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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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO SUPPRESS EVIDENCE**

The Division has misapprehended the very nature of a motion to suppress. Their Opposition to the Employer's motion contends that suppression would require this Board to step outside of its authority to "invalidate" an action of the Superior Court. Contrary to the Division's contention, this motion is actually about this Board's authority to regulate for itself the evidence it decides to admit for its own proceedings. More fundamentally, however, State case law makes clear that it is well within this Board's purview to assess the constitutionality of an inspection warrant—and the binding precedent of this Board makes clear this is not an optional duty.

I. <u>This Board has the legal authority to asses an affidavit presented in support of an inspection warrant and to rule on the admissibility of evidence.</u>

The Division has claimed that this Board does not have the authority to invalidate a warrant from the Superior Court. However, the California Supreme Court, has long ago rejected the argument that the Division now brings. In in *Goldin v. Pub. Utilities Comm'n*, the Court held that

administrative agencies have the authority to make their own assessments of affidavits presented for warrants during their judicial proceedings. 23 Cal. 3d 638, 668–69(1979). In that case, the Public Utilities Commission made such a determination during their proceedings, which was challenged on appeal. The holding of the court was unequivocal:

> 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 [the agency's] 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.

Despite this, the Division protests the fact that 8 C.C.R. § 350.1 does not enumerate the power "to review the actions and decisions of a Superior Court Judge in the issuance of a warrant" or to issue a warrant. What Section 350.1 does provide, however, is the broad authority for administrative law judges to "rule on objections, privileges, defenses, and the receipt of relevant and material evidence . . . ." Further, administrative law judges are empowered "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 . . . ." Simply put, this Board has the legal authority to make an assessment of the affidavit presented in support of the inspection warrant, and it is not forced to admit evidence gained in violation of the Fourth Amendment. This Board can—and must—make its own independent assessment.

The Division further objects that the Academy should have sought a remedy at the Superior Court. However, what the Division fails to state is that the Academy had no opportunity to seek a remedy because the warrant application was an *ex parte* proceeding. The Academy was not invited to the hearing and was given no opportunity to be heard. To compound this, the Division expressly sought (and was granted) a waiver of the twenty-four-hour notice provision. This means that the Academy had no opportunity to be heard even after the warrant was issued before it was executed. After it was executed, it was too late—the inspection had already happened; "invalidating" the warrant would have

accomplished nothing.

The Division's fundamental misconception of the suppression proceedings is further evidenced by their suggestion that the Academy should have made a motion under *Franks v. Delaware*, 438 U.S. 154 (1978), and *Cnty. of Contra Costa v. Humore*, 45 Cal. App. 4th 1335 (1996). This type of motion is attached to a civil or criminal action in the Superior Court and invalidates the warrant and the evidence obtained thereby for the purposes of trial. *See Franks*, 438 U.S. at 163 (noting that the effect of quashing a warrant is to bar the use of evidence at trial). However, the Academy could not seek such a remedy because there is no impending civil or criminal trial in the Superior Court in which to make the motion. Further, a disposition on an evidentiary objection like suppression in the Superior Court would not be binding on this Board, which has vastly different rules of evidence than traditional courts. *See People v. Gallegos*, 54 Cal. App. 4th 252 (1997) (discussing generally how a grant of suppression in one case is not usually binding in subsequent actions); 8 C.C.R. § 376.2 (noting that "[t]he hearing need not be conducted according to technical rules relating to evidence and witnesses."). Because of this, the Academy's only effectual remedy is in front of this Board.

II. The fact that this Board is not bound by the Penal Code is irrelevant because statute, case law, and regulation equip this Board to suppress evidence.

The Division spends many pages making the point that the Penal Code does not apply to this Board. This was never in dispute; *see* Mot. at 9. The Division's real argument is that this Board cannot entertain a motion to suppress because no statute or regulation explicitly provides for this specific type of motion.

If this were the case, there would be very few motions this Board could ever hear, as the Labor Code and the Code of Regulations never provide a list of allowed motions and procedures.[1] *See generally* Cal. Lab. Code div. 1, ch. 6.5 (statutory authorization of the Board); 8 C.C.R. div. 1,

[1] Of note, the Board regularly engages in legal analysis outside the bounds of regulation or statute, including the creation of its own affirmative defenses. *See, e.g.*, *In re Bay Cities Paving & Grading, Inc.*, No. 12-R2D1-1665, 2004 WL 2624399, at *4 (Cal. Occ. Safety & Health Appeals Bd. May 16, 2014) (decision after reconsideration) (discussing the logical time defense, which "is a Board created affirmative defense.").

ch. 3.3 (regulations pertaining to the Board). In fact, statute explicitly gives control of procedure to the Board. *See* Cal. Lab. Code § 148.7.[2] At any rate, suppression is not at its core a statutory remedy, but a judicial one; while many states have codified the motion, the procedure was created by the Supreme Court. *See United States v. Calandra*, 414 U.S. 338, 348 (1974) (noting that the exclusionary rule is "a judicially created remedy . . . .").

The Division's argument misses the broader point, however. The Code of Regulations explicitly vest this Board with the broad power to "rule on objections, privileges, defenses, and the receipt of relevant and material evidence . . . ." 8 C.C.R. § 350.1. Suppression is an evidentiary tool that functions purely to exclude or include evidence. As such, it fits plainly within the meaning of the rule.

Binding decisions of this Board make additionally clear that suppression is an applicable tool. The Division attempts to distinguish *In re Bimbo Bakeries USA* on the grounds that a warrant was never procured in that case, but it was forced to admit that the case 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. at 5; No. 03-R1D3-5217, 2010 WL 2706195, at *10 (Cal. Occ. Safety & Health Appeals Bd. June 9, 2010) (decision after reconsideration). Another precedential decision, *In re Rudolph and Sletten, Inc.*, expressly considered 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?" No. 01-R1D5-478, 2004 WL 817770 (Cal. Occ. Safety & Health Appeals Bd. March 30, 2004) (decision after reconsideration) (emphasis added); *see also In re Forty-Niner Sierra Res., Inc.*, No. 90-R2D4-165, 1991 WL 528425, at *7 (Cal. Occ. Safety & Health Appeals Bd. July 15, 1991) (decision after reconsideration) (noting that the original proceedings included a hearing on a motion to suppress that the Board heard). The Division thus cannot sustain its claim that this Board has no ability to hear a motion to suppress.

[2] While the Division complains that no suppression procedure exists in the Code of Civil Procedure, those rules are as equally inapplicable here as the Penal Code. Additionally, the Division cites Cal. Penal Code § 1538.5(b) to dispute this Board's authority to hear a motion to suppress, which is inconsistent with its argument that the Penal Code should not be applied.

III. The affidavit presented to the Superior Court was grossly insufficient to show probable cause, making suppression proper.

The Division lastly asserts that probable cause did actually exist. However, the Division could not even cite the correct standard for probable cause. While the Division cited to the Code of Civil Procedure § 1822.52 for the relaxed standard ("reasonable legislative or administrative standards"), the California Court of Appeals has bluntly stated that "[t]he 'cause' standard for administrative inspections provided in Code of Civil Procedure section 1822.52 will not apply to Cal/OSHA inspections." *Salwasser Mfg. Co. v. Mun. Ct.*, 94 Cal. App. 3d 223, 231–32. Instead, that court (on Salwasser's second trip to court) applied the standard that federal courts have applied to federal OSHA warrants predicated on evidence of a violation. *Salwasser II*, 214 Cal. App. 3d at 632. That standard is succinctly summed up in *Marshall v. Horn Seed Co.* as "some plausible basis for believing that a violation is likely to be found." 647 F.2d 96, 102 (10th Cir. 1981). California courts have further held that a judge 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*, 45 Cal. App. 4th at 1347 (1996).

Tellingly, the Division discusses none of the detailed factors or considerations outlined in the Academy's motion. Rather, the Division argues that the "public interest" was at stake when it made the determination to inspect the Academy. This, of course, is not the standard for probable cause—although it is an *additional* hurdle the Division must cross. *See Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1319 (7th Cir. 1980) (holding that "[t]he administrative probable cause standard requires that any inspection be reasonable: the public interest in the inspection must outweigh the invasion of privacy," but also in the same paragraph that, among other things, "the application must at least inform the Magistrate of the substance of the employee complaints, so that the Magistrate may exercise independent judgment . . . rather than acting as a mere rubber stamp . . . .").

Held up to the standard of the law, the Division's affidavit hopelessly fails. The Division

tries to save it with a number of assertions: that the complaint received alleged the Academy was not complying with outbreak reporting requirements, that the public had a strong interest in quelling the spread of Covid-19, that the Division inspectors believed that Ms. Wood was not wearing a mask inside the building, that the complaint was sincere, and that the representatives of the division believed that violations of the mask mandate were committed and ongoing at the Academy. However, none of these newly minted assertions—raised more than 8 months after the inspection warrant was issued—were included in the Haskell Declaration. The issuing judge never saw these allegations. When reviewing the sufficiency of a warrant application, only "the evidence before the Magistrate at the time of application" can be considered. *Id.* As it stands, the Haskell Declaration alleged only that a complaint about "face masks" was received and that Ms. Wood was not wearing a mask *outside* the building.

Even if the Division had alleged in the Haskell Declaration that it reasonably believed that Ms. Wood was not wearing a mask *indoors* because they observed her *outdoors* without one, the application would still fall flat. The California courts have made abundantly clear that lawful activity cannot be used to assert probable cause that unlawful activity is occurring. *See, e.g.*, *People v. Hall*, 57 Cal. App. 5th 946 (2020) (holding that the presence of a legal amount of marijuana in a car could not support probable cause to search the car for illegal quantities). Thus, seeing Ms. Woods step outside without a mask—where she was not obligated to wear one—cannot be used as a basis for asking for a search warrant.

The Division obscures its failures behind a veil of confidentiality, noting that the Labor Code "prohibits the Division from revealing the identity of complainants." Opp. at 7. Contrary to the Division's assertion, the Academy never suggested in its motion that the Division was required to disclose the name of complainants. The Academy rather argued that "[w]hile the Division cited confidentiality concerns to the Academy when refusing to divulge information, it could easily have kept confidentiality by redacting the name of the complainant . . . . Confidentiality does not provide a basis for the rest of the complaint to be kept entirely hidden . . . ."). Mot. at 14.

In sum, if the Division believed that violations were ongoing at the Academy, it should have said so. If it believed that Ms. Wood was not wearing a mask indoors, it should have said so. If the

Division believed that the public interest demanded a search, it should have said so. If the division received complaints it deemed "sincere," it should have said so. If the division suspected that reporting requirements were not being followed, it should have said so. But it did not. None of this information was included in the affidavit presented to the issuing judge. The boilerplate contentions the Haskell Declaration made were insufficient to show probable cause. For that reason, this Board should GRANT the Academy's motion to suppress and exclude all evidence obtained as a result.

Respectfully submitted,

/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 08-16-22, I caused to be served the foregoing documents described as **EMPLOYER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO SUPPRESS EVIDENCE** 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)**

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☐ 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**

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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
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☐ **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