.

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¹⁷ *Marlo v. Board of Medical Examiners*, 112 Cal. App. 2d 276, 246 P.2d 69 (1952).

¹⁸ 125 Cal. App. 2d 432, 270 P.2d 518 (1954). *Swegle* had allegedly been lax in conducting her on-sale establishment by allowing fights, intoxicated persons, and soliciting prostitutes on the premises.

¹⁹ 141 Cal. App. 2d 807, 297 P.2d 762 (1956). Here the court was reviewing the suspension of respondent's liquor license for serving liquor to a minor. Respondent appeared by counsel who did not object to the introduction of hearsay evidence.

²⁰ The court actually cited a civil action case for this proposition, *Merchant Shippers Ass'n v. Kellogg Express & Draying Co.*, 28 Cal. 2d 594, 170 P.2d 923 (1946). *Id.* at 811, 297 P.2d 764.

²¹ 187 Cal. App. 2d 213, 9 Cal. Rptr. 525 (1960). Respondent appealed from a revocation of his liquor license for keeping a disorderly house, disturbing the neighborhood, and allowing sexual perverts on his premises.

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