

DECLARATION OF SERVICE BY MAIL OR EMAIL

**Inspection Number
1564732**

I, Mirna Lopez, declare:

1. I am at least 18 years of age, not a party to this action, and I am employed in Los Angeles County at 100 N. Barranca St., Suite 410, West Covina, CA 91791.
2. On _____, I served a copy of the attached Order on Motion to Suppress Evidence in an envelope addressed as shown below and placed the envelope for collection and mailing on the date and at the place shown in item 3 following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

3. Date mailed: _____ Place mailed: (city, state): West Covina, CA

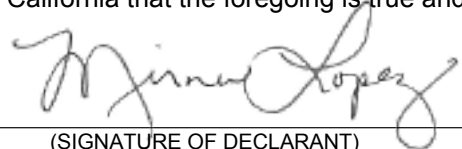
4. On 09/02/2022, I electronically served the document listed in item 2 as follows:

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<u>Denise Cardoso, DOSH Legal</u>	<u>dcardoso_doshlegal@dir.ca.gov</u>
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Mirna Lopez

(TYPE OR PRINT NAME OF DECLARANT)



(SIGNATURE OF DECLARANT)

**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

**ORDER ON MOTION TO
SUPPRESS EVIDENCE**

On November 18, 2021, two inspectors from the Division of Occupational Safety and Health (Division or Cal/OSHA) were denied consent to inspect Employer’s premises, a private school located in a church (the site). On November 29, 2021, the Division was granted a warrant to inspect the site. An inspection of the site was conducted on November 30, 2021, and 12 citations were issued to Employer on March 10, 2022. Employer filed timely appeals of all the citations on March 21, 2022.

On July 18, 2022, Employer filed a Motion to Suppress Evidence (Motion), asserting that the warrant obtained by the Division was invalid based on lack of “cause” set forth in the declaration supporting the warrant.¹ The Division opposed Employer’s Motion (Opposition), asserting that (1) the Appeals Board does not have authority to review the magistrate’s issuance of a warrant, (2) the appropriate “cause” required for a warrant is not the probable cause required by the penal code, and (3) the warrant was validly issued by the Superior Court.

Appeals Board Authority to Review Validity of the Warrant

Contrary to the Division’s assertions in its Opposition, the Appeals Board has the authority to make an independent assessment of the underlying document supporting a search warrant in Cal/OSHA cases. (*In re Forty-Niner Sierra Resources, Inc.*, Cal/OSHA App. 90-165, Decision After Reconsideration (July 15, 1991).) The Appeals Board relied on *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638 (*Goldin*), to set forth the standard of review for such affidavits and declarations supporting inspection warrants:

[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

¹ Shortly after the Motion was filed, Employer filed amended appeal forms to include the previously-unasserted affirmative defense that the inspection was invalid. The amendment was granted in an Order Amending Appeal issued concurrently with this Order on Motion to Suppress Evidence.

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 [agency] 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.

(In re Forty-Niner Sierra Resources, Inc., supra, Cal/OSHA App. 90-165, citing Goldin v. Public Utilities Commission, supra, 23 Cal.3d at 669 (footnotes and citations omitted).)

Under the standard of review set forth in *Goldin, supra* 23 Cal.3d at 668, "there is not only jurisdiction to determine constitutional infirmities in a search warrant, but a clear duty imposed upon the Appeals Board to do so." (*Kaiser Steel Corporation, Steel Manufacturing Group, Cal/OSHA App. 80-826, Decision After Reconsideration (Sept. 30, 1981).*)

Accordingly, it is appropriate and, because the warrant has been challenged by Employer, necessary for the Appeals Board to review the sufficiency of the declaration submitted by the Division in support of its warrant.

Cause for Issuance of the Warrant

Labor Code section 6314, subdivision (b), in effect since 1979, provides, in relevant part:

If permission to investigate or inspect the place of employment is refused, ... the chief 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. Cause for the 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...

California Code of Civil Procedure section 1822.51 provides:

An 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.

The Division correctly argues, and Employer does not dispute, that the appropriate standard for probable cause for an administrative warrant is not criminal probable cause. However, “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.)

It is the primary object of the search which determines what type of probable cause showing is required. ... The primary purpose of a Cal-OSHA inspection is not to discover evidence of a crime but rather to enforce standards designed to assure safe and healthful working conditions for employees. (Lab. Code, § 6300.) In this context, the probable cause standards outlined for [Federal Occupational Safety and Health Administration (OSHA)] warrants based on employee complaints should also be applied to such Cal-OSHA warrants. Balancing the government interest in maintaining safe and healthful working conditions against the invasion of commercial premises to inspect for compliance with Cal-OSHA, the circuit court guidelines set forth above are reasonable.

(*Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625, 632 (*Salwasser II*).

The California Court of Appeal in *Salwasser II* relied heavily on opinions of federal courts and held that the various federal courts’ analyses of probable cause for administrative warrants should also apply to Cal/OSHA’s warrants. The *Salwasser II* court discussed at length that the declaration submitted in support of the warrant must be reviewed to determine whether it set forth “specific evidence sufficient to support a reasonable suspicion of a violation.” (*Salwasser II, supra*, 214 Cal.App.3d at p. 631, citing to *U.S. v. Establishment Inspection of: Jeep Corp.* (6th Cir. 1988) 836 F.2d 1026, 1027.) “[T]he evidence of a specific violation required to establish administrative probable cause, while less than that needed to show a probability of a violation, must at least show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed.” (*Salwasser II, supra*, 214 Cal.App.3d at p. 631.)

“By necessity, such a determination requires the magistrate to consider the reliability of the information tendered in support of the application. Again, a criminal standard is not imposed. Although a ‘substantial basis’ is not required to credit the information’s reliability, there must be some basis for believing that a complaint was actually made, that the complainant was sincere in his assertion that a violation exists, and that he had some plausible basis for entering a complaint.” (*Marshall v. Horn Seed Co., Inc., supra*, 647 F.2d at pp. 102-103.) Relying on this standard, the court in *Salwasser II* held that a conclusory statement that employee complaints have been received by Cal/OSHA, without more, is insufficient to establish probable cause for a warrant. (*Salwasser II, supra*, 214 Cal.App.3d at p. 631.)

Labor Code section 6314 sets forth that a complaint about health and safety violations may be a basis for a judge to find cause to issue a warrant when consent to inspect has been refused. However, in order to establish cause, a declaration or affidavit must be submitted with the application for a warrant. (Cal. Code of Civ. Pro. §1822.51.) The declaration must contain sufficient information for the judge to “exercise independent judgment as to whether an inspection is justified, rather than acting as a mere rubber stamp validating the [Agency’s] decision...” (*Salwasser II, supra*, 214 Cal.App.3d at p. 631, citing to *Burkart Randall Div. of Textron, Inc. v. Marshall* (7th Cir. 1980) 625 F.2d 1313, 1319.)

Both parties agree that the standard for probable cause for an administrative warrant is less than that for criminal matters. However, to establish the lesser level of cause based on a specific complaint, there must be some basis for the magistrate that issued the warrant to have reviewed the supporting declaration and determined that there was “some plausible basis for believing that a violation is *likely* to be found.” (*Salwasser II, supra*, 214 Cal.App.3d at p. 631. Emphasis in original.) Accordingly, the declaration must be evaluated to determine whether it met the minimum standards set forth by the courts and Appeals Board decisions.

Validity of the Warrant

The California Supreme Court in *Goldin, supra*, 23 Cal.3d 638, held that an administrative agency’s authority to review the validity of an inspection warrant is limited “to the face of the affidavits and an assessment of their adequacy to support the magistrate’s finding.” (*Id.* at 668.) Therefore, “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., Cen-Vi-Ro Division*, Cal/OSHA App. 80-1038, Decision After Reconsideration (Nov. 27, 1985).)

Employer asserts that the declaration of Associate Safety Engineer Richard Haskell is lacking in sufficient facts, thereby invalidating the warrant. The warrant contains one sentence that references the basis for the inspection: “We 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.” (Motion, Ex. 2: Haskell Decl., p. 2, ln. 1-4.) There is no other mention of the complaint in the declaration.

The *Salwasser II* case and the federal opinions referenced therein set forth criteria for the courts to find cause to support an administrative search warrant. “[T]here must be some basis for believing that a complaint was actually made, that the complainant was sincere in his assertion that a violation exists, and that he had some plausible basis for entering a complaint.” (*Salwasser*

II, supra, 214 Cal.App.3d at p. 631.) As stated previously, “a conclusory statement in the application that employee complaints have been received by OSHA, without more, is insufficient to establish probable cause.” (*Id.*)

“It is not sufficient that the affiant ... simply state that a complaint was received and detail the conditions alleged to be unsafe.” (*Marshall v. Horn Seed Co., Inc., supra*, 647 F.2d at p. 103.)

Ideally, the affidavit should state whether the complaint was received by the affiant personally or by some other specific OSHA official known to the affiant. While the name of the complainant need not be given, the magistrate should be informed as to the source of the complaint. Is the source an employee, a competitor, a customer, a casual visitor to the plant, or someone else? The magistrate should also be told whatever underlying facts and surrounding circumstances the complainant provided OSHA. If the complaint was received in written form, it should be attached to the application, although the complainant’s name may be deleted. The affiant should specify the steps he or other OSHA officials took to verify the information in the complaint. The affiant should relate any personal observations he has made of the premises and the employer’s past history of violations.

(*Id.* at 103.)

The declaration in the instant matter is utterly devoid of detail about the complaint. First, it 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?² 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?

² Employer’s Motion raised the possibility that the complainant may even have been a party to current litigation involving Employer and the County of Santa Clara, which would have been a relevant fact for the magistrate to consider.

The declaration contains one statement that the Division's Opposition asserts should support a finding of a reasonable belief of a violation: "Ms. Wood came from inside of the office and was not wearing a face covering." As Employer's Motion points out, at the time of the inspection, not wearing a face covering outdoors was not a violation of any safety order or other regulation. The declaration does not provide any further statements to bolster an argument that not wearing a face covering when outside of a building supported the inspectors' suspicions that the employee was also not wearing it inside the building. Indeed, there is no statement in the declaration that the Division inspectors observed any behaviors that would give rise to a violation of any safety orders.

Salwasser II, supra, 214 Cal.App.3d at pp. 632-633, and several Appeals Board decisions reveal that declarations that have been found to be sufficient to support an inspection warrant contain more detail than the mere recitation of the fact that a complaint had been received, as contained in the instant declaration. The *Salwasser II* declaration informed the magistrate that the complaint was telephonic, the complainant was a current employee providing information based on personal knowledge, two Division employees each contacted the complainant multiple times to obtain details and confirm ongoing violations, and the declarant stated that he believed there were ongoing violations at the work location.

In *In re Forty-Niner Sierra Resources, Inc., supra*, Cal/OSHA App. 90-165, the declaration contained statements that the complainant had provided information based on personal knowledge, gave detailed descriptions of the violations observed by the complainant ("drums of used paint thinner were stored next to an air compressor which did not have a shut-off valve"), and stated that the declarant contacted the complainant to verify the information originally provided in the complaint.

The warrant application in *Kaiser Steel Corporation, Steel Manufacturing Group, supra*, Cal/OSHA App. 80-826, contained eight employee declarations outlining observed violations, a declaration from a Division inspector that he had reviewed the employees' complaints and believed they supported a violation of a safety order, and another Division employee submitted a declaration that it was his opinion that the complaints from the employees made it necessary to inspect the employer's operations and records.

These examples of declarations found to be sufficiently detailed in support of inspection warrants allowed the magistrate reviewing them to "exercise independent judgment as to whether an inspection [was] justified..." (*Salwasser II, supra*, 214 Cal.App.3d at p. 631.) The declaration submitted in support of the warrant in the instant matter not only contains no detail, but it is precisely what is proscribed as merely "a conclusory statement in the application that employee complaints have been received" and provided nothing more for the magistrate to review. (*Id.*)

Accordingly, Employer's Motion to Suppress Evidence is GRANTED. As requested in the Motion, the following evidence is excluded:

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."

IT IS SO ORDERED.

Dated: 09/01/2022


Kerry Lewis
Administrative Law Judge