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SC Court of Appeals

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

South Carolina Department of Revenue,  
  
Petitioner,

Docket No. 16-ALJ-17-0221-CC  
Docket No. 17-ALJ-17-0113-CC

vs.

BI-LO, LLC, d/b/a BI-LO Store #5612,  
  
Respondent.

**FILED**

**FINAL ORDER AND DECISION**

NOV 21 2017

SC ADMIN. LAW COURT

**APPEARANCES:** For the Petitioner: Elisabeth W. Shields, Esquire  
For the Respondent: Zoe Sanders, Esquire

**STATEMENT OF THE CASE**

The two above cited cases are before the Administrative Law Court (ALC or court) pursuant to requests for contested case hearings filed on behalf of BI-LO, LLC, d/b/a BI-LO #5612 (Respondent or BI-LO), on June 30, 2016 for the violation at issue in Docket No. 16-ALJ-17-0221-CC (February Violation), and on April 24, 2017 for the violation at issue in Docket No. 17-ALJ-17-0113-CC (August Violation). Although these cases were not consolidated, the court finds that it is appropriate to issue this joint Final Order and Decision governing both docket numbers.

The Respondent contests separate determinations of the South Carolina Department of Revenue (Petitioner or Department) that the Respondent committed violations of South Carolina Code Section 61-6-1500(A)(1)(c) by selling or permitting the sale of alcoholic liquor to a person under the age of twenty-one on its licensed premises. The Department asserts that the proper penalty for Docket Number 16-ALJ-17-0221-CC is a forty-five (45) day suspension, and that the proper penalty for Docket Number 17-ALJ-17-0113-CC is a revocation of the store's permit to sell beer and wine. The court has jurisdiction over these contested cases pursuant to South Carolina Code §§ 61-2-260 and 12-60-460. A hearing on the merits for both cases was held November 2, 2017, at the ALC in Columbia, South Carolina. After carefully weighing the evidence, the court finds that there was a violation of § 61-6-1500(A)(1)(c) by the Respondent in each case.

**FINDINGS OF FACT**

Pursuant to ALC Rule 25(C), the Parties stipulated to the following facts prior to the hearing in this matter:

### The February Violation

1. BI-LO, LLC, d/b/a BI-LO #5612, located at 1103 N. Main Street, Fountain Inn, South Carolina, is the holder of a seven-day off-premises beer and wine permit (32023029-P7B) issued by the South Carolina Department of Revenue (Department). The Respondent held the permit at all times relevant to both cases.
2. On February 5, 2016, at approximately 6:44 p.m., State Law Enforcement Division (SLED) Special Agent Kevin Tyner and Dena Metzler and the Fountain Inn Police Department conducted an undercover investigation utilizing an Underage Cooperating Individual (UCI) at the Licensed Premises.
3. The UCI entered the Licensed Premises in an undercover capacity to purchase beer, carrying \$15.00 in State funds and her State of South Carolina issued driver's license.
4. The UCI picked up one (1) twenty-five fluid ounce can of Bud Light Lime-A-Rita (beer) and approached the clerk, Angela Cynthia Pyles (also referred to, herein, as the "employee"), to purchase the beer. Ms. Pyles asked the UCI to see her identification, checked it, handed it back to her and sold the beer to the UCI without asking the UCI her age or whether she was over the age of twenty-one (21). The UCI was nineteen (19) years of age at the time of the above-referenced sale.
5. After the UCI purchased the beer, Agents Tyner and Metzler entered the Licensed Premises and identified themselves to Ms. Pyles. They informed Ms. Pyles that she sold beer to a minor, and then Agent Tyner issued the Respondent an administrative violation at the Licensed Premises, pursuant to Regulation 7-200.4 for permitting the sale of beer to a person under the age of twenty-one. Officer Peden of the Fountain Inn Police Department also issued a criminal citation to Ms. Pyles for violating S.C. Code Ann. § 61-4-50 (2009) for the sale of beer to a person under the age of twenty-one (21).
6. Ms. Pyles' employment was terminated by the Respondent after the incident.
7. The Respondent previously violated Regulation 7-200.4 on February 26, 2014 and December 22, 2015, making the February 2016 violation the Respondent's third violation on its seven-day off-premises beer and wine permit within a three (3) year period.
8. On March 4, 2016, the Department issued the Respondent a Notice of Intent to Suspend (Notice) for the February Violation. The Notice informed the Respondent that the

Department intended to suspend the seven-day off-premises beer and wine permit for forty-five (45) days.

9. The Respondent protested the Notice by letter received on May 27, 2016.
10. On June 6, 2016, the Department issued its Determination in this matter.
11. On June 30, 2016, this court received the Respondent's request for a contested case hearing. This case received Docket Number 16-ALJ-0221-CC.

#### The August Violation

12. Regarding the same BI-LO location (#5612) described in paragraph 1 above, on August 26, 2016, at approximately 12:59 p.m., State Law Enforcement Division (SLED) Special Agents Kevin Tyner and Dena Metzler and the Fountain Inn Police Department conducted an undercover investigation utilizing an Underage Cooperating Individual (UCI) at the Licensed Premises.
13. The UCI entered the Licensed Premises in an undercover capacity to purchase beer, carrying only her State of South Carolina issued driver's license and \$10.00 in State funds.
14. The UCI picked up one (1) twenty-five fl. oz. can of Bud Light Straw-Ber-Rita (beer) and approached the clerk, Lisa Hopper (also referred to, herein, as the "employee"), to cash out. Ms. Hopper asked the UCI to see her identification, the entered the information from the identification into the register. The register then requested an override at which time Ms. Hopper requested assistance from a manager. A service center associate named Collin Banks came to the register and entered an override code, and at that point Ms. Hopper sold the beer to the UCI without asking the UCI her age or whether she was over the age of twenty-one (21). The UCI was nineteen (19) years of age at the time of the above-referenced sale.
15. A witness for the Respondent testified that the Service Center Associate (Associate) position at BI-LO is an intermediary position, in which Associates have some managerial powers but not to the extent of store managers. One of the managerial powers vested in the Associates is the ability to override the cashier terminals, which lock up when an underage birth date is entered or scanned into the system for the purchase of alcohol.
16. After the UCI purchased the beer, Agents and Officers entered the Licensed Premises and identified themselves to Ms. Hopper. After informing Ms. Hopper that she sold beer to a minor, Agent Metzler issued the Permittee an administrative violation at the Licensed

Premises, pursuant to Regulation 7-200.4 for permitting the sale of beer to a person under the age of twenty-one. Officer Peden of the Fountain Inn Police Department also issued a criminal citation to Ms. Hopper for violating S.C. Code Ann. § 61-4-50 (2009) for the sale of beer to a person under the age of twenty-one (21).

17. The Service Center Associate who entered the override code on Ms. Hopper's terminal was fired by the Respondent following this incident for violating company policy. Another employee of the Respondent was also terminated about this violation for breaking with company policy.
18. The Respondent had three prior violations of Regulation 7-200.4 (referred to earlier in the Final Order and Decision) at the time of this alleged violation, making this the Respondent's fourth violation on its seven-day off-premises beer and wine permit within a 3-year period.
19. On November 15, 2016, the Department issued the Respondent a Notice of Intent to Revoke (Notice) for the August Violation. The Notice informed the Respondent that the Department intended to revoke the seven-day off-premises beer and wine permit.
20. The Respondent protested the Notice by letter received on January 18, 2017.
21. On April 6, 2017, the Department issued its Determination in this matter.
22. On April 24, 2017, this court received the Respondent's request for a contested case hearing. This case received Docket Number 17-ALJ-0113-CC.

Additionally, this court makes following Findings of Fact by a preponderance of the evidence:

23. The Respondent stipulates, and this court finds that in each case, an employee of the Respondent sold alcohol to an underage individual in violation of Section 61-6-1500(A)(1)(c), and Regulation of 7-200.4.
24. The Respondent offered evidence that, prior to beginning work, all BI-LO employees are required to watch an interactive training video that explains when they are permitted to sell age restricted products, including alcohol, and when it is forbidden under the law or company policy. Further, throughout their employment at BI-LO, employees are supposed to continually watch training videos that are updated daily. Likewise, all new BI-LO employees participate in several days of on-the-job training after they begin working.
25. The Respondent additionally offered testimony that each employee is given a copy of the BI-LO company policies, within which is BI-LO's age restricted beer and wine policy.

- The consequence for violating company policy is termination. Managers, of which there are one or two on duty at any given time, are responsible for ensuring compliance with these policies. Compliance with these policies is also monitored by district managers, who can move managers around, change positions, and order more training for store employees.
26. The Respondent's witness and Chief of Police of Fountain Inn testified that the Fountain Inn BI-LO always voluntarily participates in the Fountain Inn Police's yearly compliance training program.
  27. Based on testimony from the Respondent's witnesses, the Fountain Inn BI-LO instituted some equipment changes to the store's registers approximately two years ago that no longer permit cashiers to override the requirement to enter a customer's birth date for an age restricted sale. However, the instant violations occurred after these changes were implemented.
  28. No evidence was introduced establishing that the Respondent has made any policy, equipment, or training procedure changes to better ensure compliance with the law following the instant violations. However, the Respondent's witnesses offered testimony that some unspecified training reinforcement has been offered at the Fountain Inn BI-LO to its employees following these incidents.
  29. Beyond just alcohol sales, basket sales<sup>1</sup> account for a significant portion of the revenue for the Fountain Inn BI-LO, and would be harmed if the store were to lose its beer and wine permit.
  30. The Fountain Inn BI-LO employs approximately fifty-eight (58) people.
  31. The Fountain Inn BI-LO is the only traditional grocery store in the surrounding community.
  32. BI-LO, is generally regarded as having a good reputation in South Carolina. The Respondent also offered evidence suggesting that the Fountain Inn BI-LO hosts community outreach events and performs some level of community service.
  33. The Fountain Inn BI-LO would lose a significant portion of its revenue if its alcohol permit is revoked. The loss of revenue could result in some store employees having their work hours reduced, or some employees being terminated. Likewise, a permit revocation would create some degree of risk that the store would face closure.

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<sup>1</sup> Basket sales, as described by the Respondent's District Manager responsible for the Fountain Inn BI-LO store, refer to the sale of additional goods to customers who went to the store initially just to purchase alcohol.

34. Employees at the Fountain Inn BI-LO would be harmed by any reduction in their work schedules, by termination, or by closure of the store.
35. The surrounding community would be harmed by the closure of the Fountain Inn BI-LO.

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the court concludes the following as a matter of law:

1. South Carolina Code Section 1-23-600 grants jurisdiction to this court to hear contested cases under the Administrative Procedures Act. Specifically, South Carolina Code Section 61-2-260 grants the ALC the authority to hold contested case hearings in matters governing alcoholic beverages, beer, and wine.
2. South Carolina Code Section 61-6-1500(A)(1)(c) forbids the sale of alcoholic liquors to a person under twenty-one years of age. The statute does not make any distinction between intentional and unintentional sales nor contain any requirement that the sale be knowing or willful. *Compare* S.C. Code Ann. § 61-6-1500(A)(1)(c) (Supp. 2015) (stating only that a retail dealer “may not” make a sale to a person under twenty-one years of age) *with* S.C. Code Ann. § 61-6-1500(B) (Supp. 2015) (containing a “knowingly and willfully” requirement for tampering with a bottle of liquor). While South Carolina Code Section 61-6-50 generally provides that a violation of a rule under the Alcohol Beverage Control Act must be willful, Section 61-6-1500(A)(1)(c) is the law that specifically applies in this case. *Compare* S.C. Code Ann. § 61-6-50 (2009) (last amended in 2006) *with* S.C. Code Ann. § 61-6-1500(A)(1)(c) (Supp. 2015) (last amended in 2014). The rules of statutory construction dictate that the more recent and specific statute prevails. *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) (citations omitted). Therefore, although the sale of liquor to an underage individual may be inadvertent, the law does not excuse the violation.
3. Permits and licenses issued by this State for the sale of liquor, beer, and wine are privileges to be used and enjoyed only so long as the holder complies with the restrictions and conditions governing them. *See Feldman v. S.C. Tax Comm’n*, 203 S.C. 49, 26 S.E.2d 22 (1943).
4. South Carolina Code Section 61-2-20 charges the Department with the responsibility of administering and enforcing the laws governing the sale of alcohol. To this end, the

Department has issued South Carolina Revenue Procedure #13-2, which establishes Alcoholic Beverage Licensing violation guidelines. The procedure provides that the penalty for a first offense against a retail store liquor license is a Five Hundred Dollar (\$500) fine, the penalty for a second offense is a One Thousand Dollar (\$1,000) fine, the penalty for a third offense is a forty-five (45) day suspension of the store's license, and the penalty for the fourth offense is permit revocation. The Department's South Carolina Revenue Procedure #13-2 states that, in calculating the number of previous violations at the licensed location, the Department will look back three (3) years from the date of the most recent violation.

5. In this contested case, the court sits as fact-finder and has the discretion to impose an appropriate penalty based on the facts presented. *S.C. Dept. of Revenue v. Sandalwood Social Club*, 399 S.C. 267, 279–80, 731 S.E.2d 330, 337 (Ct. App. 2012) (quoting *Walker v. S.C. Alcoholic Beverage Control Comm'n*, 305 S.C. 209, 210, 407 S.E.2d 633, 634 (1991)). Here, this is the Respondent's fourth alcohol sale to a UCI in a three-year period and the Respondent failed to advance evidence showing it had made any substantive training procedure, store policy, or equipment changes to help better ensure compliance since the occurrence of the two violations at issue. The Respondent's witness testimony and defense was largely based on the premise that these violations were simply the result of an employee mistake that could happen again.<sup>2</sup> The court is deeply concerned with the Respondent's underwhelming response to these repeated violations, and flatly rejects the argument that these violations are simply the result of unavoidable human error.
6. In *S.C. Dep't of Revenue v. Ingles Mkts., Inc.*, the Respondent was contesting the Department's determination that it had committed its third permit violation and that its permit should be suspended for forty-five (45) days. *S.C. Dep't of Revenue v. Ingles Mkts., Inc.*, Docket No. 13-ALJ-17-0283-CC (Dec. 11, 2013). The President of Ingles Markets, Inc. appeared at the hearing and testified about the extensive and costly improvements that the store made to further prevent any compliance problems following the violation at issue in that case. *Id* at 2-3. Among these improvements were: 1) an entirely new cash register system; 2) installation of new software for the terminals that locks the terminal for manager

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<sup>2</sup> The Respondent's witness testified that "We've made mistakes, and we're admitting we made mistakes, and I'm not going to say we're not ever going to make them again, because we're all human."

approval each time an alcoholic beverage is scanned, even when multiple alcoholic beverages are purchased by a single customer; 3) additional training for all employees; 4) the hiring of additional managers to accommodate the increased workload. *Id.* The estimated cost of implementing these changes, again, made in response to Ingles Markets' third violation, was between \$75,000 and \$100,000 a year. *Id.* at 3. Considering the actions taken by Ingles managers after its third alcoholic beverage related violation, the court was both alarmed and surprised at the Respondent's less than vigorous remedial measures to correct its third and fourth violations of the same law.

7. Moreover, while the Respondent put forth evidence showing it has partnered with the University of South Carolina Athletics Department (USC Athletics), the court finds this evidence unpersuasive and unresponsive. Prevention of underage drinking is not an aspect of the USC Athletics partnership.<sup>3</sup>
8. However, the court acknowledges the beneficial impact of the Fountain Inn BI-LO. The court finds that as the only traditional grocery store in the immediate community, and as the employer of approximately fifty-eight (58) employees, the Respondent's store is an asset to the surrounding community. The court is also convinced that the revenue loss to the store caused by a revocation of its beer and wine permit could place the store in jeopardy of closing altogether. As such, this court is inclined to accept that a permit revocation is not an appropriate penalty for the violations presently before the court. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); S.C. Revenue Procedure #04-4 (It is within the court's discretion to apply a certain set of facts as a mitigating circumstance and reduce the penalty imposed on a permit holder by the Department).<sup>4</sup>
9. In this case, the court finds that the above referenced matters constitute mitigating factors that, in these cases, weigh against imposition of the penalties the Department proposes.

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<sup>3</sup> The court rejects the off-hand anecdotal testimony of the Fountain Inn Chief of Police who speculated that the Respondent was somehow being treated more harshly than other permitted locations he had seen with respect to permit violations. The Respondent offered no specific evidence that it is being treated dissimilarly from any other licensed or permitted location.

<sup>4</sup> The court's sympathetic attitude towards the Respondent's employees and the surrounding Fountain Inn community is not without limits. The repeated violations of the alcoholic beverage laws by the Respondent cannot be countenanced forever. As such, this court encourages the Respondent to reconsider its business practices and implement policies and procedures above and beyond what is called for in this Final Order and Decision to ensure no future violations of the State's alcohol beverage laws are committed at this location.

Accordingly, the court finds that circumstances exist to support a finding that the penalty against the Respondent should be reduced.

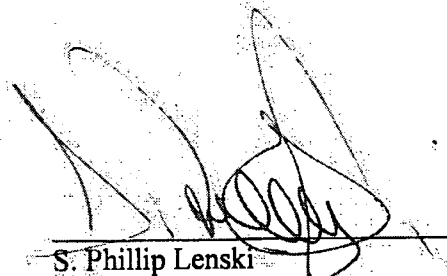
**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, the court finds that the Department has met its burden of proof and that the Department's Determination that the violations were committed should be upheld.

**IT IS THEREFORE ORDERED**, that for Docket Number 16-ALJ-17-0221 (the February violation), the penalty assessed to the Respondent shall be a one-thousand-dollar (\$1,000) fine, and a Seven (7) day suspension of the Respondent's beer and wine permit.

**IT IS FURTHER ORDERED**, that for Docket Number 17-ALJ-17-0113 (the August violation), the penalty assessed to the Respondent is a two-thousand-dollar (\$2,000) fine, and a ten (10) day suspension of the Respondent's beer and wine permit.<sup>5</sup> Additionally, the Respondent must change its policy that permits Service Center Associates to override register terminals to permit alcohol sales. The Respondent must require that any overriding of register terminals for alcohol sales must be done by a Store Manager, and this duty may not be delegated. Furthermore, the location must, within ninety (90) days of this Final Order and Decision, implement a new mandatory alcoholic sales training program for all existing and new employees. The training program implemented must be from the programs approved by the Department and listed on the Department's website. The Respondent should confer with the Department to ensure that the new program it selects is among the programs approved by the Department.

**AND IT IS SO ORDERED.**



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S. Phillip Lenski  
S.C Administrative Law Court

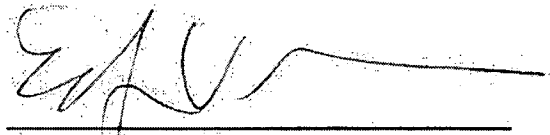
November <sup>21</sup>, 2017  
Columbia, South Carolina

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<sup>5</sup> The two periods of suspension (7 day and 10 day) should be imposed together (back-to-back) so that the Respondent's beer and wine permit is suspended for a continuous period of seventeen (17) days.

**CERTIFICATE OF SERVICE**

I, Edye U. Moran, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in black ink, appearing to read 'Edye U. Moran', written over a horizontal line.

Edye U. Moran  
Judicial Law Clerk

November 21, 2017  
Columbia, South Carolina