BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1564732**
CALVARY CHAPEL OF SAN JOSE **1175 Hillsdale Avenue** **San Jose, California 95118**	**DECISION AFTER RECONSIDERATION**
Employer	

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

This is the second time that the Board has engaged in interlocutory review in Calvary Chapel of San Jose's (Employer) appeal. The Board first considered this matter in *Calvary Chapel of San Jose*, Cal/OSHA App. 1564732, Decision After Reconsideration (Nov. 2, 2023). There the Board was called upon to reconsider an order suppressing evidence issued by Presiding Administrative Law Judge (ALJ) Kerry Lewis. The ALJ's order concluded that there had been an inadequate showing of probable cause for an inspection warrant and applied the exclusionary rule to certain evidence acquired during the Division of Occupational Safety and Health's (Division) inspection. The Division challenged the ALJ's order via a petition for reconsideration. On reconsideration, the Board, among other things, held that it had jurisdiction to rule on the motion to suppress evidence, discussed the standard to apply when determining whether cause existed for the warrant, and found there had been an inadequate showing of cause. However, rather than apply the exclusionary rule, the Board remanded the matter back to the ALJ to determine whether the "good faith exception" to the exclusionary rule applied.

On remand, after further briefing on the good faith exception, the ALJ issued an Order Re Good Faith Exception to the Exclusionary Rule. The ALJ's order held that the good faith exception was not satisfied. The Division then filed a second petition for reconsideration. The Division's petition argues that the ALJ erred by failing to apply the good faith exception to the exclusionary rule so the evidence could be admitted. Employer has answered the petition.

ISSUE

1. Was the good faith exception to the exclusionary rule satisfied?

2. Was the affidavit so lacking in indicia of probable cause that it would be entirely unreasonable for the Division investigator to believe such cause existed?

3. Was the issuing judge misled by information that the Division officer knew or would have known was false except for his reckless disregard for the truth?

FINDINGS OF FACT

1. The Division's declaration in support of the warrant application was so lacking in indicia of probable cause that it would be entirely unreasonable for a Division investigator to believe such cause existed.

2. The Division recklessly omitted material information from the declaration in support of the search warrant.

DECISION AFTER RECONSIDERATION

The Board follows the good faith exception to the exclusionary rule. (*Southwest Marine, Inc*., Cal/OSHA App. 96-1902, Decision After Reconsideration (Jan. 10, 2002).) The good faith exception "embodies the proposition that . . . 'the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective.'" (*People v. Machupa* (1994) 7 Cal.4th 614, 623, citing *Illinois v. Krull* (1987) 480 U.S. 340, 348.) The Division holds the burden to establish objectively reasonable reliance. (*People v. Camarella* (1991) 54 Cal.3d 592, 596; *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508; *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1654-1655.) However, the good faith exception will not apply under one or more of the following circumstances: (1) the issuing magistrate was misled by information that the officer knew or should have known was false; (2) the magistrate abandoned his or her judicial role; (3) the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed; and (4) the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid. (*People v. Camarella*, *supra*, 54 Cal.3d at 596, citing *United States v. Leon* (1984) 468 U.S. 897 (*Leon*).) The four reasons for rejecting the good faith exception apply in the disjunctive. (*Ibid*.)

The ALJ's order rejected application of the good faith exception, finding that the judge was misled by information (or the omission of information) that the Division knew, or should have known, made the declaration false. The order also concluded that the affidavit in support of the warrant was so lacking in probable cause that it would be entirely unreasonable for an investigator to believe such cause existed. We agree with the ALJ's conclusions. We address the latter point first.

1) Was the affidavit so lacking in indicia of cause that it would be entirely unreasonable to believe such cause existed?

The good faith exception will not apply if the Division investigator's declaration in support of the warrant application was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer or investigator to believe such cause existed. (*People v. Camarella*, *supra*, 54 Cal.3d at 596.) The test is measured against the standard of objective reasonableness. (*People v. Hernandez* (1994) 30 Cal.App.4th 919, 924 (*Hernandez*).) "If a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that

the officer should not have sought a warrant), exclusion is required under the third situation described in *Leon*[.]" (*People v. Camarella*, *supra*, 54 Cal. 3d at 596 [emphasis in original].) "[T]he objective reasonableness of an officer's decision to apply for a warrant must be judged based on the affidavit and the evidence of probable cause contained therein and known to the officer, 'and without consideration of the fact that the magistrate accepted the affidavit.' [Citation.]" (*People v. Lim* (2000) 85 Cal.App.4th 1289, 1297, citing *Camarella, supra*, at 605; *Hernandez*, *supra*, 30 Cal.App.4th at 925.) "The standard of objective good faith derives from something more substantial than a hunch. It requires that officers 'have a reasonable knowledge of what the law prohibits.' [Citation.]" (*Hernandez*, *supra*, 30 Cal.App.4th at 924, citing *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1113.)

In the immediate matter, as we have previously noted, there are three sentences, all contained in the Division investigator's declaration, which generally set forth the purported probable cause for the inspection. The investigator's declaration said, "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." (Investigator's Decl., ¶ 3.) It also stated, "On November 18, 2021, we went to the school's administrative office, where we were met outside by a woman who later identified herself as Jenny Wood. Ms. Wood came from inside the office and was not wearing a face covering." (Investigator's Decl., at ¶ 4.) For reasons we have already addressed in our earlier decision, we conclude that these assertions do not establish requisite cause for issuance of a warrant as discussed in *Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625 (*Salwasser II*). Now turning to the good faith exception, we additionally conclude that the declaration was so lacking in indicia of probable cause that it would be entirely unreasonable for the investigator to believe such cause existed.

We first address the Division investigator's assertion that the Division had received a complaint that Employer was not complying with section 3205. (Investigator's Decl., ¶ 3.) This assertion does not demonstrate sufficient cause for issuance of the warrant. The level of scrutiny required for issuance of Cal/OSHA[1] inspection warrant is detailed in *Salwasser II*, which held that a "conclusory statement in the application that employee complaints have been received by OSHA, without more, is insufficient to establish probable cause." (*Salwasser II*, *supra*, 214 Cal.App.3d at 630-631.) Rather, "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." (*Ibid*.) The investigator's declaration does exactly what *Salwasser II* prohibits; it merely offers a conclusory assertion that complaints had been received. This does not meet the *Salwasser II* requirements. Applying an objectively reasonable standard, we think that a reasonable and well-trained Division investigator would have known that this assertion did not establish cause for issuance of the warrant. The *Salwasser II* decision is approximately 35 years old and directly addresses the standard for issuance of a warrant in Cal/OSHA proceedings. A well-trained Division investigator, particularly one who bears the responsibility for seeking inspection warrants (even if only on occasion), should have been trained on the *Salwasser II* requirements. Indeed, even if the investigator need not be trained on the *Salwasser II* decision itself, they should be trained on the key legal concepts therein. As Employer notes, "A reasonably

[1] The term Cal/OSHA is often used as an abbreviation for the California Occupational Safety and Health Act.

well-trained inspector needs to know only a few key principles, long established by this Board and the courts, to craft a constitutionally sufficient affidavit." (Answer, p. 3.)

We next address the Division investigator's assertion that Wood came from inside the office without a face covering. (Investigator's Decl., ¶ 4.) This statement must be considered in context. It relates back to the prior assertion that the Division received a complaint that Employer was not complying with the face covering requirements. As the ALJ noted, there is no doubt that the Division included this statement so the judge would correlate Wood's lack of a face covering with the prior masking complaints, and infer that Wood was non-compliant with section 3205, subdivision (c)(6)'s masking requirement. However, this assertion does not demonstrate sufficient cause for issuance of the warrant. *Salwasser II* held that "'the 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….This requirement is met by a showing of specific evidence sufficient to support a reasonable suspicion of a violation.'" (*Salwasser II*, *supra*, 214 Cal.App.3d at 630-631, citing *United States v. Establishment Inspection of: Jeep Corp*. (6th Cir. 1988) 836 F.2d 1026, 1027.) "[W]hen the warrant application is based on specific evidence of violations, '…there must be some plausible basis for believing a violation is likely to be found.'" (*Ibid*., citing *Marshall v. Horn Seed Co.* (10th Cir. 1981) 647 F.2d 96, 102.) We conclude no reasonable and well-trained investigator could conclude that the statement regarding Wood demonstrated such probable cause for multiple reasons. First, the declaration reveals that the investigator's observations of Wood occurred almost exclusively outdoors, and there is no requirement to wear a mask outdoors. Second, even if Wood exited the building without a mask, as the Division itself has acknowledged, it is entirely possible that she had been wearing a face covering inside, and only took it off before stepping outside of the building. (Division Petition [9.30.22], p. 22.) Third, even assuming Wood had not been wearing a mask indoors, a careful review of the regulation and the record demonstrates the weakness of any inference that a violation exists.[2] As we noted in our prior decision, there were multiple situations where it would have been entirely acceptable for her not to wear a mask indoors. (§ 3205, subd. (c)(6)(D).) A reasonable and well-trained investigator would have known that a mask is not required indoors under many circumstances, and that insufficient information existed (or was given) to determine whether wearing a mask indoors was required in this instance. Given these facts, and the dearth of information as to whether Wood was actually required to wear a mask indoors, we conclude that a reasonable and well-trained investigator would have known that the affidavit failed to establish cause necessary for issuance of the warrant.[3]

The Division argues that its investigator reasonably relied on the plain wording of Labor Code section 6314, subdivision (b), which states, "[c]ause 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[.]" (Division Petition [4.23.24],

[2] Notably, the Division itself, at one point, indicated that the declaration's statements regarding Wood's failure to have a mask were not presented "as evidence of a violation." (Div. Brief re Good Faith Exception [1.31.24], p. 4.)

[3] We also observe the statements regarding Wood are inextricably linked with the declaration's prior assertion that the Division received a complaint that employer had not been complying with mask covering requirements. In other words, the assertion regarding Wood must be read and understood with reference to the Division's prior assertion that the Division had received a complaint of a masking violation. But, as noted, the conclusory assertion that a complaint was received is insufficient to establish cause under *Salwasser II,* so derivative allegations likewise fail.

pp.14-16.) Based on the contents of this statute, the Division argues that a well-trained investigator would have believed that the declaration presented sufficient cause for the warrant, particularly since the declaration recites that the Division received a complaint of violations of occupational safety and health standards at a place of employment. (Division Petition, [4.23.24], pp. 14-17.) The Division argues that its investigators need not be constitutional law scholars and necessarily know of the *Salwasser II* requirements. (*Ibid*.) Although we agree that Division investigators need not be legal scholars, we disagree that they do not need training on California legal precedent directly applicable to their responsibilities. The law pertaining to California Occupational Safety and Health Act proceedings is set forth in statutes, regulations, case law, and administrative decisions. It is not reasonable to follow only one source of law and ignore others. The *Salwasser II* decision, which is now approximately 35 years old, directly addresses the standard for issuance of a warrant in Cal/OSHA proceedings. When a Division investigator is tasked with securing a warrant, it is not reasonable for the investigator to be ignorant of (or, alternatively, to ignore) the key legal concepts within that decision.

Next, the Division challenges those portions of the ALJ's Order that pertain to attorney involvement. The ALJ found both that an attorney had been involved in drafting the investigator's declaration, and that the attorney's involvement was relevant to defeat the good faith exception. (Order Re Good Faith Exception, p. 6.) The ALJ noted the Division "attorneys had access to legal research in the form of the Appeals Board's prior decisions regarding probable cause, case law relative to the issues, and all other relevant legal authorities needed to ascertain whether the sparse factual recitation in the declaration was sufficient to support a warrant." (*Ibid*.) The ALJ held, "It is unreasonable for experienced legal counsel to prepare a declaration for the signature of the inspector and then blame the inadequacy of the declaration on that inspector." (*Ibid*.) In opposition, the Division argues that the ALJ's finding that an attorney drafted the regulation is wholly speculative, irrelevant, and does not change the standard of review, noting that the standard is whether a "well trained officer" not a "well trained attorney" would find the warrant objectively reasonable. (Division Petition, [4.23.24], pp. 17-18.) The Division is partially correct. On the one hand, we agree with the ALJ that the record demonstrates that a Division attorney was directly involved in efforts to secure the warrant, and likely participated in the drafting of the investigator's declaration. (Order Re Good Faith Exception, p. 6.) On the other hand, we agree that the standard is not necessarily modified due to the attorney's involvement. Regardless of whether the declaration was drafted by the investigator, an attorney, or both, the standard is whether the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed. (*People v. Camarella*, supra, 54 Cal.3d at 596, citing *Leon*, *supra*, 468 U.S. 897.) However, the result is not changed. We still conclude that a reasonable and well-trained Division investigator should have known that the declaration failed to establish probable cause, even if the declaration was prepared by a Division attorney and presented to him. As we have already noted, a reasonable and well-trained Division investigator should have been trained on the key requirements found in *Salwasser II*, and should have known that the declaration failed to meet those requirements.

2) Was the issuing magistrate misled by information that the officer knew or should have known was false?

The good faith exception also does not apply "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known

was false except for his reckless disregard of the truth." (*Leon*, *supra*, 468 U.S. at 923, *citing Franks* v. *Delaware* (1978) 438 U.S. 154; see also *United States v. Lauria* (2nd Cir. 2023) 70 F.4th 106, 121.) The exception also does not apply when the affiant recklessly omits material information from an affidavit in support of a search warrant. (*United States v. Xiang* (11th Cir. 2021) 12 F.4th 1176, 1179; *People v. Maestas* (1988) 204 Cal. App. 3d 1208, 1216.)

Employer argues that the good faith exception should not apply because three items in the investigator's declaration were misleading: "the statement that 'Ms. Wood came from inside of the office and was not wearing a face covering'; the declaration's inclusion of Labor Code section 6314 as a seemingly conclusory statement that cause for a warrant 'shall be deemed to exist' if a health or safety complaint is filed; and the reference in the declaration to Labor Code section 6321, which the Division appears to say means that it can waive the 24-hour advance notice requirement for executing the warrant." (Order re Good Faith Exception [3.18.24], p. 3.) Like the ALJ, we focus our analysis on the first item.

The ALJ found that the judge that issued the warrant was misled because the Division intentionally omitted material information from the declaration. The ALJ's Order noted,

> The Division, as the government agency enforcing the COVID-19 prevention regulations, knew that there was no requirement that Ms. Wood wear a face covering outdoors and, indeed, there were several situations where it would have been entirely acceptable for her to not wear one indoors at the time of the inspection. The Division was well aware that there was intense nationwide focus on the COVID-19 pandemic and mask-wearing was a topic of great import in 2021, when this situation occurred. The Division's inclusion of the statement could only have been intended to convey the message that what Ms. Wood was doing was a violation. The statement, while not "false" on its face, was certainly presented in such a way that it could reasonably mislead the judge, who would not likely have been as well-versed in the various COVID-19 prevention regulations at issue.
>
> Thus, it is found that the judge was misled by the Division's ambiguous statement that Ms. Wood was not wearing a face covering when she walked out of the building.
>
> (Order re Good Faith Exception [3.18.24], p. 4.)

We find the ALJ's ultimate conclusion to be reasonable, although we disagree with some of the ALJ's analysis.

Again, the good faith exception does not apply if the judge "in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." (*Leon*, *supra*, 468 U.S. at 923.) Parsing this

statement, it is not enough that the judge was misled; the affiant must have intentionally or recklessly misled the judge.

We concur with the ALJ that the judge that issued the warrant was misled because the Division omitted material facts from the declaration essential to a probable cause finding. After stating that the Division had received a complaint of face covering violations, the declaration included a terse statement that "Ms. Wood came from inside the office and was not wearing a face covering." The statements were clearly placed in adjacent paragraphs so that a reader would assume that Wood was engaging in a violation. However, the declaration omitted that the investigator's observations of Wood were almost exclusively outdoors and a mask was not required outdoors. The declaration also omitted that masks were not required indoors under all circumstances, nor did it disclose that the investigator did not have a reasonable opportunity to observe whether the circumstances excusing the mask requirement applied, i.e., whether there was a medical condition, whether the employee was eating, etc. The omission of this information was also misleading.

However, even though the declaration was misleading, we must still decide (as noted above) whether the omission of this information was done intentionally or with reckless disregard for the truth. (*Leon*, *supra*, 468 U.S. at 923.) The ALJ's order indicates or implies that the omission of the information was done intentionally. We disagree. There is simply insufficient information to demonstrate that the omission of information was done with intentionality. Further, absent more persuasive evidence of intentionality, we decline to ascribe such an ill motivation or intention to the Division or its personnel. However, that does not mean the good faith exception applies. Even if the omission was not done intentionally, we conclude that the omission was done recklessly or with reckless disregard for the truth. In the context of the Fourth Amendment, "recklessness may be inferred where the omitted information was critical to the probable cause determination." (See *Burke v. Town of Walpole* (1st Cir. 2005) 405 F.3d 66, 81-82.) "[O]missions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know." (*Wilson v. Russo* (3d Cir. 2000) 212 F.3d 781, 787-788; see also *United States v. Jacobs* (8th Cir. 1993) 986 F.2d 1231, 1234-1235.) We conclude that the Division's omission of this information was done recklessly since the omitted information was essential to a probable cause determination; we believe the omitted information was something the judge would certainly want to know.

In opposition, the Division argues that it had no duty when seeking the warrant to mention that there are multiple circumstances where a mask was not required indoors, nor to mention that its investigator had no reasonable opportunity to observe whether these circumstances applied. (Division Petition [4.23.24], p. 12.) The Division argues that these are exceptions to the safety order, not within the Division's burden of proof, and that it need not discuss these facts in a warrant application. (*Ibid*.) However, the Division's argument improperly conflates the burdens that apply at a hearing when seeking to establish a violation of a safety order, with the burdens that apply when seeking a warrant. The burdens are not the same. The Division holds some duty to disclose adverse or exculpatory information in a warrant affidavit. While assuredly "an affidavit need not disclose every imaginable fact however irrelevant," it must "furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present. [citations.]" (*People v.*

Sandoval (2015) 62 Cal. 4th 394, 410 [underline added], citing *People v. Kurland* (1980) 28 Cal. 3d 376, 384.) "[A]n affiant's duty of disclosure extends only to 'material' or 'relevant' adverse facts." (*Ibid*.) "[F]acts are 'material' and hence must be disclosed if their omission would make the affidavit *substantially misleading*." (*Ibid*. [emphasis in original].) Here, although the Division assuredly need not address every conceivable exception to a safety order in a warrant application (nor insert every piece of exculpatory information), we conclude that they must address facts that directly undermine the Division's assertion or intended inference that a violation was observed at the workplace, especially here, where the omission of such facts made the declaration substantially misleading. Here, since the Division's intended inference was that Wood violated an indoor masking requirement, the Division had a duty to disclose that masks were not required outdoors, nor were they required indoors under all circumstances. The Division should have additionally disclosed that it had no reasonable opportunity to observe whether any of the indoor exceptions to the masking requirement applied. The exclusion of this information made the investigator's declaration substantially misleading and hindered the inference-drawing powers of the judge, particularly since, as the ALJ noted, a judge is unlikely to be as well-versed in the various COVID-19 prevention regulations. (Order Re Good Faith Exception [3.18.24], p. 4.)

Of course, not all failures to disclose adverse or exculpatory information will result in exclusion. Had the good faith exception applied, exclusion would not be mandated. However, as noted herein, the good faith exception does not apply for two reasons. It does not apply because the investigator, or whoever wrote the declaration, recklessly omitted material information from an affidavit in support of a search warrant. (*United States v. Xiang*, supra, 12 F.4th at 1179.) Next, as noted in the previous section, irrespective of whether the omission of the aforementioned facts was done intentionally or recklessly, we reiterate our decision that a reasonable and well-trained investigator could not have harbored any objectively reasonable belief here in the existence of cause as defined in *Salwasser II*. (*People v. Maestas*, *supra*, 204 Cal. App. 3d at 1216.)

DECISION

The order of the ALJ is affirmed for the reasons stated herein, and the petition for reconsideration is denied. This matter is remanded to hearing operations. As the ALJ correctly noted, the application of the exclusionary rule does not apply "to preclude an agency from pursuing corrective actions but may apply for assessment of penalties after the fact." (*Calvary Chapel of San Jose*, supra, Cal/OSHA App. 1564732, citing to *Southwest Marine, Inc*., *supra*, Cal/OSHA App. 96-1902.)

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

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