

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE EMPLOYEES TRADES COUNCIL,  
LOCAL 1268, LIUNA, AFL-CIO,

Charging Party,

v.

STATE OF CALIFORNIA, DEPARTMENT  
OF TRANSPORTATION,

Respondent.

Case No. S-CE-26-S

PERB Decision No. 257-S

November 16, 1982

Appearances: Thomas E. Rankin, Attorney for State Employees Trade Council, Local 1268, LIUNA, AFL-CIO; William M. McMillan, and Barbara T. Stuart (Department of Personnel Administration), Attorneys for State of California, Department of Transportation.

Before Gluck, Chairperson; Tovar and Jensen, Members.

DECISION

GLUCK, Chairperson: The State of California, Department of Transportation (Caltrans) excepts to a hearing officer's proposed finding that it terminated Richard Delsigne, a shop steward, because of his participation in protected activities. The charging party, State Employees Trades Council, Local 1268, LIUNA, AFL-CIO (SETC), claims that Caltrans' stated reasons for his termination, including sleeping on the job, using racially derogatory language, and poor work performance are pretexts to disguise its anti-union animus. Caltrans denies such motivation and that Delsigne was engaged in protected activity.

## FACTS

Delsigne was a highway equipment operator for 14 years at the Department's Placerville yard. He was an active union member and as an aggressive SETC shop steward since 1979 had several meetings with Don Frohreich, the highway superintendent, representing other grievants and himself. Three punitive actions were taken against him since 1975, including a five-day suspension in January 1980.

On February 20, 1980, Delsigne received an anonymous phone call that Frohreich was at the Carriage House, a local bar and restaurant. Delsigne went there at approximately 5:20 p.m., with his friend Joel Espinoza, and photographed Frohreich having a drink. Frohreich, angered, asked Delsigne; "What's the idea of taking pictures?"

Delsigne replied to the effect:

What's the idea of giving me five days off unnecessarily? I have a family like anyone else and it was bad to give someone five days off for what he said at a safety meeting.

He then said he was going to take pictures of Frohreich's state car which was parked outside. Another employee later came to the Carriage House and drove the car away.

The following day, Frohreich called Delsigne into his office, reprimanded him for taking the pictures and warned him that punitive action and perhaps a civil suit could be filed against him. Frohreich also called in Espinoza and another

employee who had witnessed the event and told them virtually the same thing. He did not, however, discipline those two employees.

Shortly thereafter, Delsigne sent the pictures he had taken to SETC, and asked it to file a complaint against Frohreich for drinking while in possession of a state vehicle. The union sent the pictures to the Caltrans<sup>1</sup> district office in Marysville and requested punitive action. Caltrans declined, finding that Frohreich had not been drinking on company time, and that he did not drive the state car after he had been drinking.<sup>1</sup>

From this point on, Frohreich and his supervisors documented every Delsigne transgression. In early April, he was reprimanded for sleeping on the job. In writing up the reprimand, Delsigne's supervisor also cited him for not wearing his hard-hat or using his seat belt. Neither of these "charges" had been mentioned to Delsigne prior to preparation of the reprimand.

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<sup>1</sup>Two years earlier, Delsigne and other employees had filed charges against Frohreich for drinking while driving a state vehicle and were told by Caltrans<sup>1</sup> district manager that they could not prove their case without photographs. Frohreich is assigned a state car on a 24-hour per day, 7-day per week basis. Frohreich testified on cross-examination that he "recently" had a drunk driving charge reduced to reckless driving, although this did not occur during working hours or involve a state car.

On April 9, Frohreich wrote to the district maintenance engineer requesting Delsigne's dismissal. He also asked Jerry Hamm, another supervisor, for a letter complaining about Delsigne.<sup>2</sup> Melvin Fronk, a lead worker who considered Delsigne's performance to be very good, was not consulted.

During the spring, Froerich counseled Delsigne concerning his use of racially derogatory language. Such language was common at the Placerville yard, but Frohreich had never disciplined anyone for this reason.

On July 2, 1980, Delsigne received his notice of termination citing inefficiency, neglect of duties, insubordination, and discourteous treatment of the public and other employees. The notice specified Delsigne's telling offensive ethnic jokes and using racially derogatory words; photographing Frohreich at the Carriage House; aggravating other crew members; sleeping on the job and not wearing a hard-hat or using seat belts; referring to his supervisors as "Hitler" and "dictator" and ridiculing another supervisor by placing a cartoon on the bulletin board. A poor annual

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<sup>2</sup>Another letter may have been solicited from a supervisor who had worked with Delsigne some two years earlier. Frohreich denies asking him to write it but did use it in preparing the dismissal charges.

performance rating and the derogatory letter solicited from one of Designe's former supervisors were also cited.<sup>3</sup>

Delsigne appealed his termination to the State Personnel Board and SETC filed this unfair practice charge alleging, inter alia, that Caltrans had violated subsections 3519(a), (b) and (d) of the State Employer-Employee Relations Act (SEERA) by firing him for engaging in protected activities, namely photographing Frohreich and posting materials on the union bulletin board.<sup>4</sup>

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<sup>3</sup>Delsigne denied only the charge that he had slept on the job. SETC did not except to the hearing officer's adverse resolution of the conflicting testimony.

<sup>4</sup>**SEERA** is codified at Government Code section 3512 et seq. All references hereafter will be to the Government Code unless otherwise indicated.

Subsections 3519(a), (b) and (d) state:

It shall be unlawful for the state to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

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(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

## DISCUSSION

The hearing officer determined that Delsigne would not have been dismissed but for his taking Frohreich's picture, an act she found to be protected<sup>5</sup>. Caltrans admits that its decision to terminate Delsigne was influenced by this incident but argues that his actions are not protected.<sup>6</sup>

Activity directed against a supervisor's performance has been protected in the private sector when its purpose was to advance the employees' interests in working conditions. In Dreis & Krump Mfg. Co. v. NLRB (7th Cir. 1976) 544 F.2d 320 [93 LRRM 2739], an employee was reprimanded for the negligent use of tools. He grieved this, contending that his supervisor had not adequately trained him or informed him of safety procedures. While the grievance was being processed, the employee distributed leaflets to his coworkers informing them of his complaint, criticizing his supervisor and urging other

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The hearing officer did not address the 3519(d) violation. Since there was no evidence or argument presented in support of this charge, we dismiss it here.

<sup>5</sup>Section 3515 guarantees that:

state employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

<sup>6</sup>We do not reach the question of whether posting the material was protected in this instance. The hearing officer made no finding on this and SETC did not except to the omission.

employees to come forward if they had similar grievances. The employee was fired for the leafletting. Ordering reinstatement, the court found the leafletting protected because its purpose was to elicit group activity which would benefit all participants as employees. See also Avalon-Carver Community Center (1981) 255 NLRB 241 [107 LRRM 1077], where a grievance criticizing the supervisor was protected because the supervisor's performance affected collective working conditions.

Where, however, an employee's circulation of a petition signed by 27 employees, calling for the dismissal of a supervisor was for the purpose of humiliating the supervisor against whom he harbored a personal grudge, his conduct was denied protection.<sup>7</sup>

Here, we do not find that Delsigne's act furthered a legitimate interest of the employees. Whether or not Frohreich drank after hours (a period of time in which employees normally have no interest in their supervisors' activities), used a state car to go to a bar or drove the car after drinking at a

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<sup>7</sup>The employee who had been disciplined by the supervisor for running a gambling operation on company property and being overly attentive to a female worker, was fired for circulating the petition. The court did concede that, if the purpose of the action relates to working conditions, it will not lose its protection because of the questionable motives of those initiating the action. Joanna Cotton Mills v. NLRB (4th Cir. 1949) 176 F.2d 749 [24 LRRM 2416].

bar, bears no discernable relationship to the unit employee's working conditions. While any individual may report a state employee's improprieties to appropriate authority, Delsigne's action falls outside the range of conduct which SEERA was enacted to protect.

SETC also charges that, after Delsigne's termination, Joel Espinoza was overheard telling him by phone that Frohreich was having a beer at lunch, and was warned by his supervisor not to make phone calls during his lunch hour. The hearing officer found this "warning" violated subsections 3515(a) and (b). No exception was taken to this finding. The pertinent part of the hearing officer's order is therefore final as to the parties.

#### ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board ORDERS that the charge brought by the State Employees Trades Council against the State of California, Department of Transportation in Case No. S-CE-26-S is DISMISSED, except as to that portion thereof alleging that the Department violated subsections 3519 (a) and (b) of the SEERA by issuing a warning to Joel Espinoza.

The hearing officer's decision and order with respect to said allegations, not having been excepted to, is final as to the parties.

The matter is remanded to the General Counsel to prepare and issue an amended Notice to Employees conforming herewith,

Members Tovar and Jensen concurred.