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BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **CALVARY CHAPEL OF SAN JOSE** **dba CALVARY CHRISTIAN ACADEMY,** **Employer.**	Inspection No. **1564732** **EMPLOYER'S ANSWERING BRIEF OPPOSING PETITION FOR RECONSIDERATION** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

The Division of Occupational Safety and Health ("the Division") had the opportunity to oppose the Employer's motion to suppress evidence gained through an unlawful search of the Employer's premises. It provided seven pages of argument in its Opposition. After considering the arguments, Administrative Law Judge Kerry Lewis ("the ALJ") granted the motion and excluded the evidence.

Now the Division presents an additional thirty-one pages in an attempt to get a second bite at the proverbial apple. But neither the law nor the facts have changed; reconsideration is therefore inappropriate. Further, this Board should not embrace the radical paradigm shifts the Division asks for, which not only involve overturning this Board's prior decisions but also reevaluating the scope of its legal power and its core constitutional legitimacy. While the citations the Division seeks to enforce are already abated, the Division's proposals here would permanently impair this Board's judicial functions.

The petition to reconsider should be rejected on any one of the following two independent grounds. First, the petition has not adequately alleged any of the five authorized scenarios in which reconsideration can be sought. Second, the motion to suppress was correctly decided by the ALJ on its merits and should be affirmed. The Division grossly overstepped its constitutional boundaries when it conducted a search of the Employer's premises, and suppression is the appropriate remedy to discourage future abuses.

STATEMENT OF FACTS

Calvary Christian Academy ("the Academy") is a private, non-denominational, Christian school located in San Jose, California. The school is run by and as a ministry of Calvary Chapel of San Jose, a local church ("the Church"). The case now before this Board began to unfold when the Fremont District Office of the Division apparently received a complaint that the Academy was not complying with facemask requirements. Haskell Decl. ¶ 3.[1] The Division decided to inspect the premises.

[1] The Haskell Declaration was submitted in support of the Division's request for the inspection warrant. It was also attached to the Employer's original Motion to Suppress as Exhibit 2. Here, to avoid duplication of exhibits, the Employer joins in and adopts the Division's Request for Official Notice filed concurrently with its Petition.

When the inspectors arrived at the Academy's administrative office, an employee of the school named Jennie Wood greeted them outside. Allegedly, Ms. Wood was not wearing a face covering while conversing with the Division inspectors, Haskell Decl. ¶ 4. However, health mandates at the time did not require masks to be worn outdoors where the conversation took place.[2] Ms. Wood contacted Mike McClure—the Senior Pastor at Calvary Chapel San Jose and head of the Academy—and he and another individual arrived to talk to the inspectors.

The inspectors told Mr. McClure they were there in response to a complaint. Mr. McClure asked the identity of the complainant and the nature of the complaint, but the inspectors would not give any details, citing confidentiality concerns. Mr. McClure explained that since the church was involved in litigation, he would not discuss anything further with them.[3] After giving them the contact information of the Church's attorney (Mariah Gondeiro), he politely declined their request to inspect the Academy premises.

After waiting nearly two weeks following that initial encounter, the Division applied to the Santa Clara County Superior Court for a warrant to inspect the Academy for violations of Cal/OSHA regulations. The Division also asked that the statutory twenty-four hour notice requirement of Cal. Civ. Proc. Code § 1822.56 be waived. Haskell Decl. ¶ 12. In support of its application, the Division attached a declaration from Richard Haskell, a Division inspector. He noted that the office had received a complaint, that he had tried to inspect the premises, and that he was turned away. Haskell Decl. ¶ 3–5. However, the only description of the complaint given in the Declaration submitted in support of the inspection warrant was that the Academy "was not complying with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting requirements." Haskell Decl. ¶ 3. The affidavit also never listed what (if any) follow-up the Division did with the complainant to determine the source and/or credibility of the complaint. In fact, the affidavit did not even include a boilerplate statement that the Division believed

[2] Guidance for the Use of Masks, Cal. Dep't of Pub. Health (July 28, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings-07-28-2021.aspx; see also Order of the Health Officer of the County of Santa Clara Requiring Use of Face Coverings Indoors by All Persons, Cnty. of Santa Clara Pub. Health Dep't 1–2 (Aug. 2, 2021), https://covid19.sccgov.org/sites/g/files/exjcpb766/files/documents/Health-Officer-Order-August-2-2021.pdf.

[3] While the Division's affidavit stated that Mr. McClure told them the legal action was with the State of California, Haskell Decl. ¶ 5, the litigation is actually with the County of Santa Clara.

violations were ongoing and/or that it believed employees were working in conditions that threatened their health or safety.

The inspection warrant was granted the same day with the notice provision waived.[4] The Division subsequently inspected the Academy twice and issued twelve citations, totaling $67,330 in proposed penalties. Most of the fines related to COVID-19 regulations. The Academy timely appealed those citations.

The Academy then filed a motion to suppress the evidence the Division gained during its inspection, arguing that the exclusionary rule and the Fourth Amendment prohibition on unreasonable searches should bar that evidence from being utilized. The Division opposed that motion, arguing that the Board had no authority to hear such a motion and that the warrant application was constitutionally sufficient. After receiving briefs from both sides, the ALJ granted the motion, holding that the Board has the authority to hear a motion to suppress and that the affidavit the Division presented was constitutionally deficient. In holding this, the ALJ found that the affidavit was "merely a conclusory statement . . . that employee complaints have been received and provided nothing more for the magistrate to review." Order on Mot. to Suppress Evid. at 6 (citations omitted).

The Division then brought this petition for reconsideration. It has argued that reconsideration should be granted because the Board acted in excess of its powers, the Academy attempted to procure the order by fraud, and the evidence received by the Board did not justify its finding of fact. It also argued against the good-faith exception to the exclusionary rule—an argument the Division never raised in its opposition to the original motion to suppress, and thus was never subsequently addressed in the Employer's reply brief or in the ALJ's ruling.

ISSUES PRESENTED

I. Under Cal. Code Regs. tit. 8, § 390.1 and Cal. Lab. Code § 6617, is reconsideration of a Board ruling inappropriate when (1) the ruling suppressed unlawfully obtained evidence, prohibiting its use in prosecuting the current

[4] Th warrant was attached to the Employer's original Motion to Suppress as Exhibit 2. Here, to avoid duplication of exhibits, the Employer joins in and adopts the Division's Request for Official Notice filed concurrently with its Petition.

citations; (2) no law or facts have changed since the ruling; and (3) the Division raises arguments that were never included in its prior briefing or the ALJ's ruling?

II. Under the Fourth Amendment and California Const. art. I, § 13, did the Board appropriately suppress evidence gained through an inspection warrant when the affidavit used to support the warrant application (1) contained only one conclusory sentence regarding the complaint precipitating the search; (2) gave no details regarding the facts alleged in the complaint, (3) gave no information regarding the source or credibility of the complaint, and (4) contained no claim that the Division believed violations were ongoing or that the place of employment was unsafe for employees?

ARGUMENT

I. Reconsideration is procedurally inappropriate because none of the five allowed scenarios for reconsideration are present.

As a preliminary matter, reconsideration is inappropriate because none of the grounds for reconsideration have been adequately alleged. Cal. Code Regs. tit. 8, § 390.1 allows for reconsideration in five different scenarios, only three of which the Division argues: that the Board acted without or in excess of its powers, that the order was procured by fraud, and that the evidence received by the Board did not justify its findings of fact. However, the Division does not present a sufficient basis for any of these claims. This Court can and should deny reconsideration for this reason alone.[5]

A. This Board acted within its powers when it excluded evidence from its own proceedings.

First, the Board acted within its powers when it suppressed the evidence because the Code of Regulations explicitly vest this Board with the authority to rule on objections and motions controlling what evidence the Board will consider in its rulings. Cal. Code Regs. tit. 8, § 350.1(a) grants ALJs the power to "rule on objections . . . and the receipt of relevant and material evidence

[5] The Division's assertion that "[i]f this order stands . . . [the] Employer will be allowed to violate California's health and safety regulations without consequence," Pet. at 6, reflects a fundamental misunderstanding of basic Fourth Amendment jurisprudence. Nothing in this ruling prevents the Division from obtaining a *lawful* warrant in the future to inspect any suspected violations.

. . . .” This is sufficient in itself to find that this Board can rule on a motion to suppress. In order to hold that suppression is outside this Board’s authority, the plain language of this regulation has to be completely ignored.

Case law also makes clear that administrative law courts in this state have the power to hear motions to suppress and review the sufficiency of affidavits presented to a judge to procure a warrant. As a starting matter, this Board has always recognized its power to suppress evidence. *See* Board decisions cited *infra*, Part II.A. Additionally, in *Goldin v. Public Utilities Commission,* 23 Cal. 3d 638, 668–69 (1979) the California Supreme Court expressly rejected the argument the Division now brings. The Court minced no words:

> It is urged that the Commission was without legal authority to determine the validity of a search warrant pursuant to which certain evidence presented was obtained. Again, we do not agree. . . . [W]e believe that its authority in cases of this nature includes the power to make an assessment of the affidavits presented in support of a search warrant pursuant to which evidence sought to be introduced before it was obtained, and to determine therefrom whether they contain a sufficiently objective and credible basis for the magistrate’s finding.

Id. (citations omitted).[6]

The Division attempts to distinguish this case, cabining its applicability to the Public Utilities Commission only. But that is not what the Court held. Rather, it applied its holding to all “civil administrative proceeding[s] of this nature, where the liberty of the subscriber is not at stake.” *Id.* at 668. There is no basis for limiting the Court’s principle to just the Commission, and the Court’s language shows this was not its intention. While the Division attempts to highlight meager differences between the authority of the Commission and this Board, this Board has a grant of authority similar to that of the Commission. Cal. Code Regs. tit. 8, § 350.1(a) grants ALJs “full power, jurisdiction and authority” to exercise an extensive list of powers:

> [T]o hold a hearing and ascertain facts for the information of the Appeals Board . . . to issue a subpoena and subpoena duces tecum for the attendance of a person and the production of testimony, books, documents, or other things, to compel the attendance of a person residing anywhere in the state, to certify official acts, to regulate the course of a hearing, to grant a withdrawal, disposition or

[6] While this argument appears nowhere in the Petition for Reconsideration, the Division argued in its original Opposition that the proper remedy was a motion in the Superior Court. *Goldin* is instructive here as well: “[T]he remedy set forth in section 1538.5 of the Penal Code [motion to suppress in the Superior Court] is not applicable in the instant circumstances. That section may be invoked only by ‘a defendant’ in a criminal case; petitioner . . . is not ‘a defendant.’” *Goldin*, 23 Cal. 3d at 668, 592 P.2d at 308.

> amendment . . . to administer oaths and affirmations, to rule on objections, privileges, defenses, and the receipt of relevant and material evidence, to call and examine a party or witness and introduce into the hearing record documentary or other evidence, to request a party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding . . . to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter, or take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, status conference, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act.

There is no basis for holding that this wide grant is materially different than the Commission's.

The Division further pits this Board's legislative authorization against the Commission's constitutional authorization: "There are no constitutional provisions explicitly granting broad powers to the Appeals Board. Similarly, there is no Constitutional provision enabling the Legislature to confer additional authority upon the Appeals Board . . . ." Pet. at 15. But that argument has no force unless this Board is prepared to find that all of its own judicial functions are in fact a violation of the California Constitution. The logic of the Division's argument necessitates this conclusion—if a constitutional grant of authority is necessary for an administrative agency to exercise "not only administrative but also legislative and judicial powers," Pet. at 14, and this Board has no constitutional grant of authority, then its judicial powers must be unconstitutional.

In short, the holding the Division asks for would also create the troubling implication that this Board cannot decide for itself what evidence it will admit for its own proceedings. The Division treats a warrant from the Superior Court as some kind of inexorable command to this Board to admit any evidence gained with it. But a warrant only authorizes the gathering of evidence—it doesn't mandate its admission. This Board is vested with the authority to manage its own procedures, including regulating what evidence it will hear. Suppression is a mere regulation of evidence (not "invalidating" an action of the Superior Court, as the Division erroneously argues) and is fully within this Board's power. This Board should also reject the Division's constitutional arguments, which undermine this Board's legitimacy as a judicial body.

B. The Employer did not defraud the Board to obtain its ruling.

Second, the Division claims that the Employer misstated a legal standard, thus defrauded the Board to obtain its ruling. But this is neither fraud nor factually the case. The Division incorrectly asserts that *Salwasser II* was an appeal from *Salwasser I*, which was overturned. A cursory glance, however, shows that *Salwasser II* is an entirely separate case—decided a decade later from a set of facts related only by the party in common, the Salwasser Company. Further, the two holdings are not in conflict in the least; *Salwasser I* held that the lowest standard of administrative probable cause could not be applied to Cal/OSHA warrants specifically because, unlike other violations enforced by administrative agencies, Cal/OSHA violations can potentially carry criminal penalties. *Salwasser Mfg. Co. v. Mun. Ct.*, 94 Cal. App. 3d 223, 231-33 (1979) (*Salwasser I*). *Salwasser II* merely clarified this standard in holding that the Penal Code (and the criminal probable cause standard) does not apply to such warrants. *Salwasser Mfg. Co. v. Occupational Safety. & Health Appeal Bd.*, 214 Cal. App. 3d 625, 632 (1989) (*Salwasser II*). Instead, the standard applied to Cal/OSHA warrant applications is the same as for federal OSHA warrants predicated on evidence of a violation. *Salwasser II*, 214 Cal. App. 3d at 632 (adopting the standards from various federal Circuit Courts of Appeal).

Even so, misstatement of a legal standard is not "fraud." In asserting fraud, the Division makes a very serious ethical accusation (one that it never mentioned to the ALJ in its Reply Brief and it now raises after receiving an unfavorable ruling). But the record does not show that the Employer tried to keep the ALJ in the dark as to the relevant legal standard, or that the judge was kept in the dark regarding the *Salwasser* cases. Both the Employer and the ALJ cited extensively from *Salwasser II* in framing the relevant legal standards. *See* Employer's Mot. Suppress at 9; Order on Mot. to Suppress Evid. at 4–5, 7. The ALJ disagreeing with the Division's interpretation of case law is not a basis for accusing the Employer's counsel of fraud.

C. The Division has failed to allege factual conclusions that were not justified by the evidence the ALJ reviewed.

Section 390.1(a)(5) allows a party to petition for reconsideration on the grounds that "the findings of fact do not support the order or decision." However, the Division has not argued that this is the case. Instead, the Division has referred to Section 390.1(a)(3)—that "the evidence

received by the Appeals Board does not justify the findings of fact", and alleges that "the Evidence Received by the Appeals Board does Not Justify the Finding of Fact that the Warrant is Insufficient." Pet. at 17. In so doing, the Division has confused factual conclusions with legal conclusions. Whether or not a warrant is sufficient is a legal inquiry, not a factual one. This is made even clearer when the Division continues to discuss the legal standards in cases like *Marshall* and *Bell* instead of discussing the factual conclusions the ALJ made.

In fact, the ALJ did not resolve any issues of fact in ruling on the motion to suppress evidence. The full hearing on the merits of the citations has not occurred yet, meaning that none of those factual questions have been resolved, and there were no material disputes as to the facts precipitating the suppression. The only dispute was a legal question—whether suppression was appropriate given that certain facts actually occurred.

Therefore, the Division has failed to appropriately alleged that the evidence reviewed did not justify the findings of fact made by the ALJ. The argument that the Division has actually attempted to make is that the findings of fact (which were largely undisputed) did not support the suppression order. Because the Division did not claim this as a basis for reconsideration, the petition fails procedurally under Section 390.1.

This Board is not obligated to aid the Division in its argumentation by construing its petition to say something it did not. The petition thus should be denied as procedurally deficient. However, should this Board construe the Division's argument as one under Section 390.1(a)(5) rather than 390.1(a)(3), the petition still fails on its merits, as discussed below.

II. The Motion to Suppress was correctly decided by the ALJ because the affidavit supporting the Division's warrant application was grossly deficient.

Even if this Board holds that the petition for reconsideration is procedurally proper, it should deny the relief the Division asks for. The Constitution does not impose any unduly burdensome standard on the Division when it wants to perform a search; it only asks that searches be "reasonable." U.S. Const. amend. IV; Cal. Const. art. I, § 13. However, the Division did not present a basis for reasonable belief that violations were ongoing at the Academy to the judge who issued them a warrant, even though doing so takes minimal effort in those cases where

probable cause exists.

The basic purpose of suppression is to ensure that in the future, government entities like the Division, respect constitutional boundaries; it operates prospectively as an educational and corrective tool. *United States v. Leon*, 468 U.S. 897, 916 (1984) ("First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."). If nothing else, this Board should let the ALJ's order stand as a proper reminder to the Division that it needs to take at least basic steps to ensure it is in compliance with the little the Constitution asks of it. The Division sought the invasive tool of a nonconsensual search of the Academy's premises. It is not too much to ask that its affidavit support its request with basic details as to what violations it suspects and on what basis it suspects those violations.

A. The ALJ correctly held that this Board's cases all show that it uses the exclusionary rule to suppress evidence that was gained in violation of the U.S. and California Constitutions.

Generally, in order to conduct a search without consent, the government must obtain a warrant. *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528-29 (1967). When a warrant is required, the standard of "probable cause" is used to determine the reasonableness of the proposed search. *Id.* at 534.

In order to incentivize law enforcement agents to comply with these constitutional protections, courts have developed the exclusionary rule. This rule prohibits the use of evidence that was obtained in violation of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 231-32 (2011). While the suppression of illegally obtained evidence is not a constitutional right per se, the exclusionary rule is properly applied when exclusion would deter future illegal conduct (which is the primary purpose of the rule). *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

This Board cannot hold that suppression (the exclusionary rule) cannot be applied in its cases without dismantling its own prior cases. The precedential decisions of the Occupational Safety and Health Appeals Board make clear the exclusionary rule applies in proceedings before this Board as well. *E.g.*, *In re Bimbo Bakeries USA*, No. 03-R1D3-5217, 2010 WL 2706195, at *6 (Cal. Occ. Safety & Health Appeals Bd. June 9, 2010) (decision after reconsideration). The burden of proof is initially on the employer to sufficiently allege that it had an interest protected

by the Fourth Amendment (in other words, that it had a "reasonable expectation of privacy"), and that the Division infringed on that interest; from that point forward, the burden shifts to the Division to prove that their inspection did not violate the employer's Fourth Amendment rights. *Id.* at *9.

The Board has walked through the exclusionary rule analysis in many other reconsideration petitions, never doubting that it applied. *See, e.g.*, *In re Forty-Niner Sierra Resources, Inc.*, No. 90-R2D4-165, 1991 WL 528425, at *2 (Cal. Occ. Safety & Health Appeals Bd. July 15, 1991) (decision after reconsideration) (considering the question "Must the evidence obtained as a result of the inspection be suppressed because Employer was not given at least twenty-four hours advance notice of execution of the warrant?"); *In re Rudolph and Sletten, Inc.*, No. 01-R1D5-478, 2004 WL 817770 (Cal. Occ. Safety & Health Appeals Bd. March 30, 2004) (decision after reconsideration) (considering the question "Did the Division conduct an invalid inspection of Employer's worksite . . . which compels exclusion of all evidence presented by the Division in support of the violations?"). Further, the Division admitted in its opposition that *In re Bimbo Bakeries* stood for the proposition that "an employer could raise on appeal a defense that the inspection was 'invalid' on an alleged Fourth Amendment basis . . . ." Opp. to Mot. to Suppress at 5; 2010 WL 2706195, at *10. This Board must apply the exclusionary rule here if it is to remain consistent with its precedents.

B. The standard used for evaluating the sufficiency of Cal/OSHA warrant applications is lower than criminal probable cause, but higher than the normal administrative cause standard.

While the Division muddies the water with its erroneous description of the *Salwasser* cases, the standard for review of Cal/OSHA warrants is not difficult to ascertain. The Employer, the Division, and the ALJ all agree that administrative agencies do not have to show criminal probable cause in order to obtain a warrant. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978). However, this does not mean that the criminal context is entirely irrelevant. Generally, administrative agencies need only show that a reasonable legislative or administrative standard for inspection is met by certain premises in order to inspect; the agency need not suspect a violation. *Camara*, 387 U.S. at 538; Cal. Civ. Proc. Code § 1822.52.

However, *Salwasser I* made clear that this standard is too relaxed for Cal/OSHA warrants (as opposed to other administrative warrants) because Cal/OSHA violations have the unusual potential to carry criminal penalties. 94 Cal. App. 3d at 231. Because of these "possible far-reaching consequences of a Cal/OSHA inspection," that court held "[t]he 'cause' standard for administrative inspections provided in Code of Civil Procedure section 1822.52 will not apply to Cal/OSHA inspections." *Id.* at 231–32. As the court clarified a decade later in *Salwasser II*, the appropriate standard, without demanding compliance with the Penal Code, requires the Division to show "specific evidence sufficient to support a reasonable suspicion of a violation." 214 Cal. App. 3d at 631 (quoting *Unites States v. Establishment Inspection of: Jeep Corp.*, 836 F.2d 1026, 1027 (6th Cir. 1988)). In other words, Cal/OSHA warrants require "probable cause," which is more than just "cause," without requiring every protection afforded by criminal probable cause.

Salwasser II also integrated federal case law into the jurisprudence of California courts since the standard for Cal/OSHA warrant applications is the same used for evaluating federal OSHA warrant applications predicated on suspected violations. *See id.* at 632 (finding, after a discussion of federal case law from various circuits, that "the circuit court guidelines set forth above are reasonable."). Affidavits presented to a magistrate or judge must lay out "some plausible basis for believing that a violation is likely to be found." *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1981). If the inspection was prompted by a complaint, a mere summary statement that a complaint was received is not sufficient. *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1319 (7th Cir. 1980). The judge issuing the warrant must be provided with enough details to give a basis for "believing that complaints were actually made, that the complainants were sincere in asserting that a violation existed, and that they had some plausible basis for entering a complaint. A conclusory statement in the warrant application that employee complaints have been received, without more, is insufficient to establish probable cause." *Cnty. of Contra Costa v. Humore, Inc.*, 45 Cal. App. 4th 1335, 1347 (1966). An affidavit predicated on a complaint should generally contain, among other things, a copy of the complaint if it was written (to allow the judge to determine if the allegations actually constituted a violation), with the complainant's name redacted; the source of the complaint (an employee,

competitor, customer, etc., without divulging the name); any steps taken to verify the information in the complaint; and the employer's history of past violations. *Horn Seed*, 647 F.2d at 103. "Only with such information can the magistrate actually determine 'the need for the intrusion' and execute his duty of 'assur(ing) that the proposed search will be reasonable.'" *Id.* (quoting *Michigan v. Tyler*, 436 U.S. 499, 507 (1978)).

The Division was thus required to show the judge who issued the warrant that it reasonably suspected a violation was occurring—a showing which needed to include some kind of specific details from the complaint it allegedly received. This is not a particularly high standard, but it is a showing the Division never made.

C. The affidavit the Division presented in support of its warrant application falls short of the constitutional standard.

The Division cannot show that its affidavit met the required standard. In fact, the Division has consistently refused in all its argumentation in front of this Board to apply the framework discussed above in any meaningful way. Instead, it has danced around the framework by arguing that (i) applying this standard would not adequately protect the identity of the complainant, (ii) applying this standard would not give the issuing judge enough deference, and (iii) applying this standard would run afoul of the good faith exception to the exclusionary rule (a new argument it never raised in front of the ALJ). All of these are without merit.

i. The Division could have provided the necessary information without identifying the complainant.

The only description of the complaint the Division gave in the Haskell Declaration was that the Academy "was not complying with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting requirements." This is a far cry from the *Horn Seed* standard, which requires at least enough substance from the complaint to allow the judge to determine if the alleged conduct was actually a violation. This cannot possibly be obtained from this meager sentence. The Division has continually claimed that Cal. Lab. Code § 6309(c)'s prohibition on revealing the identity of the complainant prevented it from giving any further details. But this argument is not compelling because there are plenty of details the Division could have given that

would not have revealed the identity of the complainant.

The Division states that "[m]uch of the information that the ALJ states should be included in the declaration has the potential to reveal the identity of the complainant . . . . Requiring the Division to reveal the nature of the relationship of the complainant to the employer, how the complainant obtained their information, when they observed alleged violations, who they observed, and how many times they observed the violations, all has the potential to reveal the identity of the complainant either explicitly or by inference." Pet. at 19–20. But there is no reasonable case to be made that any of this information, even in redacted form, would reveal the identity of the complainant. This Board should not allow the Division to entitle itself to unquestioned, blind belief when it asserts that it could not give **any** useful information in its warrant application. And in any event, the requirements of the Constitution rather than the Division's unsupported assertions should control the issue of suppression.

ii. This Board owes no special deference to the issuing judge because it is not reviewing the warrant on appeal, and any deference due is overcome.

The Division continues with its mischaracterization of this Board's suppression proceedings as a type of appellate review of the Superior Court when it makes its argument regarding a "de nova [sic]" standard of review. The cases it cites for its assertion that a high level of deference is owed to the Superior Court are all in the context of appellate review. However, this Board's proceedings are not appellate in nature, but rather a determination of what evidence it will admit or preclude from its own proceedings. To make that determination, it need not pay homage to the findings of any other court, because it is vested with the "full power, jurisdiction and authority" to "hear and determine all issues of fact and law presented . . . ." Cal. Code Regs. tit. 8, § 350.1.

But even if this Board owed deference to the Superior Court's issuance of a warrant, that deference is not insurmountable and is overcome here. Even through the lens of deference, the warrant application is entirely unsupportable here. While the Division now asserts that the complaint was not anonymous and that an Academy employee who did not wear a mask outside was enough to suspect violations, it never said as much to the Superior Court judge in the Haskell

Declaration. The Division even failed to allege that it believed violations were ongoing—the crux of the standard for probable cause. The astonishing lack of detail in the affidavit necessitates correction from this Board to instruct against future similar violations.

iii. This Board should not review the Good Faith Defense for the first time during reconsideration, but any such defense is overcome.

The Division, either by choice or by negligence, decided not to raise the good faith defense in front of the ALJ when it opposed the Motion to Suppress. It now seeks to make the defense its ticket to reconsideration. However, that effort fails for two reasons. First, this Board should refuse to allow reconsideration petitions to be overrun with arguments presented for the first time; such arguments are properly deemed waived. But even if this Board considers the good faith defense, the Division's arguments are ultimately uncompelling.

First, this Board should hold that the Division's argument of the good faith defense was waived when it failed to present it to the ALJ. This is supported by this Board's ruling in its precedential decision in *In re Bimbo Bakeries*, which held that an argument was waived when it was made for the first time in a post-hearing brief. No. 03-R1D3-5217, 2010 WL 2706195, at *9 (Cal. Occ. Safety & Health Appeals Bd. June 9, 2010) (decision after reconsideration). This is sufficiently analogous to be instructive here because the same principles of fair play, judicial economy, and what the Board in *In re Bimbo Bakeries* called "gamesmanship" apply here. *Id.* It is disruptive to this Board's processes when parties make arguments for the first time on reconsideration that do not have the benefit of a ruling from the ALJ to provide a starting point for review. And it is unfair to not just the adverse party, but to the Board to review an error a party never claimed. This Board should thus refuse to consider the good faith exception.

However, even if this Board does consider the exception, the affidavit the Division presented is still deficient. The exception allows the introduction of illegally obtained evidence if exclusion would only serve to punish officials who acted in good faith for the errors of the magistrate. *Leon*, 468 U.S. at 919–20. This is in keeping with the primary purpose of the exclusionary rule—deterring officials from improperly asking for warrants. *Id.* at 916. However, there are three exceptions to the rule. First, the exception will not apply if the government

officials misled the magistrate with their affidavit. *Id.* at 923. Second, the exception does not apply if the government officials could not have reasonably believed that a warrant would properly issue. *Id.* Third, the exception will not apply if the issuing judge "wholly abandoned his judicial role" in granting the warrant. While all three of these arguably apply, the first and second are particularly applicable here.

When an affidavit is misleading—through negligent, reckless, or dishonest preparation—suppression is appropriate, and the good faith exception does not apply. *See id.* at 926; *People v. Ivey*, 228 Cal. App. 3d 1423, 1426–27 (1991).[7] As noted in the Employer's Motion to Suppress, the Division was misleading in its affidavit in several respects. First, the Declaration deliberately omitted the fact that face coverings were not required outdoors when it mentioned that inspectors observed Ms. Wood step outside "not wearing a face covering." Haskell Decl. ¶ 4. This was clearly meant to convey the impression that the inspectors had witnessed some type of violation. However, as the ALJ correctly noted, there was "no statement in the declaration that the Division inspectors observed any behaviors that would give rise to a violation of any safety orders." To the extent the Division attempted to characterize its interactions with Ms. Wood as a violation, it was misleading.

Second, the Division misled the issuing judge on the legal standard regarding issuance of the warrant. The Haskell Declaration reads that "[c]ause for issuance of a warrant shall be deemed to exist '. . . if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division." Haskell Decl. ¶ 10 (citing Cal. Lab. Code § 6314 (b)). The Division left its recitation of legal cause for issuance of the warrant at that one sentence. The Division neglected to provide any mention of the constitutional standard required by the Fourth Amendment, which cannot be superseded by state statute. Section 6314(b) is not a definition of the probable cause standard required under the Fourth Amendment; it is in fact a separate, additional statutory standard that the Division must meet. The Division left this distinction either deliberately, negligently, or ignorantly blurred.

[7] While the Division claims that the Employer must show that the affiant was "intentionally withheld information or was dishonest," Pet. at 29, it cites no authority for that contention, and this is contra to both *Leon* and *Ivey*.

Third, the Haskell Declaration misled the court by stating that Cal. Lab. Code § 6321 required the waiver of the twenty-four hour notice provision in the Civil Procedure Code, allowing for immediate execution of the warrant. Haskell Decl. ¶ 12. The Code of Civil Procedure provides that when administrative warrants are granted, "[w]here prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown." Cal. Civ. Proc. Code § 1822.56. The Declaration made no pretense to show that waiver was "reasonably necessary," and indeed with its "circumstances shown" hardly could—the warrant was sought 11 days after the Academy declined consent to inspect. Rather, the Declaration asserted only that waiver was appropriate "[b]ecause Labor Code section 6321 prohibits giving advance notice of an inspection." Haskell Decl. ¶ 12. That statute reads, in pertinent part, "No person or employer shall be given advance warning of an inspection or investigation by any authorized representative of the division unless authorized under provisions of this part." Cal. Lab. Code § 6321.

The Division thus held out Section 6321 as being in conflict with Section 1822.56. It cited no case law for this position, and indeed it could not have: there is none. In fact, other cases before this Board have held the opposite. *See In re Forty-Niner Sierra Resources, Inc.*, No. 90-R2D4-165, 1991 WL 528425, at *7 (finding that Section 6321 is a direction to the Chief of the Division, not to courts issuing inspection warrants; judges can consider the statute as a factor in determining whether to waive the requirements of Section 1822.56, but the facts ultimately provide the basis for waiver). The Division, being the same entity that prosecuted the citations in cases like *In re Forty-Niner Sierra Resources*, knew or should have known that its interpretation of the law was erroneous, but it still proceeded to put it on the affidavit. That destroys a claim of "good faith."[8]

Beyond these points, the good faith exception doesn't apply because the Division could

[8] Further compelling this conclusion is that the Division's interpretation of Section 6312 as prohibiting all communication that an inspection may take place at an unspecified future time would mean that Division counsel Lisa Brokaw confessed to a misdemeanor in her affidavit. *See* Brokaw Decl. (detailing communications with Mariah Gondeiro, counsel for the Academy); Cal. Lab. Code § 6321 (making it a misdemeanor to give advance notice of an inspection).

not have reasonably believed it had probable cause for a warrant. The standard for determining whether a lack of probable cause undercuts the good faith exception is whether or not "'a well-trained officer should reasonably have known that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant).' An officer applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits." *People v. Pressey*, 102 Cal. App. 4th 1178 (2002) (quoting *People v. Camarella*, 54 Cal. 3d 592, 596 (1991)).

In this case, the Declaration did not contain the most basic components that would have shown probable cause: facts surrounding the receipt of the complaint, the factual substance of the complaint, or even an averment that the Division believed violations were ongoing or that the health and safety of employees was endangered. The Division cannot in good faith claim that it reasonably believed such a warrant was sufficient.

To summarize, this Board should decline to hear the Division's arguments on the good faith exception because they were not made before the ALJ, but are brought for the first time on reconsideration. But even the good faith exception would not save the Division's affidavit. Unless this Board affirms the suppression order, the Division will have no incentive to change its behaviors and will continue to apply for warrants without showing probable cause. This is exactly what the exclusionary rule operates to prevent, and it should so operate here.

CONCLUSION

For all the foregoing reasons, the Academy respectfully requests that this Board affirm the order suppressing evidence.

Respectfully submitted,

October 30, 2022
/s/Nicolai Cocis
Nicolai Cocis
TYLER & BURSCH, LLP
Counsel for Employer

PROOF OF SERVICE

In the Matter of the Appeal of
Calvary Chapel of San Jose dba Calvary Christian Academy
Inspection Number 1564732

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 25026 Las Brisas Rd., Murrieta, California 92562.

On 10-30-22, I caused to be served the foregoing documents described as **EMPLOYER'S ANSWERING BRIEF OPPOSING PETITION FOR RECONSIDERATION** on the interested parties in this action

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list: **(SEE ATTACHED MAILING LIST)**

☐ **BY MAIL**

☐ I deposited such envelope in the mail at or near Murrieta, California. The envelope was mailed with postage thereon fully prepaid.

☐ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at or near Murrieta, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE**

Such envelope was delivered by hand to the office(s) of the addressee(s).

☒ **BY E-SERVICE/FACSIMILE TRANSMISSION**

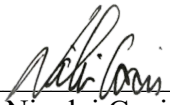
I caused all of the pages of the above-entitled document to be sent to the recipient(s) noted below via electronic transfer (facsimile) at the respective telephone numbers indicated above.

Kathryn Tanner, Staff Counsel, Division of Occupational Safety & Health
1515 Clay Street, Suite 1901
Oakland, CA 94612
Email: ktanner@dir.ca.gov

☐ **OVERNIGHT MAIL**

I caused such all of the above-described documents to be served on the interested parties noted above by Overnight Mail.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Nicolai Cocis