

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE EMPLOYEES TRADES COUNCIL)	
LOCAL 1268, LIUNA, AFL-CIO,)	
)	
Charging Party,)	Case No. SF-CE-16-S
)	
v.)	PERB Decision No. 268-S
)	
STATE OF CALIFORNIA,)	December 21, 1982
(DEPARTMENT OF TRANSPORTATION),)	
)	
Respondent.)	

Appearances; Thomas E. Rankin, Attorney for State Employees Trades Council, Local 1268, LIUNA, AFL-CIO; William M. McMillan, Attorney for State of California, Department of Transportation.

Before Tovar, Jaeger and Jensen, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California, Department of Transportation (Department or Respondent) to a hearing officer's proposed decision which finds that the Department violated subsections 3519(a) and (b) of the State Employer-Employee Relations Act (SEERA or the Act)¹ by engaging in intimidating, coercive conduct against

¹SEERA is codified at Government Code section 3512 et seq. All statutory references herein are to the Government Code unless otherwise noted.

Section 3519 provides in relevant part as follows:

It shall be unlawful for the state to:

one of its employees because of her exercise of rights protected by the Act.

After considering the proposed decision, the exceptions thereto, and the entire record in this case, the Board reverses the hearing officer and dismisses the charge.

FACTS

Lanell Zaragoza was hired by the Department on April 1, 1980, as a landscape maintenance worker and was assigned to work out of the Orinda yard of the Department's Walnut Creek District. Her duties involved working on the side of the freeway clearing weeds, pruning trees and spraying chemicals. She joined the State Employees Trades Council, Local 1268, LIUNA, AFL-CIO (SETC) during her first month of employment there.

In May 1980, Zaragoza encountered a problem regarding bathroom procedures. Because the bulk of her work time is spent working on the side of the freeway, going to the bathroom

(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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may require driving the maintenance truck some distance to the nearest available facility. A dispute developed concerning how often she should be making these trips, and where. She contacted her union representative, Bill McCune, for assistance. McCune and Zaragoza met with her immediate supervisor, Jim Masterson, and the problem was resolved to the satisfaction of all parties.

The Job Performance Reports

Later that summer Supervisor Masterson and Zaragoza became involved in another controversy which began when she asked why an employee cannot be issued a copy of his or her performance evaluation report, which is known in the Department as a "report of performance" (ROP), as soon as the employee has signed it. Masterson's response at the time Zaragoza first raised the point was that he didn't know why, but that it was Department procedure.

Zaragoza became involved in another controversy in August 1980, when Masterson presented her with her second ROP. The report incorrectly stated that she had nine absences during the review period. She pointed out to Masterson that the correct figure was only four, and on that ground refused to sign the report. She told Masterson that she was going to telephone a representative of her employee organization, SETC, about the matter, and in fact did so. Masterson returned later

that day, acknowledged that the report had been in error, and said a new, corrected report would be prepared.

On August 21, Masterson came to Zaragoza with the corrected second ROP. Zaragoza signed the ROP at that time, but again raised the question of why she could not receive a copy of the report upon signing it. This time Masterson responded that he didn't know, but that he would find out the reason for the policy. The regular second line supervisor was on vacation that day, and his place had been filled by another supervisor, Willard Oneth. Oneth was on temporary assignment to the Walnut Creek-Orinda area to serve during the two weeks that the regular second line supervisor was away. Masterson relayed Zaragoza's question to Oneth, explaining that this was the second time she had raised the issue without getting an answer. In turn, the next morning, August 22, Oneth spoke to Irv Smitten, senior highway superintendent, who was Oneth's supervisor. Smitten asked Oneth to arrange to have Zaragoza come to the Orinda yard later that morning to meet with him to resolve the question. Oneth contacted Zaragoza, who was working with her partner, Donald Wesley, and the two employees drove to the Orinda yard. Masterson's office - a small, ground-level room attached to a maintenance garage structure - is there at the Orinda yard. Masterson was present when Zaragoza and Wesley arrived, and Oneth and Smitten arrived shortly thereafter. The three supervisors and Zaragoza then

entered Masterson's office, while Wesley worked on irrigation equipment in the adjoining maintenance garage.

The Meeting

According to Zaragoza's testimony, the meeting began as follows (transcript, p.9):

Q. [following Zaragoza's description of events leading up to the meeting]: And could you tell us what happened in that meeting?

A. Mr. Smitten proceeded to explain to me the procedures on why I could not have my copy when I signed it.

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Q. Do you recall any other remarks that Mr. Smitten made at the beginning of the meeting?

A. Yes, he did [sic]. He said that he wanted to let me know that I had already been brought to his attention twice since I had come to his district. Not once but twice had I asked for my personnel file. He resented the fact that I had a union representative in his yard discussing his policies and procedures on bathrooms and that he felt that that was very unnecessary and he didn't like that at all.

Zaragoza described Smitten's voice as being at times loud and very harsh and direct. She testified that at one point Smitten told her "that I had better God damn wipe that smile off my face." She also testified that Smitten at one point addressed Masterson, criticizing his handling of ROP's and finally throwing papers at him.

Zaragoza's work partner, Donald Wesley, testified that while working on equipment in the garage adjoining the meeting room he could hear some of the conversation inside the office. He twice testified that he could not make out the conversation when it occurred in a normal speaking volume, but could only hear it clearly when the speaker's voice was raised. He testified (transcript, p. 18) that:

A. The first thing that happened was Lanell goes in, they close the door, and he is yelling at Lanell about her bathroom habits and that was totally different from what we were to understand the conversation was to be about.

Q. So you heard him saying something about her restroom habits?

A. Yes. This was the second time that we have had to talk to, of matters concerning yourself, of herself and the first one was her bathroom habits.

Q. Did you hear anything Lanell said?

A. She talked in a normal tone to him as, you know, you don't need to talk to me that loud, I am right here.

Wesley testified that other than this initial exchange between Smitten and Zaragoza he could not recall the content of any of their remaining conversation, other than their incidental closing remarks, but that he could recall generally that the meeting thereafter was conducted at more or less normal volume.

Bill McCune, the SETC representative, testified that Zaragoza called him in May regarding the bathroom problem,

which he assisted her in resolving. She also called him about the error regarding the number of absences in her second ROP, but later notified him that the problem had been corrected. After the meeting of August 22, she called and told McCune about the meeting, which prompted McCune to file this unfair practice charge. He also testified that in his past dealings with Smitten on behalf of the union Mr. Smitten has been cooperative, He offered hearsay testimony that union members have told him that Smitten's behavior has been inconsistent and frequently volatile.

Erv Smitten testified, consistently with Zaragoza, that the meeting began with his effort to explain to Zaragoza why she cannot receive a copy of her ROP upon signing it. He flatly denied, however, that he yelled at Zaragoza or Masterson, that he threw paperwork, that he expressed a negative opinion regarding union representatives being in his yard discussing rules, or that Zaragoza had made a request for union representation at the meeting. He testified that it was Zaragoza who first raised the subject of the bathroom dispute:

Q. Was the subject of bathroom policy discussed at this meeting?

A. Yes. It was brought up by Ms. Zaragoza.

Q. And do you recall what she said about the policy?

A. I believe right at the outset of the meeting when I explained to her the reason that I was there and why I had called it,

she made the charge that Jim Masterson had made her sign a report of performance blank. And when we, Jim and I, talked this over and he explained to her how she may have been confused on it, I think it was because the facing copy had pulled off the ROP or something. When he explained that to her I think Lanell made the statement, well, it's the same as the bathroom, I had to get the union in here to get that straightened out. I think that's the way the bathroom conversation came up at all. Prior to that I had very little, if any knowledge of what had gone on at all.

Smitten denied using profanity at the meeting, and denied throwing papers at Masterson, testifying instead that after discussing the ROP forms with Masterson he had simply laid them on the desk.

Masterson's testimony was consistent for the most part with Smitten's. He affirmed that Smitten had during the meeting pointed out to him that he had not fully completed the ROP's on three employees, including Zaragoza. But he specifically denied that Smitten yelled at him or threw paperwork at him. He also denied that Smitten said anything about not liking union representatives in his yard discussing rules, or that Smitten had used profanity. He testified, as did Smitten, that the only time Smitten mentioned union representation was in explaining to Zaragoza that, if she was dissatisfied with the Department's policies and procedures, she could try to have them changed, and that she could seek the assistance of her employee organization in doing so. Masterson also

inadvertently illuminated one possible explanation for the conflicting versions of the meeting dialogue. He said that at the beginning of the meeting Mr. Smitten said words to the effect that this is the second time she had been upset with district procedures. Masterson indicates that he thought Smitten was making reference to the fact that Zaragoza had been party to the bathroom dispute in May, and thus that the instant dispute was the "second time she had been upset." But Masterson was clear in saying that Smitten never actually mentioned the bathroom dispute in any way. In fact, the testimony of both Masterson and Smitten indicates that Smitten played no part in the May bathroom dispute, that Masterson, who handled the matter on behalf of the Department, had never told Smitten anything about it, and that Smitten was probably at best only minimally aware that such a dispute had ever occurred. On the other hand, Smitten, Masterson and Willard Oneth agree that Smitten had been apprised of Zaragoza's twice-expressed objections to the ROP procedures, and Smitten testified specifically that it was upon learning of Zaragoza's second unanswered challenge to the ROP procedures that he was prompted to call the August 22 meeting. Thus, when he opened the meeting by saying that this was the second time she had been upset with procedures, it appears that he may have been referring to the two times she had questioned Masterson about the ROP policy. The testimony is unrefuted that Willard Oneth

came to Smitten about 9:00 a.m. on August 22 to inform him of Zaragoza's second questioning of the procedures. Smitten thereupon asked Oneth to arrange for Zaragoza to come meet with him, and the meeting occurred at about 10:30. Thus, since he had just learned of her second complaint an hour and a half before, Smitten started by saying that this was the second time Zaragoza had been upset with the procedures. Zaragoza apparently thought he was referring to the bathroom dispute and in response commented in some way about that dispute. Thus, Smitten says that Zaragoza raised the subject of the bathroom dispute, while Zaragoza charges that Smitten first brought it up. Masterson's actual testimony was as follows:

Q. (By Mr. Rankin) All right. In the meeting of the 22nd do you recall what Mr. Smitten said about the restroom problem with Ms. Zaragoza?

A. Actually he didn't, as far as I know, he didn't say anything other than the fact that he said this is the second time that she has been upset over our, the procedures. And I was thinking that he was referring to the restroom policy. At the time, he didn't, I don't believe he had mentioned it. [Transcript, p. 78]

The testimony of Willard Oneth provides the clearest, most detailed narration of the meeting. It convincingly resolves some of the conflicts in the testimony of previous witnesses. In connection with the above discussion of Smitten's opening comments regarding Zaragoza's twice-stated objections to procedures, Oneth's unrefuted testimony was that Smitten asked

him to arrange the meeting with Zaragoza only after Oneth told Smitten that Zaragoza had twice asked about ROP procedures without getting an answer and that, in Oneth's opinion, she deserved to get an answer. Oneth also testified as follows (at p. 83) :

Q. Was there any discussion concerning restroom policy?

A. Yes, there was. But she said at that point, she said, this is twice now I've had trouble understanding policies. She said I had to get the union representative to solve it the first time. And Erv looked somewhat surprised; I don't think he knew there was any problem but they went to the union over her of going to the restroom.

Q. So Ms. Zaragoza initiated the comment about restroom policy, is that correct?

A. Yes, she did.

Oneth also testified that the only mention Smitten made of employee representation was in stating that if Zaragoza wanted to change Department procedures she should "get together" with her employee organization.

In connection with Zaragoza's allegation that Smitten had spoken "loudly, harshly and directly" and told her to "wipe that God damn smile off your face," Oneth testified that on one occasion Smitten had become stern, raising his voice somewhat, and telling Zaragoza that her accusation of misconduct against Masterson was a serious charge and that it was no laughing matter. Oneth testified, however, that he remembered no other

time when Smitten raised his voice, and denied that Smitten had used profanity.

In connection with Zaragoza's allegation that Smitten had berated Masterson and thrown ROP forms at him, Oneth testified:

And [Smitten] asked me, I had three ROP's in my folder and Erv asked me for them. So I took them out and I laid them on Jim's desk and Erv says I'll show you why you can't have a copy of it. And he showed her on there where she had, where Jim had not marked in the blank that she was supposed to been discussed with her. He said, when you receive these there should be no errors in them. And then he said a few other words . . . And then he, had them and he tossed them back on the edge of Jim's desk. . . . He didn't throw them, he just tossed them on Jim's desk.

DISCUSSION

On exceptions, the Department contends that the hearing officer erred in finding that, while meeting with Zaragoza, "Smitten raised his voice and told Zaragoza that he resented the fact that she had a union representative in his yard to discuss bathroom procedures."

Central to that finding of the hearing officer is his determination that Donald Wesley was a credible witness. He reasoned that Wesley is not a member of SETC, that he gave testimony adverse to his employer's interests while still an employee (thus suggesting the credibility of such testimony) and that he comported himself in a forthright and credible manner. He then found that Wesley's testimony corroborated

Zaragoza's testimony that Smitten began the meeting by yelling at her about the bathroom dispute, and that SETC representative McCune's testimony further corroborated Zaragoza's account of the August 22 meeting. On this basis he determined that Zaragoza's account of the meeting should be favored over Smitten's.

In Santa Clara Unified School District (9/26/79) PERB Decision No. 104, the Board articulated the standard it will apply in reviewing its hearing officers' findings. We stated that

. . . while the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented.

The instant case requires a resolution of conflicting accounts of the August 22 meeting offered by Lanell Zaragoza on the one hand and three witnesses for Respondent on the other. In electing to credit Zaragoza's version over that offered by Respondent's witnesses, the hearing officer neither made nor relied on findings based on first-hand observation of Zaragoza's demeanor. Instead, he cites preponderantly objective evidence, making a finding based on witness demeanor only in the case of Donald Wesley. We do not disturb the hearing officer's finding that Wesley was a truthful witness.

Nevertheless, we find that Wesley's testimony is not by itself determinative of the result.

In recounting the fragment of Smitten's conversation which Wesley testified he overheard, he does not verify that Smitten said anything about union representation. He testified only that Smitten yelled at her about her bathroom habits. We find no basis here for concluding that Zaragoza's claim that Smitten chastised her for availing herself of union representation should be credited. So, too, in light of Wesley's testimony that he could hear only those parts of the conversation which were uttered at higher than normal volume, his testimony provides no basis on which to determine who was the first to raise the subject of the bathroom dispute, since he could not hear any comments which Zaragoza might have made prior to Smitten's louder speech. In fact, Wesley's account of the fragment of conversation he overheard contradicts Zaragoza's testimony as much as that of Respondent's witnesses. Wesley testified that "[t]he first thing that happened was . . . [Smitten] is yelling at Lanell about her bathroom habits" Zaragoza's testimony, however, was that Smitten began the meeting by saying that she had already been brought to his attention twice, then commenting that she had twice asked for her personnel file, and, thirdly, saying that he "resented the fact that I had a union representative in his

yard discussing his policies and procedures on bathrooms.

... " Thus, Wesley's and Zaragoza's accounts are inconsistent as to the first subject addressed by Smitten at the meeting and as to whether "bathroom habits," as opposed to her recourse to union representation, were discussed at all. Wesley's testimony as to the substance of the conversation is only corroborative of Zaragoza's account to the extent that it shows that Smitten spoke about the May, 1980 bathroom incident. Yet Respondent's witnesses too acknowledge in their testimony that Smitten commented on that subject, though they suggest that it was only in response to Zaragoza's raising of the subject. Again, therefore, Wesley's testimony provides no clear basis for crediting Zaragoza's account over that of Respondent's witnesses.

On collateral matters, Wesley's testimony is equally ambiguous. Thus, on the subject of how the meeting ended, Zaragoza testified that she made a demand for union representation, that Smitten denied her demand, that she thereupon stated that the meeting was through, and that she and Smitten thanked each other for their time. Smitten, however, in his testimony denied that Zaragoza made such a demand for union representation. Wesley testified that he remembered the ending and, specifically, that there was agreement that nothing more could be accomplished and that they thanked each other for their time. Thus, Wesley fails to support Zaragoza's claim

that she demanded representation at the meeting's end. In our view, therefore, while we accept the hearing officer's determination that Donald Wesley was a truthful witness, his testimony does not provide a basis for concluding that Zaragoza's account of the meeting should be credited over the accounts of three witnesses of Respondent.

As a further basis for crediting Zaragoza's account of the meeting, the hearing officer cited the testimony of Bill McCune to the effect that Zaragoza called him shortly after the August 22 meeting and told him what had transpired at the meeting. McCune did not, however, testify as to what Zaragoza actually said to him. We find little probative value in the evidence that Zaragoza had a telephone conversation with McCune about the meeting. It does nothing to illuminate for us the conversation between Zaragoza and Smitten.

Finally, the hearing officer noted certain inconsistencies in Smitten's own testimony, as well as certain particulars in which Smitten's observations conflict with Wesley's testimony, and relied on these factors in finding that doubt is cast on the reliability of Smitten's testimony. Without reversing this finding, we fail to see how this evidence impeaches the testimony of Masterson and Oneth. The hearing officer fails to note, nor do we find, any evidence that their testimony is not as credible as Zaragoza's.

These two witnesses extensively corroborate Smitten's account of the meeting in the important particulars. The testimony of Oneth especially was clear, consistent and detailed. His testimony clarified a number of otherwise ambiguous aspects of the events at issue. Oneth was not regularly assigned to work with any of the other individuals involved in this matter, being present at that time only as a result of a temporary two-week assignment. Thus he would not appear to be influenced by personal affiliations with any of these people.

In our statement of the facts, above, we noted the possibility that Zaragoza may have misconstrued a reference by Smitten to the fact that she had twice taken issue with Department procedures, understanding those words to include a reference to the May bathroom dispute when no such reference was intended. We need not find that this is in fact the true explanation of the matter. It is sufficient that we find that the charging party has failed to prove by a preponderance of the evidence that "Smitten raised his voice and told Zaragoza that he resented the fact that she had a union representative in his yard to discuss bathroom procedures," or that Smitten otherwise engaged in speech or conduct at the August 22 meeting which would constitute a violation of SEERA subsections 3519(a) and (b).

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is hereby ORDERED that:

The charge that the State of California, Department of Transportation violated Government Code subsections 3519(a) and (b) is hereby DISMISSED.

Member Jensen joined in this Decision.

Member Jaeger, dissenting: I disagree with the majority's basis for overturning the proposed decision as I would summarily affirm the hearing officer in this case. My colleagues correctly cited Santa Clara Unified School District (9/26/79) PERB Decision No. 104 as the applicable precedent. However, they go on to misapply the case. Santa Clara requires that the Board "... consider the entire record, including the totality of the testimony offered, and is free to draw its own and perhaps contrary inference from the evidence presented." (Supra, at p. 12, emphasis added.)

The evidence in the record does not support the majority in drawing an inference so contrary to that of the hearing officer. Therefore, I find no reason to reject the hearing officer's credibility resolution regarding the testimony of Zaragoza. To conclude that the hearing officer's determination "neither made nor relied on findings based on first-hand observation of Zaragoza's demeanor" is illogical. The hearing officer did make a specific credibility determination in favor of the Charging Party's version of the meeting. It is clear that in making this determination the demeanor of the witness was observed. The hearing officer's failure to state this fact explicitly in the proposed decision can nonetheless be readily inferred from his discussion.

As to the crucial issue in this case, not a single witness for the Respondent, except Supervisor Smitten, directly contradicted the credited testimony of the Charging Party regarding the union representation statement.