THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable S. Phillip Lenski, Administrative Law Judge

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.

FINAL BRIEF OF APPELLANT

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DID THE ADMINISTRATIVE LAW COURT ERR BY RELYING ON NON-MITIGATING CIRCUMSTANCES TO JUSTIFY A DEPARTURE FROM THE PENALTIES IMPOSED BY TITLE 61 AND THE DEPARTMENT'S PENALTY GUIDELINES, WHEN THE RECORD EVIDENCE SUPPORTED A FORTY-FIVE (45) DAY SUSPENSION AND REVOCATION OF THE RESPONDENT'S BEER AND WINE PERMIT AS REQUIRED BY THE PENALTY GUIDELINES?

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) in accordance with the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2015) for a contested case hearing. Respondent, Bi-Lo, LLC, d/b/a Bi-Lo Store #5612 (Respondent/Bi-Lo), filed for a contested case hearing with the ALC on June 30, 2016, in case number 16-ALJ-17-0221-CC, to challenge a Department Determination issued by the South Carolina Department of Revenue (Department/Appellant) on June 6, 2016. (R. p. 001, lines 14-16, p. 003, lines 4-6, pp. 011-015; Order pp. 1:14-16, 3:4-6). In the Department Determination, the Department sought a forty-five (45) day suspension of the Respondent's seven-day off-premises beer and wine permit (Permit) for a third violation of South Carolina Regulation 7-200.4 by selling or permitting the sale of beer to a person under the age of twenty-one. (R. p. 001, lines 19-23, pp. 011-015; Order p. 1:19-23). Respondent also filed for a contested case hearing with the ALC on April 24, 2017, in case number 17-ALJ-17-0113-CC, to challenge a Department Determination issued by the Department on April 6, 2017, wherein the Department sought the revocation of the Respondent's Permit for a fourth violation of South Carolina Regulation 7-200.4 by selling or permitting the sale of beer to a person under the age of twenty-one. (R. p. 001, lines 14-17, 19-22, 24-25, pp. 016-020; Order p. 1:14-17, 19-22, 24-25).

The parties filed Stipulations of Fact under both case numbers on October 18, 2017, wherein the Respondent stipulated to committing the violations at issue (discussed more fully below). (R. p. 001, lines 30-31, pp. 112-117; Order p. 1:30-31; Stipulations of Fact for Case No. 16-ALJ-17-0221-CC; Stipulations of Fact for Case No. 17-ALJ-17-0113-CC). On November 2, 2017, the ALC held a hearing on the merits for both cases. (R. p. 001, lines 26-27; Order p. 1:26-27). While the cases were not consolidated, the ALC issued a joint Final Order and Decision

(Order) governing both cases. (R. p. 001, lines 17-18; Order p. 1:17-18). The ALC issued the Order on November 21, 2017, finding that the Department met its burden of proof that the violations were committed and, in that regard, the Department Determinations should be upheld. (R. p. 009, lines 4-6; Order p. 9:4-6). Based on concerns related to the economic impact that would be suffered by Respondent, as discussed in more detail herein, the ALC reduced the proposed forty-five (45) day suspension and instead issued a one thousand ($1,000.00) dollar fine and a seven (7) day suspension of the Respondent's Permit for the third violation. (R. p. 009, lines 7-9; Order p. 9:7-9). The ALC also reduced the proposed revocation of the Respondent's permit and instead issued a two thousand ($2,000.00) dollar fine and a ten (10) day suspension of the Respondent's Permit for the fourth violation. (R. p. 009, lines 10-12; Order p. 9:10-12). In a footnote, the ALC provided that the seven (7) day and the ten (10) day suspensions were to run consecutively, for a continuous seventeen (17) day suspension period. (R. p. 009, footnote 5; Order p. 9:footnote). The Department filed its appeal of the ALC's decision to the South Carolina Court of Appeals on December 20, 2017.

STATEMENT OF FACTS

During the period of 2014 through 2016, State Law Enforcement Division (SLED) issued administrative violations to the Respondent for four (4) instances of selling beer to an underage person. (R. p. 002, lines 20-22, 26-28, p. 003, line 31—p. 004, line 2, 9-12; Order pp. 2:20-22, 26-28, 3:31-4:2, 9-12). The dates for those violations are as follows: February 26, 2014; December 22, 2015; February 5, 2016; and August 26, 2016. (R. p. 002, lines 6, 26-28, p. 003, lines 8-9; Order pp. 2:6, 26-28, 3:8-9). At issue in this appeal are the Respondent's third and fourth violations. (R. p. 002, lines 27-28, p. 002, lines 10-12; Order pp. 2:27-28, 4:10-12).

On February 5, 2016, the Respondent sold beer to an Undercover Cooperating Individual (UCI), who was assisting SLED in an undercover investigation. (R. p. 002, lines 6-17, p. 112, lines 17-28; Order p. 2:6-17). On that day, the UCI approached Respondent's employee with a beer and her State issued driver's license, which indicated that the UCI was only nineteen (19) years old at the time. (R. p. 002, lines 10-17, p. 112, lines 25-28; Order p. 2:10-17). The Respondent's employee reviewed the UCI's State issued driver's license, but then entered in an incorrect date of birth in the cash register system in order to sell the beer to the UCI. (R. p. 002, lines 14-17, p. 037, line 22—p. 038, line 1; Order p. 2:14-17; Tr. pp. 17:22-18-1).

On August 26, 2016, just six (6) months later, the Respondent sold beer to another UCI, who was also nineteen (19) years old. (R. p. 003, lines 8-9, 15-23, p. 115, lines 17-30; Order p. 3:8-9, 15-23). On this date, the UCI approached Respondent's employee to purchase a beer, at which time Respondent's employee entered the information from the UCI's identification into the cash register. (R. p. 003, lines 15-18, p. 115, lines 23-26; Order p. 3:15-18). At that point, the register requested an override in order to complete the sale. (R. p. 003, lines 18-19, p. 038, line 18—p. 039, line 1, p. 115, lines 26-27; Order. p. 3:18-19; Tr. pp. 18:18-19:1). The employee's supervisor, a service center associate for Respondent, then came to the cash register and, without checking the UCI's identification, entered an override code to allow the sale. (R. p. 003, lines 19-20, p. 039, lines 6-7, p. 115, lines 27-28; Order p. 3:19-20; Tr. p. 19:6-7).

SLED issued administrative violations to Respondent after both of these sales, pursuant to Regulation 7-200.4 for permitting the sale of beer to a person under the age of twenty-one. (R. p. 002, lines 20-22, 003, line 31—p. 004, line 2, p. 112, lines 29-33, p. 115, lines 33-35; Order pp. 2:20-22, 3:31-4:2). These sales constitute a third and fourth violation within a three (3) year period under Respondent's Permit for permitting the sale of beer to a person under the age of twenty-one.

(R. p. 002, lines 27-28, p. 004, lines 10-12, p. 113, lines 1-3, p. 116, lines 1-3; Order p. 2:27-28, 4:10-12).

South Carolina Revenue Procedure #13-2 establishes Alcoholic Beverage Licensing violation guidelines (Penalty Guidelines). (R. p. 007, lines 1-2, pp. 138-143; Order p. 7:1-2). Pursuant to the these guidelines, a third sale of beer or wine to an underage person is subject to a forty-five (45) day suspension and a fourth sale of beer or wine to an underage person is subject to the revocation of a permit. (R. p. 006, line 31—p. 007, line 6, p. 140; Order pp. 6:31-7:6). In accordance with the Penalty Guidelines, the Department sought a forty-five (45) day suspension of the Respondent's Permit for the third violation and a revocation of the Respondent's Permit for the fourth violation. (R. p. 001, lines 23-25, p. 003, line 4, p. 004, line 17, p. 014, lines 21-31, p. 019, lines 20-30; Order pp. 1:23-25, 3:4, 4:17).

While the Respondent disputed the penalties imposed by the Penalty Guidelines, it admitted at trial that, even though it has received four (4) administrative violations for selling beer to an underage person within the last three (3) years, it has not instituted any new policies or procedures to better ensure compliance with the law. (R. p. 005, lines 13-15, p. 051, lines 11-22, p. 052, lines 5-13; Order p. 5:13-15; Tr. pp. 31:11-22, 32:5-13). Instead, the Respondent claimed it simply tried to reinforce its prior educational training, policies, and procedures. (R. p. 004, lines 24-29, p. 005, lines 6-7, p. 051, lines 21-22; Order pp. 4:24-29; 5:6-7; Tr. p. 31:21-22). The Respondent did install new systems into the cash registers in 2015 in an effort to prevent underage sales. (R. p. 005, lines 8-11, p. 082, lines 9-13; Order p. 5:8-11; Tr. p. 62:9-13). The Respondent testified that the new register systems prevent an employee from entering in a date of birth in order to override the system. (R. p. 005, lines 8-12, p. 080, line 14—p. 081, line 1; Tr. pp. 60:14-61:1, Order p. 5:8-12). The Respondent's claim that its new system would prevent employees from

overriding the system is contradicted by the February 5, 2016 violation, where the Respondent's employee overrode the system and allowed the sale of beer to an underage person. (R. p. 037, line 22—p. 038, line 1, p. 080, line 24—p. 081, line 1; Tr. pp. 17:22-18:1, 60:24-61:1).

In further disputing the penalties pursuant to the Penalty Guidelines, the Respondent testified that the imposition of such penalties would have a negative impact on the community as well as a negative impact on its revenue. (R. p. 061, line 17—p. 065, line 22, p. 091, lines 14-15, p. 092, line 25; Tr. pp. 41:17-45:22, 71:14-15, 72:25). Regarding the potential impact on its revenue, the Respondent testified at trial that its total gross sales are approximately $230,000.00 a week, almost $1 million a month. (R. p. 055, line 23—p. 056, line 2; Tr. pp. 35:23-36:2). However, the Respondent further testified that, out of that $1 million monthly figure, less than 5% is attributable to the sale of beer or wine and it would only lose approximately 2% of its sales if the Permit were suspended or revoked. (R. p. 055, lines 16-22, p. 056, lines 3-7, p. 062, lines 5-14; Tr. pp. 35:16-22, 36:3-7, 42:5-14).

ARGUMENT

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2015) provides the applicable standard:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the

> [Appellant] have been prejudiced because the finding, conclusion, or decision is:
>
> > (a) in violation of constitutional or statutory provisions;
> > (b) in excess of the statutory authority of the agency;
> > (c) made upon unlawful procedure;
> > (d) affected by other error of law;
> > (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

As will be explained more fully herein, the ALC abused its discretion when it ordered penalties that are substantially lower than the penalties sought by the Department. The ALC's drastic reduction in the penalties is an abuse of discretion because such reduction is based upon improper consideration of non-mitigating, irrelevant circumstances. The penalties issued by the ALC were clearly erroneous in light of the reliable, probative, and substantial evidence recognized by the ALC in its Order. In reducing the penalties sought by the Department, the ALC failed to give the proper deference to the Department's construction of the laws it is charged to administer and enforce. Furthermore, the ALC ignored the Department's long-standing administrative practice. Therefore, this Court should reverse the ALC's decision and impose the penalties sought by the Department.

THE ADMINISTRATIVE LAW COURT ERRED BY IMPROPERLY RELYING ON NON-MITIGATING CIRCUMSTANCES TO JUSTIFY A DEPARTURE FROM THE PENALTIES IMPOSED BY TITLE 61 AND THE DEPARTMENT'S PENALTY GUIDELINES, WHEN THE RECORD EVIDENCE SUPPORTED A FORTY-FIVE (45) DAY SUSPENSION AND REVOCATION OF THE RESPONDENT'S BEER AND WINE PERMIT AS REQUIRED BY THE PENALTY GUIDELINES.

A. The Substantial Evidence On The Record, The Applicable Law, And The Department's Construction Of Such Laws Support The Suspension And Revocation Of The Respondent's Permit.

The Respondent stipulated to committing a third and fourth violation on its Permit for

permitting the sale of beer to an underage person within a three (3) year period. (R. p. 001, lines 30-31, p. 004, lines 21-23, p. 113, lines 12-13, p. 116, lines 11-12; Order p. 1; Stipulations of Fact for Case No. 16-ALJ-17-0221-CC; Stipulations of Fact for Case No. 17-ALJ-17-0113-CC). S.C. Code Ann. § 61-4-580 and S.C. Regs. 7-200.4 provide that the violation of permitting an underage sale is sufficient grounds for the Department to suspend or revoke a permit or license issued by the Department. See S.C. Code Ann. § 61-4-580 (Supp. 2016) and S.C. Code Ann. Regs. 7-200.4 (Supp. 2016). The Department's construction of these laws, set forth in its Penalty Guidelines, and its long-standing administrative practices support the imposition of a suspension or a revocation of a permit or license when an underage sale is permitted. Despite the Department's long-standing administrative practices, the ALC ignored the Departments practice and ordered a significantly reduced penalty not appropriate for the two violations at issue.

i. Under South Carolina law, selling beer or wine to an underage person is grounds for suspension or revocation of a permit issued by the Department.

The Department is vested with the administration and regulation of the sale of beer, wine, and liquor in South Carolina. S.C. Code Ann. § 61-2-20 (2009). More specifically, the Department

> ...is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors . . . and occupies the entire field of beer, wine, and liquor regulation except as it relates to hours of operation more restrictive than those set forth in this title.

S.C. Code Ann. § 61-2-80 (2009). Section 61-4-580 provides that "[n]o holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit: (1) sell beer or wine to a person under twenty-one years of age . . . ." § 61-4-580(1). "A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit." Id. The South Carolina General Assembly explicitly empowered the Department

with the authority to promulgate regulations for the sale of beer within the State. S.C. Code Ann. § 61-2-60(6) (2009). Pursuant to that authority, the Department promulgated Regulation 7-200.4, which provides:

> To permit or knowingly allow a person under twenty-one year [sic] of age to purchase or possess or consume alcoholic liquors, beer or wine in or on a licensed place of business which holds a license or permit issued by the Department is prohibited and constitutes a violation against the license or permit.

Reg. 7-200.4. Regulation 7-200.4 further provides that "[s]uch violation shall be sufficient cause to suspend or revoke the license or permit by the Department." Id. However, the Department may, in its discretion, impose a monetary penalty upon the holder of a beer or wine permit in lieu of suspension or revocation for violations of Chapter 4 in Title 61 or for a violation of any regulation pertaining to beer or wine. S.C. Code Ann. § 61-4-250 (2009).

The plain reading of these statutes, when read collectively, demonstrates that the default penalty for permitting the sale of beer to a person under the age of twenty-one is suspension or revocation of the permit, but that the Department, in its discretion, may issue a monetary fine in lieu of suspension or revocation. Based on this, it is within the statutory authority of the Department to seek a suspension or revocation of a permit for any violation of permitting an underage sale. However, when assessing a penalty, the Department aims for deterrence rather than punishment. See South Carolina Dep't of Revenue v. Meenaxi, Inc., 417 S.C. 639, 662, 790 S.E.2d 792, 804 (Ct. App. 2016). With deterrence of underage sales as the Department's ultimate goal, the Department established guidelines as to when the Department would seek a suspension or revocation of a permit and when it would seek a monetary fine in lieu of a suspension or revocation. Those guidelines are found in S.C. Rev. Proc. #13-2, the Department's Penalty Guidelines.

ii. The Department established Penalty Guidelines, which provide a graduated scale of penalties in an effort to deter underage sales of alcohol.

The Department's administrative penalties for violations of the alcohol beverage licensing laws are set forth in S.C. Rev. Proc. #13-2, entitled "Penalty Guidelines for ABL [Alcohol Beverage Licensing] Violations" (Penalty Guidelines). These Penalty Guidelines provide a graduated scale of penalties based on the number of violations against the particular permit or license as well as the type of violation. The Penalty Guidelines provide graduated scales of penalties for beer, wine, and alcoholic liquors (collectively, herein, referred to as "alcohol"). Regarding violations for the sale of beer or wine to a person under the age of twenty-one by the holder of a retail beer and wine permit, the penalty for a first violation is a five hundred ($500.00) dollar fine, the penalty for a second violation is a one-thousand ($1,000.00) dollar fine, the penalty for a third violation is a forty-five (45) day suspension, and the penalty for a fourth violation is revocation of the permit. S.C. Rev. Proc. #13-2. In calculating the number of violations at the licensed location, the Department looks back three (3) years from the date of the most recent violation. Id.

The plain reading of section 61-4-580 and Regulation 7-200.4 provides that the Department may seek a suspension or revocation of the permit no matter how many violations the permit holder may have committed previously. See § 61-4-580 and Reg. 7-200.4. Pursuant to section 61-4-580 and Regulation 7-200.4, a first violation for permitting the sale of beer to someone under the age of twenty-one is sufficient grounds for suspension or revocation. Id. However, the Department understands that a violation can still occur despite a permit holder's best efforts. Accordingly, in an effort to deter future underage sales and not to necessarily punish permit holders, the Department has exercised its discretion in seeking monetary fines in lieu of suspension or revocation for the first and second violation under a retail beer and wine permit. See S.C. Rev.

Proc. #13-2. The Department utilizes fines for a first and second violation in an effort to deter future violations while allowing the permit holder the opportunity to make any necessary changes to its policies and procedures in an effort to prevent future violations. However, as the Penalty Guidelines demonstrate, when a permit holder is repeatedly committing violations and failing to make any attempts to remedy the issue, the Department will default to the language in § 61-4-580 and Reg. 7-200.4 and seek suspensions and revocations.[1]

a. *The Penalty Guidelines represent the Department's construction of the laws it is charged to administer and enforce as well as the Department's long-standing administrative practice; as such, the Penalty Guidelines are entitled to the utmost consideration and deference.*

The South Carolina Supreme Court adopted the deference doctrine from United States Supreme Court precedent, which provides that "[t]he construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." Kiawah Development Partners, II v. South Carolina Dep't of Health & Envtl. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 718 (2014) (quoting Read Phosphate Co. v. South Carolina Tax Comm'n, 169 S.C. 314, 330, 168 S.E. 722, 728 (1933)). See also CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2010) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons"); Media Gen. Commc'ns v. South Carolina Dep't of Revenue, 388 S.C. 138, 150, 694 S.E.2d 525, 530-31 (2010)

[1]It is important to note that, if imposed, a revocation is not a permanent revocation, where a permit holder can never seek a permit or license from the Department in the future. In Respondent's case, if the Court were to impose the revocation sought by the Department, this would simply make the Respondent ineligible to receive another retail beer and wine permit for two (2) years from the date of revocation. See S.C. Code Ann. 61-4-520(3) (2009). A revocation which is not permanent is in line with the spirit and purpose behind the Department's administrative penalties, which is to deter and not to punish.

("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a revising court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language"); and Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 26, 579 S.E.2d 334, 338 (Ct. App. 2003) ("South Carolina has long recognized the rule that an opinion or construction of a statute by an agency that is in charge of enforcing the statute should be given great deference").

The rationale for affording this deference to agencies is that "[t]he officers concerned are usually able men, and masters of the subject . . . [and] [n]ot unfrequently they are the draftsmen of the laws they are . . . called upon to interpret." Kiawah at 34, 766 S.E.2d at 718 (quoting Read Phosphate at 330, 168 S.E. at 728). Thus, South Carolina courts give deference to agencies "both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." Id.

As stated above, the Department is vested with the administration and regulation of the sale of alcohol in South Carolina. § 61-2-20. To aid the public on understanding the Department's position on the laws it is charged with administering and enforcing the Department issues Revenue Rulings, Revenue Procedures, Private Letter Rulings, and Information Letters. See S.C. Rev. Proc. #09-3. The Department issues these "[t]o provide guidance to the general public and to employees concerning the application of laws administered by the Department that are not adequately covered by statute, case law, or regulation." Id.; See also S.C. Code Ann. § 1-23-10(4) (2005). Further, "[t]his guidance represents the position of the Department and is intended to assist the public by giving them notice of the Department's position." Id. A Revenue Procedure, in particular, may be issued by the Department "to provide procedural guidance to the general public" and "to assist in the administration of laws and regulations by providing guidance that may be followed in order

to comply with the law." Id.

Sections 61-4-580 and 61-4-250 and Regulation 7-200.4 do not specify when the Department will seek a suspension or revocation or when it will use its discretion and seek a monetary fine. Because the law does not provide that guidance, the Department issued its Penalty Guidelines, in the form of a Revenue Procedure, to provide guidance on this issue. While the Penalty Guidelines do not establish a binding norm, they assist the public in understanding the Department's uniform position and implementation on when it will seek a suspension or revocation for violations or when it will seek a monetary penalty in lieu of a suspension or revocation. As such, the Department's Penalty Guidelines are an appropriate means of informing the public of a state agency's construction and implementation of the laws it is charged with administering and enforcing.

Furthermore, the Department's current Penalty Guidelines were established in 2013; however, the penalties set forth therein have been implemented by the Department since 2003, when S.C. Rev. Proc. #03-4 was issued by the Department and set forth the same graduated scale of penalties as the Penalty Guidelines.[2] Furthermore, the Department's seeking of a forty-five (45) day suspension for a third violation and a revocation for a forth violation under a retail beer and wine permit have been ongoing since 1995, when the Department issued S.C. Revenue Procedure #95-7. This establishes a continuous, long-standing administrative practice that, throughout the last two decades, the Department has consistently sought the same penalties.

Revenue Procedure #13-2 and the penalties prescribed therein reflect the Department's unique knowledge of the frequency of violations, including sales to underage persons. Only the

[2] S.C. Revenue Procedure #13-2 supersedes any and all previously issued ABL penalty guidelines. See S.C. Rev. Proc. #13-2.

Department knows how often violations occur and therefore, the Department is in the best position to determine what is necessary to deter such violations. Furthermore, the Department's utilization of Revenue Procedure #13-2 provides consistency in the penalties assessed for violations. This consistency ensures that all license and permit holders received the same treatment. The ALC's departure from Revenue Procedure #13-2 creates inconsistent results depending upon the personal evaluation by each Judge.

While the ALC has, in the past, acknowledged that the Department's advisory opinions are entitled to deference[3], the ALC has failed to give the Department's Penalty Guidelines such consideration and deference in many cases throughout the years for various reasons. However, as pointed out by the South Carolina Court of Appeals (more fully discussed below), as long as the Department's construction and long-standing administrative practice demonstrated through an advisory opinion is within the statutory limits established by the Legislature, such construction and long-standing administrative practice is owed the most respectful consideration and deference on a continual basis.

b. *The Penalty Guidelines are within the statutory limits established by the Legislature and, as such, are not in conflict with any other law.*

As long as a state agency's construction of the laws it is charged with enforcing is not in conflict with any other law, the agency's construction should be given deference and the most respectful consideration. See Media Gen. at 150, 694 S.E.2d at 530-31. In South Carolina Dep't of Revenue v. Meenaxi, Inc., 417 S.C. 639, 662, 790 S.E.2d 792, 804 (Ct. App. 2016), the Court of Appeals found that the Department's Penalty Guidelines were within the statutory limits

[3] See Laura Siegfried, d/b/a Taylor's Rack & Co. 9070 Hwy. 11, Campobello, SC v. South Carolina Dep't of Revenue, 2003 WL 24004736, 2 (S.C.Admin.Law.Judge.Div.) (...providing that "the Department established an interpretation of its statutes through its Revenue Ruling and is entitled to most respectful consideration").

established by the Legislature; as such, the Penalty Guidelines are not in conflict with any other laws and should be afforded the most respectful consideration and deference.

In Meenaxi, this Court was faced with the question of whether the ALC abused its discretion by determining that the revocation of a convenience store's off premises beer and wine permit was an appropriate penalty for an illegal gaming violation. Meenaxi at 662, 790 S.E.2d at 804. In Meenaxi, the Department sought to revoke the off-premises beer and wine permit of Meenaxi, Inc., d/b/a Corner Mart (Meenaxi) for violating section 61-4-580(5) by knowingly keeping illegal video gaming machines inside its convenience store. Id. at 647-48, 790 S.E.2d at 796; see § 61-4-580(5). After holding a contested case hearing, the ALC affirmed the Department's revocation of the permit and Meenaxi appealed. Id. at 648, 790 S.E.2d at 796. Among other issues, Meenaxi appealed to this Court on the basis that the ALC abused its discretion in affirming the Department's revocation of its permit, to which this Court disagreed. Id. at 662, 790 S.E.2d at 804.

In affirming the ALC, this Court noted that section 61-4-580 provides, "[A] violation of any provision of [section 61-4-580] is a ground for the revocation or suspension of the holder's permit." Id. (quoting § 61-4-580). This Court also noted that the Department's Penalty Guidelines provide that "revocation of a beer and wine permit is the appropriate penalty for '[p]ermitting any act that constitutes a crime under the laws of South Carolina (61-4-580(5))' . . . ." Id. at 662, 790 S.E.2d at 804 (quoting S.C. Rev. Proc. #13-2). This Court found that the revocation imposed by the ALC "was within the range of penalties authorized by section 61-4-580 and was the penalty prescribed by the Department in Revenue Procedure 13-2." Id. at 663-664, 790 S.E.2d at 805.

The reasoning behind the Court affirming the ALC's decision in Meenaxi is present in this matter. Here, the Department sought a suspension and revocation based on the Department's

Penalty Guidelines, which were created based on the statutes providing for suspension or revocation and the statute affording the Department with the discretion to issue a fine in lieu of same. As such, the Penalty Guidelines are within said statutory limits, complement, and do not conflict with, said statutes.

iii. The reliable, probative, and substantial evidence on the whole record demonstrates the Respondent's failure to implement any new policies or procedures to ensure compliance with the law and to make an effort to prevent future underage sales.

In contested case hearings, the ALC is the sole fact-finder and has the discretion "to impose an appropriate penalty based on the facts presented." South Carolina Dep't of Revenue v. Sandalwood Social Club d/b/a Sinners Resort & Marina, 399 S.C. 267, 279-280, 731 S.E.2d 330, 337 (Ct. App. 2012) (quoting Walker v. South Carolina Alcoholic Beverage Control Comm'n, 305 S.C. 209, 210, 407 S.E.2d 633, 634 (1991). "[T]he ALC's decision [based on the facts presented] 'should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.'" Kan Enterprises, Inc. v. South Carolina Dep't of Revenue, 420 S.C. 596, 603, 803 S.E.2d 882, 886 (Ct. App. 2017) (quoting Original Blue Ribbon Taxi Corp. v. South Carolina Dep't of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." Id. (quoting Original Blue Ribbon, 380 S.C. at 605, 370 S.E.2d at 676). Thus, "[i]n determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC." Kiawah at 28, 766 S.E.2d at 715 (2014) (citing Hill v. South Carolina Dep't of Health & Envtl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)).

In this case, there is no evidence from which reasonable minds could reach the same

conclusion as the ALC. The record on appeal demonstrates that Respondent has a history of selling beer to underage persons. Specifically, Respondent violated South Carolina law and sold beer to underage persons on four separate occasions over a three (3) year period. (R. p. 002, lines 26-28, p. 004, lines 9-12, p. 113, lines 1-3, 12-13, p. 116, lines 1-3, 11-12; Order pp. 2:26-28, 4:9-12). The Respondent failed to provide any evidence that it initiated any substantive preventative measures before the third and fourth violation. (R. p. 005, lines 13-15; Order p. 5:13-15). At the hearing, the Department's counsel asked Mike Grizzle, who testified he was the Respondent's store manager at the time of all four (4) violations, what, if any, changes the Respondent made to its policies or procedures before and after these four violations for the sale of beer to underage persons:

> **Q:** . . . So after the first [violation] and that was – let me find that date, that was February 26th, 2014 and you were the manager then?
> **A:** Correct
> **Q:** Okay. So after that one, what policies or procedures did you have in place or put in place after that violation?
> **A:** Ma'am, we already had polices [sic] and procedures. We don't – we didn't put anything different in place, we just reinforced it to everybody.
>
> ****
>
> **Q:** So after the second violation did you put any new policies or procedures in place after the second?
> **A:** No, ma'am.
> **Q:** Okay. After the third?
> **A:** No, ma'am.
> **Q:** What about after this fourth one, have you put any new policies or procedures in place?
> **A:** No, ma'am.

(R. p. 030, lines 3-5, 12-15, p. 051, lines 11-22, p. 052, lines 5-13; Tr. pp. 10:3-5, 12-15, 31:11-22, 32:5-13). Then, when questioned by the ALC, Tommy Brown, the Respondent's District Manager, confirmed Mr. Grizzle's testimony regarding the lack of change in the Respondent's

policies or procedures:

> **THE COURT:** . . . My concern is, you know, if I'm inclined to decide that the Bi-Lo should keep it's license in some form or fashion, you know, what – what else can you do to ensure that there will not be further sale to – to underage persons? I mean **four [violations for underage sales] in three years is, you know, by law that's excessive** so what more could the store do? . . .
> **A:** Yes, sir. I think – I think when Mike was asked the question it was our policy, have we changed our policies. And he answered correct, we have not changed our policies . . . .

(R. p. 079, lines 18-25, p. 080, lines 11-14; Tr. pp. 59:18-25, 60:11-14) (emphasis added).

As the ALC recognized in its Order, the testimony provided by Mr. Grizzle and Mr. Brown "failed to . . . show[] [that Respondent] had made any substantive training procedure, store policy, or equipment changes to help better ensure compliance" with the law. (R. p. 007, lines 15-17; Order p. 7:15-17). Instead, the Court found that, "[t]he 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." (R. p. 007, lines 17-19; Order p. 7:17-19). Specifically, Mr. Brown testified that ". . . yes, we made mistakes and we admittedly make mistakes and – and I'm not gonna say we're not gonna make them again because we're all human." (R. p. 007, footnote 2, p. 071, lines 7-10; Tr. p. 51:7-10; Order p. 7: footnote). In response, the ALC stated that it was "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." (R. p. 007, lines 19-21; Order p. 7:19-21).

The ALC compared the Respondent's lack of actions to the abundance of measures taken by Ingles Markets after its third violation for an underage sale in South Carolina Dep't of Revenue v. Ingles Mkts., Inc., Docket No. 13-ALJ-17-0283-CC (Dec. 11, 2013). The ALC noted in the Order the "extensive and costly improvements" the store made in the Ingles case as a response to

its third violation for an underage sale within three (3) years:

> 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. [ ] 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 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. [ ] 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. [ ]

(R. p. 007, lines 25—p. 008, line 5; Order pp. 7:25-8:5 (quoting South Carolina Dep't of Revenue v. Ingles Mkts., Inc., Docket No. 13-ALJ-17-0283-CC, at 2-3 (Dec. 11, 2013)). In comparing the Respondent's lack of actions to the actions demonstrated in Ingles, the ALC 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." (R. p. 008, lines 6-8; Order p. 8:6-8).

As set forth above, the substantial evidence on the whole record, as recognized by the ALC its Order, demonstrates the Respondent's disregard for continued underage sales at its store.[4] The

[4] The Respondent presented evidence that it "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." (R. p. 005, lines 8-11, p. 080, line 14—p. 081, line 1, p. 082, lines 9-12; Order p. 5:8-11; Tr. pp. 60:14-61:1, 62:9-12). However, as the ALC noted, the third and fourth violations at issue occurred after these changes were implemented. (R. p. 005, lines 11-12; Order p. 5:11-12). In fact, the type of action that this equipment change was meant to prevent was done by the associate who committed the third violation on February 5, 2016. The Respondent's witness testified that this new register system, implemented the year prior to the third violation, would not allow an associate to override the cash register by inputting an incorrect date of birth; however, that's exactly how the third violation occurred. (R. p. 037, line 21—p. 038, line 1, p. 080, line 14—p. 081, line 1; Tr. pp. 17:21-18:1; 60:14-61:1).

Therefore, it appears that the new register system implemented by the Respondent in 2015, which was intended to assist in the prevention of future sales of beer or wine to underage persons, is

whole record demonstrates that the Respondent committed four violations in recent years, yet took almost no action to prevent underage sales from happening again in the future. When presented this evidence and the law authorizing the suspension and revocation of a permit for such violations, a reasonable mind would conclude that the suspension and revocation proposed by the Department are the appropriate penalties. However, the ALC did not reach this decision. Instead, as will be more fully discussed below, the ALC departed from South Carolina law and the Department's Penalty Guidelines by relying on non-mitigating circumstances to justify reduced penalties.

B. The Administrative Law Court Abused Its Discretion By Relying On Non-Mitigating Circumstances To Support A Departure From The Penalty Guidelines.

South Carolina law provides that selling beer to someone under the age of twenty-one is grounds for a suspension or revocation of a beer and wine permit. The Department, in accordance with the law and consistent with its Penalty Guidelines, sought a forty-five (45) day suspension and revocation for Respondent's third and fourth violations of selling beer to an underage person. The ALC disregarded the Department Penalty Guidelines and ordered a drastically reduced penalty. In so doing, the ALC failed to give the Department's Penalty Guidelines and its long-standing administrative practice the consideration and deference it is due. The ALC chose to rely on non-mitigating circumstances in justifying a substantial deviation from the penalties proposed by the Department. Such a deviation is an abuse of discretion and warrants a reversal of the ALC's Order.

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ineffective and the Respondent presented no evidence that it made any changes to this register system since the third violation.

i. The Penalty Guidelines recognize certain mitigating circumstances that, when present, may justify a deviation from the graduated scale of penalties set forth therein.

In understanding that there may be circumstances present in a case that calls for either a more severe or less severe penalty for an offense, the Department's Penalty Guidelines provide the following mitigating circumstances when assessing penalties for sales to underage persons:

1. The employee committing the violation has completed a training program recognized by the Department. This training must have taken place within a reasonable period of time prior to the offense and must include training covering the violation at hand. The person claiming mitigating circumstances under this item must also provide the Department verification that the employee attended the training and an outline of the training conducted.

2. Documented in-house training given to the offending employee on a regular and frequent basis. This in-house training must contain instruction relevant to the type of violation at issue.

3. Documentation that an internal check (*e.g.*, visit to the offending store by a mystery shopper) designed to ensure compliance occurred within a reasonable period of time prior to the offense. This internal check must be relevant to the type of violation at issue.

4. Automated age verification programs if the violation deals with age.

5. The volume of sales of beer, wine or liquor at the location. For example, a location with a large number of clerks and a high volume of beer sales is more likely to have a problem with violations than a location with a small volume of beer sales.

S.C. Rev. Proc. #13-2. "If recognized mitigating circumstances are present, suspensions may be reduced in duration, and revocations may be reduced to suspensions with monetary penalties." Id.

While "mitigating circumstances" is not defined within the Penalty Guidelines, Title 61, or Regulation 7-200.4, this list set forth in the Penalty Guidelines demonstrates that "mitigating circumstances" are circumstances demonstrating the permit holder's actions taken prior to the

violation at issue, which were intended to prevent or limit the likelihood that such a violation would occur. This application of the Department's listed mitigating circumstances falls in line with a definition of "mitigating circumstances" found in Black's Law Dictionary, which states that a mitigating circumstance is "[a] fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability [or responsibility] and thus may reduce damages (in a civil case) or the punishment (in a criminal case)." *Mitigating Circumstance,* BLACK'S LAW DICTIONARY (10th ed. 2014). For example, the Department considers it a mitigating circumstance when the permit holder can show that the employee who committed the violation, i.e. conducted the underage sale, completed a Department approved training program within a reasonable period of time *prior* to the offense, with such training covering age-restricted items. Proof of such a mitigating circumstance lessens the permit holder's culpability or responsibility for the unauthorized sale in that it demonstrates the permit holder's efforts to mitigate or prevent that sale from occurring.[5]

a. *Post-violation remedial measures or the economic impact on the surrounding community are not valid mitigating circumstances.*

Remedial measures taken post-violation by a permit holder are not the same as the preventative measures described in the Department's Penalty Guidelines. Efforts made by a permit holder after a violation occurs do not lessen the permit holder's culpability or responsibility in the underage sale. Remedial measures should not be taken into consideration as a mitigating

[5]The Department also recognizes "the volume of sales of beer, wine or liquor at the location" as an appropriate mitigating circumstance. While such a factor does not demonstrate the permit holder's prior efforts in attempting to prevent future violations, it still lessens the permit holder's culpability or responsibility for the underage sale when it can be shown that the location has a high volume of such sales. The Department understands that a location faces greater opportunity for underage sales if the location has a high volume of beer, wine, or liquor sales as opposed to a location with a smaller volume of such sales.

circumstance as they are measures taken "too little, too late" and do not demonstrate the permit holder's attempt to prevent a violation from occurring in the first place. See South Carolina Dep't of Revenue v. Quick Stop of Broad River Road, LLC, d/b/a Quick Stop of Broad River Road, 2017 WL 6275973 (S.C.Admin.Law.Judge.Div.). In Quick Stop, the Department sought the revocation of the Respondent's off-premises beer and wine permit as a result of the Respondent's fifth violation for an underage sale within three (3) years. Quick Stop, page 1. The ALC recognized certain steps, or mitigating measures, the Respondent took to assure compliance:

> a. A digital sign in the store informs employees that customers must be born before a certain date to purchase alcohol;
> b. An ID Scanner Age Verification System with Driver's License Bar Code Reader;
> c. [The Respondent's owner] and two employees have completed the PREP program; [and]
> d. Employees have signed an affidavit confirming that they understand that they will be terminated for selling tobacco products or alcohol to underage individuals.

Quick Stop, page 4. However, the ALC noted that, "[e]xcept for the digital sign, these steps were not taken until after the current (fifth) violation occurred." Id. The ALC further noted that "[t]hese practices, if implemented during the suspension of Respondent's permit after the third violation[6], might have prevented the fourth[7] and fifth violations[;] Respondent, however, did not take prompt steps to assure compliance with the law and protect his permit." Id. Therefore, the

[6]According to the Department's records, the Respondent in Quick Stop failed to respond to the Department's Notice of Intent to Suspend issued after the Respondent's third violation. As such, the Department issued an administrative Order of Suspension, where the Respondent in Quick Stop served a forty-five (45) day suspension.

[7]In South Carolina Dep't of Revenue v. Quick Stop of Broad River, LLC, 2017 WL 947020 (S.C.Admin.Law.Judge.Div.), the ALC issued a four-thousand ($4,000.00) dollar fine against the Respondent for its fourth violation for an underage sale instead of imposing the revocation sought by the Department pursuant to the Department's Penalty Guidelines. The fourth violation occurred on June 20, 2016 and the fifth violation occurred on July 13, 2016.

ALC found these steps taken by the Respondent to be "too little, too late" and revoked the Respondent's permit. Id.

Further, this Court in Meenaxi found that the ALC did not abuse its discretion by declining to deviate from the Department's Penalty Guidelines when the ALC did not find any of the mitigating circumstances listed in the Penalty Guidelines to be present. Meenaxi at 664, 790 S.E.2d at 805. While this Court recognized that the mitigating circumstances listed in the Penalty Guidelines are not an exhaustive list and the Department may consider other circumstances not enumerated in the Penalty Guidelines when deciding to reduce a penalty, the Court found no other non-enumerated mitigating circumstances that warranted a reduction in penalty from a revocation to either a fine or a suspension. Id.

Just as post-violation measures taken by a permit holder do not lessen the culpability or responsibility of the permit holder, neither does the economic impact that a penalty would have on the surrounding community or on the business who committed the underage sale. In this case, the ALC used the following factors to justify its deviation from the penalties proposed by the Department:

> [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. 008, lines 13-18, 24-25; Order p. 8:13-18, 24-25).

Revenue loss to a store does not constitute a valid factor to justify reducing the penalty set forth in the Department's Penalty Guidelines. The beneficial impact of the Respondent on the community and the revenue loss that the Respondent could potentially incur as a result of the

imposition of the Department's penalties do not reduce or lessen the Respondent's culpability or responsibility for selling beer or wine to an underage person.

Any illegal activity, such as selling beer to underage persons, may create economic gain for the business engaged in such illegal activity. However, concern for the business' profitability is not an appropriate circumstance to consider when evaluating the proper penalty for an administrative violation. Reducing penalties so as to avoid a potential negative economic impact on a business hinders the deterring effects of the penalties outlined in the Penalty Guidelines. A business may well evaluate the cost of taking preventative measures, like those outlined in the Penalty Guidelines, against the cost of receiving an administrative violation. When penalties are drastically reduced as they were in this case, it becomes more cost effective to continue to violate the law and face a small penalty from the ALC, rather than incur the cost of implementing preventative measures. The likelihood of a business failing to implement preventative measures becomes even more likely if a business is allowed to use the potential negative economic impact of the prescribed penalty as justification for a reduced penalty.

Unlike the mitigating circumstances recognized by the Department in its Penalty Guidelines, the factors considered and applied by the ALC do not relate to any preventative measures the Respondent did or did not make in an effort to deter the sale of beer to underage persons. To allow the reduction of penalties against permit or license holders due to such non-mitigating circumstances will never have the same deterring effect on underage sales as requiring permit and licenses holders to meet the mitigating circumstances set forth in the Department's Penalty Guidelines.[8]

[8]Even if the factors applied by the ALC were deemed to be appropriate mitigating circumstances, which the Department contends they are not, the facts presented to the ALC do not support the facts cited by the ALC in determining such facts constituted mitigating circumstances.

ii. This State's deeply rooted concern for the sale of alcohol to underage persons is sufficient reason for suspension or revocation of a permit holder who has repeatedly committed this violation.

If this Court were to find that the effect on the community is a proper mitigating circumstance to consider when imposing a penalty, then this Court should find that the State's deeply rooted concern for the safety and well-being of the community requires a suspension or revocation of the permit of a repeat offender making underage sales.

This State's concern regarding the sale of alcohol to underage persons is more deeply

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In its Findings of Fact, the ALC found that "[t]he [Respondent] would lose a significant portion of its revenue if its alcohol permit is revoked." (R. p. 005, lines 26-27; Order p. 5:26-27). In actuality, the testimony provided by the Respondent's witness, Mr. Brown, indicates that the loss in revenue, if the Permit were suspended or revoked, would only be approximately 2% of the Respondent's total gross sales. (R. p. 055, line 16—p. 056, line 7, p. 062, lines 5-14; Tr. 35:16-36:7, 42:5-14).

The ALC further found that "a permit revocation would create some degree of risk that the store would face closure." (R. p. 005, lines 28-29; Order p. 5:28-29). However, the testimony provided by Mr. Grizzle indicates that the Respondent's gross monthly sales is approximately $1 million. (R. p. 055, line 23—p. 056, line 2; Tr. p. 35:23-36:2). Further testimony provided by both Mr. Grizzle and Mr. Brown indicated that only approximately 4-5% of that $1 million figure is attributable to the sale of beer and wine. (R. p. 055, lines 15-22, p. 056, lines 3-7, p. 060, line 19—p. 061, line 1; Tr. p. 35:15-22, 36:3-7; 40:19-41:1).

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, as acknowledged by Mr. Brown in his testimony, where he stated " . . . [U]s as a business as a total business will we survive, yes we would . . . ." (R. p. 072, lines 4-6; Tr. p. 52:4-6).

Lastly, the testimony that the Respondent's "basket sales," i.e., sales of other items in addition to beer or wine, would be harmed is purely speculation. (R. p. 005, lines 18-20, p. 065, lines 12-22; Tr. p. 45:12-22; Order p. 5:18-20). The Respondent is essentially saying that its customers will go to its nearest competitor, Wal-Mart, for all of their grocery needs if they are unable to purchase beer or wine from the Respondent. (R. p. 064, line 25—p. 065, line 7; Tr. pp. 44:25-45:7). However, the Respondent does not take into account customers who already shop at the Respondent's store for items other than beer and wine on a regular basis, such as the Respondent's witness, Chief Keith Morton, who testified that he does not drink alcoholic beverages, so he only shops at the Respondent's store for items other than beer and wine. (R. p. 094, lines 8-10; Tr. p. 74:8-10).

rooted beyond the statutes found in Title 61 and the regulations promulgated by the Department. As Justice Geathers points out, "[t]he extension of the age of majority with regard to alcoholic beverages is so deeply ingrained in South Carolina law that it is found not only in Title 61 and the Department's regulations, but also in the state constitution and in the basic statutory definition of a 'minor'." JOHN D. GEATHERS & JUSTIN R. WERNER, THE REGULATION OF ALCOHOLIC BEVERAGES IN SOUTH CAROLINA 246-247 (The South Carolina Bar Continuing Legal Education Division) (2007) (citing S.C. Const. art. XVII, § 14; S.C. Code Ann. § 15-1-320(a) (2005)). Further, "South Carolina courts have routinely concluded that the two-fold purpose underlying the statutes and regulations prohibiting the sale of alcohol to underage individuals is 'to prevent harm to the minor who purchased the alcohol and to members of the public harmed by the minor's consumption of that alcohol.'" Id. (citing Whitlaw v. Kroger Co., 306 S.C. 51, 54-55, 410 S.E.2d 251, 253 (1991).

In commercial settings, such as the Respondent's store, "South Carolina appellate courts have held that a statute criminalizing the sale of beer or wine to a person under the age of 21 and one providing regulatory penalties for the knowing sale to a person under 21 places a duty on a commercial vendor." Marcum v. Bowen, 372 S.C. 452, 459, 643 S.E.2d 85, 88 (2007) (referencing S.C. Code Ann. § 61-4-50 (2009) ("It is unlawful for a person to sell beer, ale, porter, wine, or other similar malt or fermented beverage to a person under twenty-one years of age . . . .") and § 61-4-580). "A vendor who violates this duty and sells to a person under 21 may be liable to the unlawful purchaser, and to third parties harmed by the purchaser's consumption of the alcohol." Id.

As demonstrated, South Carolina statutes, regulations, and case law are all indicative of this State's deeply rooted concern regarding and its active initiative to prevent the sale of alcohol

to persons under the age of twenty-one. Here, the Respondent has committed four violations of underage sales within a three (3) year period. (R. p. 004, lines 9-12; Order p. 4:9-12). The ALC acknowledged that, "four [violations for underage sales] in three years is . . . by law . . . excessive . . . ." (R. p. 079, lines 23-25; Tr. p. 59:23-25). And yet, while acknowledging the excessiveness of underage sales at the Respondent's store and the "less than vigorous" efforts made by Respondent in trying to prevent these sales, the ALC based its deviation from the Department's proposed suspension and revocation on the impact such penalties would have on the community. Based on this State's deeply rooted concern regarding underage sales of alcohol, it appears the only impact such penalties would have on the community would be a positive impact—the reduction of alcohol sales to persons under twenty-one.

Accordingly, the goal of deterring permit holders from selling to underage persons necessitates a strict application of the Department's Penalty Guidelines and outlined mitigating circumstances. To allow outside factors that have no bearing on a permit or license holder's culpability or responsibility for the sale of alcohol to someone under the age of twenty-one to reduce the penalty imposed does not aid this State in deterring these unauthorized sales. Rather, it allows the offender to continue operations as usual after paying a small fine or serving a short suspension period. Such insignificant penalties do not deter future violations; rather, such reduced penalties are just the cost of doing business—a reduced penalty for an administrative violation pales in comparison to the potential profits resulting from continued alcohol violations.

CONCLUSION

As the ALC noted in this case, permits and licenses issued by the Department for the sale of beer and wine are privileges to be used and enjoyed only so long as the holder complies with the restrictions and conditions governing them. (R. p. 006, lines 26-28; Order. p. 6:26-28) (quoting

Feldman v. South Carolina Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943)). The substantial, reliable, and probative evidence on the whole record as described herein demonstrates that the Respondent, the holder of a retail beer and wine permit, can no longer use and enjoy the privileges of holding such a permit because of its failure to comply with the restrictions and conditions governing said permit. Not only does the substantial evidence on the record demonstrate the Respondent's habitual failure to comply with such restrictions, but it also shows the Respondent's lack of vigorous efforts to comply with the law. The ALC abused its discretion by failing to give the Department's construction of the laws it is charged to administer and enforce and the Department's long-standing administrative practice the due consideration and deference it is afforded by law. Furthermore, the ALC abused its discretion by utilizing non-mitigating circumstances to justify reducing the penalties sought by the Department. In so doing, the ALC made a decision that no other reasonable mind would make based on the remaining, substantial evidence on the record. Therefore, this Court should reverse the ALC's decision and impose the penalties sought by the Department.

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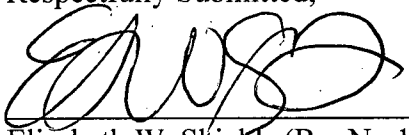
Respectfully Submitted,



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May 25, 2018

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable S. Phillip Lenski, Administrative Law Judge

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

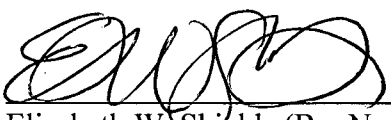
South Carolina Department of Revenue .....Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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