

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable S. Phillip Lenski, Administrative Law Judge

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MAY 04 2018

SC Court of Appeals

Case No. 16-ALJ-17-0221-CC
Case No. 17-ALJ-17-0113-CC
Appellate Case No. 2017-002568

South Carolina Department of Revenue,.....Appellant,

v.

Bi-Lo, LLC, d/b/a Bi-Lo #5612,.....Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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Pursuant to Rule 208(a)(3), SCACR, the Appellant, South Carolina Department of Revenue (Department), files its Reply to the Initial Brief of Respondent.

ARGUMENTS

I. THE ISSUE OF WHAT CONSTITUTES A VALID MITIGATING CIRCUMSTANCE FOR THE ADMINISTRATIVE LAW COURT (ALC) TO CONSIDER WHEN ISSUING PENALTIES FOR UNDERAGE SALES WAS PROPERLY PRESERVED FOR THIS COURT'S REVIEW.

In its brief, the Respondent argues that the Department has waived an issue the Department raises in its Initial Brief. (Initial Brief of Resp't p. 5). Specifically, the Respondent claims that the issue of what constitutes a valid mitigating circumstance is improperly before this Court because the Department did not file a post-trial motion. (Initial Brief of Resp't pp. 5-8). However, as discussed in more detail below, this issue was raised to and ruled on by the ALC. As such, the issue is ripe for appellate review.

A. The Department Was Not Required To File Post-Trial Motions To Preserve The Issue For Appeal.

The Respondent argues that the Department did not properly preserve its right to appeal the ALC's ruling based upon potential economic impacts because the Department did not file any post-trial motions with the ALC addressing this issue. (Initial Brief of Resp't p. 6-8).

"Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." Wilder Corp v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). In this case, as discussed in more detail below, the ALC made a clear ruling on what it believed to be the appropriate penalty and what it believed to be proper grounds to deviate from the penalties proposed by the Department, penalties pursuant to South Carolina Revenue Procedure #13-2 (Penalty Guidelines). Because the ALC ruled upon the appropriate penalty for Respondent's violations and because the

ALC ruled upon what basis justifies deviation from the Penalty Guidelines, there was no need to file any post-trial motions to preserve the issue for appeal.

Moreover, the issue of what circumstances the ALC should consider in determining the appropriate penalty did not first arise from the ALC's Final Order (Order). Rather, the parties and the Court discussed the issue extensively at trial, as the sole purpose of the hearing was to determine the appropriate penalties for the Respondent's violations. The Department asserted that the ALC should uphold the Department Determinations for each violation, which sought penalties pursuant to the Penalty Guidelines. (R. p. -----; Tr. pp. 7:6-9, 79:22-80:3). The Penalty Guidelines do not include post violation remedial measures or potential economic impacts as mitigating circumstances, which were focused upon by the ALC. The Respondent argued that the ALC should focus upon the impacts a suspension and revocation would have on the Respondent and the community. (R. p. -----; Tr. pp. 7:20-22, 8:5-13, 80:11-19, 81:3-7, 82:17-20, 24-83:3). Therefore, the circumstances that justify deviation from the Penalty Guidelines was an issue before the Court and not something that arose for the first time in the Order.

The Rishner case cited by Respondent supports the Department's position. In the Rishner case, the Appellant argued that the ALC erred in essentially making itself a witness when, after the close of all the evidence, it conducted its own on-site inspection and included observations from said inspection in its findings of fact in the final order. Rishner v. South Carolina Dep't of Health & Env'tl. Control, 393 S.C. 198, 206-07, 712 S.E.2d 428, 432-33 (2011). Because the ALC conducted its on-site inspection after the close of evidence and was unable to include its observations as evidence at trial, the inclusion of its observations in its final order is a perfect example of an issue "first arising from the ALC's final order," thus requiring a post-trial motion in order to properly preserve the issue for appeal. Id.; see also South Carolina Dep't of Motor

Vehicles v. Dover, 2018 WL 1403624, at n. 3 (Ct.App. 2018). Unlike Rishner, this case does not involve any issues arising for the first time in the Order. To the contrary, the issue remains what is the appropriate penalty for third and fourth violations for selling beer to an underage person. Determining the appropriate penalty inherently includes determining what factors justify deviation from the Department's proposed penalty.

B. The Appropriate Penalties For Respondent's Violations, Which Inherently Includes What Circumstances Exist Warranting Deviation From The Department's Penalties, Was The Sole Issue Before The ALC And Was Ruled On By The ALC.

The issue in this appeal, just as the issue was before the ALC, is the appropriate penalty for Respondent's third and fourth violations for selling beer to underage persons. The Record on Appeal (Record) shows that the Respondent stipulated that these violations occurred. Therefore, the only issue left for the ALC to address, which the Department and the Respondent both raised, was the appropriate penalties for such violations. Thus, the hearing regarding the appropriate penalty to impose in a violation case necessarily included the raising and presentation of any circumstances or factors the parties deem mitigating to the violation. The ALC ruled on this issue. Therefore, the issue is not waived.

The Respondent stipulated to, and the ALC found, that the Respondent committed two separate violations of S.C. Regulation 7-200.4 by permitting the sale of beer to an underage person on February 5, 2016, and August 26, 2016. (R. p. -----; Order pp. 2:6, 3:8-9, 4:21-23; Stipulations of Fact for Case No. 16-ALJ-17-0221-CC; Stipulations of Fact for Case No. 17-ALJ-17-0113-CC). As such, both the Department and the Respondent acknowledged that the only issue before the ALC was the appropriate penalties for such violations. (R. p. -----; Tr. p. 6:12-14, 7:19-20). Therefore, the testimony provided, as well as the exhibits presented by Respondent, focused on

the penalties sought by the Department and what, if any, mitigating circumstances the ALC should properly consider when determining the appropriate penalties for the violations.

- i. The Record contains sufficient evidence that the issue on what circumstances warrant deviation from the Penalty Guidelines was properly raised to and ruled on by the ALC.

As discussed more fully in its initial brief, the Department pursued a 45 day suspension and revocation in accordance with South Carolina law and the Penalty Guidelines. See S.C. Code Ann. § 61-4-580 (2009) and S.C. Code Regs. Ann. 7-200.4 (2016) (providing that an underage sale of alcohol is sufficient grounds for revocation). The Department does not pursue revocation for every offense; rather, the Department relies on the graduated penalty system provided in the Penalty Guidelines. Deviation from the graduated penalty system is warranted only when mitigating circumstances support such deviation. Here, the ALC abused its discretion by deviating from the Penalty Guidelines solely based on non-mitigating circumstances related to potential impacts the Respondent may suffer because of the penalty sought, rather than actions the Respondent could have taken to prevent the violations from ever occurring. (Initial Brief of Appellant pp. 19-25).

The Penalty Guidelines do not consider impacts a penalty will have on a permit holder or remedial measures taken by a permit holder after a violation to be mitigating to the underlying offense. Only measures taken and/or circumstances existing prior to a violation can constitute mitigation for a violation. Accordingly, the ALC abused its discretion by deviating from the Department's proposed penalties based upon factors not included in the Penalty Guidelines. The specific factors the ALC cited as warranting a deviation from the Penalty Guidelines were as follows:

[T]he 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.

(R. p. -----; Order p. 8:13-18). The ALC then ruled that "the above referenced matters constitute mitigating factors that, in these cases, weigh against imposition of the penalties the Department proposes." (R. p. -----; Order p. 8:24-25). Based on the ALC's ruling that these factors constituted valid mitigating circumstances, the ALC determined that "circumstances exist to support a finding that the penalty against the Respondent should be reduced." (R. p. -----; Order p. 9:1-2).

The Department raised the issue that the appropriate penalties were a 45 day suspension and revocation based upon the Penalty Guidelines. (R. p. -----; Order p. 1:22-25; Tr. pp. 7:6-9, 79:22-80:3). The ALC then ruled upon the Department's argument and chose to disregard the Penalty Guidelines and consider factors not recognized in the Penalty Guidelines or applicable statutes and regulations. (R. p. -----; Order p. 8:13-9:2). Based on the above, the ALC made a clear ruling on what it believed constituted mitigating circumstances and what it considered to be the appropriate penalty for Respondent's third and fourth violations. As such, the issue of what is the appropriate penalty, as well as the issue of what circumstances warrant deviation from the Penalty Guidelines, were raised and ruled upon by the ALC and are therefore ripe for appeal.

II. THE SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD DOES NOT SUPPORT THE ALC'S REDUCTION IN THE PENALTIES SOUGHT BY THE DEPARTMENT; THEREFORE, SUCH A REDUCTION WAS AN ABUSE OF DISCRETION.

The Respondent claims that "[t]he penalty imposed by the ALC in this case was obviously within the statutory range and therefore was not an abuse of discretion or based on an error of law." (Initial Brief of Resp't p. 9). Under this rationale, a penalty will always fall within the statutory range so long as it is no less than a fine and no more than revocation of the license. By

this logic, any penalty, even one as low as one dollar for a permit holder's 25th violation for an underage sale, is not an abuse of discretion. This construction misunderstands the difference between abuse of discretion and a penalty outside the statutory range, and would lead to absurd results.

Here, although the penalties imposed by the ALC were technically within the general statutory range, the ALC abused its discretion by ignoring the Penalty Guidelines and ordering a far too lenient penalty based on non-mitigating circumstances. Stated differently, in light of the Respondent's repeated and ongoing failure to prevent the sale of beer to underage persons, combined with Respondent's failure to take sufficient measures to address these repeated sales, a seven (7) day suspension and \$1,000.00 fine and a ten (10) day suspension and \$2,000.00 fine were not appropriate penalties, and constitute an abuse of discretion.

A. The Substantial Evidence In The Record Demonstrates Respondent's Lack Of Efforts To Ensure Its Compliance With The Law.

In its Statement of Facts, the Respondent discusses various measures taken by the Respondent to educate and inform their employees about underage sales. (Initial Brief of Resp't pp. 1-2). As cited in Respondent's brief, these facts were included in the ALC's Findings of Fact. (Initial Brief of Resp't p. 11).¹ However, the ALC also stated in its Findings of Fact that "[n]o evidence was introduced establishing that the Respondent has made any policy, equipment, or

¹This evidence includes, but is not limited to, the following: (1) that Respondent requires all of its employees to watch interactive training videos regarding age restricted sales and to participate in several days of on-the-job training (R. p. -----; Order p. 4:24-29); (2) that Respondent provides their employees with its company policies, which contains Respondent's age restricted beer and wine policy (R. p. -----; Order p. 4:30-31); (3) the Respondent terminates employees for violating the company policy (R. p. -----; Order p. 5:1); (4) the Respondent voluntarily participates in the Fountain Inn Police's yearly compliance training program (R. p. ---; Order p. 5:5-7); and (5) the Respondent instituted some equipment changes to the store's registers (R. p. -----; Order p. 5:8-11).

training changes to better ensure compliance with the law following the instant violations.” (R. p. -----; Order p. 5:13-15). Throughout its Conclusions of Law, the ALC criticizes the same evidence the Respondent is now claiming supports the ALC’s ruling. Specifically, the ALC stated:

. . . [T]he 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.[] 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.

Considering the actions taken by the Ingles managers [in South Carolina Dep’t of Revenue v. Ingles Mkts., Inc., Docket No. 13-ALJ-17-0283-CC (Dec. 11, 2013)] after its third alcoholic beverage related violation, *this 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.

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.

(R. p. -----; Order pp. 7:14-21, 8:6-12) (emphasis added).

Essentially, the ALC found the evidence Respondent presented at trial, the same evidence set forth in Respondent’s Initial Brief, to be an underwhelming and less than vigorous effort to remedy the Respondent’s repeated violations of the law. The ALC’s findings support the conclusion that the Respondent did not take any substantive preventative measures to avoid these repeated violations. Based upon the Respondent’s history of repeated violations, combined with Respondent’s failure to take substantive measures to prevent even more violations from occurring in the future, the penalties imposed by the Penalty Guidelines were reasonable and should have

been affirmed by the ALC.

Yet, despite the ALC's determination regarding this underwhelming and alarming evidence, the ALC deviated from the Department's proposed penalties by improperly focusing upon the impact those penalties would have on Respondent and the community. For these reasons, the substantial evidence on the whole record does not support the ALC's significant reduction in penalties imposed on the Respondent.

B. The ALC Abused Its Discretion When It Considered The Potential, Yet Unsupported, Economic Impact A Suspension Or Revocation Would Have On The Respondent's Store Or The Community To Justify A Deviation From The Penalties Sought By The Department.

“An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law.” Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 891 (Ct.App. 2004). As demonstrated above, the substantial evidence on the whole record does not support the ALC's decision to reduce the penalties imposed on Respondent. The evidence, as discussed above, included what the ALC determined was the Respondent's “underwhelming response” to the repeated violations at its store and the lack of vigorous efforts to prevent future violations. The evidence also included testimony regarding the potential economic impact a suspension or revocation would have on the Respondent's store and the surrounding community. The ALC improperly disregarded the overwhelming evidence of Respondent's repeated violations of law and failure to take sufficient actions to prevent those violations. Instead, the ALC abused its discretion and chose to focus on the speculative testimony about the potential impact the proposed penalties would have on the Respondent.

- i. The ALC's findings regarding the potential economic impact a suspension or revocation would have on the Respondent's store or the community constituted an abuse of discretion based on the facts presented.

Respondent argues in its brief that "the mitigating circumstances relied on by the ALC were supported by substantial evidence." (Initial Brief of Resp't p. 11). On the contrary—as the Department described in great detail in its Initial Brief, the facts presented to the ALC by the Respondent's witnesses did not support the ALC's findings. (Initial Brief of Appellant p. 25, footnote 8).

The ALC found that "[t]he [Respondent] would lose a significant portion of its revenue if its alcohol permit is revoked" and that "a permit revocation would create some degree of risk that the store would face closure." (R. p. -----; Order p. 5:26-29). However, the testimony provided indicates that the Respondent's gross monthly sales are approximately \$1 million. (R. p. -----; Tr. p. 35:23-36:2). Further testimony indicated that only approximately 4-5% of that \$1 million figure is attributable to the sale of beer and wine and the Respondent's store would only suffer a 2% loss of gross sales should a suspension or revocation be imposed. (R. p. -----; Tr. 35:15-36:7, 40:19-41:1, 42:5-14).

As the Department stated in its Initial Brief, these figures are not indicative of a store that would lose a "significant portion of its revenue" or would run the risk of closing if its permit to sell beer and wine was suspended or revoked. Rather, it appears that the sale of beer and wine in Respondent's store is but a very small portion of its gross sales and that Respondent would more than likely continue to thrive and operate as normal.

Therefore, even if this Court were to determine that the potential economic impact a suspension or revocation would have on a licensed location or on the community constitutes a valid consideration for deviation from the Penalty Guidelines, the ALC's reliance of such factors

in this case was improper. Because the facts presented do not support the findings made by the ALC, and thus do not support the substantial deviation from the penalties proposed by the Department, the great consideration the ALC placed on such factors constitutes an abuse of discretion.

- ii. Prior ALC rulings are non-binding and thus are not precedent; therefore, such rulings considering remedial measures or “economic impact” as mitigating circumstances do not validate the ALC’s reliance on same in this case.

In its brief, the Respondent relies on prior ALC rulings which considered remedial measures or “economic impact” to be valid mitigating circumstances. Specifically, Respondent stated “there is precedent for considering remedial measures and economic impact as mitigating circumstances.” (Initial Brief of Resp’t p. 14). The “precedent” cited by Respondent are all prior ALC rulings. (See Initial Brief of Resp’t pp. 14-16). Matters heard at the ALC that stem from a protest of a final agency determination from the Department are de novo hearings; these rulings are not binding on this Court and have no precedential value. See Brown v. South Carolina Dep’t of Health & Env’tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002). Moreover, to the extent the ALC in those cases deviated from the Penalty Guidelines based on a consideration of non-mitigating factors, those cases have no persuasive authority. Therefore, the Respondent’s reliance on these cases as “precedent” that these factors are valid mitigating circumstances is misplaced.

III. THE APPLICABLE LAW IMPOSING THE PENALTIES FOR UNDERAGE SALES OF ALCOHOL IS SILENT ON THE SPECIFIC ISSUES ADDRESSED IN THE PENALTY GUIDELINES; THEREFORE, THE DEPARTMENT’S ARGUMENT REGARDING THE DEFERENCE OWED TO THE DEPARTMENT’S CONSTRUCTION OF SUCH LAWS AND ITS LONG-STANDING ADMINISTRATIVE PRACTICE ARE APPROPRIATE ARGUMENTS TO CONSIDER ON APPEAL.

As the Department argued in its Initial Brief, the Penalty Guidelines represent the Department’s long-standing administrative practice and its construction of the laws it is charged

with enforcing, and are therefore entitled to due deference and most respectful consideration. (See Initial Brief of Appellant pp. 10-14). The Respondent claims that this argument is “inapposite” as there is no issue of statutory or regulatory construction in this case because the applicable statutes and regulations are unambiguous. (Initial Brief of Resp’t pp. 11-12).

The Department does not contend that §§ 61-4-580 and 61-4-250 and Regulation 7-200.4 are ambiguous. Rather, the Department contends the statutes and regulations are silent as to when and how a monetary fine is appropriate in lieu of a suspension or revocation, which are the default penalties for underage sales pursuant to § 61-4-580 and Regulation 7-200.4. In other words, the statutes and regulations establish both a floor and a ceiling, but leave it to the Department to determine the appropriate steps between. (See Initial Brief of Appellant p. 8-9, 12). See also Bruning v. South Carolina Dep’t of Health & Env’tl. Control, 418 S.C. 537, 545, 795 S.E.2d 290, 295 (Ct.App. 2016) (“If the statute or regulation ‘is *silent* or ambiguous with respect to *the specific issue*,’ the court then must give deference to the agency’s interpretation of the statute or regulation”) (emphasis added).


As such, the Department issued its Penalty Guidelines to fill in the gaps; this guidance has been in place since 1995. (Initial Brief of Appellant pp. 12-13). As the agency charged with the regulation and enforcement of these laws, the Department possesses the unique knowledge of the frequency of underage sales occurring in the establishments it licenses. (Initial Brief of Appellant p. 13). Therefore, the Department is in the best position to determine what is necessary to deter such violations and ensure compliance, and the Penalty Guidelines are the appropriate means of informing the public on the Department’s construction and application of the laws it is charged with administering and regulating. The Penalty Guidelines represent the Department’s long-standing administrative practice, and the ALC abused its discretion and committed clear error by

failing to give deference to the Department's long-standing interpretation of the applicable statutes and regulations. See Media Gen. Commc'ns, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 149–50, 694 S.E.2d 525, 530–31 (2010). (Initial Brief of Appellant p. 13).²

CONCLUSION

The Respondent's argument that the issue regarding what constitutes a mitigating circumstance was not properly preserved for appellate review falls short, since the evidence demonstrates that the issue was raised to and ruled on by the ALC. Further, there is authority that supports the Department that it was not obligated to file a post-trial motion on the issue in order to preserve the issue for appellate review. Additionally, and as was more discussed and argued in the Department's Initial Brief, the substantial evidence on the whole record does not support the ALC's findings, which it then used to justify a significant deviation from the penalties proposed by the Department. Therefore, such a deviation was an abuse of discretion. Accordingly, this Court should reverse the ALC's decision.

Respectfully Submitted,



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May 4, 2018

²For a more in-depth analysis on this argument, the Department references and incorporates its arguments set forth in its Initial Brief, pages 10 through 14.

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South Carolina Department of Revenue,.....Appellant,

v.

Bi-Lo, LLC, d/b/a Bi-Lo #5612,.....Respondent.

PROOF OF SERVICE

I, Jean M. O'Connor, hereby certify that I have caused to be mailed a copy of the South Carolina Department of Revenue's Initial Reply Brief regarding the above-referenced case, by depositing the same in the United States Mail, postage prepaid, to Zoe Sanders, The Sanders Law Firm of South Carolina, LLC, 1513 Hampton Street, Columbia, SC 29201, this 4th day of May, 2018



Jean M. O'Connor