THE STATE OF SOUTH CAROLINA
In The 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 RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW COURT ERR BY IMPOSING LESSER PENALTIES THAN THOSE SOUGHT BY THE DEPARTMENT?

STATEMENT OF FACTS

The Department has provided a Statement of Facts and Respondent adds the following facts that were found by the ALC based on the testimony presented at the hearing.

The facts presented at the hearing, and as found by the ALC, established that the employees responsible for the sale of alcohol to persons under the age of twenty-one were terminated by Bi-Lo management. (R. p. 2, line 6; p. 4, line 17; p. 38, lines 9-12; p. 40, lines 18-20; p. 42, lines 9-25; p. 43, lines 1-25; p. 44, lines 1-21; pp. 134-137). 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. (R. p. 4, line 24; p. 31, lines 8-25; p. 32, lines 15-25; p. 33, lines 1-20; pp. 118-120). Further, throughout their employment at Bi-Lo, employees are supposed to continually watch training videos that are updated daily. (R. p. 4, line 24; p. 34, lines 15-25; p. 35, lines 1-11; p. 36, lines 4-10). Likewise, all new Bi-Lo employees participate in several days of on-the-job training after they begin working. (R. p. 4, line 24; p. 34, lines 10-23). Each employee is given a copy of the Bi-Lo company policies, within which is Bi-Lo's age-restricted beer and wine policy. (R. p. 4, line 25; p. 31, lines 17-24; Tr. 11:17-24). The consequence for violating company policy is termination. (R. p. 4, line 25; p. 33, lines 18-20). Managers, of which there are one or

two on duty at any given time, are responsible for ensuring compliance with these policies; compliance is also monitored by district managers, who can move managers around, change positions, and order more store training for store employees. (R. p. 5, line 25; p. 32, lines 18-25; p. 33, lines 1-10; pp. 76, 79-83). The Fountain Inn Bi-Lo always voluntarily participates in the Fountain Inn Police's yearly compliance training program. (R. p. 5, line 26; pp. 83, 85-86). The Fountain Inn Bi-Lo instituted some equipment changes to 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. 5, line 27; p. 52, lines 18-25; p. 53, lines 1-3; pp. 80-83). Some training reinforcement has been offered at the Fountain Inn Bi-Lo to its employees following the third and fourth violations (R. p. 5, line 28; pp. 82-83).

Beyond just alcohol sales, basket sales (the sale of additional goods to customers who went to the store initially just to purchase alcohol) 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. (R. p. 5, line 29; p. 64, lines 14-25; p. 65, lines 1-22). The Fountain Inn Bi-Lo employs approximately 58 people and is the only traditional grocery store in the surrounding community. (R. p. 5, lines 30-31; p. 60, lines 5-15; p. 92, lines 2-6). The Fountain Inn Bi-Lo would lose a significant portion of its revenue if its alcohol permit is revoked; and the loss of the 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. (R. p. 5, line 33; p. 60, lines 16-25; pp. 41-45). Employees at the Fountain Inn Bi-Lo would be harmed by any

reduction in their work schedules, by termination, or by the closure of the store; and the surrounding community would be harmed by the closure of the store. (R. p. 6, lines 34-35; pp. 63-64, 71-72). Bi-Lo is generally regarded as having a good reputation in South Carolina, and the Fountain Inn Bi-Lo hosts community outreach events and performs community service. (R. p. 5, line 32; p. 45, lines 16-25; p. 65, lines 23-25; pp. 66-68, 88-90).

ARGUMENT

THE ADMINISTRATIVE LAW COURT DID NOT ERR IN IMPOSING PENALTIES LESSER THAN THOSE SOUGHT BY THE DEPARTMENT.

As the Department of Revenue (Department) stated in its initial brief, in an appeal from the decision of an Administrative Law Court (ALC), the Administrative Procedures Act (APA) provides the appropriate standard of review. *S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 648, 790 S.E.2d 792, 796 (Ct. App. 2016); *South Carolina Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 648, 790 S.E.2d 792, 796 (Ct. App. 2016); *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). This standard is set forth in S.C. Code Ann. § 1-23-610(B) as follows:

> (B) 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 petitioner 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.

In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding. *Charleston Cty. Assessor v. Univ. Ventures, LLC*, 421 S.C. 194, 202, 805 S.E.2d 216, 221 (Ct. App. 2017). The Rules of Procedure for the Administrative Law Court (SCALC) and, where practicable, the South Carolina Rules of Civil Procedure and Appellate Court Rules apply to proceedings before the ALC, SCALC Rule 68; *see* S.C. Code Ann. § 1-23-650(C); *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 208, 712 S.E.2d 428 (2011) and n. 5 712 S.E.2d 428, 433 and n. 5 (2011). As an administrative agency, the ALC is the fact-finder and it is the ALC's prerogative to impose an appropriate penalty based on the facts presented. *S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. at 662, 790 S.E.2d at 804. The decision of the ALC should not be overturned unless it is not supported by substantial evidence or controlled by some error of law. *Charleston Cty. Assessor v. Univ. Ventures, LLC*, 421 S.C. 194, 203, 805 S.E.2d 216, 221 (Ct. App. 2017). "Substantial evidence" is

> 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.' " *Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being

> supported by substantial evidence." *Palmetto Alliance, Inc. v. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011).

In this case, the Department's contention that the ALC abused its discretion when it ordered the penalties at issue here, which are lesser than the penalties sought by the Department, is completely without merit. (*See* Initial Brief of Appellant at 6). The penalty assessed by the ALC was within the range of penalties authorized by statute, as well as the advisory guidelines by the Department, based on mitigating circumstances. Similarly, the Department's contention that the ALC's reduction of the penalties recommended by the Department was "based upon improper consideration of non-mitigating, irrelevant circumstances" is devoid of merit. (*See* Initial Brief of Appellant at 6). There is no authority to support the Department's contention. The ALC did not depart from South Carolina law or even the Department's advisory penalty guidelines, which do not limit the type of mitigating circumstances that may be considered in assessing a penalty below the advisory guidelines penalties.

A. The Administrative Law Court Did Not Err In Relying On Mitigating Circumstances In Imposing Penalties Lesser Than Those Sought By The Department

1. Waiver

Before addressing the merits of the Department's argument, Respondent respectfully submits that the Department has waived the issue it raises in this appeal. The Department states the issue presented in this appeal as: "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...?" (Initial Brief of Appellant at 1). More specifically, the Department contends that remedial measures and the negative economic impact a suspension or revocation would have on the store and its employees, as well as the impact it would have on the community, are not valid mitigating circumstances that the ALC may consider. (Initial Brief of Appellant 19, 21-27). Although the Department has argued various other points in its brief that are unrelated to the its "STATEMENT OF THE ISSUE ON APPEAL", the issue it expressly raises is whether the ALC relied on valid mitigating circumstances. As will be discussed below, the clear answer, based on the applicable statutes, regulations and Advisory Revenue Procedures is that the ALC did rely on valid mitigating circumstances. Initially, however, Respondent submits that the Department has waived this issue. Issues not raised to and ruled on by the ALC are not presented for appellate consideration. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002); *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). As explained in *S.C. Dep't of Motor Vehicles v. Dover*, No. 2016-001030, 2018 WL 1403624 at n. 3 (S.C. Ct. App. Mar. 21, 2018), the South Carolina Supreme Court in *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 208, 712 S.E.2d 428, 433 (2011), has held that an appellant's failure to file a motion for reconsideration or a motion to alter or amend the judgment pursuant to SCALC Rules 29 or 68 or Rules 59(e) or 60, SCRCP, renders review of an issue first arising from the ALC's final order unpreserved for the supreme court's review.

Here, Respondent never objected to the ALC's consideration of the foregoing mitigating circumstance at the hearing or by motion following the ALC's final order. In its opening statement addressing what would be a "just penalty for these third and final violations", Bi-Lo's counsel stated that Bi-Lo would show that a 45-day suspension would have a "drastic monetary impact on Bi-Lo" and "would not only harm Bi-Lo as a corporation, but will actually harm the employees and the community of Fountain Inn." (R. p. 27, lines 20-22; p. 8, lines 5-13) Respondent was thus put on notice of some of the mitigating circumstances Bi-Lo would raise and claim warranted only a brief suspension rather than a 45-day suspension or revocation. Bi-Lo then presented its witnesses who testified to the economic and other impacts of a revocation or long suspension on the company, its employees and the community, as well as to other matters in mitigation, such as remedial measures taken. (R. pp. 60-65, 71-72, 88-93).

The Department made no objection to this testimony, and in its closing argument did not even suggest that the economic and other impact to the community would not be proper circumstances for mitigation (although it did point out what it considered inconsistencies in the testimony about sales numbers) (R. pp. 97-100.) In its closing argument, Bi-Lo specifically referred to the testimony pertaining to the negative impact a suspension or revocation would have on the store, its employees and the community in arguing for a lesser penalty. (R. pp. 100-103, 109.) Again, the Department made no objection to such argument, even when the ALC suggested he might be "inclined to explore other possible options other [sic] revocation of their license" and asked about training options available if he "decid[ed] not to revoke the license of the – or to – or to pull the

Department's determination the license should not be revoked in this matter, if I direct a different course..." (R. pp. 106, 108). And, of course, Respondent made no post-final decision motions.

Therefore, as the authority cited indicates, the Department has failed to preserve the issue it now raises on appeal. In any case, the Department's argument is without merit.

2. The Substantial Evidence On The Record And The Applicable Law Support The Penalties Imposed By The ALC

The Department's argument that the ALC abused its discretion in imposing the penalties it did and that the substantial evidence and applicable law do not support such penalties is completely devoid of merit. The ALC was authorized to depart from the penalty sought by the Department and impose a penalty below the Guidelines Penalties based on mitigating circumstances.

As explained in *S.C. Dep't of Revenue v. Sandalwood Soc. Club*, 399 S.C. 267, 278, 731 S.E.2d 330, 336 (Ct. App. 2012), the Department is charged with the responsibility of administering and enforcing the laws and regulations governing the manufacture and sale of alcoholic beverages, including beer, wine, and alcoholic liquors. *See* S.C. Code Ann. § 61-2-20. " 'Contested case hearings arising under the provisions of [Title 61, Alcohol and Alcoholic Beverages] must be heard by the [ALC] pursuant to the South Carolina Revenue Procedures Act and the [APA].' S.C. Code Ann. § 61-2-260 (2009)." *Sandalwood Social Club, id.*

The Department has the authority to determine an appropriate administrative penalty within the statutory limits established by the legislative, after the parties have had

an opportunity for a hearing on the issues. *Sandalwood Social Club, id.* at 278-79, 731 S.E.2d at 336. Further, in assessing a penalty, the Department should give effect to the major purpose of a civil penalty, which is deterrence. *Id.* at 279, 731 S.E.2d at 336; *see* S.C. Revenue Procedure # 13-2 ("The Department recognizes that insurance compliance with the law, not punishment, is the reason for administrative penalties.")

S.C. Code Ann. § 61-4-580(A)(1) provides that

> (A) No 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;

"[A] violation of any provision of this section is a ground for the revocation or suspension of the holder's permit." *Id.* subsection (B); *see* S.C. Code Ann. Regulation 7-200-4. Pursuant to S.C. Code Ann. § 61-4-250, the Department "may, in its discretion, impose a monetary penalty upon the holder of a beer or wine because in lieu of a suspension or revocation." Thus, under the applicable statutes, the punishments authorized for selling beer or wine to underaged persons ranges from revocation or suspension to a monetary penalty, with no mandatory length for any suspensions imposed. The penalty imposed by the ALC in this case was obviously within this statutory range and therefore was not an abuse of discretion or based on an error of law. *See S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 662–664, 790 S.E.2d 792, 804–805 (Ct. App. 2016).

South Carolina Revenue Procedure #13-2 setting forth advisory Penalty Guidelines does not alter this conclusion. As discussed in *S.C. Dep't of Revenue v. Meenaxi, Inc., id.* at 662-63, 790 S.E.2d 792 at 804 (2016), South Carolina Revenue Procedure #13-2

"provides guidelines to be used by Department employees in assessing penalties for violation of the statutes and regulations governing the sale, distribution, or possession of beer, wine, and distilled spirits." The Procedure is an "advisory opinion" and the penalties it sets forth are "guidelines only" and do "not establish a binding norm", and "do not restrict the Department's authority to impose any sanction within the statutory authority granted by the General Assembly." Revenue Procedure #13-2 (footnote omitted); *see Meenaxi, id.* S.C. Revenue Procedure #13-2 recognizes that "[t]here will often be circumstances present that call for either more severe or less severe sanctions for an offense." It further provides that "the Department will consider mitigating circumstances when assessing penalties for sales to underage persons, and may reduce any penalty outlined in the advisory opinion when mitigating circumstances exist." S.C. Revenue Procedure #13-2. Specifically, suspensions may be reduced in duration, and revocations may be reduced to suspensions with monetary penalties. *Id; see S.C. Dep't of Revenue v. Meenaxi, Inc.,* 417 S.C. at 663, 790 S.E.2d at 804.

In light of the express provisions of Revenue Procedure #13-2 granting discretion to impose any sanction authorized by statute, as well as its express advisory nature, it did not require the ALC to impose a penalty set forth in its guidelines, even if no mitigating circumstances existed. But, of course, the ALC found that there was mitigating circumstances. The ALC referred to the guidelines and recognized that it was within its discretion to apply a certain set of mitigating circumstances and reduce the penalties imposed on a permit holder by the Department. Order p. 8-9. The ALC, therefore, acted

well within its discretion in imposing penalties not as severe as those sought by the Department.

In *S.C. Dep't of Revenue v. Meenaxi, Inc.*, the Court held that the ALC did not abuse its discretion in imposing the penalty it chose where the penalty imposed was within the range of penalties authorized by S.C. Code Ann. § 61-4-580 (and was the penalty prescribed by the Department in Revenue Procedure #13-2). *Meenaxi, id.* at 663-64, 790 S.E.2d at 805. Here, too, the penalty imposed by the ALC was within the range of penalties authorized by S.C. Code Ann. § 61-4-580 and by the advisory opinion of Revenue Procedure #13-2. Therefore, the ALC did not err in imposing the penalties at issue.

There is also no merit to the Department's contention that the substantial evidence did not support the mitigating circumstances found by the ALC. This contention is raised only in a footnote by the Department. (Initial Brief of Appellant at 25 n. 8). Contrary to the Department's claim, the evidence, as presented through Bi-Lo's witnesses at the hearing, amply support the ALC's findings of facts and conclusion of law regarding the mitigating circumstances found by the ALC. Respondent's Statement of Facts cites to such testimony. Therefore, the mitigating circumstances relied on by the ALC were supported by substantial evidence.

3. The Department's Argument Pertaining To The "Construction" Of The Penalty Guidelines Is Inapposite And Without Merit

The Department's discussion pertaining to the deference to be afforded construction given to a statute by the agency charged with the duty of exercising it, *see e.g. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707,

718 (2014), is inapposite. There is no issue of statutory or regulatory construction in this case.

The statutes, discussed above, setting forth the range of punishments for the violations at issue here, *see* S.C. Code Ann. §§ 61-4-580, 61-4-250, S.C. Code Ann. Regs. 7-200-4, are unambiguous and in no need of "construction." *See Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017) (there is no occasion for employing rules of statutory interpretation, and the court has no right to look for or impose another meaning, unless a statutory provision is ambiguous). Regulations are interpreted using the same rules of construction as statutes. *Bruning v. SCDHEC*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (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, assuming the interpretation is worthy of deference." *Id.* (citations and internal quotes omitted); *see Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 35, 766 S.E.2d 707, 718 (2014) ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute'." (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If, however, the statute or regulation is not silent or ambiguous, there is no need for deference or construction; rather, the court must utilize the clear meaning of the statute. *See Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014); *Bruning v. SCDHEC*. The statutes and regulation at issue here are not ambiguous and do not require construction.

Like the applicable statutes and regulations, S.C. Revenue Procedure #13-2, is plain and unambiguous. It expressly states that it is advisory only and not binding and recognizes the Department's discretion to impose any sanction authorized by statute, and recognizes that mitigating circumstances "may reduce any penalty outlined in the advisory opinion." Clearly, the Department thus has no basis to "construe" #13-2 otherwise. The ALC acted in accordance with all statutes and regulations, as well as the advisory Revenue Procedure #13-2. Therefore, the Department's statutory construction argument is without merit. The ALC acted well within the law and its authority in imposing the penalty at issue.

B. The Administrative Law Court Relied On Valid Mitigating Circumstances To Support The Penalties It Imposed.

The Department contends that post-violation remedial measures or the economic impact on the business or surrounding community are not valid mitigating circumstances on which the ALC could rely. There is no authority to support such a contention.

Pursuant to S.C. Revenue Procedure #13-2, mitigating circumstances include, "<u>but are not limited to</u>", the following:

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. Document 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 a 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. Revenue Procedure #13-2. This list is not exhaustive and the Department, as well as the ALC, may consider other circumstances not enumerated in Revenue Procedure #13-2 when deciding whether to reduce a penalty. *See, S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. at 664, 790 S.E.2d at 805.

The Department acknowledges the applicable statutes, regulations and Revenue Procedures do not define "mitigating circumstances." Nor do they limit the type of circumstance that may be considered mitigating. While Revenue Procedure #13-2 lists some mitigating circumstances, it expressly states that "mitigating circumstances...are not limited to "circumstances demonstrating the permit holder's actions taken prior to the violation at issue", as the Department contends. (Initial Brief of Appellant at 21). Indeed, the Department recognizes, albeit in a footnote, that "the volume of sales of beer, wine or liquor at the location" is an appropriate mitigating circumstance, *id.* at n. 5, even though this circumstance does not fit into the Respondent's arbitrary and unsupported definition.

The authority thus indicates that the ALC may consider any mitigating circumstances it deems appropriate. Moreover, there is precedent for considering remedial measures and economic impact as mitigating circumstances. For example, as the

Respondent acknowledged in a footnote, *S.C. Dep't of Revenue v. Quick Stop of Broad River Road, LLC,* 2017 WL 947020 (S.C. Admin. Law Judge Div.), the ALC issued a $4,000 fine for the Respondent's fourth violation based on mitigating circumstances rather than the revocation sought by the Department pursuant to the Department's Penalty Guidelines. (Initial Brief of Appellant at 22 n. 7). The ALC found

> that Respondent has proved that there are mitigating factors warranting a reduction in the standard penalty. Respondent has informed employees that they must always check ID's to ensure that no one under the age of twenty-one is able to purchase alcohol. Additionally, Respondent has installed a digital sign in the store to inform employees that customers must be born before a certain date to purchase alcohol. Respondent has also recently purchased an ID Scanner Age Verification System with Driver's License Bar Code Reader. Mr. Kassim has also enrolled himself in the PREP program, and stated that he will also rotate his employees through the PREP program. However, the Court cautions Respondent that nothing in this order prevents the Department from seeking revocation of the permit in the event of a fifth violation.

Id. at *4. The digital sign and ID scanner were purchased after the fourth violation occurred. *Id.* at *3. The ALC also found that the owner "will terminate employees who sell alcohol to persons under the age of twenty-one," and he had registered to attend "PREP" training program after the violation occurred, and will also rotate employees through the PREP program. *Id. at* *3. Thus, the mitigating circumstances found and considered by ALC in *Quick Stop* included remedial measures taken after the violation occurred. It is noted that in imposing a fine rather than a recommended revocation, the ALC in *Quick Stop* cautioned the Respondent "that nothing in this order prevents the Department from seeking a revocation of the permit in the event of a fifth violation." *Id.* at *4. Subsequently, a fifth violation did occur and the penalty imposed in that case was revocation. *S.C. Dep't of*

Revenue v. Quick Stop of Broad River Road, LLC, 2017 WL 6275973 (S.C. Admin. Law Judge Div.). Nevertheless, the earlier opinion of the ALC in *Quick Stop* shows that mitigating circumstances may include remedial measures.

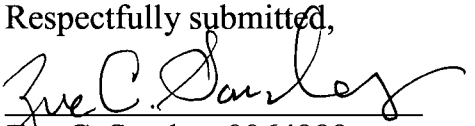
Economic circumstances have also been considered by the ALC as mitigating circumstances. For example, in *South Carolina Department of Revenue v. Shop N Save, LLC, D/B/A Shop N Save 2*, 2018 WL 457322 (S.C. Admin. Law Judge. Div.), the ALC considered as a mitigating circumstance the economic effect a revocation of license would have on the business and the owner and his family. The ALC stated that it was "sympathetic to [the owner's] testimony that a revocation ... would almost certainly devastate his family and close a business that has operated for twenty-five (25) years." *Id.* at *4. The ALC, therefore, ordered a suspension of the Respondent's liquor license for 10 consecutive days for the two violations at issue rather than the revocation as ordered by the Department in accordance with its guidelines for penalties. *Id; see also, South Carolina Department of Revenue v. Circle K Stores, Inc.*, 2018 WL 452262 (S.C. Admin. Law Judge Div.) (in mitigating penalty for third violation in three years, ALC took into consideration fact that a significant portion of store's revenue would be lost if store were to lose its beer and wine permit; ALC reduced suspension from 45 days to 15 days).

As the foregoing authority demonstrates, the ALC properly relied on the mitigating circumstances it set forth in its Order.

CONCLUSION

Although the Department has tried to complicate this matter, this case presents the simple issue of whether the ALC abused its discretion in imposing a penalty within the statutory limits established by the legislative limit that was less than the penalty sought by the Department. The facts, based on substantial evidence, and authority clearly show that the ALC did not abuse its discretion. The ALC acted within its prerogative to impose an appropriate penalty based on the facts presented. Under the applicable standard of review, there is no basis to overturn the decision of the ALC. Therefore, the ALC's decision should be affirmed.

Respectfully submitted,



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