

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9697

File: 20-507909 Reg: 17085609

CRUISE THRU DAIRY,
500 East Avenue K
Lancaster, CA 93535-4738,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: October 4, 2018
Ontario, CA

ISSUED OCTOBER 19, 2018

Appearances: *Appellant:* Ralph Barat Saltsman and Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Cruise Thru Dairy.
Respondent: Joseph J. Scoleri III and Colleen Villareal as counsel for the Department of Alcoholic Beverage Control.

OPINION

Cruise Thru Dairy (appellant) appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license pursuant to Business and Professions Code sections 23405(d) and 24200(a) because its president and sole shareholder pled nolo contendere to a crime of moral turpitude.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 22, 2011. On June 5, 2017, the Department filed an accusation charging that appellant's president and sole

1. The decision of the Department, dated February 22, 2018, is set forth in the appendix.

shareholder, Tiffany Ngo,² pled nolo contendere to a public offense involving moral turpitude, to wit, vandalism, a violation of Penal Code 594, which constitutes grounds for license revocation under Business and Professions Code sections 23405(d) and 24200(d).

At the administrative hearing held on November 30, 2017, documentary evidence was received and testimony was presented by Tiffany Ngo.³ Appellant presented no witnesses.

Testimony and documentary evidence established that Ngo is the 100% shareholder of appellant Cruise Thru Dairy. A Corporate Questionnaire, ABC-243 Form, relating to the corporation name of Cruise Thru Dairy reflects a California incorporation date of May 22, 2002; that as of January 1, 2009, Ngo holds 200 shares, or 100% of the shares, of said corporation; and that Ngo holds the titles of president and secretary.

Ngo admitted that while she was working at Valero Mart, Inc. (hereinafter, "Valero Food Mart") on May 17, 2016, after approximately two hours of repeatedly coming out of the Valero Food Mart premises and asking Reymundo Tejeda to move his truck and his continued refusal to move his truck from gas pump number eight, she threatened to "smash" Tejeda's truck if he did not leave. Ngo went inside the Valero Food Mart and after half an hour, she went back outside to confront Tejeda. While Tejeda remained inside his vehicle, Ngo counted to 10 twice, and when Tejeda did not

2. Throughout appellant's brief, counsel uses the term "appellant" to refer to Ngo herself. However, Cruise Thru Dairy, the corporate entity, is the licensee and appellant, not Ngo. Accordingly, this decision refers to Ngo by her surname and uses "appellant" to refer only to Cruise Thru Dairy.

3. Ngo was called as a witness by the Department.

move his vehicle, she used a wooden stick to strike Tejada's truck at least four times, damaging the quarter panel, tailgate, and rear left brake light.

Ngo further testified that on September 26, 2016, she pled nolo contendere to a violation of Penal Code section 594(a), vandalism, for which the Los Angeles Superior Court found her guilty. She was ordered to pay, and did pay, \$261 to the court, which included a \$150 court restitution fine in addition to other court costs and fines. The court also ordered her to pay, and she did pay, \$2,867 to Tejada in restitution for the damage she caused to his vehicle on May 17, 2016. She was ordered to serve 200 hours of community service. She was placed on summary probation for 36 months beginning on the date of conviction, with a two-day credit for having served two days in the Los Angeles County Jail. At the time of the administrative hearing on the matter at hand, Ngo remained on probation in Los Angeles County.

Ngo admitted that she has twice violated section 25658(a): by selling tobacco to a minor in May 1997, and by selling beer to a minor in December 2015. She further admitted that in 2010 she was convicted of a violation of Business and Professions Code section 22974.3(b) for possessing untaxed tobacco products in violation of section 24200(d). The penalty for the 2010 violation was revocation stayed for three years and a 20-day suspension.⁴ The penalty for the December 2015 violation was a 15-day license suspension.⁵

4. See Tiffany Ngo, doing business as Valero Food Mart, file number 20-455614, registration number 11074518.

5. See Cruise Thru Dairy, file number 20-507909, registration number 16083946.

After the hearing, the Department issued a decision determining that the violation charged was proved and no defense was established. Appellant's license was ordered revoked.

Appellant then filed this appeal contending Ngo's crime did not involve moral turpitude.

DISCUSSION

I

Appellant contends that under the circumstances, Ngo did not commit a crime of moral turpitude.

Appellant argues that despite the presence of the word "maliciously" in the language of the statute, a violation of Penal Code section 594 is not necessarily a crime of moral turpitude. (App.Br., at p. 8.) Appellant objects to the Department's reliance on *Campbell*—a California court of appeal case holding that a violation of section 594 is a crime of moral turpitude for purposes of impeaching a defendant's testimony—and instead cites immigration cases interpreting similar laws from other states as support. (*Id.*, at pp. 8-9; see also *People v. Campbell* (1994) 23 Cal. App. 4th 1488, 1493 [28 Cal. Rptr. 2d 716].)

Appellant also suggests that Ngo would have been better off striking Tejeda himself, as simple battery would not constitute a crime of moral turpitude. (App.Br., at p. 3.)

Finally, appellant argues Tejeda was the wrongdoer, and that Ngo only struck his car out of "obvious exasperation." (*Id.*, at p. 6, 13.) Appellant argues the Department

should be required to look beyond the statutory language and examine the facts of the criminal act before determining a crime involved moral turpitude. (*Id.*, at p. 12.)

This Board is bound by the factual findings in the Department's decision as long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) Where there are conflicts in the evidence, the Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences in support of the Department's findings. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) "The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is

any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case." (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].) The Appeals Board will not interfere with credibility determinations absent a clear showing of abuse of discretion.

Section 23405 provides, in relevant part,

The department may deny any application or suspend or revoke any license of a corporation subject to the provisions of this section where conditions exist in relation to any officer, director, or person holding 10 percent or more of the corporate stock of that corporation which would constitute grounds for disciplinary action against that person if the person was a licensee.

(Bus. & Prof. Code, § 23405(d).) Section 24200 provides,

The following are the grounds that constitute a basis for the suspension or revocation of licenses:

¶ . . . ¶

(d) The plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude or under any federal law prohibiting or regulating the sale, exposing for sale, use, possession, or giving away of alcoholic beverages or intoxicating liquors or prohibiting the refilling or reuse of distilled spirits containers charged against the licensee.

(Bus. & Prof. Code, § 24200.) A corporate licensee may therefore face revocation if its officer or shareholder pleads nolo contendere to a crime of moral turpitude.

As one court has explained,

"Moral turpitude" is an elusive concept incapable of precise general definition. One dramatic exposition of the term was rendered by this court in 1938, and has since been consistently followed: "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97 [82 P.2d 442]; see also *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 73 [64 Cal.Rptr. 785, 435 P.2d 553]; *In re Boyd* (1957) 48 Cal.2d 69, 70 [307 P.2d 625].) Moral turpitude has also been described as any crime or misconduct committed without excuse (*In re Hallinan* (1954) 43 Cal.2d 243, 251 [272 P.2d 768]; *In re Rothrock*

(1940) 16 Cal.2d 449, 453 [106 P.2d 907, 131 A.L.R. 226]), or as any "dishonest or immoral" act, not necessarily a crime. (1 Witkin, Cal. Procedure (2d ed. 1970) Attorneys, § 195, at p. 202.) "The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times," (see *In re Hatch* (1937) 10 Cal.2d 147, 151 [73 P.2d 885]), as well as on the degree of public harm produced by the act in question.

(*In re Higbie* (1972) 6 Cal.3d 562, 569-570 [99 Cal.Rptr. 865].) As other courts have observed, however, moral turpitude "is innately a relative concept depending upon both contemporary moral values and the degree of its inimical quality . . . whose purpose as a legislated standard is not punishment but protection of the public." (*Rice, supra*, at p. 36.)

While not every public offense may involve conduct constituting moral turpitude without a showing of moral unfitness to pursue a licensed activity [citation], conviction of certain types of crimes may establish moral turpitude as a matter of law. [Citation.] Thus, moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose [citations] but not in other crimes which neither intrinsically reflect similar inimical factors nor demonstrate a level of ethical transgression so as to render the actor unfit or unsuitable to serve the interests of the public in the licensed activity.

(*Id.*, at p. 37 [finding possession of cocaine and marijuana for sale constituted crime of moral turpitude meriting alcoholic beverage license revocation].)

Penal Code section 594—the crime to which Ngo pled *nolo contendere*—necessarily implicates the defendant's state of mind:

(a) Every person who *maliciously* commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

- (1) Defaces with graffiti or other inscribed material.
- (2) Damages.
- (3) Destroys.

(Pen. Code, § 594(a), emphasis added.) Where a case under this provision proceeds to trial, the prosecution must prove the defendant acted "maliciously"; where the defendant pleads nolo contendere to the charge, the requisite malicious state of mind is undisputed and need not be separately proven.

The Penal Code expressly defines the terms "malice" or "maliciously" to "import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act." (Pen. Code, § 7.)

In *People v. Campbell*, the court of appeal addressed whether a felony violation of Penal Code section 594 constituted a crime of moral turpitude for purposes of witness impeachment.⁶ (*People v. Campbell* (1994) 23 Cal.App.4th 1488 [28 Cal.Rptr.2d 716].) The court found that because a malicious state of mind was a necessary element of vandalism under section 594, a felony conviction under the statute constituted a crime of moral turpitude for purposes of witness impeachment. (*Id.*, at p. 1493.)

It is undisputed that Ngo pled nolo contendere to a charge of vandalism under Penal Code 594, that she paid restitution to the court and to Tejada for the damage to his truck, and that she was sentenced to probation and 200 hours of community service.

Where the facts are not in dispute, "whether such offense[] involve[s] moral turpitude within the meaning of the applicable constitutional and statutory provisions

6. Where a defendant testifies and has, in the past, committed a crime of moral turpitude, that previous conviction can be used as evidence to impeach his character and thereby undermine his credibility as a witness. (Evid. Code, § 788; see also *People v. Castro* (1985) 38 Cal.3d 301, 313-316 [211 Cal.Rptr. 719].)

thus becomes a question of law." (*Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 35 [152 Cal.Rptr. 285].)

Section 594 of the Penal Code necessarily implicates the defendant's state of mind: "Every person who *maliciously* commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism." (Pen. Code, § 594(a), emphasis added.) The courts have held that a crime committed with malicious intent—including vandalism under section 594 of the Penal Code—constitutes a crime of moral turpitude:

[T]he term "maliciously," defining the requisite mens rea of the offense, "import[s] a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (§ 7.) Moreover, section 594, subdivision (a), which was enacted as section 594 in the original 1872 Criminal Code as a "preliminary catch-all provision" to what is now title 14 of the Criminal Code, dealing with malicious injury to property (2 Witkin & Epstein, *Cal.Criminal Law* (2d ed. 1988) Crimes Against Property, § 678, pp. 761–762), still follows the language of the original malicious-mischief statutes in specifying "malice" as the mens rea of the offense. "It is generally held that [the term 'malice' in such statutes] calls for more than mere intentional harm without justification or excuse; there must be a wanton and wilful (or 'reckless') disregard of the plain dangers of harm, without justification, excuse or mitigation." (*Id.* at p. 762.) Such a state of mind betokens that "general readiness to do evil" which constitutes moral turpitude. (See *Castro, supra*, 38 Cal.3d at p. 314, 211 Cal.Rptr. 719, 38 Cal.3d 301.)

(*Campbell, supra*, at p. 1493.)

Appellant, however, argues that the circumstances of the case indicate that Ngo did not commit a crime of moral turpitude. In particular, it contends that a violation of Penal Code section 594 is not necessarily a crime of moral turpitude, and that in Ngo's case in particular, it does not rise to that level. Appellant acknowledges the presence of the word "maliciously" in section 594, but counters that the language of the statute "should be the beginning of the analysis rather [than] the end of the analysis." (App.Br.,

at p. 8.) Appellant questions the Department's reliance on *Campbell*, noting that the case was criminal, and not an administrative licensing matter.

Appellant then launches several counterarguments that largely parallel the arguments presented by the defendant in *Campbell*. First, appellant directs this Board to *Rodriguez-Herrera*, a Ninth Circuit immigration case that addressed whether a violation of a Washington state vandalism statute constituted a crime of moral turpitude for purposes of deportation proceedings. (App.Br., at pp. 9-10, citing *Rodriguez-Herrera v. INS* (1995) 52 Fed.3d 238.) Appellant contends that because the Washington state vandalism provision at issue in *Rodriguez-Herrera* also employs the term "maliciously" as the required state of mind (see Wash. Rev. Code, § 9A.48.080), this Board should follow the holding in that case, rather than *Campbell*.

Appellant does not explain why this Board should favor a federal court's interpretation of Washington law over a California court's interpretation the very same California penal statute at issue in this case. California courts are best positioned to interpret and apply California law, and their precedent is binding on this Board. While federal cases interpreting other states' laws may provide guidance in the absence of relevant California law, there is no such absence here. (See generally *Campbell, supra*.) Notably, the defendant in *Campbell* also relied on out-of-state immigration cases, a strategy the court rejected:

[D]efendant next turns to federal immigration cases which have considered the issue of moral turpitude as to various offenses in the context of deportation proceedings. [Citation.] Given that ample California case law considering moral turpitude as to California statutes has arisen . . . the usefulness of searching foreign decisions for guidance on this question has diminished.

(*Campbell, supra*, at p. 1494.) We therefore find *Rodriguez-Herrera* unhelpful, and rely instead on the California court of appeal's holding in *Campbell*.

In passing, appellant suggests that Ngo would have been punished less severely for striking Tejeda himself:

In argument, the Appellant noted had Ms. Ngo taken the stick to Mr. Tejeda, the most likely result would have been a simple charge of battery which no forum has interpreted to be a crime involving moral turpitude. Instead, in a less dangerous act Ms. Ngo took that stick to the rear of that offending vehicle.

(App.Br., at p. 3.) This is speculation. Had she struck Tejeda instead, Ngo could easily have been charged with a more serious crime, such as assault, which may show moral turpitude depending on the facts. (See *People v. Cavazos* (1985) 172 Cal.App.3d 589, 594 [218 Cal.Rptr. 269] ["[A] simple assault does not necessarily show moral turpitude. Only by looking behind the conviction to the particular facts can moral turpitude be ascertained."]; *People v. Elwell* (1988) 206 Cal.App.3d 171, 177 [253 Cal.Rptr. 480] ["[T]he average person would believe that anyone who unlawfully attempts to injure another by means of force likely to produce great bodily injury is guilty of some degree of moral laxity."].) Moreover, the court in *Campbell* rejected precisely the same analysis. (*Campbell, supra*, at p. 1495 [noting that simple battery, unlike section 594 vandalism, does not include a showing of malice as a necessary element].)

Ultimately, however, appellant is simply trying to downplay the severity of Ngo's actions, implying that she somehow took the moral high road by *only* causing thousands of dollars in damage to Tejeda's property, rather than attacking him directly. In reality, Ngo was not forced to choose between attacking either Tejeda or his vehicle. Had she but chosen to do so, Ngo could avoided committing any crime at all.

Appellant next contends this Board should require the Department to "delve beyond statutory language and weigh and consider underlying facts behind a conviction." (App.Br., at p. 12.) Appellant then presents the facts of Ngo's criminal conviction in the light most favorable to Ngo herself:

The facts of this case demonstrate deplorable conduct on the part of Mr. Tejeda and an unfortunate response by [Ms. Ngo].

It should be recognized and remembered that it was Mr. Tejeda who intentionally used his vehicle to block gas pumps for hours. It should be remembered that it was Mr. Tejeda who attempted to extort [Ms. Ngo] by demanding \$30 to pay for gas that was never pumped.

It was Mr. Tejeda who told [Ms. Ngo] that if someone wished to pump gas, they should go elsewhere.

(App.Br., at p. 13.)

Appellant forgets that Tejeda is not on trial before this Board, nor was he on trial before the Department. Moreover, the ALJ largely rejected the version of events Ngo offered at the administrative hearing, with references to her testimony:

7. Tiffany Ngo's contentions that on May 17, 2016, (1) she was afraid and scared of Reymundo Tejeda, (2) that Reymundo Tejeda "came out of his car" and "rushed towards" her and so her "basic instinct reaction is to hit, to protect myself," but hit the car instead, (3) she did not say to Reymundo Tejeda, if he did not leave by the time she returned she would smash his truck and (4) she believed Reymundo Tejeda to be dealing drugs or marijuana from his vehicle while parked at gas pump number eight at Valero Food Mart, located at 101 East Avenue J in Lancaster, are disbelieved for the following reasons.

8. Ms. Ngo presented inconsistent testimony and had a clear motive to fabricate her testimony as the president and 100 percent shareholder of Cruise Thru Dairy, which was facing revocation. Ms. Ngo claimed she was afraid/scared of Reymundo Tejeda but inconsistently admitted to feeling "agitated for him to go," "angry," and "wanted him to leave." She further presented inconsistent testimony that despite being afraid of Mr. Tejeda, who allegedly "rushed towards" her, she allegedly had time to ponder not to strike him but to instead strike his vehicle because, "When you hit a human being it's going to be even greater trouble than that, that's why I hit

the car instead." If Mr. Tejada was rushing toward her, as Ms. Ngo claimed, it would seem more probable that her reaction would be to defend herself against the person rushing her, not the vehicle. Ms. Ngo's contentions of fear are further inconsistent with her testimony that she went in and out of Valero Food Mart a number of times to confront Mr. Tejada on multiple occasions. She further admitted that she was not so afraid of Mr. Tejada that she felt the need to lock herself up in Valero Food Mart or call the police. She then claimed whenever she does call the police they do not come. Yet, she acknowledged that when the police were called by Mr. Tejada on May 17, 2016, the police did come by [at] 7:00 p.m., two and a half to three hours after the incident.

9. Ms. Ngo continued to present further inconsistent testimony. When asked despite claiming to be afraid of Mr. Tejada [why] she did not stay away from him but went back outside of the premises and hit his truck, Ms. Ngo immediately replied, "He was inside the car." She then immediately corrected her testimony and claimed, "When I went out the final time, he came out of the car towards me, that's why I hit his car."

10. Upon examination by the Department attorney, when Ms. Ngo was asked if she told the police officer on May 17, 2016, that she told Mr. Tejada if the [*sic*] he did not leave by the time she returned she would smash his vehicle, she initially denied making the statement, replying, "No I did not say it *like* that. I just said I asked him to leave again." (emphasis added with italics.) She also said, "I don't know whether the police lying [*sic*] or not, I just know that I did not say that, what he said—what you say." Upon further questioning Ms. Ngo then admitted she did not *recall* making the statement.

11. The Department attorney then read from the officer's statement from the County of Los Angeles Sheriff's Incident Report – Narrative, which indicated that at 4:10 pm, Ms. Ngo noticed Mr. Tejada was still at the gas pump, she "approached him with a wooden stick and told him she would count to 10 and give him a chance to leave or she would smash his vehicle." The Department attorney asked Ms. Ngo if she made that statement, to which Ms. Ngo replied, "Perhaps I did say something to that extent." She also admitted to telling the police officer that she counted to 10 but Mr. Tejada did not leave so she told him she would count to 10 one more time giving him plenty of warning for him to leave in his truck.

(Conclusions of Law, ¶¶ 7-11.) Appellant criticizes the ALJ for "wad[ing] deeply into the credibility of [Ms. Ngo]" (App.Br., at p. 7), but then asks this Board to blindly credit Ngo's version of events and find that while Ngo's conduct was merely "unfortunate," Tejada's was "deplorable" (App.Br., at p. 13). Appellant's position is absurd. Ngo pled nolo

contendere to a charge of maliciously causing thousands of dollars in damage to Tejada's property. Ngo's conduct was far beyond "unfortunate."

Because a malicious state of mind was a necessary element of Ngo's crime, her plea alone was sufficient to establish moral turpitude; the ALJ need not have looked further. (See generally *Campbell, supra.*) The ALJ, however, chose to look behind the plea and examined the alleged facts the case based on the only evidence available: Ngo's testimony. The ALJ determined Ngo was not a credible witness, expressly discounted much of her testimony, and found that she had indeed committed a crime of moral turpitude. The ALJ's reasoning was thorough and sound, and this Board is bound by the credibility determinations below.

ORDER

The decision of the Department is affirmed.⁷

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

7. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION
AGAINST:

CRUISE THRU DAIRY
CRUISE THRU DAIRY
500 E AVENUE K
LANCASTER, CA 93535-4738

OFF-SALE BEER AND WINE - LICENSE

VAN NUYS DISTRICT OFFICE

File: 20-507909

Reg: 17085609

AB: 9697

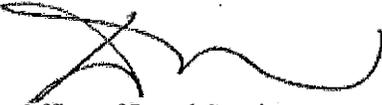
Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on April 16, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

2018 APR 18 AM 9:19
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ABC APPEALS BOARD

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

CRUISE THRU DAIRY
CRUISE THRU DAIRY
500 EAST AVENUE K
LANCASTER, CA 93535-4738

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

VAN NUYS DISTRICT OFFICE

File: 20-507909

Reg: 17085609

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on February 13, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after April 4, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: February 22, 2018

RECEIVED

FEB 22 2018

Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Cruise Thru Dairy
Dbas: Cruise Thru Dairy
500 East Avenue K
Lancaster, California 93535-4738

Respondent

} File: 20-507909
}
} Reg.: 17085609
}
} License Type: 20
}
} Word Count: 21,050
}
} Reporter:
} Tracy Terkeurst
} California Reporting
} Khmer Interpreter:
} Paulina Laurent, Badge No. 301695

Off-Sale Beer and Wine License

PROPOSED DECISION

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on November 30, 2017.

Jacob Rambo, Attorney, represented the Department of Alcoholic Beverage Control (hereinafter referred to as the Department).

Ralph Saltsman, Attorney, represented Respondent, Cruise Thru Dairy.

The Department seeks to discipline the Respondent's license on the grounds that on or about September 26, 2016, Respondent-Licensee's, officer, director or person holding 10% or more of the corporate stock, Tiffany Ngo, was the subject of a plea, verdict or judgment of guilty or pled nolo contendere to a public offense involving moral turpitude, to-wit: Vandalism (Penal Code section 594), such conviction being grounds for suspension or revocation of the license under Business and Professions Code sections 23405(d) and 24200(d).¹ (Exhibit IB.)

On September 1, 2017, the Department requested to consolidate the hearings in registration numbers 17085608 (Valero Mart, Inc., file number 20-506768) and 17085609 (Cruise Thru Dairy, file number 20-507909). On September 8, 2017, Chief

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

Administrative Law Judge John Lewis issued an Order Consolidating Hearings with both accusations to be heard on November 30, 2017. (Exhibit 1E.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on November 30, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on June 5, 2017.
2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on July 22, 2011 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

<u>Violation Date</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
December 12, 2015	16083946	BP§25658(a)	15-day suspension, beginning date stayed per BP§23095
August 2, 2010	11074518	BP §§ 24200(d), 22974.3(b)	Revocation stayed for 3 years and a 20-day suspension

The foregoing disciplinary matters are final. (Exhibits 2 and 3.)

4. Tiffany Ngo testified she is the 100% shareholder of Cruise Thru Dairy, located at 500 East Avenue K, in Lancaster, and holder of the Department license issued thereto with file number 20-507909. A Corporate Questionnaire, ABC-243 Form, relating to the corporation name of Cruise Thru Dairy, reflects: a California Incorporation date of May 22, 2002, that as of January 1, 2009, Tiffany Ngo has held 200 shares, or 100% of the shares, of said California Corporation, Cruise Thru Dairy, and Tiffany Ngo holds the titles of president and secretary. (Exhibit 4.)

5. Tiffany Ngo admitted that while she was working at Valero Mart, Inc., (hereinafter referred to as Valero Food Mart), on May 17, 2016, after approximately two hours of repeatedly coming out of the said premises and asking Reymundo Tejada to move his truck and his continued refusal to move his truck from gas pump number eight, she threatened to "smash" Reymundo Tejada's truck if he did not leave after she returned and the count of 10. Tiffany Ngo went inside Valero Food Mart and after half an hour she went back outside the store to confront Reymundo Tejada. While Reymundo Tejada remained inside his vehicle, Tiffany Ngo counted to 10 twice, and thereafter, when Mr. Tejada did not move his vehicle, she used a wooden stick and struck Mr. Tejada's truck

multiple times, at least four times, damaging the quarter panel, tailgate, and left, rear brake light.

6. Tiffany Ngo further testified that, on September 26, 2016, she pled nolo contendere to a violation of Penal Code section 594(a), vandalism, for which the Los Angeles Superior Court found her guilty. The felony count in the complaint was reduced to a misdemeanor in exchange for her plea. She was ordered to pay and did pay to the court \$261, which included a \$150 court restitution fine in addition to other court costs and fines. The court ordered her to pay and she did pay \$2,867 to Reymundo Tejada in restitution for the damage she caused to Mr. Tejada's vehicle on May 17, 2016. She was ordered to serve 200 hours of community service. She was placed on summary probation for 36 months beginning on the date of conviction (September 26, 2016), with a two-day credit for having served two days in the Los Angeles County Jail. At the time of the hearing in the matter at hand Tiffany Ngo remained on probation in Los Angeles County. (Exhibits 8 and 9.)

7. Tiffany Ngo admitted that she twice violated section 25658(a), for having sold tobacco to a minor in May 1997, and in December 2015, for having sold beer to a minor. She further admitted that in 2010 she was convicted of Business and Professions Code section 22974.3(b) for possessing untaxed tobacco products, in violation of section 24200(d). The disciplinary action for the latter violation was license revocation stayed for three years and a 20-day suspension (relating to Tiffany Ngo, doing business as Valero Food Mart, registration number 11074518 and file number 20-455614), and the disciplinary action for the December 2015 violation was a 15-day suspension of the license (relating to Cruise Thru Dairy, registration number 16083946 and file number 20-507909). (Exhibits 2 and 3.)

8. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 23405(d) provides that the Department may "suspend or revoke any license of a corporation subject to the provisions of this section where conditions exist in relation to any officer, director, or person holding 10 percent or more of the corporate stock of that corporation which would constitute grounds for disciplinary action against that person if the person was a licensee."

3. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

4. Section 24200(d) provides that the Department may suspend or revoke a license upon the plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude charged against the licensee.

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that on or about September 26, 2016, the Respondent-licensee's officer, director or person holding 10 percent or more of the corporate stock, Tiffany Ngo, who in fact held 100 percent of the corporate stock of Cruise Thru Dairy, was convicted of misdemeanor vandalism in violation of Penal Code section 594(a), having pled nolo contendere thereto, a public offense involving moral turpitude, in violation of Business and Professions Code sections 23405(d) and 24200(d). (Findings of Fact ¶¶ 4 through 6.)

6. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including the manner in which the witness testifies, the extent of the capacity of the witness to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, and the existence or nonexistence of a bias, interest, or other motive.

7. Tiffany Ngo's contentions that on May 17, 2016, (1) she was afraid and scared of Reymundo Tejada, (2) that Reymundo Tejada "came out of his car" and "rushed towards" her and so her "basic instinct reaction is to hit, to protect myself," but hit the car instead, (3) she did not say to Reymundo Tejada, if he did not leave by the time she returned she would smash his truck and (4) she believed Reymundo Tejada to be dealing drugs or marijuana from his vehicle while parked at gas pump number eight at Valero Food Mart, located at 101 East Avenue J in Lancaster, are disbelieved for the following reasons.

8. Ms. Ngo presented inconsistent testimony and had a clear motive to fabricate her testimony as the president and 100 percent shareholder of Cruise Thru Dairy, which was facing revocation. Ms. Ngo claimed she was afraid/scared of Reymundo Tejada but inconsistently admitted to feeling "agitated for him to go," "angry," and "wanted him to leave." She further presented inconsistent testimony that despite being afraid of Mr. Tejada, who allegedly "rushed towards" her, she allegedly had time to ponder not to

strike him but to instead strike his vehicle because, “When you hit a human being it’s going to be even greater trouble than that, that’s why I hit the car instead.” If Mr. Tejada was rushing toward her, as Ms. Ngo claimed, it would seem more probable that her reaction would be to defend herself against the person rushing her, not the vehicle. Ms. Ngo’s contentions of fear are further inconsistent with her testimony that she went in and out of Valero Food Mart a number of times to confront Mr. Tejada on multiple occasions. She further admitted that she was not so afraid of Mr. Tejada that she felt the need to lock herself up in Valero Food Mart or call the police. She then claimed whenever she does call the police they do not come. Yet, she acknowledged that when the police were called by Mr. Tejada on May 17, 2016, the police did come by 7:00 p.m., two and a half to three hours after the incident.

9. Ms. Ngo continued to present further inconsistent testimony. When asked despite claiming to be afraid of Mr. Tejada she did not stay away from him but went back outside of the premises and hit his truck, Ms. Ngo immediately replied, “He was inside the car.” She then immediately corrected her testimony and claimed, “When I went out the final time, he came out of the car towards me, that’s why I hit his car.”

10. Upon examination by the Department attorney, when Ms. Ngo was asked if she told the police officer on May 17, 2016, that she told Mr. Tejada if he did not leave by the time she returned she would smash his vehicle, she initially denied making the statement, replying, “No I did not say it *like* that. I just said I asked him to leave again.” (emphasis added with italics.) She also said, “I don’t know whether the police lying[sic] or not, I just know that I did not say that, what he said - what you say.” Upon further questioning Ms. Ngo then admitted she did not *recall* making the statement.

11. The Department attorney then read from the officer’s statement from the County of Los Angeles Sheriff’s Incident Report - Narrative, which indicated that at 4:10 pm Ms. Ngo noticed Mr. Tejada was still at the gas pump, she “approached him with a wooden stick and told him she would count to 10 and give him a chance to leave or she would smash his vehicle.” The Department attorney asked Ms. Ngo if she made that statement, to which Ms. Ngo replied, “Perhaps I did say something to that extent.” She also admitted to telling the police officer that she counted to 10 but Mr. Tejada did not leave so she told him she would count to 10 one more time giving him plenty of warning for him to leave in his truck.

12. The Respondent questioned whether a violation of Penal Code section 594(a), vandalism, is a crime involving moral turpitude, citing three cases, *Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, *Donley v. Jeff Davi* (2009) 180 Cal.App.4th 447, *People vs Lindsay* (1989) 209 Cal.App.3d 849. The *Donley* court cites both *Campbell* and *Castro*, which is relied upon by the Department (see citations below). The Respondent contends those cases relied upon by the Department do not

involve licensing matters, that “moral turpitude is a more fluid term,” and that “our courts have grappled with the amorphous term in a variety of factual contexts.” Respondent went on to state that “our highest court has defined moral turpitude as ‘an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen’” which definition the Respondent says the *Rice* court repeats and discusses, eventually finding drug dealing to be a crime involving moral turpitude. Respondent then states the *Donley* court found spousal abuse to be a crime involving moral turpitude, defined as “the general readiness to do evil.” Respondent states that the *Lindsay* court opined in citing earlier cases that “moral turpitude means the general readiness to do evil, and act of baseness, vileness or depravity, and so on.” Respondent concludes with stating “the circumstances presented in this case, according to all sources of information, don't leave us to that conclusion.” Respondent’s counsel opined that he did not “believe we have a readiness to do evil. We have a woman who is alone at the station, with issues in the back of her mind as to what this guy's doing for two and a half hours. Who in the world spends two or two and a half hours at a gas pump? Well, maybe drugs dealers do that. And with the murder, the shooting death in the past history at one of these locations” and her past experience calling the police who do not come. As described more fully above, in balancing the factors of Evidence Code section 780 those matters described disprove the truthfulness of Ms. Ngo’s testimony at the hearing, therefore the undersigned did not find Ms. Ngo’s testimony to be credible, including, but not limited to these suggestions of Ms. Ngo’s testimony as stated above by Respondent’s counsel.

13. The Department argued that Penal Code section 594(a) misdemeanor vandalism is a crime involving moral turpitude, citing, *People vs Campbell* (1994) 23 Cal.App. 4th 1488, and *People v. Castro* (1985) 38 Cal. 3d 301. The Department stated that the *Campbell* court analyzed whether section 594 is a crime of moral turpitude, with the *Campbell* court focusing on the fact that vandalism has, as a necessary element, a minimal element of proof, the element of malice. The Department went on to add that Penal Code section 594(a), which is the definition of both the misdemeanor and felony versions of the offense, includes malice as a necessary minimal element in that it states “every person who *maliciously* commits any of the following acts...is guilty of vandalism.” (Emphasis added with italics.) The Department further argued the *Campbell* court found that any crime that has malice as a necessary element is a crime of moral turpitude, with the *Campbell* court relying upon *People v. Castro* (1985) 38 Cal. 3d 301. The Department went on to state there is some dicta in the *Campbell* case whether or not \$1,000 worth of damage was a trivial amount; and that the court first suggested that vandalism of any kind is not trivial, and second the court found vandalism resulting in \$1,000 in damage is not trivial. The Department then argued that in the matter at hand the evidence established the Los Angeles Superior Court ordered restitution, the amount Tiffany Ngo testified she paid at the time of conviction was \$2,876. The Department argued, therefore, pursuant to the *Campbell* standard, that is not a trivial amount. The Department finished with saying, “more importantly, because the necessary element [of

vandalism] is malice [vandalism] is a crime of moral turpitude.” The Department added that pursuant to the standard Judicial Council CALCRIM Jury Instruction the element of malice is included in both the misdemeanor and felony instructions, with the only difference being that the felony jury has to make an affirmative finding the damage is more than \$400.

14. The undersigned agrees with the Department’s analysis and application of the *Campbell* and *Castro* decisions to the matter at hand. The *Campbell* court analyzed whether felony vandalism is a crime of moral turpitude for the purpose of determining whether such prior conviction may be used for impeachment purposes. The *Campbell* court pointed out that under Evidence Code 788, a defendant who testifies may be impeached with a prior conviction of any felony evincing moral turpitude, defined as the “general readiness to do evil.” (*Campbell, supra* at p. 1492, citing *People v. Castro* (1985) 38 Cal.3d 301, 313-316, 211 Cal.Rptr. 719, 696 P.2d 111.) The *Campbell* court went on to say, “Only if ‘the least adjudicated elements of the conviction necessarily involve moral turpitude’ is the conviction admissible for impeachment.” (*Campbell, supra* at p. 1492, citing *Castro supra* at p. 317.) The “least adjudicated elements” test means that “from the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude.” (*Campbell supra* at p. 1492, citing *People v. Thomas* (1988) 206 Cal.App.3d 689, 698, 254 Cal.Rptr. 15, italics added; accord *People v. White* (1992) 4 Cal.App.4th 1299, 1303, 6 Cal.Rptr.2d 259; *People v. Bautista* (1990) 217 Cal.App.3d 1, 6,265 Cal.Rptr. 661.) The *Campbell* court maintained that with malice as the mens rea of the Penal Code section 594 offense “such a state of mind betokens that ‘general readiness to do evil’ which constitutes moral turpitude.” (See *Campbell, supra*, at p. 1493, citing *Castro, supra*, at p. 314.) In the matter at hand, misdemeanor vandalism under Penal Code section 594(a) in fact has malice as the least adjudicated element, and as the mens rea of the offense it “betokens that general readiness to do evil which constitutes moral turpitude.”

15. Using the Respondent’s own reliance upon the *Donley* decision, that court found that Penal Code section 273.5 is a crime involving moral turpitude based on the “‘least adjudicated elements’ of the offense - without regard to the facts of the particular violation,” with a “readiness to do evil.” (*Donley supra* at pp. 458-461, with citations to *Campbell supra* at p. 1488, and *Castro supra* at p.313-316.) The *Donley* court also determined that even if they were to consider the underlying facts of the *Donley* case they would also find the offense to involve moral turpitude because “[Donley] became the aggressor and physically reengaged with Ms. Riddle, which behavior constitutes conduct involving moral turpitude.” (*Donley supra* at p. 461.) The *Donley* court went on to make the point, “That this decision was conscious and intentional is revealed by [Donley's] testimony that he wanted to resume the argument because he felt Ms. Riddle was wrong in what she was doing. Given the existence of the special relationship

between [Donley] and Ms. Riddle as described in *People v. Rodriguez, supra*, [5 Cal.App.4th at p. 1402, 7 Cal.Rptr.2d 495,] [Donley's] revival of the conflict despite a clear opportunity to disengage constitutes moral turpitude.” (*Donley supra* at p. 463.) Similarly, even if the undersigned were to consider the underlying facts of the case at hand, Ms. Ngo clearly had the opportunity to disengage and call the police, but her revival of the conflict by repeatedly going outside of Valero Food Mart to confront Mr. Tejedra to tell him to leave over two hours, then threatening him she would smash his truck if he did not leave after the count of 10, and her subsequent malicious act of vandalism of Mr. Tejedra’s vehicle, constitutes a “readiness to do evil,”- moral turpitude.

16. The *Lindsay* court, which also cited *Castro* and was relied upon by the Respondent, held that battery upon a police officer involves moral turpitude, for purposes of determining whether a prior conviction may be used for impeachment purposes; and that “the knowledge element of the crime of battery upon a peace officer (that defendant know or reasonably should have known the victim was a peace officer in the performance of his duties) clearly involves moral turpitude”, which demonstrates a readiness to do evil. (*Lindsay supra* at p. 857.)

17. The 1979 *Rice* case, which was also relied upon by the Respondent, held that “proof of conviction of the crimes of possessing cocaine or marijuana for purposes of sale constitute moral turpitude as a matter of law within the meaning of [Cal. Const.,] Art. XX, § 22, and Bus. & Prof. Code, § 24200, justifying the imposition of administrative sanctions without a further showing of unfitness or unsuitability or its effect upon the conduct of the licensed business.” (*Rice supra* at p.38, citing *Otash v. Bureau of Private Investigators*, 230 Cal.App.2d 568, 574; *H. D. Wallace & Assoc., Inc. v. Dept. of Alcoholic Bev. Control* (1969) 271 Cal.App.2d 589, 593.) The *Rice* court opined that a crime of moral turpitude is one that demonstrates “a level of ethical transgression so as to render the actor unfit or unsuitable to serve the interests of the public in the licensed activity.” (*Rice supra* at p. 37, citing *In re Rohan* (1978) 21 Cal.3d 195, 200.) In applying that standard to the case at hand, Ms. Ngo’s actions, described above, also fit this version of the definition of a crime involving moral turpitude.

PENALTY

The Department requested that the Respondent’s license be revoked citing that the standard penalty under Rule 144 for conviction of a crime involving moral turpitude is automatic revocation. The Department argued aggravating factors which included “a fairly recent[]” prior history of discipline, with direct licensee involvement, continuing course or pattern of conduct, by repeatedly demonstrating “her inability to adhere to the standards expected of individuals engaged in the high risk, high responsibility profession of selling alcohol,” and, lastly, arguing the lack of credibility of Tiffany Ngo’s testimony. The Respondent recommended a penalty less than revocation in the event that the

accusation was sustained, such as revocation stayed upon the condition the license is transferred, or revocation stayed with some period of suspension. The Respondent argued for mitigating circumstances based on the alleged circumstances in which Tiffany Ngo found herself, pursuant to her alleged testimony. The penalty recommended herein complies with rule 144.²

ORDER

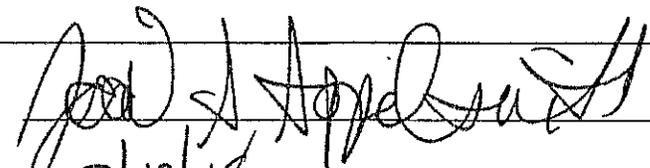
The Respondent's off-sale beer and wine license is hereby revoked.

Dated: January 5, 2018



D. Huebel

Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 2/13/18

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.