STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER #504,	)	
Charging Party,	)	Case No. LA-CE-2224
v.	)	PERB Decision No. 708
PLEASANT VALLEY SCHOOL DISTRICT,	)	December 21, 1988
Respondent.	)	

Appearances: William C. Heath for California School Employees Association, Chapter #504; Liebert, Cassidy & Frierson by Bruce Barsook for Pleasant Valley School District.

Before Hesse, Chairperson; Porter and Shank, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the respondent, Pleasant Valley School District (District), to the proposed decision of a PERB administrative law judge (ALJ). The ALJ held that the District violated section 3543.5, subdivision (a) of the Educational Employment Relations Act (EERA or Act) and, derivatively, section 3543.5, subdivision (b),[1] when it reassigned a classified employee following his

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 provides, in pertinent part, as follows:

assertion of a safety complaint. We affirm the attached decision of the ALJ to the extent that a violation is found; however, we reach this conclusion for different reasons, as set forth below.

FACTUAL SUMMARY

Vincent Flores (Flores) has been employed by the District since 1955. Flores was a bus driver/maintenance employee from 1955 to 1972 and, from 1972 to 1981, he was head bus driver for the District. From 1955 to 1972, Flores had regularly performed lawn mowing duties in his capacity as a maintenance employee. When the District purchased a Jacobson tractor/riding mower at some point during the period between 1955 and 1972, Flores was its primary operator until he became head bus driver.

In 1981, Flores voluntarily demoted to the groundskeeper classification. At the time of his voluntary demotion, there was an opening within the groundskeeper classification for a mower operator. Flores specifically requested that he be assigned to mowing duties, and his request was approved, in

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> It shall be unlawful for a public school employer 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.

writing, by the District. When Flores took over the mowing duties in 1981, the primary mower for the District was a Toro Parkmaster (Parkmaster), another large riding mower. The Jacobson, after some needed repairs, was also still operational. Flores operated the Jacobson whenever the Parkmaster was out of service (an average of one week's time per year). He also operated the Jacobson every Friday to perform the mowing work on District property within the immediate area of the maintenance headquarters. Flores was never required to drive the Jacobson to locations not adjacent to the headquarters because he had discussed with his supervisor, Bob Humphrey, that it was unsafe for highway transportation and they had agreed that Flores would operate it only in the adjacent areas.

On February 15, 1985, however, the Parkmaster was being repaired and Humphrey told Flores to drive the Jacobson to a school site which was approximately one and one-quarter miles from headquarters. Humphrey warned Flores to drive the mower carefully and to "take it easy," but Flores told Humphrey that he would not drive it on public streets because it was a safety hazard. Humphrey did not pursue the matter but told Flores to put this in writing. Flores did document his complaint, subsequent to consulting with his California School Employees Association (CSEA) chapter president, Hector Dion.

Following the February 15 incident, Humphrey and Mr. Riley, another District supervisor, test drove the Jacobson. By using

an automobile to check the speed at which the Jacobson became unsafe, they were able to ascertain a maximum limit of 10 miles per hour for the mower. The Jacobson itself has no speedometer.

The results of the test drive were never disclosed to Flores. Humphrey, however, offered the mowing assignment to Jay Hurtado, a groundskeeper, after explaining the 10-m.p.h. limitation to him. Hurtado accepted the assignment. On February 19, Flores was informed by Humphrey that he was being assigned to Hurtado's duties, which consisted primarily of raking, pruning, watering and the like, whereas Hurtado would be operating the Jacobson. At that point, Flores did not object to this arrangement.

When the Parkmaster was returned to service approximately one week later, Flores went to Humphrey to see about his assignment. Humphrey told him that he would be continuing with Hurtado's duties. When Flores inquired as to the reason for this, Humphrey responded that it was being done because switching Flores and Hurtado back and forth between assignments would create too much of a hardship. A written memo was issued to Flores from Humphrey on February 28, wherein it was stated that Flores had been reassigned on February 19, from the mower to grounds. Flores was displeased with this reassignment, despite there being no loss of wages or benefits, because he preferred the mowing work which is "less physical" than the grounds work. Further, Flores originally took the voluntary

demotion with the understanding that he would be performing mowing duties. Prior to the February 19 reassignment, Flores had never switched duties with anyone within the groundskeeper classification. Thus, he had been assigned to mowing duties exclusively for almost four years. Flores had always received satisfactory evaluations from the District in connection with his work in this capacity.

The parties stipulated that CSEA served on the District a subpoena duces tecum requesting all documents relating to involuntary transfers or reassignments of employees within a classification, occurring between January 1, 1980 and January 7, 1985. The District investigated the matter, but was unable to produce any documentation responsive to the subpoena. The ALJ inferred therefrom that the District did not initiate any nondisciplinary, involuntary transfers or reassignments during the specified period of time.

On March 25, Flores filed a grievance alleging that his reassignment violated articles III and XVII of the collective bargaining agreement (CBA).[2] At the first level of the

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[2]The contract provisions at issue provide:

ARTICLE III
NO DISCRIMINATION

> Discrimination Prohibited: No employee in the bargaining unit shall be discriminated against because of his/her race, national origin, religion, marital status, lawful

grievance proceeding, Humphrey denied Flores' grievance stating that: (1) the District had not reassigned Flores for discriminatory reasons but, rather, because of Flores' "refusal to perform" his "regularly assigned duties"; and (2) the District "carefully examined the Jacobson mower and found it to be in safe operating condition as long as it is not driven above 10 miles-per-hour."

At the second level, the grievance was denied because: (1) the Jacobson mower was determined "to be safe, provided it

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> activities under the Act, and, to the extent prohibited by law, no person shall be discriminated against because of age, sex, or physical handicap.
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> ARTICLE XVII
> SAFETY
>
> This District shall attempt to provide employees with safe working conditions. The Board shall attempt to comply with the provisions of the California State Occupational Safety & Health Act regulations as described in the general industry and construction industry (where applicable) standards. Employees shall report to the immediate supervisor conditions of unsafe or hazardous work.
>
> A safety committee shall be formed composed of not less than two (2) bargaining unit members selected by the Association and two (2) administrators. The purpose of the Safety Committee shall be to review reports from employees and management relative to potential unsafe working conditions and to make recommendations to the Superintendent in terms of correcting unsafe or hazardous working conditions. (Emphasis added.)

is driven within the explicit guidelines outlined to you by Mr. Humphrey" (emphasis added); (2) Flores' discrimination allegations are vague and without merit; and (3) Humphrey has the "right to reassign employees within their job classification" based upon District need and, in this case, the reassignment was "reasonable" and caused no loss of wages or benefits to Flores.

At the final level of the grievance procedure, the matter was heard by the District's board of trustees. On June 6, 1985, the board voted four to one to deny Flores[1] grievance. Dr. Robert Formhals filed a minority report in support of granting the grievance. Formhals' minority report concluded that the District's decision to reassign Flores was unlawfully motivated and was an abuse of discretion.

Meanwhile, on March 1, 1985, a District safety committee"[3] met and issued a report containing a reference to the loose gear box and loose steering on the Jacobson mower and characterizing the mower as a "potential hazard." Based on the committee's report, the superintendent determined that money would be budgeted for repairs to the Jacobson mower for the subsequent school year.

In response to a complaint filed by a CSEA representative against the District, the California Division of Occupational

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3This committee, sanctioned by the CBA, consisted of two bargaining unit members selected by CSEA and two administrators.

Safety and Health (OSHA) inspected the Jacobson mower on June 18, 1985, and issued a citation with respect to the mower's faulty steering mechanism.

On August 13, 1985, CSEA filed a charge against the District based on these facts, and a complaint issued on August 29. The complaint, incorporating the charge by reference, alleges that the involuntary reassignment of Flores constitutes a violation of EERA sections 3543.5, subdivision (a) and 3543 and, derivatively, 3543.5, subdivision (b) and 3543.1, subdivision (a), in that the action was taken in retaliation for Flores' participation in protected activities.

ALJ'S PROPOSED DECISION

The ALJ, applying the test set forth in Novato Unified School District (1982) PERB Decision No. 210,[4] ultimately concluded that the District's action in this instance was violative of section 3543.5, subdivision (a) and, derivatively, 3543.5, subdivision (b).

Initially, as to the issue of protected activity, the ALJ noted that safety conditions of employment is an enumerated term and condition of employment pursuant to section 3543.2,

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[4]In Novato, the Board held that, in cases of alleged reprisals against employees, the charging party must establish that the employee was engaged in protected activity, that the employer had actual or imputed knowledge of the employee's protected activity, and that the employer's conduct was motivated by the employee's participation in protected activity. Unlawful motive may be established by circumstantial evidence and inferred from the record as a whole.

subdivision (a) and, as such, clearly within the scope of representation. Further, in the instant case, the parties expressly addressed the issue of safe working conditions in their CBA. (See fn. 2.)

The ALJ found that when Flores "expressed his reservations" about driving the mower, he was complying with the terms of the CBA which requires an employee to report conditions of unsafe or hazardous work to his/her immediate supervisor. Moreover, he found that in complying with the CBA's safety provisions, Flores was participating in protected activities. The ALJ reasoned that when Flores voiced his legitimate and reasonable safety concern and indicated an unwillingness to drive the Jacobson mower, he was asserting rights guaranteed to him under the terms of the CBA. Accordingly, under the Board's holding in North Sacramento School District (1982) PERB Decision No. 264, the ALJ determined that Flores' conduct was expressly protected by section 3543 of the Act.

Secondly, under an agency theory, the ALJ found that Humphrey's undisputed direct and personal knowledge of Flores' conduct was imputed to the District, citing Antelope Valley Community College District (1979) PERB Decision No. 97.

Finally, with respect to whether the District discriminated against Flores in reassigning him because of his protected conduct, the ALJ examined the District's manifested reasons for the reassignment in order to determine "whether these reasons

reasonably support such District action in light of all of the surrounding circumstances." Viewing Humphrey's manifested reasons for the reassignment, the ALJ focused on his claim that it would be unfair to Hurtado to move the two employees back and forth whenever there was trouble with the Parkmaster. This statement, along with Humphrey's failure to reoffer the Jacobson to Flores after explaining the road test results to him, indicated to the ALJ that, under these circumstances, there must have been some other unasserted reason behind the reassignment. Because the Parkmaster was out of service for no more than one week per year on average, the ALJ found the District's reasoning to be illogical, and this led him to infer that the District's reasons were pretextual. Consequently, he concluded that a prima facie case of discrimination was established by CSEA.

In defense, the District asserted that it was its prerogative to assign any employee to any task within that employee's job classification. The ALJ noted that this district right is limited to the extent that a district cannot violate an employee's statutory rights in making a reassignment.

In the instant case, the ALJ concluded that the District reassigned Flores either to punish him for his reluctance to drive the Jacobson mower or to reward Hurtado for driving the unsafe mower. The ALJ held that either reason violates the Act. Moreover, he found that the District failed to show that

the reassignment was for a legitimate operational purpose. Therefore, the District did not demonstrate that it would have reassigned Flores notwithstanding his protected activity.

Finally, the ALJ relied on Carlsbad Unified School District (1979) PERB Decision No. 89 in finding that the reassignment itself, despite no loss of pay or benefits to Flores, constitutes sufficient harm to support a finding of discrimination. The ALJ reasoned that any harm, no matter how slight, resulting from unlawful retaliation for reporting unsafe working conditions will have a chilling effect on the future exercise of the right.

In sum, the ALJ held that the reassignment of Flores violated section 3543.5, subdivision (a) and, derivatively, 3543.5, subdivision (b). The ALJ noted that, although it was further alleged that sections 3543 and 3543.1, subdivision (a) were violated, section 3543.5 is the operative section for determining whether or not violations of the rights guaranteed therein indeed occurred.

DISCUSSION

The District, on appeal, has raised several exceptions to the ALJ's proposed decision. The District takes exception to the ALJ's finding that Hurtado's assignment to the mower operator position was permanent, but this challenge is without merit and is not particularly relevant in any event. On February 26, when Flores went to Humphrey about his assignment,

Humphrey told him that Hurtado would remain on mowing duties and Flores would continue on assignment at the school (in Hurtado's previous position). Humphrey told Flores that it would be too much of a hardship to switch the two employees back and forth between these positions. The written memo of February 28, confirmed Flores' reassignment. Moreover, before he was reassigned, Flores had been in the mower operator position exclusively for almost four years.

Given these facts, and especially the District's initial proffered justification for the reassignment of Flores, it appears that groundskeeper assignments are, indeed, made on a relatively "permanent" basis in the District. There is nothing in the record to indicate that the assignment of Hurtado to mowing duties is an exception to the rule. Moreover, whether or not Hurtado has been assigned "permanently" to mowing duties is not necessarily relevant to the issue at hand. Even if Hurtado were eventually taken off the mowing assignment by the District, there is no guarantee that Flores would be returned to mowing duties.

The District also excepts to the ALJ's finding that Humphrey reassigned Flores because of unfairness to Hurtado. The ALJ's actual finding was that the District offered several different justifications for the reassignment, although he did focus on Humphrey's "unfairness" justification in his analysis of the facts. Flores testified that Humphrey initially told

him that he would not be returned to mowing because it would be too great a hardship to switch Flores and Hurtado around between the two positions. In the February 28 memo, Humphrey stated that, because Flores "expressed concern that the Jacobson was unsafe," Flores would be reassigned "in order to continue with our maintenance program." Humphrey stated, in the first level grievance response, that Flores had been reassigned in response to his refusal to perform his regularly assigned duties and that the District had determined the mower to be safe at speeds below 10 m.p.h. Humphrey testified that, at the hearing on Flores' grievance, he told the governing board that he thought it would be unfair to Hurtado to move him back and forth each time there was a problem with the Parkmaster.

Accordingly, the District's exception is unsupported by the record which shows that, in fact, Humphrey himself testified that he had felt it would be unfair to Hurtado to switch the employees around between the two positions. Granted, this was not the only justification asserted by Humphrey, but it was, indeed, one of his reasons, as he freely admitted at the hearing.

The District likewise takes issue with the ALJ's legal conclusion that Flores engaged in protected activity, arguing that the conclusion lacks both evidentiary and legal support. Essentially, the District claims that Flores was not pursuing a grievance or participating in activities of the employee

organization in any other broad sense. It claims further that Flores was not acting as a CSEA "spokesperson" in connection with his refusal to operate the mower, nor did he seek to warn others of the safety hazard. Thus, the District asserts that the facts are akin to those presented to the NLRB in Meyers Industry II (1986) 281 NLRB No. 118 [123 LRRM 1137], wherein it was held that an employee's complaint regarding his personal safety did not constitute "concerted activity" within the meaning of the NLRA and, therefore, was unprotected. Additionally, the District argues that the ALJ's reliance on North Sacramento School District, supra, PERB Decision No. 264 was misplaced because, in North Sacramento, the Board found that the charging party's filing of a grievance constituted protected conduct. Here, there is no evidence that Flores filed a grievance prior to his reassignment. Thus, according to the District, North Sacramento is inapposite.

Regarding the issue of "protected activity," CSEA argues, and we agree, that in dealing with Humphrey, Flores was exercising his right to represent himself in his employment relations with the District. The language of EERA, on its face, clearly permits and protects conduct of the nature involved in this case. Section 3543 provides, in relevant part:

> Public school employees . . . shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to section

> 3544.1 or certified pursuant to section 3544.7, no employee in that unit may meet and negotiate with the public school employer. (Emphasis added.)

Safety matters are clearly an implicit part of any employment relationship. Here, as well, the express terms of the CBA obligated the District to endeavor to provide safe working conditions and to comply with all applicable OSHA provisions, and employees were to report unsafe conditions. When Flores told Humphrey that the Jacobson mower was not safe for driving on public streets and that he did not want to drive it to the other school sites, he was not only complying with the CBA, but he was also exercising his right to represent himself individually in his employment relations regarding a proposed working assignment.[5] His personal concern with operating the mower on public streets was reasonable as evidenced by the subsequent OSHA citation and the District's determination that repairs were necessary. Accordingly, in presenting his safety concerns to Humphrey, Flores was engaging in protected activity.[6]

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[5]We would note that in presenting his concerns to his supervisors, Flores was not attempting to meet and negotiate with his employer, but was simply communicating in a manner consistent with the day-to-day activities involving employer/employee relations. Further, Flores[1] activities did not undermine the union's status as a bargaining representative or abridge the statutory principle of exclusivity.

[6]Because we find that Flores' activity is of the type expressly protected by statute, we do not adopt the ALJ's holding with respect to the issue of protected activity and it is unnecessary to address the issue of the applicability of North Sacramento to these facts.

Finally, the District excepts to the ALJ's finding that the District's reassignment of Flores was motivated by, or in retaliation for, Flores' protected activity. The District claims that there is insufficient evidence upon which to base a conclusion that the reassignment was unlawfully motivated. However, contrary to the District's assertions, we find ample circumstantial evidence to support an inference of unlawful motive under Novato.

It is clear from the timing of the District's action that the reassignment was related to Flores' raising of his safety concern with Humphrey. Flores was initially reassigned four days after his complaint, which was his first day back to work after a holiday weekend. Additionally, in view of the lack of other involuntary reassignments during the five-year period preceding Flores' reassignment, the reassignment could be viewed as a form of disparate treatment. It is disparate in the sense that, for at least five years, the District did not see fit to reassign any employee other than Flores for a nondisciplinary purpose. Suddenly, the District reassigned Flores after he had performed the same duties for over four years, consistently receiving satisfactory job performance evaluations during his tenure.

Moreover, the shifting and vague justifications offered by the District for the reassignment are of critical importance here. Humphrey told Flores that the reassignment was made

to avoid hardship or unfairness. He also told him that the reassignment was made "to continue with our maintenance program." He further stated that Flores was reassigned because he refused to perform his regularly assigned duties. This statement alone could be construed to be an admission, on the part of the District, that Flores was, in fact, reassigned because of his presentation of a safety complaint. Howard Hamilton stated that the District found the mower to be safe if driven "within the explicit guidelines outlined to you by Mr. Humphrey." It is clear from the evidence, however, that Humphrey never outlined the "explicit guidelines" for Flores' benefit.

In view of the foregoing, it is without question that Flores' protected activity was a motivating factor behind his involuntary reassignment. Thus, since CSEA established a prima facie showing of discrimination/retaliation, under Novato, the burden shifted to the District to prove that its actions would have been the same notwithstanding Flores' protected conduct. The District argues on appeal that the reassignment was within its management prerogative and that Flores was reassigned to avoid the hardship resulting from switching employees around. Obviously, however, the District would not have reassigned Flores had he not expressed his safety concerns to Humphrey. No matter which of its purported justifications it relies on, the District implicitly admits that the reassignment occurred

solely as a result of Flores' challenge to the District concerning the unsafe condition of the Jacobson.

Accordingly, the District's exceptions are without merit and are hereby rejected. The District's conduct herein clearly constitutes a violation of section 3543.5, subdivision (a). There is no evidence, however, that the District's actions also violated CSEA's rights under EERA and, therefore, we do not find a derivative section 3543.5, subdivision (b), violation. (Tahoe-Truckee USD (1988) PERB Decision No. 668, p. 13.)

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to section 3541.5, subdivision (c) of the Educational Employment Relations Act, it is hereby ORDERED that the Pleasant Valley School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing reprisals on, discriminating against or otherwise interfering with Vincent Flores because of the exercise of his right to represent himself in his employment relations with his public school employer.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Rescind the action of Mr. Humphrey which effected the change in Mr. Flores' work assignment and return Mr. Flores

to his prior duties operating the District's primary riding mower.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his/her instructions.

Chairperson Hesse and Member Shank joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-2224, California School Employees Association, Chapter #504 v. Pleasant Valley School District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5, subdivision (a), by imposing reprisals on, discriminating against or otherwise interfering with Vincent Flores because of his exercise of his right to represent himself in his employment relations with his public school employer.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Imposing reprisals on, discriminating against or otherwise interfering with Vincent Flores because of the exercise of his right to represent himself in his employment relations with his public school employer.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Rescind the action of Mr. Humphrey which effected the change in Mr. Flores' work assignment and return Mr. Flores to his prior duties operating the District's primary riding mower.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of this Notice, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his/her instructions.

Dated: _____ PLEASANT VALLEY SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER #504,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2224
v.	)	
PLEASANT VALLEY SCHOOL DISTRICT,	)	PROPOSED DECISION (11/24/86)
Respondent.	)	

Appearances: William C. Heath, for California School Employees Association, Chapter #504; Liebert, Cassidy & Frierson by Bruce Barsook for Pleasant Valley School District.

Before: Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On August 13, 1985, the California School Employees Association, Chapter #504 (hereafter Charging Party, CSEA or Association) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB or Board) against the Pleasant Valley School District (hereafter Respondent or District) alleging violations of Government Code sections 3543, and 3543.1(a) and 3543.5(a) and (b).[1] All of these sections

[1]Sections 3543, 3543.1(a), and 3543.5(a) and (b) provide as follows:

> 3543. RIGHTS OF EMPLOYEES
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> Public school 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

are contained in the Education Employment Relations Act (hereafter EERA or Act) (commencing with section 3540 et seq.

> employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.
>
> 3543.1. RIGHTS OF EMPLOYEE ORGANIZATIONS
>
> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in

of the Government Code).[2]

On August 29, 1985, the general counsel of the PERB issued a complaint against the District.

On September 18, 1985, the District filed its answer to the unfair practice charge and complaint.

On October 4, 1985, the parties met in an informal conference in an attempt to settle the matter. The case was not settled.

On January 7, 1986, a formal evidentiary hearing was held at the Los Angeles office of the PERB. The parties briefed their respective positions and the case was submitted on April 9, 1986.

> their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.
>
> 3543.5. UNLAWFUL PRACTICES: EMPLOYER
>
> It shall be unlawful for a public school employer 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.

[2]All section references, unless otherwise indicated, are to the Government Code.

JURISDICTION

The parties stipulated to the Charging Party being an exclusive representative and the Respondent being a public school employer within the meaning of section 3540.1 of the Act.

INTRODUCTION

Vincent Flores, a long-time employee of the District, held a position in the classification of groundskeeper. His assignment, for the four years previous to this charge, was to operate the District's large riding grass mower. When the primary grass mower was temporarily inoperative, he was asked to drive a substitute riding mower to a nearby school. He told his immediate supervisor, Bob Humphrey, that, in his estimation, the vehicle was not safe on the public streets. Humphrey ostensibly accepted his reason for declining to carry out his instruction and assigned him temporary duties elsewhere. He asked Mr. Flores to put his concerns in a written memo. Mr. Flores did so.

Humphrey, accompanied by the busing and garage supervisor, Mr. Riley, tested the mower in a large unused parking lot and determined that it was safe to drive, provided it was not driven over 10 miles per hour. He then went to a second groundskeeper, Jay Hurtado, and described (1) Flores[1] reluctance to drive the machine, (2) the road test and (3) his 10-mph-limit conclusions and asked him to drive the vehicle to the nearby school and mow the lawn. Hurtado agreed to use the

machine as directed. Once the primary machine was returned to service, the supervisor switched the regular assignments of the two subject employees and the second driver was given the more desirable assignment on a permanent basis. Flores, the original driver, filed a grievance over the reassignment, citing violations of the Anti-Discrimination and Safety Articles of the collective bargaining agreement (CBA). The grievance was denied.

FINDINGS OF FACT

Vincent Flores has been a District employee since 1955. From 1955 to 1972 he held a dual appointment as a bus driver and a maintenance employee. In 1972 he took over as the head bus driver. He remained in that classification until he voluntarily demoted to a position in the groundskeeper classification on June 9, 1981.

From 1955 to his full-time assignment as the head bus driver in 1972, Flores had been assigned mowing duties using a number of machines. When the District purchased a Jacobson seven-reel, tractor/riding mower with hydraulic lifts, he became its primary operator. While he was the head bus driver, the District purchased a large riding mower, a Toro Parkmaster, to replace the Jacobson which remained inoperative for a considerable period of time. When it was subsequently repaired it was used exclusively at the District headquarters and an adjacent location. Although it was possible to use the Jacobson there was no dispute that it was not fully operational.

A few weeks before Flores demoted, the groundskeeper whose primary assignment was the operation of the Toro Parkmaster left the District's employ and Jay Hurtado, a custodian, was temporarily assigned to replace him in that assignment. CSEA was concerned that this reassignment violated the CBA, in that the duties of groundskeeper and custodian were sufficiently dissimilar so as to prohibit such a lateral transfer. A grievance was filed and it was ultimately determined, by the Personnel Commission, that such a lateral transfer violated the internal personnel rules. Hurtado was taken off the Toro Parkmaster. Once the position riding the Parkmaster became vacant, Flores asked for and was given the assignment.

Flores continued in that assignment until February 1985. During the period from 1981 to 1985, whenever the Toro Parkmaster was temporarily inoperative, Flores would use the Jacobson mower, which was stored in the headquarters area, at the two District sites immediately adjacent to the District headquarters. He was never asked to drive the machine to any of the other District locations. Each time the Toro Parkmaster returned to service, Flores would resume his duties as its primary operator. The Toro Parkmaster averaged one week-long breakdown per year.

On Friday, February 15, 1985, after the Toro Parkmaster was determined to be in need of repairs, Flores[1] immediate supervisor, Robert Humphrey, told him to drive the Jacobson to

Los Nogales school, a distance of one to one and one-quarter miles, and mow the lawns. Flores told Humphrey that he believed that the Jacobson was unsafe to drive on the city streets and he expressed reservations about using it in such a manner. His concerns were related to the vehicle's steering apparatus. The two men had discussed the Jacobson's safety deficiencies in the past. Flores admits Humphrey may have told him to "take it easy" when directing him to drive to Los Nogales. Flores did not absolutely refuse to drive the mower, he just nodded his head in a negative manner and voiced his safety concerns. Humphrey did not press Flores to drive the mower but asked him to put his concerns in a written memo and to temporarily take over other, nonmowing duties. Flores first consulted with his CSEA president and then wrote the memo and embarked upon his temporary duties.

Humphrey and Riley took the Jacobson mower to a parking lot to test drive the vehicle. Riley drove the Jacobson and Humphrey followed in a passenger car. Whenever Riley would reach a speed at which the mower would become, in his estimation, unsafe, he would signal Humphrey. Humphrey determined that the mower was safe at speeds up to 10 mph. However, it would not be possible for the driver to determine when 10 mph had been reached, as the Jacobson mower did not have a speedometer.

Humphrey told Jay Hurtado of Flores[1] concerns. Hurtado had, subsequent to the improper lateral transfer previously

described, been given a new assignment as a groundskeeper. Humphrey also told him that the vehicle had been test driven and that it had been determined that the mower was safe at speeds up to 10 mph. He offered the machine to Hurtado. He did not describe the road test to Flores and offer the Jacobson to him with the maximum 10 mph condition. Hurtado accepted the machine and went to Los Nogales to start the mowing assignment. During the time he drove it, the only time he had any trouble was when he exceeded the 10 mph prohibition.

On February 19, the following Tuesday - Monday was a holiday - Humphrey told Flores he was being assigned to Hurtado's duties and that Hurtado was being assigned to drive the Jacobson. Flores did not object.

Mr. Hurtado's duties had consisted of raking, pruning, watering, etc. Mr. Flores preferred the mowing job for a number of reasons, one of which was that it was a cleaner assignment. On February 25 Humphrey learned that the Toro Parkmaster was repaired and ready to be put into operation again. On February 26 Flores was told that he would not return to the Toro Parkmaster, that Hurtado would be its primary driver from that day forward.

There was no question regarding the level of competence of either Hurtado or Flores, both had excellent work records.

The District has approximately 12 individual school sites, the farthest being approximately four miles away from the

District headquarters. Neither the Toro Parkmaster nor the Jacobson are trailerable. If either one is to be used at locations other than those immediately adjacent to the District's headquarters it has to be driven on city streets.

Flores discussed the matter with his CSEA chapter president, Hector Dion, and then filed a grievance over his reassignment, citing the CBA sections on discrimination and safety. These sections are as follows:

ARTICLE III
NO DISCRIMINATION

> Discrimination Prohibited: No employee in the bargaining unit shall be discriminated against because of his/her race, national origin, religion, marital status, lawful activities under the Act, and, to the extent prohibited by law, no person shall be discriminated against because of age, sex, or physical handicap.

ARTICLE XVII
SAFETY

> This District shall attempt to provide employees with safe working conditions. The Board shall attempt to comply with the provisions of the California State Occupational Safety & Health Act regulations as described in the general industry and construction industry (where applicable) standards. Employees shall report to the immediate supervisor conditions of unsafe or hazardous work.
>
> A safety committee shall be formed composed of not less than two (2) bargaining unit members selected by the Association and two (2) administrators. The purpose of the Safety Committee shall be to review reports from employees and management relative to

> potential unsafe working conditions and to make recommendations to the Superintendent in terms of correcting unsafe or hazardous working conditions.

Humphrey, in his first level grievance response, denied the grievance because (1) the District had not discriminated against Flores in any of the ways prohibited by the CBA, i.e., race, age, sex, religion, etc., and that he had been reassigned "in response to your refusal to perform your regularly assigned duties" and (2) the District "carefully examined the Jacobson mower and found it to be in safe operating condition as long as it was not driven above 10 mph."

Dr. Howard Hamilton, previously an intermediate school principal and presently the administrative assistant to the superintendent, in his second level grievance response, rejected the grievance for the following reasons: (1) the Jacobson mower Was found "to be safe, provided it is driven within the explicit guidelines outlined to you by Mr. Humphrey," (2) the discrimination allegations are "vague and without verifiable substance," and (3) Mr. Humphrey has a "right to reassign employees within their job classification" based upon the "needs of the District" and that such reassignment "was reasonable" and did not cause Flores "to suffer any loss in wages or benefits".

The grievance procedure's last appeal level is the District's Board of Trustees. At the Board of Trustee's

meeting on June 6, 1985, during its deliberations on the grievance, a question arose as to why Humphrey did not return Flores to his Parkmaster mowing duties after the machine was repaired. Both sides agree that Dr. Robert W. Formhals, a board member, raised this question. Humphrey's answer was the subject of considerable testimony at the hearing and in both parties' briefs.

Hector Dion, CSEA president and a building and equipment service worker for the District, testified, when questioned on direct examination by the Association's attorney, as follows:

> Q. Was he (Dr. Formhals) asking that question to any one in particular?
>
> A. I think he was questioning, if I recall correctly, he was questioning Mr. Humphrey, he was questioning Bob Humphrey, yes.
>
> Q. What did Mr. Humphrey reply?
>
> A. Something, if I recall, something to the effect that it was a hardship to transfer people back and forth, and it would be a hardship on a man if he were willing to drive an unsafe piece of equipment to transfer him back, such short notice, short span of time, or something to that effect.
>
> Q. After he said that, or words to that effect, what happened next?
>
> A. Well, the superintendent corrected him that it was not an unsafe mower, that it was an alleged piece of equipment, unsafe mower, or something . . .
>
> Q. Did he say anything else?
>
> A. Well, he appeared to jump in a little quick and a little, you might say, slightly

upset, that he, you know, wanted to correct the records somehow, that . . .

ALJ: He being the superintendent?

WITNESS: Yes. Yes, the superintendent.

Q. (By Mr. Heath) How do you know he was upset?

A. Oh, tone of voice and gestures, you know. His face reddened a little bit at the time, and . . .

Ann Finan, a CSEA field representative with responsibility for the classified employees at the District, duplicated Mr. Dion's testimony regarding Humphrey's reply.

Dr. Hamilton, however, recalled Humphrey's answer differently. In response to questioning by Respondent's attorney, he testified as follows:

Q. Do you recall Mr. Formhals asking a question to that effect?

A. I can't be sure as to who asked the question, as a number of questions were being asked. I can't pinpoint as to who asked which question.

Q. But you do recall that the question was asked?

A. Oh, yes.

Q. Okay, and do you recall Mr. Humphrey's response to the question?

A. To the best of my recollection, he > responded something about it being unfair to be removing one person and putting someone else back. It revolved around unfairness.

Q. Did Mr. Humphrey state that Mr. Hurtado had been willing to work on an unsafe machine, and that . . .

A. I don't recall the term unsafe being used, but my memory is very vague on that issue.

Q. Do you recall the issue of whether Mr. Humphrey made the statement that Mr. Hurtado had been willing to work on an unsafe machine, do you recall whether that issue arose after the conclusion of the grievance hearing on June 6, 1986?

A. The issue arose, and I wish I could pinpoint as to why or how, but I know it arose because I asked the board members if they recall the term "unsafe" being used specifically by Mr. Humphrey, and two of them said they had taken minutes and that they would immediately check their minutes. That was Mrs. Rains and Dr. Formhals, both checked their minutes, had had (sic) nothing in their minutes indicating "unsafe". The other three board members, or the other, I can't recall if all five were there, but the other board members indicated that they did not recall the term specifically, "unsafe" being used by Mr. Humphrey.

When Mr. Humphrey was asked, in the formal hearing, if he made such a statement at the subject board meeting, he said:

A. I don't believe that is what I said, no.

Q. What did you say in response to that?

A. I said I did not feel that it would be fair to Mr. Hurtado to move him back and forth each time we had trouble with the Toro, or the large Toro. That I felt that once it was on, might as well stay rather than, I felt that possibly the next week he would have another breakdown, the next thing, we're shifting again, so, that was my thought on that.

Q. And it's your testimony that you didn't say that it would be unfair to him because of his willingness to operate the Jacobson?

A. No, I don't recall anything like that.

To the extent that these various pieces of testimony raise the issue of whether Humphrey admitted, at the Board of Trustees meeting on the grievance, that the mower was unsafe, they are relevant, but not dispositive of the issue.

On June 6, 1985 the Board of Trustees voted in closed session, 4 to 1, to deny Mr. Flores' grievance. Dr. Formhals voted to grant the grievance's requested action and, in addition, filed an extensive, well reasoned minority report. That report closely parallels, in both content and conclusion, this proposed decision.

The Safety Committee

The District has a Safety Committee, sanctioned by the CBA, and composed of two bargaining unit members selected by CSEA and two administrators. The purpose of the Safety Committee, according to the CBA, "shall be to review reports from employees and management relative to potential unsafe working conditions and to make recommendations to the Superintendent in terms of correcting unsafe or hazardous working conditions."

On March 1, 1985, the Safety Committee met and issued a report which contained the following item: 3. The Jacobson mower has a loose gear box and loose steering — it is a potential hazard.

On March 18, 1985, the Superintendent sent a memo to Eric C. Anders, Director of Special Services, regarding the

Safety Committee's March 1 report, which stated, in pertinent part:

> Item 3: An amount will be budgeted for 1985-86 for repairs on the Jacobson mower.

In early June, 1985, Ann Finan, CSEA field representative, communicated a complaint regarding the Jacobson mower to the state Division of Occupational Safety and Health (OSHA). On July 17, 1985 she received a reply which stated, in pertinent part:

> On June 12, 1985 we received your complaint against Pleasant Valley School District at 600 Temple Ave., Camarillo concerning the following conditions:
>
> 1. Unsafe steering on mower
> 2. Loose concrete block on mower
> 3. No rear view mirror
> 4. No headlights
> 5. Rear light cover broken
> 6. Bad brakes
>
> On June 18, 1985 the Division was able to make a partial inspection of this operation, with the following results:
>
> 1. A citation was issued
> 2. 2, 3, 4, 5, 6, NO citation was issued on these items; however, you may want to contact the local police, Sheriff, or California Highway Patrol about these problems when the equipment is operated on the street.
>
> Other violations of safety orders were noted and the employer was cited accordingly.

The parties stipulated that the District had received a subpoena duces tecum, which requested documents related to any transfer or reassignment of employees to different duties or

responsibilities within a classification where such transfer was not requested by the employees, did not result from a disciplinary action, and occurred between January 1, 1980 and January 7, 1985. In response to that subpoena, the stipulation continues, the District investigated and was not able to find any documents that related to that request.

It is to be inferred from this stipulation that the District, during the specified time period, did not force any employee, other than as a result of a disciplinary action, to accept a transfer or different duties or responsibilities.

ISSUES

1. Was Vincent Flores engaging in protected activities when he expressed reservations about operating the Jacobson mower on February 15, 1985?

2. If this activity was protected, was the employer aware of such acts?

3. Did the District discriminate against Flores when it reassigned him because of these protected activities?

CONCLUSIONS OF LAW

Precedent and Test

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89, set forth the following test for the disposition of charges alleging violations of section 3543.5(a):

> (1) A single test shall be applicable in all instances in which violations of section 3543.5 (a) are alleged;

(2) Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

(3) Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

(4) Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

(5) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. (Emphasis added.)

Proof of Unlawful Intent Where Offered or Required

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record.

In Novato Unified School District (1982) PERB Decision No. 210, the Board clarified the Carlsbad test for cases involving retaliation or discrimination in light of the NLRB decision in

Wright line (1980) 105 LRRM 1169. In Novato, unlawful motive must be proven in order to find a violation.

Under Novato, in order to establish a prima facie case, charging party must first prove the subject employee engaged in protected activity. Next, it must establish that the employer had knowledge of such protected activity. Lastly, it must prove that the employer took the subject adverse personnel action, in whole or in part due to the employee's protected activities.

Under both the interference and the discrimination concepts, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

ISSUE NO. 1. Was Vincent Flores engaging in protected activities when he expressed reservations about operating the Jacobson mower on February 15, 1985?

In enacting the EERA, the Legislature determined that safety was of sufficient importance to be made a condition of employment within the scope of representation and, therefore, a mandatory subject of negotiations (See section 3543.2) In Jefferson School District (1980) PERB Decision No. 133, the Board stated that employees' interests in safety are equal to the District's right to make pertinent educational policy decisions to the extent that rules governing such matters should be made on a bilateral basis.

The parties, acknowledging such provisions of the law, negotiated and agreed upon specific language on this subject. The pertinent CBA section, Article XVII, requires the employer to "attempt" to (1) "provide employees with safe working conditions" and (2) "comply with the provisions of the California State Occupational Safety and Health Act regulations . . . . Employees shall", the Article continues, "report to the immediate supervisor conditions of unsafe or hazardous work."

Mr. Flores did exactly this when he expressed his reservations about driving the Jacobson mower on city streets. Flores insists he never refused to drive the mower. Humphrey states only that Flores shook his head when asked to drive the mower. There is no specific charge of insubordination, although Humphrey suggests this was an underlying cause for his decision to reassign Flores when he stated, in his first level grievance denial, that:

> 3. Your transfer of February 19, 1985 was based on your refusal to operate the Jacobson mower that you believe is unsafe.

However, as Humphrey did not insist upon Flores[1] compliance with his directive, and because the District does not base its defense on any alleged insubordination, the degree to which Flores declined to operate the Jacobson is not directly at issue.

The question remains, was Flores engaging in protected activities by merely reporting the unsafe condition and manifesting reservations about driving the mower in that condition on city streets?

Whether or not the mower was actually unsafe is not dispositive of the matter. Given the eventual acts of the safety committee, the OSHA representative, the District's own budgetary determinations and the unrebutted testimony of witnesses called by both parties in this case, Mr. Flores had a legitimate and reasonable concern over the safety of the equipment and his own personal safety if he were to use it in the manner originally directed by Mr. Humphrey. The "reasonableness" of this concern underscores any determination he was engaged in protected activities.

As Article XVII of the CBA grants employees not only an implied right, but even an obligation, to make such reports, it would seem that such action was protected by the contract and therefore by the EERA. See NLRB v. City Disposal Systems, Inc., (1984) 465 U.S. 822, L.Ed.2d 839.

This conclusion is supported by Article III which prohibits discrimination of any employee because of his/her "lawful activities under the Act."

The Board stated, in North Sacramento School District, (1982) PERB Decision No. 264, that "An employee's attempt to assert rights established by the terms of a negotiated

agreement clearly constitutes 'participation[1] in the activities of an employee organization and is, therefore, expressly protected by section 3543 of the Act." See City Disposal Systems, Inc., supra, compare Meyers Industry (1984) 268 NLRB 493.

Therefore it is determined that when Flores voiced his concerns about the safety of the Jacobson mowers and manifested a reluctance to drive it in the city streets he was engaging in protected activity.

ISSUE NO. 2. If this activity was protected, was the employer aware of such acts?

Due to all of the circumstances set forth in the Findings of Fact, supra, it is undisputed that the District was aware of Flores[1] acts in this regard. Humphrey^ direct and personal knowledge was imputed to the District under the. most basic tenets of agency. See Antelope Valley Community College District (1979) PERB Decision No. 97.

ISSUE NO. 3. Did the District discriminate against Flores when it reassigned him because of those protected activities?

When PERB exercises its statutory authority to determine whether or not an employee is reassigned due to activities protected by the EERA, it is necessary to examine the manifested reasons for the reassignment in order to determine whether these reasons reasonably support such District action in light of all of the surrounding circumstances. A

determination that the reasons given by the employer are not sufficiently plausible to support the reassignment will give rise to an inference that these reasons are pretextual and that there must be some other reason(s) for the employer's action. This inference can lead to a determination, if supported by sufficient evidence, that the employee is correct when he/she insists that the action was due to protected activities.

Much testimony was proffered by both sides regarding whether Humphrey admitted, at the "hearing" before the District's Board of Trustees, that the Jacobson mower was unsafe. Although the question is not totally irrelevant, a determination is not necessary as to whether such admission was made. Humphrey's manifested reasons for the reassignment, irrespective of a conclusionary statement that the vehicle was unsafe, are sufficient to support an inference that there must be some other reason for his actions. This determination is reinforced by Humphrey's failure to reoffer the Jacobson mower to Flores after it had been road tested. Had he been truly interested in avoiding future reassignments, he would have discussed the road test results with Flores and reoffered the mower to him before offering it to Hurtado.

Humphrey supported the continuing reassignment by stating he "did not feel that it would be fair to Mr. Hurtado to move him back and forth each time we had trouble with the Toro . . . " This reasoning is spurious and illogical and is

insufficient to deprive a long-term, valued employee of a preferred assignment because he had reservations about driving an admittedly unsafe vehicle. The unrebutted testimony showed that the Toro Parkmaster averaged no more than one week-long breakdown each year. This is hardly cause for a major concern over the inconvenience to either of the employees.

A determination that the reasons given for the District's actions are not logical gives rise to an inference that they are pretextual. This inference supports a conclusion that a prima facie case of discrimination has been proven.

District's Defense

The District, in its defense, cited its right to assign any employee to any task it wished within such employee's job classification. This right is acknowledged as a fundamental District right. However, such right is conditional on the reasons for such assignment not being violative of some other right of the involved employee. As has been pointed out above, the reasons for such assignment violated Mr. Flores' right to report the unsafe condition of the mower.

The circumstances set forth above show, rather clearly, that the reassignment was not based on some confused sense of fairness to Hurtado but was rather to either punish Mr. Flores for his reluctance to drive the mower or to reward Hurtado for driving the mower despite its acknowledged safety deficiencies. Both of these reasons are violative of the Act.

It is found that the District has failed to demonstrate that its motive in reassigning Flores was due to a legitimate operational purpose. Therefore, the District has failed to show that its actions would have been the same despite the protected activity.

Although the reassignment did not involve loss of pay or benefits, it can be the basis for a finding that discrimination exists if such action is taken in retaliation for protected activity. Carlsbad Unified School District (1979) PERB Decision No. 89. No matter how slight the harm, any unlawful retaliation for reporting unsafe working conditions will have a chilling effect on the future exercise of that right.

Due to the circumstances set forth above, as well as the record as a whole, it is determined that the District, when it reassigned Vincent Flores, violated Section 3543.5(a).

Under all of the circumstances set forth in the record, it is determined that the violation of section 3543.5(a) in this case also constitutes a derivative violation of section 3543.5(b) in that the District's action concurrently violated the Charging Party's right to represent its members.

Violations of sections 3543 and 3543.1(a), which describe specific rights of employees and employee organizations, respectively were alleged in the charge and incorporated, by reference, in the Complaint, as issued. Section 3543.5, however, is the operative section for determining the existence

of unfair practices under these two sections. It has been held that section 3543.5 was violated.

REMEDY

The District has been found to have violated section 3543.5(a) and (b) of the EERA by discriminating against Vincent Flores because of the exercise of rights guaranteed to him by the Act.

The PERB in section 3541.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of this chapter.

Therefore, it is appropriate to order the District to cease and desist, in general, from conduct found to be in violation of the Act and, more specifically, to cease and desist from (1) discriminating against, and interfering with, employees because of their exercise of rights guaranteed by the Act, and (2) denying to the California School Employees Association, Chapter #504, rights guaranteed to it by the Act.

The District shall also be required to rescind the action of Mr. Humphrey which effected the change in Mr. Flores' work assignment and return Mr. Flores to his prior duties operating the District's primary riding mower.

In addition, the District shall be required to post a notice incorporating the terms of the order. Posting of such a notice will provide employees with notice that the District has

acted in an unlawful manner, and it is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board and UFW (1979) 90 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. See also U.S. Supreme Court decision in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415],

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ordered that the Pleasant Valley School District, its governing board and its representative(s) shall:

A. CEASE AND DESIST FROM:

1. Discriminating against, and interfering with, Vincent Flores because of his exercise of rights guaranteed by the Educational Employment Relations Act;

2. Denying to the California School Employees Association, Chapter #504, rights guaranteed to it by the Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Rescind the action of Mr. Humphrey which effected the

change in Mr. Flores' work assignment and return Mr. Flores to his prior duties operating the District's primary riding mower.

2. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to classified employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations board in accordance with his instructions.

Pursuant to California Administrative Code, title 8, page III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify, by page citation or exhibit number, the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A

document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, section 32300, 32305 and 32140.

Dated: November 24, 1986

Allen Allen R. Link
Administrative Law Judge