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BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **CALVARY CHAPEL OF SAN JOSE dba CALVARY CHAPEL ACADEMY**, Employer	Appeal No. 1564732 **DIVISION'S PETITION FOR RECONSIDERATION OF ORDER ON MOTION TO SUPPRESS EVIDENCE**

TO THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD AND TO EACH PARTY AND REPRESENTATIVE FOR EACH PARTY IN THIS ACTION:

The Division of Occupational Safety and Health ("Division") hereby petitions the Occupational Safety and Health Appeals Board (Board), pursuant to Title 8, California Code of Regulations §§389, 390, 390.1 and 390.3[1] to reconsider the "Order on Motion to Suppress Evidence" ("order") of its Administrative Law Judge ("ALJ") served on September 2, 2022. This petition relies upon the points and authorities herein as well as the documents filed with the Board to date in this appeal.

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

I.

INTRODUCTION AND STATEMENT OF RELEVANT FACTS

The Division received a complaint on November 16, 2021 that employer Calvary Chapel of San Jose dba Calvary Chapel Academy ("Employer" or "the Academy") was not complying with §3205, COVID-19 Prevention, face covering and outbreak reporting requirements. Two Division inspectors went to the business location on November 18, 2021. The school administrator for the academy denied them entry to conduct an inspection and directed the inspectors to contact the Academy's lawyer. On November 29, 2021, Division inspector Haskell sought and was granted an inspection warrant by a judge of the Superior Court of Santa Clara County. The inspection authorized representatives of the Division to inspect the business premises between the hours of 7 a.m. and 6 p.m. On November 30, 2021, the inspectors returned to the business location with the warrant and conducted the inspection. As a result of the inspection, the Division issued twelve citations (eight general classification and four serious classification) to employer on March 10, 2022 for health and safety violations. Employer filed an appeal of the citations on March 21, 2022.

On July 18, 2022 employer filed a Motion to Suppress Evidence alleging the following:

1. The Division failed to show probable cause as required by the Fourth Amendment when it obtained its inspection warrant because the declaration of the Division inspector was not adequate detailed about the nature of the complaint.

2. Employer further alleged that the declarations filed by the Division misled the court and that therefore the Good Faith Exception does not apply.

3. Employer also alleged that the Division infringed upon the Academy's reasonable expectation of privacy, arguing that the business owners for the Academy had the same expectation of privacy as private homeowners.

The Division timely opposed employer's motion, arguing, among other things:

1. The Board does not have authority to review the declarations supporting inspection warrant issued by a judge of the superior court.

2. The declaration of the Division inspector was adequate to establish administrative probable cause for the issuance of the inspection warrant (a lower bar than probable cause for criminal search warrants).

3. The Academy did not have the same expectation of privacy in its business premise during its hours of operation as one has in a private home.

The ALJ issued an order granting employer's motion to suppress evidence on September 2, 2022. The Order held that the Appeals Board does have authority to review the validity of the warrant, based on *In re Forty-Niner Sierra Resources, Inc.*, Cal/OSHA App. 90-165, Decision After Reconsideration (July 15, 1991) and *Kaiser Steel Corporation, Steel Manufacturing Group*, Cal/OSHA App. 80-826, Decision After Reconsideration (Sept. 30, 1981). The ALJ further held that the declaration of the Division's inspector in support of the administrative inspection warrant did not contain sufficient detail to establish administrative probable cause.

The order of the ALJ excludes as evidence:

"1. Any and all statements allegedly made by Employer's staff during the illegal inspection;

2. Any and all observations made by Division agents as a result of their entry into and search of Employer's school premises, and any testimony based thereon;

3. Any and all photos, videos, or notes made by Cal/OSHA agents as a result of their entry into the school and search thereof; and

4. All evidence, whether tangible or intangible, that could be considered 'fruit of the poisonous tree.'"

II.

BASIS FOR PETITION FOR RECONSIDERATION

The exclusion of this evidence effectively prevents the Division from presenting its prima facie case at hearing in support of the twelve health and safety citations. The Division therefore seeks reconsideration pursuant to Title 8 CCR §390. This section states, "[a] party aggrieved by

an order or decision may, within 30 days of service of such order or decision, petition the Appeals Board for reconsideration with respect to any matters determined or covered by the order or decision." Title 8 CCR §390.1 sets forth five possible grounds for a petition for reconsideration:

(1) That by the order or decision the Appeals Board acted without or in excess of its powers;

(2) That the order or decision was procured by fraud;

(3) That the evidence received by the Appeals Board does not justify the findings of fact;

(4) That petitioner has discovered new material evidence which the petitioner could not, with reasonable diligence, have discovered and produced at the hearing;

(5) That the findings of fact do not support the order or decision.

The Division therefore seeks reconsideration on the following grounds under Labor Code § 6617 and Title 8 CCR § 390.1:

1. By the ALJ's order granting employer's motion to suppress evidence, the Board acted in excess of its powers. The ALJ relied on two DARs from 1981 and 1991. In both of those appeals, the Board interpreted *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638 (*Goldin*) as granting the Board the authority to assess the declarations presented in support of a warrant. The Board did not distinguish the holding in *Goldin*, which discussed the powers of the California Public Utilities Commission (Commission) only, from its own powers. However, as will be discussed below, the Commission is a much different entity than the Board, with a broader grant of authority by the California Constitution and Legislature. The same authority does not inherently cross-apply to the Board simply because it is a state administrative tribunal. Therefore, the Board acts in excess of its powers to summarily decree that it has authority to review declarations supporting inspection warrants, and should reverse its prior holdings on this issue and should reverse the ALJ's order in this appeal. Neither of the DARs relied upon by the ALJ, *In re Forty-Niner Sierra Resources, Inc.*, Cal/OSHA App. 90-165, Decision After Reconsideration (July 15, 1991) and *Kaiser Steel Corporation, Steel Manufacturing Group*,

Cal/OSHA App. 80-826, Decision After Reconsideration (Sept. 30, 1981), have been deemed precedential by the Board in accordance with Government Code section 11425.60.

2. The employer attempted to procure the order of the ALJ by fraud. In its motion to suppress, employer incorrectly states that the standard for the Division to obtain a warrant. Employer's motion states, "[s]ince most administrative inspections (e.g., housing inspections under a municipal code) do not have the primary purpose of revealing criminal activity, a warrant can be obtained by showing that a reasonable legislative or administrative standard for inspection was met by the premises. *Camara*, 387 U.S. at 538. However, this standard does not apply to the Division since Cal/OSHA violations can carry criminal as well as civil penalties; the Division was required to show to the Superior Court judge that the Division reasonably believe a violation was ongoing. *Salwasser Mfg. Co. v. Mun. Ct.*, 94 Cal. App. 3d 223, 231-33 (1979) (*Salwasser I*)." (Employer's motion, p. 9, emphasis added.) The *Salwasser* case was further appealed and a judge for the Court of Appeal held that the standard for issuance of a Cal/OSHA inspection warrant upon an employee complaint was *not* criminal probable cause standard but was rather the lesser standard of administrative probable cause. *Salwasser Mfg. Co. v. Occupational Safety. & Health Appeal Bd.*, 214 Cal. App. 3d 625, 629 (1989) (*Salwasser II*).

3. If *arguendo* the Board has authority to assess the validity of declarations in support of inspection warrants, the evidence received by the Appeals Board does not justify the finding of fact that the warrant is insufficient on several grounds. The order refers to dicta from cases in other jurisdictions to set a higher bar for the sufficiency of the declaration. The order also does not give due consideration to the Division's duty to keep the identity of the complainant confidential. The order does not give due deference to the conclusion made by the superior court judge that the declaration was sufficient. Finally, this order does not consider the good faith exception in its analysis. Therefore, the order of the ALJ should be reversed.

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III.

LEGAL ARGUMENT

A. The Board May and Should Consider this Interlocutory Petition for Reconsideration.

The Division's Petition for Reconsideration, which seeks review of the ALJ's order suppressing the Division's evidence, is interlocutory in nature. "'An interlocutory order is one issued by a tribunal before a final determination of the rights of the parties to the action has occurred.'" (*Fedex Ground,* Cal/OSHA App. 13-1220, Decision After Reconsideration (Sept. 17, 2014), citing *Gardner Trucking, Inc*., Cal/OSHA App. 12-0782, Denial of Petition for Reconsideration (Dec. 9, 2013).) Typically, the Board will not grant reconsideration of an interlocutory ruling. (*Fedex Ground, supra*, Cal/OSHA App. 13-1220.)

In *FedEx Ground*, the Board "recognized that there are exceptions to this rule, which do allow appeals of interlocutory orders, 'such as those involving questions of law, orders which are effectively final regarding issues independent of a case's merits, or matters which are final as to a particular person.' In deciding whether to grant an interlocutory order, the Board may consider 'general principles' 'followed by the courts' that allow for interlocutory review." (*Id*. citing to *Muse Trucking Company*, Cal/OSHA App. 03-4535, Denial of Petition for Reconsideration (Dec. 24, 2004).)

Here, the Board has not considered whether the Division's evidence supports the twelve citations as there has been no hearing. Instead, employer sought to suppress the evidence gathered by the inspectors prior to any hearing on the merits. This order will effectively cause a final dismissal of the citations, independent of the merits of the Division's evidence, because the Division will have insufficient evidence to present its prima facie case. If this order stands, the citations will be rendered void and Employer will be allowed to violate California's health and safety regulations without consequence. To avoid this miscarriage of justice, the Board should grant interlocutory reconsideration of this Order.

B. The Board Does Not Have Constitutional Authority to Review a Superior Court Decision and Therefore Acted in Excess of its Powers.

Through its motion, Employer sought to suppress any evidence gained by the division in its inspection of employer's business premises. Employer argued that the affidavits in support of the division's application for inspection warrant were insufficient to establish "probable cause."

Title 8 CCR §350.1 sets forth the specific authority granted to Administrative Law Judges of the Board. The Board has broad authority for overseeing the administrative hearing process. Notably absent from the list of powers in §350.1 is the power to issue an inspection warrant. That power remains vested with a "judge of a court of record." Code of Civil Procedure §1822.50. A "court of record" as defined by article VI, section 1 of the California Constitution does not include an administrative tribunal. (*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1103.) Only the Superior Court has the legal authority to issue inspection warrants; no concurrent authority exists for the Board. Both the Labor Code and the Code of Civil Procedure grant the authority to review an application for inspection warrant only to a judge of the Superior Court. Cal. Labor Code § 6314 and Code of Civil Procedure §1822.53. In fact, the Board has no jurisdiction during a Cal/OSHA inspection, and only has jurisdiction after citations are issued and an employer appeals.

1. **Board Review of the Superior Court's Finding of Administrative Probable Cause for the Issuance of an Inspection Warrant Violates the California Constitution by Divesting the Courts of Original Jurisdiction Conferred on them by California Constitution.**

The California Constitution Article VI, section 10, confers the original jurisdiction of the courts. This states, in part:

> "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction. [¶] **Superior courts have original jurisdiction in all other causes**." (emphasis added.)

On its face, Article VI, section 10 states that the superior courts have original jurisdiction in "all other causes." Its plain meaning indicates that the superior court has original jurisdiction to review applications for inspection warrants.

The California Constitution Article VI, section 11 confers Appellate jurisdiction and states in part: "[C]ourts of appeal have appellate jurisdiction when superior courts have original jurisdiction…." The plain meaning of this section dictates that the appellate court is the judicial body responsible for reviewing any superior court decision for error, not the Appeals Board. Because the language in both sections 10 and 11 "is clear and unambiguous" its "plain meaning governs." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444–445, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

2. **The Legislature May Not Curtail the Jurisdiction Vested in the Courts by the California Constitution unless the Constitution itself gives the Legislature Such Power.**

Because the California Constitution vests original jurisdiction in these courts, the Legislature is not free to defeat or impair that jurisdiction. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 252–253, 135 Cal.Rptr.3d 683, 267 P.3d 580.) This maxim is enshrined by more than one hundred years of precedent. (See *Chinn v. Superior Court* (1909) 156 Cal. 478, 480, 105 P. 580 ["where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the legislature cannot either limit or extend that jurisdiction"]. See also *Gerawan Farming, Inc. v Agricultural Labor Relations Bd*. (2016) 247 Cal.App.4th 284, 294, 202 Cal.Rptr.3d 713 [Legislature does not have power to "defeat or impair" the courts' jurisdiction].)

Unless the Constitution itself gives the Legislature such power, the Legislature may not curtail the jurisdiction vested in superior courts by the constitution. (See *Pacific Telephone and Telegraph Co. v. Eshleman* (1913) 166 Cal. 640, 652 & 689, 137 P. 1119; *Great Western Power Co. v. Pillsbury* (1915) 170 Cal. 180, 182–183, 149 P. 35 ["in the absence of some special constitutional authorization," Supreme Court's jurisdiction may "not be take away or impaired by legislative act"]. See also *Gerawan Farming*, supra, 247 Cal.App.4th at p. 294, 202 Cal.Rptr.3d 713 ["statutes barring judicial review of certain administrative decisions except in the Courts of Appeal and/or Supreme Court have been upheld, but only where the Legislature's authority to

enact such laws was found to be expressly or impliedly granted by other constitutional provisions"].)

Thus, the superior court can be diverted of its original jurisdiction under article VI, section 10 of the California Constitution and the appellate court divested of its appellate jurisdiction under article VI, section 11 only if the Legislature enacts a law pursuant to authority expressly or impliedly conferred on it by other constitutional provisions. Applying these principles to the present case, in order to defeat the courts' original jurisdiction to determine and review the inspection warrant, the Board would have to show that there is a constitutional provision that allows the Legislature to grant jurisdiction to the Appeals Board to review superior court decisions regarding inspection warrants. The Board would also have to show that the Legislature actually granted that authority to the Appeals Board via statute.

Here, there is no constitutional provision that allows the Legislature to grant jurisdiction to the Board to review decisions made by the superior court. Moreover, there is no indication that the Legislature actually intended to grant or did grant that authority to the Board via statute. In fact, the operative statute grants authority to the superior court as discussed below.

If the Legislature is not free to defeat or impair the courts' original jurisdiction absent a constitutional provision giving it express or implied authority to do so, the Board certainly may not. Here, the ALJ's order violates the Constitution by impairing the original jurisdiction of the superior court to grant or deny an application for an inspection warrant, and to entertain a motion to quash or traverse the inspection warrant if Employer believed it was improperly obtained. The ALJ's conclusion also impairs the original jurisdiction of the appellate court by divesting the court of the opportunity to review the lower court's determination and erroneously allowing the Board to appropriate that authority instead.

3. **The Appeals Board Does Not have Statutory Authority to Review a Superior Court decision.**

The Legislature granted the superior court jurisdiction to determine the validity of an application for an inspection warrant consistent with the court's constitutional authority. (Cal

Const., Art. Article VI, section 10, Code of Civil Procedure (CCP) section 1822.50 et seq. and Labor Code section 6314.) Labor Code Section 6314(b) provides that:

> "If permission to investigate or inspect the place of employment is refused, or the facts or circumstances reasonably justify the failure to seek permission, the chief [of the Division] or his or her authorized representative may obtain an inspection warrant pursuant to the provisions of Title 13 (commencing with Section 1822.50) of the Code of Civil Procedure."

Code of Civil Procedure §1822.50 provides:

> "[a]n inspection warrant is an order, in writing, in the name of the people, ***signed by a judge of a court of record,*** directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning.(emphasis added)"

California Constitution, Art. VI , Sec. 1 states: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, *all of which are courts of record*.(emphasis added)." An administrative tribunal, however, is not a "court of record" as defined by article VI, section 1 of the California Constitution. (*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd*. (2002) 99 Cal.App.4th 1094, 1103.)

The procedures for obtaining an inspection warrant are set forth in CCP section 1822.50 et seq. (aka Title 13). Title 13 is contained in Part 3 of the Code of Civil Procedure (CCP sections 1067 - 1822.60) which is entitled "Of Special Proceedings Of a Civil Nature." Part 3 confers upon the court broad powers to act in "special proceedings" such as Summary Proceedings, Contempt, Enforcement of Liens, Eminent Domain, and Inspection Warrants to name a few.

The superior court's authority in Part 3 includes the power to command a state official to conduct an inspection as required by state law. (CCP section 1822.50.) Given the expansive scope and breadth of the superior court's authority in Part 3, the Board's conclusion that it, as an administrative tribunal, has the power to review a decision of the superior court in a special proceeding cannot stand, particularly without reference to any constitutional or statutory provision allowing for such. In fact, the Board is an administrative tribunal of limited jurisdiction and that jurisdiction does not begin until a citation has been issued and a timely appeal filed by

the Employer. (See Labor Code sec. 6600 et seq.) The Board lacks jurisdiction to act during the investigative stage of enforcement proceedings and the Board cannot issue an inspection warrant. It simply makes no sense to conclude the Legislature intended to grant the Board authority to review and nullify an inspection warrant if it never had the power to issue it in the first place.

4. **The Board's Purported Authority to Review the Superior Court's Finding of Administrative Probable Cause to Issue an Inspection Warrant Derives from a Misapplication of the Holding in *Goldin v. Public Utilities Commission*.**

The ALJ Order in this case relied on two prior Board decisions (*In re Forty-Niner Sierra Resources, Inc.*[2] and *Kaiser Steel Corporation, Steel Manufacturing Group*[3]*)* in concluding that it has jurisdiction to review the underlying administrative probable cause determination made by the superior court before issuance of the inspection warrant. Those decisions do not cite any constitutional or statutory authority enabling the Board to review a superior court decision. Instead, both cases relied on a Supreme Court decision in *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638 [*Goldin*] which analyzed the scope of authority granted to a different state agency.

***a. Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638**

In *Goldin*, the California Supreme Court was asked to review certain procedures created by the Commission known as Rule 31. Rule 31 established procedures governing termination of telephone service when it was believed that the subscriber was using the service for illegal purposes. The rule permitted summary termination of telephone service after a finding by a magistrate that there was probable cause to believe the subject telephone facilities were being used to facilitate illegal acts and that the character of such acts was such that, absent immediate and summary action in the premises, significant dangers to public health, safety or welfare would result. After a summary termination, a telephone subscriber could file a complaint with the

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[2] Cal/OSHA App. 90-165, Decision After Reconsideration (July 15, 1991)

[3] Cal/OSHA App. 80-826, Decision After Reconsideration (Sept. 30, 1981)

Commission seeking restoration of interim phone services and a hearing to determine whether service should be permanently restored or discontinued.

Petitioner, the operator of a telephone answering service, filed a complaint with the Commission after his telephone service had been disconnected based upon alleged use of the service for illegal purposes. The Commission restored Petitioner's telephone service on an interim basis but ultimately determined that the petitioner was using the telephone service for an illegal purpose and that termination of petitioner's service was proper. Petitioner sought judicial review, raising various constitutional claims.

The California Supreme Court held (among other things) that promulgation of Rule 31 by the Commission was within the Commission's jurisdiction. The Court also held that the Commission, in accordance with the procedures it created under Rule 31, had authority to review a magistrate's finding of probable cause in proceedings to summarily terminate a subscriber's telephone services. Finally, the Court held that the Commission's authority included the power to assess affidavits presented in support of search warrants pursuant to which evidence sought to be introduced before Commission was obtained and to determine therefrom whether affidavits contained sufficient objective and credible basis for the magistrate's finding.

In that section of the decision oft quoted by the Appeals Board, the *Goldin* court held: "[W]e believe 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. In making this assessment of course, the ***Commission*** should be cognizant of applicable constitutional safeguards, but it should admit the subject evidence if it determines, disregarding those aspects of the affidavits which clearly fail to withstand constitutional scrutiny, that a sufficient basis for admission exists." (*Id*. at 669 (footnotes and citations omitted); emphasis added.)

The *Forty-Niner* and *Kaiser Steel Corporation* decisions quote the above passage, but substitute the word "agency" for the original word "Commission." The Board then summarily

concludes that because one state agency, the Commission, had authority to review a magistrate's probable cause determination in Rule 31 proceedings, the Board must, as a fellow state administrative agency, have similar authority to review the Superior Court's finding of administrative probable cause to issue an inspection warrant. The Board decisions do not cite any constitutional or statutory authority enabling the Board to review a superior court decision. Nor do the Board decisions contain any analysis of whether the Board and the Commission have a similar grant of authority to conduct proceedings. If this analysis had been done, it is likely the Board would have reached a different conclusion. Notably, in the citing references contained in Westlaw, no administrative agency other than the Board has cited the *Goldin* decision as authority for it to review a superior court finding of probable cause supporting the issuance of an inspection warrant.

b. The Commission is Distinct from the Board because it has a Constitutional Grant of Authority and Broader Powers than the Board.

The *Goldin* decision is not applicable to the Board because the Commission has special, extraordinary powers granted to it under the California Constitution. The Board has no such analogous grant of constitutional power.

The Commission's power to regulate was established by a constitutional enabling provision (former Cal. Const., Art. XII, §§ 22, 23, now Cal. Const., Art. XII, § 1 et seq.), and by the Public Utilities Act of 1911. The Commission has the power to "establish its own procedures. Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval " and "fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Cal. Const., Art. 12, §§ 2 and 6.) The Commission is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers. (*Wise v. Pacific Gas & Electric Co.* (App. 1 Dist. 1999) 77 Cal.App.4th 287, 300, 91 Cal.Rptr.2d 479, rehearing denied, review denied; *San Diego Gas and Electric Company v. Superior Court*, 13 Cal.4th 893, 914-915 (1996) ["The commission is a

state agency of constitutional origin with far-reaching duties, functions and powers."]; see Pub.Util.C. 301 et seq. [organization and function of Commission]; on powers and functions of Commission; see *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 C. 640, 650, 137 P. 1119; *California Motor Transport Co. v. Railroad Com. of Calif.* (1947) 30 C.2d 184, 185, 180 P.2d 912; *People v. Western Air Lines* (1954) 42 C.2d 621, 630, 268 P.2d 723.)

c. The Legislature, under its Constitutional Authority, has granted the Commission additional powers.

Additionally, "[t]he Legislature has plenary power, unlimited by the other provisions of this constitution … to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain." (Cal.Const. Art. 12, § 5.) Under the Legislature's plenary power to confer additional jurisdiction on the PUC, the PUC's powers are not restricted to those expressly mentioned in the Constitution. (*PG & E Corp. v. Public Utilities Com'n* (App. 1 Dist. 2004) 118 Cal.App.4th 1174, 1197, 13 Cal.Rptr.3d 630, review denied.)

Pursuant to this constitutional provision, the Legislature enacted the Public Utilities Act. That law vests the commission with broad authority to, "supervise and regulate every public utility in the State." It grants the commission numerous specific powers for the purpose. The commission's powers are not limited to those expressly conferred on it. The Legislature further authorized the commission to, "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient" in the exercise of its jurisdiction over public utilities. Accordingly, "[t]he commission's authority has been liberally construed" (*Consumers Lobby Against Monopolies v. Public Utilities Com*. (1979) 25 Cal.3d 891, 905, 160 Cal.Rptr. 124, 603 P.2d 41), and includes not only administrative but also legislative and judicial powers (*People v. Western Air Lines* (1954) 42 Cal.2d 621, 630, 268 P.2d).

Because both the California Constitution and Legislature bestowed upon the Commission a broad delegation of authority, it was reasonable for the California Supreme Court to conclude that the Commission's authority included power to assess the sufficiency and credibility of affidavits presented in support of search warrants, when evidence obtained pursuant to such warrants was to be introduced before the Commission.

A similar broad delegation of power has not been bestowed upon the Appeals Board. 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 or curtail the jurisdiction vested in the courts by the Constitution with respect to Appeals Board decisions. Moreover, looking at the statutory grant of authority to the Appeals Board, it is clear that the Board's authority is not as broad and sweeping as the Commission's. The Board has no jurisdiction while the Division is investigating a complaint or accident. Board jurisdiction does not commence until after the Division issues a citation and the Employer files an appeal. (Labor Code sec. 6600 et seq.) While the Commission has the power to punish for contempt (Cal. Const., Art. 12, §6), the Appeals Board holds no such power. That jurisdiction lies with the superior courts. (Labor Code sec. 6603(b).) These are but a few examples of how the scope of the agencies' powers differ.

Given the more narrow scope of Board power, it is improper to conclude that because the Commission had authority to review the magistrate's finding of probable cause, the Appeals Board does as well.

d. The *Goldin* Decision is Distinguishable on Other Grounds because the Commission was the Only Judicial Body with Jurisdiction to Review the Magistrate's findings.

The *Goldin* decision is further distinguishable on other grounds. The petitioner in *Goldin* had a constitutionally protected property interest in the continuance of his telephone services so that he could conduct his business. (*Goldin v. Public Utilities Commission*, supra, 23 Cal.3d at pg. 662.) That property interest was subject to certain due process protections which included a probable cause determination before a magistrate before a subscriber's telephone service could

be summarily discontinued, a provision for the subscriber's prompt challenge of the magistrate's determination and an independent assessment of whether the affidavits presented in support of the search warrant contained a sufficient objective and credible basis for the magistrate's finding. (*Id*. at pg. 662 -666.)

During the administrative proceedings in *Goldin*, the Commission initially took the position that it was under no obligation to review the showing made before the magistrate to determine probable cause for the summary termination and the issuance of a search warrant. Rule 31 hearings were conducted when there was a law enforcement allegation that telephone services were being used for illegal means. Law enforcement provided information to the magistrate via declarations in order for the court to make the probable cause determination. The Commission believed that petitioner could obtain a remedy in the criminal courts through a motion to suppress evidence under section 1538.5 of the Penal Code if petitioner wanted to challenge the magistrate's probable cause determination. (*Id.* at pg. 667-668.)

However, in its answer to the petition for writ of review, the Commission changed its position because the remedy set forth in section 1538.5 of the Penal Code was not applicable to Commission proceedings. That section may be invoked only by "a defendant" in a criminal case. Because Petitioner was not a criminal defendant in the Commission proceedings, he could not seek review of the magistrate's decisions in criminal court. Because there was no other provision for judicial review of the magistrate's decision the Commission conceded, and the Supreme Court agreed, that it had the authority to review the magistrate's probable cause determinations. (*Ibid.*)

In contrast to the Petitioner in *Goldin*, the employer in an administrative appeal before the Board *does* have a mechanism for judicial review of the superior court's underlying finding of probable cause to support an inspection warrant. Employer can challenge the inspection warrant immediately via a motion to quash in superior court and can seek further appellate review through the civil courts. (See *County of Contra Costa v. Humore, Inc.* 45 Cal. App. 4th 1352 (1996).)

Thus, not only is there no authority for the Board to review the Superior Court's administrative probable cause determination, there is no need because the superior and appellate courts retain original jurisdiction to address the issue.

C. Employer attempted to procure this order by fraud by misstating the applicable standard of review.

As stated above, Employer attempted to mislead the ALJ by stating that the Board should apply a higher standard of review based on *Salwasser I* to the assessment of the declaration in support of inspection warrant. Employer's argument about the appropriate standard for probable cause fails because *Salwasser II* rejects application of *Salwasser I* to complaint-based inspections and says that the standard of administrative probable cause applies.

It is important to note that Labor Code section 6314, which grants Division inspectors free access to any place of employment to investigate and inspect during regular working hours, was amended in 1979. That amendment, among other things, revised subsection (b) and clearly set forth that the statutory provisions of Title 13 (commencing with Section 1822.50) of the Code of Civil Procedure are the standards with which the Division must comply to obtain an inspection warrant. (See also *Armored Transport, Inc.* 1986 WL 220432 OSHAB; *Walnut Hill Estate Enterprises* 2010 WL 2902346 [criminal probable cause not applicable especially when health & safety involved].) Employer's motion argued for the application of an outdated standard despite clear law to the contrary.

D. If *Arguendo* the Board has Authority to Assess the Validity of Inspection Warrants, the Evidence Received by the Appeals Board does Not Justify the Finding of Fact that the Warrant is Insufficient.

The ALJ acknowledges in the order that, "the appropriate standard for probable cause for an administrative warrant is not criminal probable cause." But then the order cites to a 10th Circuit Court of Appeal case, *Marshall v. Horn Seed Co., Inc*. that, "to say that the same degree of probable cause is not required is not to say that no consideration need be given to the concerns focused on in the criminal setting." (*Marshall v. Horn Seed Co., Inc.* (10th Cir. 1981) 647 F.2d 96, 102.) This 10th Circuit holding is not precedential in California and was also later distinguished by the 10th Circuit Court of Appeal in *Robert K. Bell Enterprises Inc., v.*

*Occupational Safety and Health Review Com'n. "*We need only observe here that the affidavit presented in support of the search warrant was not based solely upon the anonymous complaint. Its most telling portions are the [compliance officer]'s observations of conditions that openly existed and which were plainly visible to him as he traversed the public path to the Bell office. Hence, the problem dealt with in *Horn Seed* is not present in this case." *Robert K. Bell Enterprises, Inc. v. Occupational Safety and Health Review Com'n* (10th Cir. Feb. 19, 1986, No. 85-1547) 1986 WL 82646, at *1).

In this case, the complaint to the Division was *not* anonymous, which lent to the Division's determination that the complaint was credible enough to investigate, although the Division cannot reveal the identity of the complainant to the employer. Additionally, although the Division inspector did not observe Academy employees directly violating the face covering requirements indoors when he initially went to the premises, he did observe an employee come out of the building and not wear a face covering, which could lead one to a reasonable suspicion that the employee had not been wearing a face covering inside.

1. The order does not give due weight or consideration to the Division's duty to protect the name and identity of a complainant.

The Division need not disclose the name or identity of a person who submits a complaint to the Division of an unsafe condition. The Division has an obligation to refuse to disclose the name **or identity** of a person who submits a complaint to the Division regarding an unsafe condition of employment or a place of employment. Labor Code section 6309(c) provides in relevant part: "The name of a person who submits to the division a complaint regarding the unsafe condition of an employment or place of employment shall be kept confidential by the division, unless that person requests otherwise."

In the Decision After Reconsideration on *Sunview Vineyards of California, Inc.*, the Board states, "the Division correctly argues that it's not just the name of the complainant that is protected from disclosure, but also the complainant's identity. (§§ 372, 372.1 ["Nothing in this Section requires the disclosure of the identity of a person who submitted a complaint regarding an unsafe condition …"]; see also Evid. Code, § 1041.) The concept of

identity encompasses more than a name. 'Identity' is defined, relevant here, as 'the distinguishing character or personality of an individual' or the 'set of characteristics by which a person or thing is definitively recognizable.' Therefore, it follows that anything that would reveal, or tend
to reveal, the identity of the person who submitted the complaint through their distinguishing or recognizable characteristics is also privileged from disclosure. (*See e.g., People v. Hobbs* (1994) 7 Cal.4th 948, 961-962 [discussing Evidence Code section 1041].) For example, notwithstanding redaction of names, if disclosure of contents within the complaint would tend to disclose the complainant's identifying distinguishing characteristics, such contents should also be protected from disclosure. (*Ibid*.)"

The order claims that the Division should disclose a wide range of information in the declaration about the complaint and the relationship of the complainant to the employer, much of which would easily lead the employer to the identification of the complainant. The order states:

" First, [the declaration] does not identify the role of the complainant: Was it a current employee? A former employee? A parent of a student at the school? A member of the public? Someone making a delivery to the school? The declaration does not indicate the manner in which the complaint was received: Was the complaint made by phone, in person, or some other means? Was there a written complaint? Who, if anyone, from the Division spoke to the complainant? Were any steps taken to verify the information in the complaint? The declaration does not provide any description of details the complainant provided about the alleged violations: Who was not wearing face coverings and where? Had there been COVID-19 outbreaks that had not been reported? When? How many? How did the complainant know that the outbreaks had not been reported? Did the complainant have personal knowledge of the alleged violations, or was the information obtained second-hand from someone else?" (Order, p. 8, footnote omitted.)

Much of the information that the ALJ states should be included in the declaration has the potential to reveal the identity of the complainant and clearly is in opposition to the *Sunview* DAR because it would identify the complainant's recognizable characteristics. 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. This would obviate the intent of Labor Code 6309(c).

While the Board has held that some information from a complaint may be disclosed to an employer, it draws a line at information that will reveal the identify the complainant. In *Sunview*, the Board also ordered that the entire description of the "hazard" in the complaint be redacted because the way it was written had the potential to reveal who submitted the complaint. The Superior Court of California, County of Alameda denied the Division's petition for writ of mandate but found no flaw with the Board's reasoning regarding the duty to protect the identity of the complainant.

Compelling the Division to disclose the complainant's relationship to the academy, how they obtained the information that led to the complaint and details about where, when and how the alleged violations were observed in order to obtain an inspection warrant stands in contradiction to the Labor Code and the Board's own recent interpretation of the Division's duty.

2. The order does not give sufficient deference to the conclusion of the superior court judge.

The Supreme Court has "repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de nova* review. A magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates,* 462 U.S. 213, 236 (1983) (citation omitted). *See also West Point-Pepperell, Inc. v. Donovan,* 689 F.2d 950, 959 (11th Cir. 1982) ("A magistrate's probable cause determination is entitled great deference and is conclusive in the absence of arbitrariness." (internal citation omitted)).

When no warrant is issued, a court may apply a de nova review to the inspecting agency's determination of reasonable suspicion or probable cause. *Ornelas v. United States,* 517

U.S. 690, 698-99 (1996). But that is not the case here. In this case, a warrant was issued by a superior court judge, who had the opportunity to examine the inspector on oath, and to satisfy himself of the existence of grounds for granting the warrant in accordance with CCP § 1822.53. At best, the Board would be entitled to review the declarations in support of the warrant on their face, to determine if they meet the requirements of the Government Code.

There is no evidence here that the judge's determination to issue this warrant was arbitrary. CCP § 1822.51 states, "[a]n inspection warrant shall be issued upon cause, unless some other provision of state or federal law makes another standard applicable. An inspection warrant shall be supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made. In addition, the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent."

In the present appeal, the Division sought an inspection warrant supported by a declaration that meets all of the requirements of CCP § 1822.51. The place to be inspected was the Academy's business location in San Jose. Contrary to what the ALJ's Order states, this was *not* "a private school located in a church." It is a private school run by Calvary Chapel of San Jose located in its own building at the address specified in the declaration and is not inside the church.

The purpose for the inspection was also plainly and factually stated on the face of the declaration. The inspectors "were directed to open this inspection in response to a complaint made to the Division's Fremont District Office on November 16, 2021 that Calvary Christian Academy was not complying with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting requirements."

The declaration also described the circumstances of the Division inspectors seeking permission to inspect and being refused entry and instructed to contact the employer's attorney, as required by this section.

CCP § 1822.52 states that for an inspection warrant, '[c]ause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle." In this case, the latter of the two conditions applied. The Division had reason to believe, based on the complaint, that employer was not complying with the emergency standard regarding Covid-19 prevention, in particular the duty to comply with CDPH masking requirements that were in effect and outbreak reporting requirements. As stated, above, this was not an anonymous complaint, and although the inspector could not disclose information leading to the identity of the complainant in the declaration, he was present at court should the judge have questions about the source or credibility of the complaint.

The Haskell declaration also stated that when he initially went to the business premises, an employee of the Academy "came from inside of the office and was not wearing a face covering." Although it is possible that the employee had been wearing a face covering inside and only took it off before stepping outside of the building, it was reasonable for the inspector to suspect that the employee had not been wearing a mask indoors and for the judge to interpret this statement in the declaration in that manner.

Reasonableness is the ultimate test for determining administrative probable cause. This test involves balancing the need to search against the invasion which the search engenders. (*Camara v. Municipal Court* (1967) 387 U.S. 523, 537, 539 [18 L. Ed. 2d 930, 940, 941, 87 S. Ct. 1727].) When the warrant declaration is grounded on specific evidence of a violation, "'there must be some plausible basis for believing that a violation is likely to be found. The facts offered must be sufficient to warrant further investigation or testing.' "(*Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.*, supra, 214 Cal.App.3d 625, 631 (*Salwasser II*).) What the Division must show is a *reasonable suspicion* of a violation. Here, the Division has received a complaint that alleged specific violations of §3205, specifically of the masking requirement

and of the Covid-19 outbreak reporting portions of the standard. The specific nature of the complaint made it plausible for the Division to reasonably suspect that there were violations that warranted further investigation. This was not, as the order claims, "a conclusory statement that employee complaints have been received by Cal/OSHA, without more…." This was a complaint that stated with specificity what portions of §3205 employer was violating.

On its face the Haskell declaration met all the requirements for the superior court judge to find there was a plausible basis for the Division to have a reasonable suspicion of violations at employer's worksite. Therefore the ALJ should have deferred to this determination in her evaluation. "Additionally, there exists a duty to save the warrant if it can be done in good conscience." (*Kaiser Steel Corporation, Steel Manufacturing Group*, Cal/OSHA App. 80-826, Decision After Reconsideration (Sept. 30, 1981), citing *Caligari v. Superior Court* (1979) 98 Cal.App. 3d 725, 729.) Although the ALJ relies on the *Kaiser Steel* DAR to support the Board's claim of authority to review the inspection warrant, the order does not give due consideration to the portion of the DAR that states, "[t]his Board is not inclined to second guess the magistrate who authorized the inspection based upon specific declarations which on their face fall within the confines of Labor Code Section 6314."

Likewise, with the *Forty-Niner* DAR that the ALJ relies upon in part, the order ignores the portion of the DAR that states that there is no duty for the Division to look beyond the facts stated in the complaint to determine the complainant's motive. "Had the Division looked beyond the complaint to consider information from Employer concerning possible wrongful motive for the complaint, the Division would have exceeded its statutory authority." (*Forty-Niner Sierra Resources, Inc.* DAR, supra). Labor Code 6309 limits the Division to the facts stated in the complaint when determining whether a complaint is intended to willfully harass an employer or lacks a reasonable basis. The order is inconsistent with the Labor Code to the extent that it directs the Division to include in its declaration "steps taken to verify information in the complaint." This was not an anonymous complaint; the Division's declarations in support of the

warrant were drafted to meet the requirements of CCP § 1822.51 while also keeping the complainant's identity confidential.

In the *Concrete Pipe and Products Co., Inc.* Decision After Reconsideration (1985), the declaration in support of the inspection warrant "set forth a summary of the violations alleged in the employees' complaint" and "the declaration in support of the inspection warrant set forth the violations as alleged in the complaint reported to the Division. The description of these alleged violations did not specifically limit the hazardous conditions to that portion of Employer's plant that comprised the welding and mechanics shop. Because that part of the declaration based on the complaint was broad enough on its face to include Employer's entire premises, it adequately supports the judge's authorization of an inspection of the entire site." (*In the Matter of the Appeal of: Concrete Pipe and Products Co., Inc. Cen-vi-ro Division*, 1985 WL 190701, at *2–3.) Like our present case, the Board considered the sufficiency of the inspection warrant according to the *Goldin* administrative probable cause standard, with review limited "to the face of the affidavits and an assessment of their adequacy to support the magistrate's finding." (*Goldin*, supra, at 668.) "In other words, if a declaration sets forth facts sufficient to support the magistrate's finding, the Appeals Board must uphold the validity of the inspection warrant." (*Concrete Pipe and Products Co., Inc.* DAR, Supra.)

E. If *Arguendo*, the inspection warrant lacked probable cause, the Board should apply the Good Faith Exception to the Exclusionary Rule and deny Employer's motion to suppress

1. The Exclusionary Rule in Criminal Cases

The prime purpose of the exclusionary rule is to effectuate the Fourth Amendment's guarantee against unreasonable searches or seizures by deterring unlawful police conduct. (*Illinois v. Krull* (1987) 480 U.S. 340, 347, 107 S.Ct. 1160.) The exclusionary rule "operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." (*Arizona v. Evans* (1995) 514 U.S. 1, 10, 115 S.Ct. 1185.) The theory is that if the evidence obtained in an unlawful search is inadmissible in a criminal trial, police officers will cease all unlawful searches and be motivated to follow the

proper procedures for obtaining a search warrant. (*Krull*, supra, 480 U.S. at p. 347, 107 S.Ct. 1160)

2. The Good Faith Exception in Criminal Cases

Under the good faith exception, evidence obtained by police officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate is not excluded under the Fourth Amendment, even if a reviewing court ultimately determines the warrant is not supported by probable cause. (*United States v. Leon* (1984) 468 U.S. 897, 900, 104 S.Ct. 3405, 82 L.Ed.2d 677 (*Leon*).) In *People v. Willis* (2002) 28 Cal.4th 22, 46 P.3d 898, 120 Cal.Rptr.2d 105, the California Supreme Court provided a detailed explanation of the purpose of the good faith exception as follows:

> "[B]ecause the exclusionary rule is a "remedial device," its application is "restricted to those situations in which its remedial purpose is effectively advanced." (Ibid.) Thus, application of the exclusionary rule "'is unwarranted' " where it would "'not result in appreciable deterrence.' "
>
> In *Leon*, the high court held that where police officers act in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later found to be invalid for lack of probable cause, the deterrent effect of exclusion is insufficient to warrant the exclusionary rule's application. In reaching this conclusion, the court considered exclusion's potential effect first on judicial officers who issue warrants, and then on police officers who execute warrants and on the policies of their departments. Regarding the former, the court concluded that for three reasons, the potential behavioral effect on judicial officers is insufficient to justify exclusion. "First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. [¶] Third, and most important, [there is] no basis ... for believing that exclusion ... will have a significant deterrent effect on the issuing judge or magistrate.
>
> …
>
> Regarding exclusion's potential effect on individual law enforcement officers and the policies of their departments, the high court explained generally that the deterrence rationale for the exclusionary rule "'necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct....' " Thus, exclusion is proper "'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional....' " Given these underlying principles, the court concluded that exclusion will not further the exclusionary rule's ends where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and

> thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. '[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Thus, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." (*Id.* at 30-32)

Because the courts have concluded there is no deterrent effect to the judiciary in applying the exclusionary rule, evidence should not be excluded where the magistrate's probable-cause determination is technically insufficient. Evidence is only excluded if there is evidence of police misconduct in securing the warrant. Thus, the focus is on the officer's conduct. "The question is whether 'a well-trained officer should reasonably have known that the affidavit failed to establish probable cause. An officer applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits. If the officer 'reasonably could have believed that the affidavit presented a close or debatable question on the issue of probable cause,' the seized evidence need not be suppressed." (*People v. Pressey* (2002) 102 Cal.App.4th 1178, 1190–1191, 126 Cal.Rptr.2d 162.)

In criminal cases, the prosecution has the burden of proving that the officer's reliance on the warrant was objectively reasonable. (*People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508, 96 Cal.Rptr.3d 918.) Courts must determine 'on a case-by-case basis' whether the circumstances of an invalid search pursuant to a warrant require the exclusionary rule's application. (*People v. Willis*, supra, 28 Cal.4th at p. 32, quoting *Leon.*) Evidence should be suppressed only in those unusual cases in which exclusion will further the purposes of deterrence. (*Leon*, supra 486 U.S. at pg. 918.)

3. The Good Faith Exception applies in Cal OSHA proceedings

Assuming, *arguendo*, that the Appeals Board has jurisdiction to review the Superior Court finding of probable cause, and no probable cause existed, the ALJ erred in granting appellant's motion to suppress the evidence obtained during the execution of the inspection

warrant because the good faith exception applies in Cal OSHA proceedings. In *Southwest Marine, Inc*., Cal OSHA App. 96-1902, Decision After Reconsideration (January 10, 2002), the Board addressed the issue of whether the good faith exception to the exclusionary rule applies to Board proceedings.

> There is some question as to whether the exclusionary rule applies to proceedings of this Board. See e.g. *Gikas v. Zolin* (1993)6 Cal.4 th 841. The Board elects to maintain the safeguards contained within the exclusionary rule but elects to only exclude evidence when it can be established that a warrant was not obtained in good faith. In this regard, we elect to follow the good faith exception to the exclusionary rule enunciated in *United States v. Leon* (1984) 468 U.S. 897, 104 5.Ct. 3405 and *People v. Camarella* (1991) 54 Cal.3d 592.

The Board further held that the burden to show that the warrant was not obtained in good faith falls on Employer. (*Ibid*.) Good faith is a factual determination made on a case-by-case basis. (*People v. Willis*, supra, 28 Cal.4th at p. 32.)

Here, Employer has not met its burden to show that the warrant was not obtained in good faith. Employer claimed that the declaration in support of the application for an inspection warrant made by Division inspector Haskell was "misleading" thereby destroying the good faith exception. (Motion to Suppress, page 15:26- 16: 2) Employer identified three alleged "misrepresentations," the first of which was a statement in the declaration of Division inspector Haskell that he received a complaint related to "face coverings" and that he observed that employee Ms. Woods was "not wearing a face covering" outside. Employer does not assert that these statements are untrue. Instead, Employer claims, without any proof, that these statements were meant to mislead to court into thinking a health violation had occurred because face coverings outdoors were not required by state or local health officials at the time. Haskell was not deposed by Employer and there is simply no evidence as to his motive. Nor is there any evidence that the judge was misled. Employer's speculation with regards to inspector Haskell's motives and the judge's conclusions is not "evidence" of misconduct and should be disregarded.

Moreover, it is Employer, not the Division, who is being misleading by not accurately quoting Haskell's declaration. The declaration also includes the following information: "Ms. Woods came from inside the office and was not wearing a face covering." (Motion to Suppress,

Ex. 2, Haskell Decl. para. 4) The clear implication is that the declarant saw Ms. Woods come from her office to the outside and that she was not wearing a face covering either inside or outside of the office.

Employer's second alleged misrepresentation in Haskell's declaration is the statement: "[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 have been received by the division." (Motion to Suppress, page 16:11-14) Haskell's statement is a direct restatement of Labor Code section 6314(b) which states in pertinent part:

> "Cause for the issuance of a warrant shall be deemed to exist if there has been an industrial accident, injury, or illness reported, if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division, or if the place of employment to be inspected has been chosen on the basis of specific neutral criteria contained in a general administrative plan for the enforcement of this division."

Employer's alleged "misrepresentation" is that "[t]he Division neglected to provide any mention of the constitutional standard required by the Fourth Amendment, which cannot be supersede by state statute." (Motion to Suppress, page 16:15-16) Employer cites no legal authority for the proposition that a declaration in support of probable cause must mention of the constitutional standard required by the Fourth Amendment. Employer next raises a legal argument about the proper interpretation of Labor Code sec. 6314. Employer's legal arguments as to the proper interpretation of various statutes are not the equivalent of a factual showing that Inspector Haskell engaged in misconduct. If taking an opposing position on the proper interpretation of a statute is tantamount to intentional misdirection or misconduct, then lawyers would be accused of misconduct every day.

Moreover, the question in an inquiry into the good faith exception is whether a well-trained inspector should reasonably have known that the affidavit failed to establish probable cause. While an inspector applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits, the inspector is not expected to be an expert in statutory and constitutional interpretation. Regardless of the persuasiveness of

Employer's proffered legal arguments, it is not "objectively reasonable" to require the inspector to be a legal scholar.

To the extent that Employer is raising a legal challenge to language in Labor Code section 6314(b) by arguing that the "cause" standard set forth in that section is not "probable cause" required for an administrative warrant, that argument does not demonstrate lack of good faith. The United States Supreme Court has held that "[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.... 'Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.' [Citation.]" (*Krull*, supra, 480 at pp. 349-350 [107 S.Ct. at p. 1167].)

Employer's third and final alleged misrepresentation in Haskell's declaration is the statement that Labor Code sec. 6321 required waiver of the twenty-four hour notice provision of the Code of Civil Procedure, allowing for immediate execution of the warrant. (Motion to Suppress, page 16:21-23) Again, Employer makes various legal arguments as to why that statement is incorrect. Employer's disagreement with the Division's interpretation of the Labor Code does not establish misconduct. To meet its burden of proof to defeat the application of the good faith exception, Employer must make a factual presentation showing that demonstrates Haskell's intent to mislead or actual misconduct. Here, Employer has not shown that the inspector intentionally withheld information or was dishonest. Thus, Employer has not met its burden of proof and the motion to suppress should be denied.

4. Even if the inspection warrant was not obtained in good faith, courts have limited the application of the exclusionary rule in proceedings where correction of OSHA violations involving unsafe or unhealthy working conditions is at issue

As discussed above, the Board in *Southwest Marine* found the good faith exception

applied to the facts of the case and thus, evidence obtained pursuant to the inspection warrant could be admitted in appeal proceedings. In making this finding, the Board was not required to consider to what extent the exclusionary rule should be applied in CalOSHA proceedings if the good faith exception did not apply. While not ruling on the issue, the Board referenced the decision in *Secretary of Labor v. Smith Steel Casting Company*, 800 F.2d 1329 (1986) and adopted its holdings.

In that case, the Fifth Circuit relying on *Leon*, supra, 468 U.S. 897, and *INS v. Lopez-Mendoza*, (1984) 468 U.S. 1032 held that the exclusionary rule does not extend to OSHA proceedings conducted for the purpose of correcting violations of occupational safety and health standards, even though the evidence supporting the inspection warrant was improperly obtained. The rule is applicable, however, where the object of the proceeding is to punish the employer for past violations of OSHA regulations —unless the good faith exception applies.

In *Davis Metal Stamping, Inc. v. Occupational Safety and Health Review Commission* 800 F.2d 1351 (1986) the Fifth District again reiterated that the exclusionary rule does not apply to OSHA proceedings conducted for the purpose of correcting violations of occupational safety and health standards. This holding was adopted by the Sixth District in *Trinity Industries v. Occupational Safety and Health Review Commission* 16 F.3d 1455 (1994).

Consistent with its decision in *Southwest Marine, Inc*, supra, Cal OSHA App. 96-1902, the Board should adopt the holdings in *Smith Steel Casting* and decline to apply the exclusionary rule to proceedings where correction of occupational safety and health violations is at issue. If the Board adopts the *Smith Steel Casting* holding, then the exclusionary rule would not apply to this appeal because Employer has put correction of occupational safety and health violations at issue in its appeal.

Employer was cited for eight general violations and four serious violations. (See Division's Request for Official Notice, Citation Package filed 03/23/2022) Employer appealed all citations and in each of these violations raised as a specific ground for appeal that "[t]he abatement requirements are unreasonable." (See Division's Request for Official Notice, Appeal

Forms filed 03/21/2022 and Notice of Perfected Appeal filed 04/20/2022) Since abatement (i.e. correction of the occupational safety and health violations) is at issue, the exclusionary rule should not apply and the evidence obtained pursuant to the inspection warrant should not be suppressed.

IV.

CONCLUSION

For the reasons stated above, the ALJ erred in granting employer's motion to suppress evidence, effectively preventing the Division from presenting its case in support of the citations issued to employer. The Division requests that the Board reconsider and reverse the ALJ, and DENY employer's motion to suppress evidence.

DATED: September 29, 2022

Respectfully Submitted,

By: Kathryn Tanner
Kathryn Tanner, Staff Counsel
DIVISION OF OCCUPATIONAL SAFETY
AND HEALTH, STATE OF CALIFORNIA

Case Name: Calvary Chapel of San Jose
Inspection No.: 1564732

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Division of Occupational Safety and Health – Legal Unit, 1515 Clay Street, Suite 1901, Oakland, CA 94612.

On **September 30, 2022**, I filed and served the within document(s):

DIVISION'S REQUEST FOR OFFICIAL NOTICE & DIVISION'S PETITION FOR RECONSIDERATION OF ORDER ON MOTION TO SUPPRESS EVIDENCE

on the interested on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows and/or by transmitting a true copy to:

Advocates for Faith & Freedom
Doing Business As Calvary Christian Academy
Attn: Mariah Gondeiro Esq.
25026 Las Brisas Road
Murrieta, CA 92562

Nic Cocis ncocis@tylerbursch.com (via email only)

Tyler & Bursch, LLP
Attn: Nic Cocis Esq.
25026 Las Brisas Road
Murrieta, CA 92562

Mariah Gondeiro - mgondeiro@faith-freedom.com (via email only)

( ) **BY MAIL : (a)** By placing on this above date a true copy of the document(s) listed above as addressed above for collection and mailing, in the course of ordinary business practice, with other correspondence of DOSH Legal Unit and the Department of Industrial Relations located at 1515 Clay Street, Oakland, California enclosed in a sealed envelope, with the postage fully prepaid. I am familiar with the practice of DOSH Legal Unit and the Department of Industrial Relations for collection, processing, and depositing mail with the United States Postal Service. It is the practice that correspondence is deposited with the United States Postal Service in Oakland, California, the same day it is submitted for mailing.
(**X**) **BY OVERNIGHT COURIER** By giving the document(s) listed above in a sealed envelope with shipping prepaid to Golden State Overnight to be delivered by Golden State by their overnight service to the addressee(s) listed above.
( ) **BY FACSIMILE:** I caused said document(s) listed above to be transmitted by facsimile to the fax number(s) set forth on this date before 5:00 pm.
(**X**) **BY ELECTRONIC MAIL**: I served a true and correct copy of the document(s) listed above by electronic delivery pursuant to C.C.P. 1010.6.
(**X**)**BY ELECTRONIC SERVICE**: I filed a true and correct copy of the document(s) listed above by electronic delivery pursuant to 8 CCR 355.4.

Occupational Safety & Health Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on **September 30, 2022** in Manteca, California.

Diane Buccuzzo