

SOAH DOCKET NO. 458-07-1191

<b>TEXAS ALCOHOLIC BEVERAGE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	
	§	
<b>BSPS MANAGEMENT, INC.</b>	§	<b>OF</b>
<b>D/B/A AMATO'S FOODMART # 4</b>	§	
<b>PERMIT NO. Q573038</b>	§	
<b>WALKER COUNTY, TEXAS</b>	§	
<b>(TABC CASE NO. 541134),</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (TABC or Staff) requested that the permit of BSPS Management, Inc. d/b/a Amato's Foodmart # 4 (Respondent) be suspended for 90 days, because on or about July 29, 2006, Respondent or Respondent's agent, servant or employee, with criminal negligence, sold, served or delivered an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. §§ 106.13(a)(b) and 11.61(b)(2). Respondent presented a safe harbor affirmative defense, which provides that the actions of an employee regarding the sale, service, dispensing, or delivery of alcohol shall not be attributable to the employer under certain conditions that are set out in TEX. ALCO. BEV. CODE ANN. § 50.10. The Administrative Law Judge (ALJ) finds Staff has proven Respondent committed the alleged violations, and recommends a 90-day suspension.

**I. PROCEDURAL HISTORY AND JURISDICTION**

There are no contested issues of notice or jurisdiction, and those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

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The Notice of Hearing originally set this matter for February 16, 2007. A Motion for Continuance was granted, and the hearing was re-set for March 16, 2007. The hearing on the merits convened March 16, 2007, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Don Smith. TABC Staff was represented by attorney Ramona Perry. Respondent appeared through attorney Gary Beauchamp. Evidence was presented, and TABC Staff objected to Respondent presenting the safe harbor affirmative defense, because Respondent had not complied with the affidavit requirement set out in TEX. ALCO. BEV. CODE ANN. § 50.10(a). A Motion for Continuance was granted to allow Respondent additional time to comply with the Code. The hearing on the merits was held May 25, 2007, evidence was presented, and the record was closed on May 25, 2007.

## II. ALLEGATIONS AND LEGAL STANDARDS

Pursuant to the Notice of Hearing issued by TABC, Staff alleges that on or about July 29, 2006, Respondent or Respondent's agent, servant, or employee, with criminal negligence, sold, served, or delivered an alcoholic beverage to a minor, in violation of TEX. ALCO. BEV. CODE ANN. §§ 106.13(a)(b) and 11.61(b)(2).

*Safe Harbor Defense.* For purposes . . . to the sales, service, dispensing, or delivery of alcoholic beverages to . . . a minor. . . the actions of an employee shall not be attributable to the employer if:

(1) the employer requires its employees to attend a commission-approved seller training program;

(2) the employee has actually attended such a training program; and

(3) the employer has not directly or indirectly encouraged the employee to violate such law.

TEX. ALCO. BEV. CODE ANN. § 106.14(a).

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*Prima facie* evidence that the employer has directly or indirectly encouraged violation of the relevant laws includes:

(1) Proof by the commission that an employee or agent of a licensee/permittee sold, delivered or served alcoholic beverages to a minor . . . more than twice within a 12-month period;

(2) the licensee/permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the licensee/permittee to prohibit such sales, service or consumption;

(3) the licensee/permittee fails to insure that employees have read and understood the licensee/permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons. TEX. ALCO. BEV. CODE ANN. §§ 50.10(c)(d)(2)(3).

The Safe Harbor Defense that an employer has not directly or indirectly encouraged the employee to violate the law is an affirmative defense whose burden is on the employer to prove. **I-Gotcha, Inc. v. McInnis**, 903 S.W.2d 829 (Tex.App.-Fort Worth 1995) writ denied; **Parker v. 20801, Inc.**, 194 S.W.3rd556 (Tex.App.-Houston (14 Dist.) 2006) pet. for review granted (Tex. March 9, 2007); **Pena v. Neal, Inc. d/b/a Fina One Stop**, 901 S.W.2d663 (Tex. App.-San Antonio 1995) writ denied; **Perseus, Inc. d/b/a Hippodrome v. Canody**, 995S.W.2d202 (Tex. App.-San Antonio 1999) no writ hist.

### III. EVIDENCE, ANALYSIS AND RECOMMENDATION

#### A. Evidence

##### 1. Testimony of Dustin Shrell

Dustin Shrell, an enforcement agent for the TABC, stated that on July 29, 2006, he was conducting surveillance on Amato's Foodmart # 4. Agent Shrell testified that he had received a

complaint, through a Constable, that a citizen was reporting that the clerk at the store was selling alcoholic beverages to minors. Amato's Foodmart # 4 is located at 9302 SH 75 in New Waverly, Texas. Agent Shrell and Agent Zella parked at the Post Office across the road from the store around 11 p.m.

They observed a young female drive into the parking lot of the store around 11:30 p.m., park, and go into the store. She walked out of the store with what appeared to be two six-packs of beer, placed the beer on the top of the car, opened the door, and placed the beer on the passenger side in back. Agent Shrell testified that when the beer was on top of the vehicle, he could tell it was six-packs with green bottles, believed by him to be "Dos Equis" beer. The young female got into the vehicle and drove about 20 yards out of the parking lot when Agent Shrell and Agent Zella stopped her vehicle.

The female in the vehicle was Laurel Celeste Rich. Agent Shrell testified that Ms. Rich had a youthful appearance, and that she had a minor's Texas Driver's License. The Texas Driver's License showed a date of birth of 7-5-1986; therefore Ms. Rich was 20-years old. Ms. Rich gave the agents consent to search her vehicle and purse for any false identification cards. Agent Schrell testified that after a thorough search, no false identifications were found. Ms. Rich was asked how she purchased the two six packs of "Dos Equis" beer found on the back right floorboard side of the vehicle.

Agent Shrell testified that Ms. Rich admitted that she purchased the beer from Amato's Foodmart # 4. Ms. Rich told the agents that "Ivan," the clerk, did not ask her for any identification, and that she did not present the clerk with any identification when she bought the beer. Agent Zella obtained a written statement from Ms. Rich, she was issued a citation for minor in possession of alcoholic beverages, and she went back to the store with the agents.

Ivan Josue Valladares was the clerk at the store. Agent Shrell testified that Mr. Valladares told the agents that he did not ask for any identification from Ms. Rich because he believed her to be over 21-years-old. Mr. Valladares gave the agents a duplicate receipt for the items Ms. Rich

purchased. The receipt showed a purchase of two six packs of "Dos Equis" beer, a bottle of salt labeled "twang," and two grocery items. Agent Shrell testified that Mr. Valladares had a recent certification that he had been trained as a server/employee. Mr. Valladares was issued a Citation for sale of an alcoholic beverages to a minor, and given an Administrative Notice for Respondent that a violation had occurred.

Agent Shrell also testified that Mr. Valladares ask the agent to write out the clerk's statement, because Mr. Valladares said he could not write very well. Agent Shrell testified that most of the clerks involved in a violation ask him to write out their statements for them.

## **2. Testimony of Laurel Celeste Rich**

Laurel Celeste Rich testified that on July 29, 2006, she bought two six packs of beer at Respondent's store. Ms. Rich testified that she went into the store, walked to the cooler, grabbed two six packs of "Dos Equis" beer, went to the clerk, that he did not ask her for any identification, she paid for the beer and other items, and walked out with her purchases. Ms. Rich testified that she did not have any fake identification card, and it was her opinion that the clerk sold her the beer without asking for any identification because she looked older than her age. Ms. Rich testified that it was the first time that she had bought alcoholic beverages at a store, *i.e.* that she got caught the first time that she bought alcohol. But then, Ms. Rich also admitted that she was arrested for DWI in March, 2006, before this incident.

## **3. Testimony of Scott Zella**

Scott Zella, an enforcement agent for the TABC, testified that on July 29, 2006 he was conducting the investigation with Agent Shrell. It was Agent Zella's opinion that Ms. Rich looked like she was under 21-years-old. As part of the investigation, Agent Zella testified that he covered the entire store, except the locked manager's office, looking to see if the store had any policies posted to employees about sales of alcoholic beverages to minors (106.14 (3) policy). Agent Zella

testified that he did not find any 106.14 (3) policies posted in the store. Agent Zella ask the clerk if there were any policies posted, and that the clerk told him that there were none. Respondent had a previous violation on February 4, 2006, and Agent Zella testified that he did not see any 106.14 (3) policies posted in the store on that date either.

Agent Zella testified that in his opinion Respondent encourages sales to minors. Agent Zella based his opinion on Respondent having so many violations in the past. Agent Zella testified about prior violations on May 21, 2005, and on February 4, 2006. The first violation was restrained, noting that the employee had attended a training program, and that the employer had not directly or indirectly encouraged the employee to violate the law. Agent Zella testified that he searched the store as part of the investigation on February 4, 2006, and did not see any 106.14 (3) policies posted in the store. Respondent does have signs on the coolers to customers that you must be age 21 or older to buy beer, but Agent Zella testified that 106.14 (3) signs have to be to the employees, not to the customers, to be in compliance with TEX. ALCO. BEV. CODE ANN. § 50.10.

When the hearing resumed on May 25, 2007, Agent Zella was called as a rebuttal witness. Agent Zella testified he was positive that Respondent did not have any 106.14 (3) policies posted in the store on July 29, 2006. Agent Zella testified that he looked everywhere in the store to see if any policies were posted, and that he could not find any. When asked in detail if the signs on the coolers were sufficient, he explained in detail why in his opinion they were not sufficient.

On cross examination, Agent Zella was asked about TABC settlement practices, and who in the chain of command would have made the recommendation of cancellation of the permits (the original recommendation by Staff concerning the permits).

#### **4. Testimony of Pirtal (Paul) Singh**

Pirtal Singh testified that he is owner and President of BSPS Management Inc. d/b/a Amato's Foodmart # 4. Mr. Singh testified that Respondent's policy is not to sell to minors or intoxicated

persons. Mr. Singh owns several stores, and testified that every employee that has been ticketed for a violation has been immediately fired. On July 5, 2006, all of the employees were certified under the Save Program, including Mr. Valladares. Mr. Singh testified that 106.14 (3) policies were posted in the store prior to July 29, 2006. Because the defense was presenting the safe harbor affirmative defense, but had not complied with the affidavit requirement, the cause was continued in order to allow Respondent to comply.

When the case resumed, Mr. Singh testified that a sample 106.14 (3) policy that TABC gave him was posted at the store before July 29, 2006. The policy was posted on the wall next to the register where the employees could see the policy, but where the customers could not see the posting. It was Mr. Singh's opinion that the policy had not been removed, but that some boxes on the counter in front of the posting may have blocked or obscured the view.

Mr. Singh testified that Respondent complies with the 50.10 requirements. Mr. Singh testified that he worked as a cashier for over ten years before he started BSPS Management Inc., and that he never sold alcoholic beverages to minors. He testified that the managers discuss and teach the newly hired employees the employer's rules, which include no sales of alcoholic beverages to minors. On July 5, 2006, Mr. Valladares was trained in a TABC program. After the incident on July 29, 2006, he was immediately fired.

After the incident in question, Respondent adopted strict rules and policies. Mr. Singh testified that he now goes over the policies daily; that the employees sign that they have received a copy of the policies; that Respondent has purchased equipment including a fraud fighter that verifies a person's identification and date of birth; that every two weeks he meets with his managers and has training sessions for the employees; and that he goes to each one of his stores at least twice a week to make sure the policies are enforced.

**B. ALJ's Analysis and Recommendation**

Respondent's employee did, with criminal negligence, sell an alcoholic beverage to a minor. Agent Shrell and Agent Zella testified that the minor appeared young. When the agents brought the minor back to the store after the purchase, they took a photograph of the minor outside of the store. In the photograph, the minor is dressed as a teenager, and has a young teenager appearance. The minor testified that she did not provide any identification to the clerk in order to buy the beer. The clerk told the agents that he did not ask the minor for any identification.

Respondent failed to prove all the elements necessary in a safe harbor defense. Respondent failed to prove that the employer has not directly or indirectly encouraged the employee to violate the law of selling alcoholic beverages to minors. TEX. ALCO. BEV. CODE ANN. § 106.14(a)(3). In three areas, Respondent failed to prove that the employer did not directly or indirectly encourage the employee to violate the law.

First, the commission proved that minors bought alcoholic beverages at Respondent's store more than twice within a 14-month period. Sales of alcoholic beverages to minors occurred at the store on May 21, 2005, February 4, 2006, and July 29, 2006. It is *prima facie* evidence that the employer has directly or indirectly encouraged violation if an employee or agent of licensee/permittee sold alcoholic beverages to a minor more than twice within a 12-month period. TEX. ALCO. BEV. CODE ANN. § 50.10(c). There were not three sales to minors within a 12-month period, but as Agent Zella testified, it was his opinion that Respondent encouraged the violation by having so many sales to minors in such a short period of time.

Second, Respondent did not prove that 106.14 (3) policies were posted in the store on July 29, 2006. Agent Zella testified that he looked everywhere in the store to see if Respondent had any policies posted to employees not to sale alcoholic beverages to minors, and did not find any policies posted. Agent Zella also testified that he did not find any 106.14 (3) policies posted on prior violations. Mr. Singh testified that maybe boxes blocked or obscured the view of the policies. It is

*prima facie* evidence that the employer has directly or indirectly encouraged violation if the licensee/permittee fails to adopt, and post within the view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the licensee/permittee to prohibit such sales, service or consumption. TEX. ALCO. BEV. CODE ANN. § 50.10(d)(2). Since the incident in question, Respondent has adopted and posted 106.14 (3) policies, but on July 29, 2006, there were none posted that were within the view of the employees.

Third, Respondent failed to prove that before July 29, 2006, employees had read and understood the licensee/permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons. TEX. ALCO. BEV. CODE ANN. § 50.10(d)(3). Mr. Singh testified that by July 29, 2006, all of Respondent's employees had been certified that they were trained in a Save Program, teaching them it is unlawful to sell alcoholic beverages to minors. But Respondent failed to present evidence showing that Respondent itself had significant policies and procedures in place on July 29, 2006, that discouraged employees from selling alcoholic beverages to minors. Since the incident in question, Respondent has adopted strict rules and policies.

At the original hearing, Staff requested that Respondent's permits be cancelled, because the July 29, 2006 incident was the third sale of alcoholic beverages to minors at this store in a 14-month period of time. Only the violations at the permit store were considered, although Mr. Singh was allowed to testify how he has now implemented strict rules and policies in all of his stores. Also, the first violation of May 21, 2005, was not considered for enhancement purposes, since TABC recognized Respondent's safe harbor defense, and restrained the case, never finding a violation against Respondent.. Therefore, the incident in question is Respondent's second violation, and Staff requested a 90-day suspension, or a \$150 per day penalty in lieu of the suspension. The ALJ finds that Respondent has a previous suspension for sale to a minor on February 4, 2006. In order to have the first suspension reduced, Respondent agreed that all of its employees would attend a Save Program, and was advised that a follow up compliance check would be conducted. By July 29, 2006,

Respondent's employees had attended a Save Program, there were signs to discourage the sale of alcoholic beverages to minors on the premises, but there were no signs visibly posted stating Respondent's policy guidelines to employees against sales of alcoholic beverages to minors. These factors all support the requested suspension, and the ALJ agrees with Staff's recommendation.

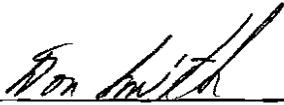
#### IV. FINDINGS OF FACT

1. BSPS Management, Inc. d/b/a Amato's Foodmart # 4 (Respondent) is the holder of a Wine Only Package Store Permit, Q-573038, and Beer Retailer's Off-Premise License, BF 573039, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 9302 Hwy 75 South, New Waverly, Walker County, Texas.
2. On December 27, 2006, the TABC's Staff sent a Notice of Hearing to Respondent.
3. The Notice of Hearing contained a statement of the time, date, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the TABC.
4. On March 16, 2007, and May 25, 2007, a public hearing was held before Administrative Law Judge Don Smith. The Staff appeared through staff attorney Ramona Perry. Respondent appeared through attorney Gary Beauchamp. Evidence was presented, and the record closed on May 25, 2007.
5. On July 29, 2006, Respondent's employee, Ivan Josue Valladares, sold alcoholic beverages to a minor, Laurel Celeste Rich, at Respondent's premises.
6. On July 29, 2006, Laurel Celeste Rich was 20 years old, and appeared to be young.
7. Respondent has a previous violation for sale to a minor on February 4, 2006.
8. On July 29, 2006, Respondent did not have any policy guidelines visibly posted to employees against the sale of alcoholic beverages to minors.
9. Respondent did not prove that the employer had not directly or indirectly encouraged the employee to violate the law prohibiting sales of alcoholic beverages to minors.

**V. CONCLUSIONS OF LAW**

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, and §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE (TAC) § 155.55.
4. Based on the above Findings of Fact, on July 29, 2006, Respondent violated TEX. ALCO. BEV. CODE §§ 106.13(a)(b) and 11.61(b)(2).
5. Based on Conclusion of Law 4, a 90-day suspension is warranted. 16 TEX. ADMIN. CODE § 37.60.
6. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, the Respondent should be allowed to pay a \$13,500 civil penalty in lieu of suspension of its permit.

**SIGNED June 25, 2007.**

  
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**DON SMITH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

# State Office of Administrative Hearings



**Shelia Bailey Taylor**  
**Chief Administrative Law Judge**

June 25, 2007

Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

**VIA REGULAR MAIL**

**RE: Docket No. 458-07-1191/Texas Alcoholic Beverage Commission vs. BSPS Management, Inc. d/b/a Amato's Foodmart #4**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink that reads "Don Smith".

Don Smith  
Administrative Law Judge

DS/mr  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**  
Ramona Perry, Attorney, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008-  
**VIA REGULAR MAIL**  
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-  
**VIA REGULAR MAIL**  
Gary F. Beauchamp, Attorney for Respondent, P.O. Box 131225, The Woodlands, Texas 77393-1225 -**VIA REGULAR MAIL**