STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| SAN JOSE/EVERGREEN COMMUNITY COLLEGE DISTRICT FACULTY ASSOCIATION,<br><br>Exclusive Representative,<br><br>and<br><br>CALIFORNIA TEACHERS ASSOCIATION/NEA,<br><br>Employee Organization,<br><br>and<br><br>SAN JOSE-EVERGREEN COMMUNITY COLLEGE DISTRICT,<br><br>Employer. | ) | Case No. SF-AC-23 (R-365)<br><br>Administrative Appeal<br><br>PERB Order No. Ad-216<br><br>October 29, 1990 |

Appearances: Robert J. Bezemek and Katherine J. Thomson, Attorneys, for San Jose/Evergreen Community College District Faculty Association; California Teachers Association by A. Eugene Huguenin, Jr., Attorney, for California Teachers Association/NEA; Liebert, Cassidy & Frierson by Jeffrey Sloan, Attorney, for San-Jose Evergreen Community College District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

HESSE, Chairperson: The California Teachers Association (CTA) appeals the administrative determination (attached hereto) of the Board agent granting the request of the San Jose-Evergreen Community College District Faculty Association (Association)[1] for an amended certification pursuant to the Public Employment

[1]Prior to its disaffiliation with CTA, the Association was identified by the name San Jose Community College District Chapter of the California Teachers Association (SJCCDCCTA).

Relations Board (PERB or Board) Regulation 32761[2] to reflect its disaffiliation with CTA and the National Education Association (NEA).

CTA appeals from the Board agent's conclusions that: (1) the changes resulting from the disaffiliation with CTA were not sufficiently dramatic to alter the local organization's identity; and, (2) the disaffiliation election was conducted with adequate due process safeguards in accordance with the Association's constitution.[3] CTA also appeals the Board agent's denial of a request for formal hearing wherein the Board agent found that there were no material facts in dispute, no credibility issues to be resolved, and any legal arguments presented by the parties were thoroughly discussed in the Association's petition and CTA's

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[2]PERB Regulations are codified at California Code of Regulations, Title 8, Section 31001, et seq. PERB Regulation 32761 provides, in pertinent, part: .

> (a) An employee organization may file with the regional office a request to reflect a change in its identity in the event of a merger, amalgamation, affiliation or transfer of jurisdiction affecting it.

[3]At p. 11 of the Administrative Determination, the Board agent cited NLRB v. Commercial Letter, Inc. (8th Cir., 1974) 496 F.2d 35, 40, as holding that a change in dues structure by itself or in conjunction with other minor organizational changes, will not prevent a finding of continuity of representation. The court, however, did not make that specific holding but rather, found the National Labor Relations Board did not abuse its discretion. Nevertheless, the Board agent's citation of Commercial as authority for her finding is harmless error. As we found in South County Community College (1990) PERB Order No. Ad-215, p. 15, citing Seattle-First National Bank v. NLRB (9th Cir., 1989) 892 F.2d 792, 798, certain changes due to an association's disaffiliation, such as changes in dues structure, are inherent in the reorganization and should not be afforded significant weight.

response. Finally, attempting to clarify its position on appeal, CTA contends that the amended certification should not be granted because the local Association's election did not sufficiently reflect the "majority view" since only 18 percent of the bargaining unit was permitted to participate. CTA argues that the results of the election were rendered unreliable because the election was limited to Association members only.

The Board, after review of the entire record, adopts the administrative determination as the decision of the Board itself, consistent with our discussion in South County Community College District, supra, PERB Order No. Ad-215. Further, we find that each of the legal arguments set forth by CTA were adequately addressed in South County, and, therefore, will not be reexamined here.[4] We write further, however, to address the additional issue raised by the San Jose-Evergreen Community College District

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[4]We note that the local association and CTA in this case are represented by the same legal counsel who represented CTA and the disaffiliated association in South County, supra. We further note that, with a few factual differences, CTA in its exceptions and the Association in its response, in this case, advance the identical legal arguments that were advanced by the parties in South County. Specifically, CTA argued that the amended certification should be denied because: (1) disaffiliation is not covered by PERB Regulation 32761; (2) the originally certified union, which CTA purports to represent, opposes the disaffiliation; (3) there have been substantial changes in the local association's identity such that the disaffiliated local association is not the same organization as the affiliated organization and, therefore, a change in the bargaining representative has occurred; (4) the results of the local Association's election, to decide whether to disaffiliate, are rendered unreliable as an indicator of the "majority view" since only members of the Association were permitted to participate; and, (5) a formal hearing should be conducted "on the various legal issues presented herein." (South County Community College District, supra, PERB Order No. Ad-215, pp. 5-7, 25.)

(District), and joined in by the Association, that the Board determine the effective date of disaffiliation. We will also address CTA's contention that the Board agent improperly denied its request for a formal hearing.

## FACTUAL BACKGROUND

On or about October 13, 1989, notices were given to members of the local Association stating that there would be informational meetings held later that month to discuss the question of whether to disaffiliate from "CTA/NEA." CTA representatives received notice of the informational meetings being held and were invited, along with other representatives of labor organizations, to participate in the discussions. The CTA representative did not attend the informational meetings; however, it is clear that interested parties had ample opportunity to discuss the disaffiliation issue. The record indicates that CTA/NEA distributed at least eight bulletins in its attempt to persuade the membership not to follow the Association leadership's recommendation to disaffiliate.[5]

Ballots were distributed to Association members through their faculty mail boxes in late November, 1989. The Association utilized the standard two-envelope ballot procedure wherein the actual ballot is contained in an envelope with no markings and enclosed in an outer envelope which is signed by the member.

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[5]The leadership of the Association remained unchanged as a result of the disaffiliation vote.

Members of the Association were requested to indicate their acceptance or rejection of the proposed change to four articles in the Association's constitution.[6] The proposed changes were: (1) change of the name of the Association from San Jose/Evergreen Community College Faculty Association of the California Teachers Association to San Jose/Evergreen Community College District Faculty Association; (2) deletion of the provision that the Association shall be affiliated with CTA and NEA; (3) deletion of a provision that would allow membership in CTA and NEA; and (4) modify the dues article to reflect that dues would be deducted for membership in the local Association only and eliminated dues deduction for unified membership in CTA and NEA. The result of the December 14, 1989 election was that 61 votes were cast in favor of, and 15 votes against, disaffiliation. Accordingly, the decision to disaffiliate exceeded the two-thirds vote required for changes in the Association's constitution.

On December 21, 1990, the Association filed a Request for Amended Certification with PERB pursuant to Regulation 32761. Pursuant to PERB Regulation 32762, the District filed a response on January 4, 1990, indicating that, based on information available at the time, it had no objection to the change. CTA filed a Response in Opposition to the Request for Amended Certification on January 29, 1990.

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[6]The By-Laws of the Association, which laid out nomination and election procedures, terms and duties of office, and the powers of the Executive Board, remained unchanged by the disaffiliation.

## DISCUSSION

1. Request for Hearing

CTA argues in its appeal that the Board agent erroneously failed to conduct an evidentiary hearing to resolve disputed facts regarding the degree of participation by CTA's representatives. CTA also contends that the Board agent's conclusion amounts to an acceptance of the Association's version of these "disputed" facts over CTA's version without explanation for her preference. Under PERB regulations, however, the Board may conduct investigations or hold hearings as deemed necessary.[7] In this case, the Board agent made findings of fact describing the degree of involvement of CTA staff with the Association in its employment relations with the District prior to the disaffiliation. As part of her findings, the Board agent stated the positions of the parties as follows:

> 7. According to CTA, during fiscal years 1987-88 and 1988-89, CTA Field Representative Judy Mason regularly represented SJCCDCCTA with employer representatives in employee grievance meetings, other employment-related meetings, arbitration and both formal and informal contract negotiations. CTA Attorney Ramon Romero represented SJCCDCCTA in two unfair practice cases before PERB.
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> 8. According to the Association, Mason attended only one or two bargaining sessions

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[7]PERB Regulation 32763 states, in pertinent part:

> (a) Upon receipt of a request filed pursuant to section 32761, the Board shall conduct such inquiries and investigations or hold such hearings as deemed necessary in order to decide the questions raised by the request.

> in three years as an observer, not a participant. In the 20-25 negotiating sessions which have taken place over the six months prior to the filing of the instant request, Mason has had minimal contact (one telephone call) with the District's negotiator. Of the two unfair practice charges filed by the Association with Romero's assistance in the last four years, one was withdrawn shortly after filing in 1989. Only two formal grievances have been filed by unit members in the past four years. In one of these grievances, one of the grievant's, an attorney, represented the grievants at the arbitration. While CTA may have been requested to assist in the investigation of two or three potential grievances in 1987-88, none went to arbitration. Approximately ten faculty complaints in the past three to four years have been resolved by local association officers without the assistance of CTA. (Administrative Determination, pp. 5-6.)

Based upon these findings, the Board agent concluded:

> In this case, the same officers remain in place and the negotiating team continues to be comprised of local Association members. Although CTA field representative Judy Mason and Attorney Ramon Romero will no longer be available to the local, <u>their participation in past activities has been minimal</u>. (Administrative Determination, p. 11, emphasis added.)

CTA does not dispute that the same officers remained in place, nor that the negotiating team continued to be comprised of, or controlled by local Association members. CTA only contends a factual dispute exists as to the level of its participation in the activities of the Association prior to the disaffiliation.

After reviewing paragraphs 7 and 8, quoted above, we see no significant inconsistency in the parties' positions. Based upon her investigation, the Board agent apparently determined, as

indicated in paragraph 8, that the statistical information provided by the Association simply clarified in more detail the specifics of CTA's claim that it "regularly represented" the Association. In its filings, CTA did not dispute the Association's account of its involvement nor does it allege other facts in support of its generalized statement that it regularly represented the Association in dealings with the District.

Under PERB Regulation 32763, however, a hearing may be deemed necessary where, among other things, the parties' positions on a factual issue are inconsistent or diametrically opposed. Since, in this case, the essential facts are not disputed and the remaining issues can and were thoroughly discussed by the parties in their briefs filed with the Board, a hearing is not necessary.

Moreover, we do not consider the degree of CTA's participation, in and of itself, critical to the resolution of this case. As stated in South County Community College District, supra, PERB Order No. Ad-215, at p. 13, in reviewing the totality of the situation, factors considered significant in determining if there has been a change in the identity of the exclusive representative include:

> . . . those bearing on the originally certified association's interaction with management and the ability of the local members to continue to affect and control the actions of the officers elected to represent their interests. [Citations.] (Emphasis added.)

Therefore, even if CTA alleged facts indicating its involvement with the local was significantly greater, such facts, by themselves, would not be sufficient to require a hearing, nor would they be conclusive as to whether there has been a substantial change in the identity of the exclusive representative.

Nevertheless, with respect to the Board agent's conclusion that CTA's participation has been minimal, the record amply supports her findings. CTA's own bulletins opposing the disaffiliation indicate that CTA field representative Judy Mason had "assisted with bargaining" (emphasis added), and that "Fran McBrien[8] is stalling at the bargaining table . . .", thus, indicating that the Association's officers remained in control of the essential representation contacts with the employer. The most significant indication of the nature of CTA's representation activities appears in a letter from the District's legal counsel responding to CTA's request to continue meeting after the disaffiliation with its representatives as opposed to the Association's representatives. The District's attorney states:

> . . . we are not now in a position to accept your contention that the District (1) must cease dealing with the individuals from within the District who have historically acted as representatives of the exclusive representative, and (2) must commence dealing with an individual who has, as far as I am aware, not been on the scene.

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[8]Fran McBrien was the President of the Association prior to the disaffiliation vote and continued to hold that office at all times relevant herein.

> Indeed, were we to comply with your demand to deal with Ms. Mason and refuse to deal with individuals with which the District has been negotiating historically, we would almost undoubtedly be the subject of unfair practice charges by the local association." (Emphasis added.)

Therefore, in light of the statements made by CTA and the Association in their written responses to the Board agent and the exhibits attached to those responses, we conclude that the Board agent properly denied CTA's request for a hearing on this matter based on the results of her investigation.

2. Effective Date of Disaffiliation

Although the issue was not specifically raised or addressed by either the Board agent or any of the three parties below, the District has requested that the Board address, in this appeal, the question of the effective date of disaffiliation.[9] In support of its request, the District states that after the Association's disaffiliation, conflicting demands for dues deductions were placed upon it by CTA and the Association. Consequently, the District contends, it was required to decide whether to continue dues deductions for CTA/NEA as an affiliate or to initiate new deductions for the Association during the pendency of the appeal. In response to the conflicting demands, the District deposited the dues deducted from bargaining unit members into an interest bearing account pending resolution of

[9]See PERB Order No. Ad-211.

the effective date of disaffiliation.[10] The record is unclear as to the exact amounts deposited.

The District also argues that although the Board is not legally obligated to determine the "effective date" of disaffiliation at this time, the issue should be addressed to remove a cloud of instability and prevent protracted litigation over the issue and ascertain the respective rights and obligations of the parties concerning the escrowed dues. The District further contends that failure to address the issue in this proceeding would result in litigation over proper disbursement of the dues in other forums. Finally, the District argues that the number of unfair practice charges arising out of the disbursement of the dues demonstrates that the uncertainty regarding the effective date is contributing to an inhospitable labor relations environment.

The Association joins the District in the request to have the Board determine the effective date of disaffiliation and it

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[10]It is noted that there are three unfair practice charges currently held in abeyance by the San Francisco Regional Attorney. Those charges are: (1) San Jose-Evergreen CCD, Case No. SF-CE-1408, wherein the Association charges the District with denying rights guaranteed under Government Code sections 3543 and 3543.1(d) in violation of section 3543.5(b) by refusing to honor any of the authorizations for new dues amounts; (2) San Jose-Evergreen CCD, Case No. SF-CE-1403, wherein CTA charges the District with showing preference for the Association by not continuing to forward organizational dues as had been done prior to disaffiliation; and (3) California Teachers Association/NEA (San Jose-Evergreen CCD Faculty Association), Case No. SF-CO-404, wherein the Association charged that CTA accepted dues deducted from unit members subsequent to the disaffiliation and thereby attempted to cause the employer to commit violations of section 3543.5.

contends that amendments of certification historically contain only a date of issuance, but no date of effect.

Responding to the District and Association's request that the Board decide this issue, CTA argues that a ruling on the effective date of disaffiliation would be premature without an evidentiary record on issues concerning the rights and duties of the parties. CTA further contends these issues were neither argued to the Board agent nor raised in the initial appeal and therefore cannot be decided here.[11] CTA also claims that issues concerning the effective dates of rights under the Educational Employment Relations Act (EERA) section 3543.1[12] are not

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[11]This position has no merit, as the resolution is legal rather than factual.

[12] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.1 states, in pertinent part:

> (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 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.
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> (d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the

representational issues but, rather, are subject to PERB's unfair practice jurisdiction and procedures. CTA supports this conclusion by asking the Board to compare various sections of EERA pertaining to representational issues with those pertaining to unfair labor practice procedures, but offers no further analysis of the comparison.

Because the District, joined by the Association, has requested the Board to decide the effective date of disaffiliation and to leave the issue unsettled would provide little guidance to the parties concerning their respective obligations and would thereby generate new litigation, we will, in the interest of judicial economy, address the issue at this time.

The District contends the disaffiliation is not effective until a final order has been issued by the Board granting the amended certification. CTA similarly argues that the exclusivity rights arising under section 3543.1 become effective upon the date of issuance of the certification. The Association, in contrast, argues the disaffiliation is effective as of the date of the Association membership's election to disaffiliate.[13]

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> employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

[13]Each of the parties, in response to the Board's Order For Briefing on this issue, submitted arguments together with their points and authorities in support of their respective positions.

For the reasons that follow, we hold that where there is no question concerning representation raised by the change and an amended certification is determined to be appropriate, the organization's right to receive properly authorized dues deductions in its new status becomes effective as of the date of the Association's decision to disaffiliate. In arriving at this conclusion, we are guided by precedent of the National Labor Relations Board (NLRB) and federal courts on this subject. (Carlsbad Unified School District (1979) PERB Decision No. 89; Los Angeles Unified School District (1976) EERB[14] Decision No. 5; Firefighters Union, Local 1186, International Association of Firefighters, AFL-CIO v. City of Vallejo, et al. (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

Specifically, we note the Court of Appeal in St. Vincent Hospital v. NLRB (10th Cir., 1980) 621 F.2d 1054 [104 LRRM 2288] found that the rights of the exclusive bargaining agent flow from the date of disaffiliation and not from the date of the amended certification. In that case, the certified bargaining representative, the St. Vincent Hospital Professional Performance Association (PPA), was affiliated with the New Mexico Nurses Association, a branch of the American Nurses Association. On February 28, 1978, the members of PPA became dissatisfied with the state organization and voted to disaffiliate with the New Mexico Nurses Association and affiliate with District 1199 NM of

[14]Prior to January 1, 1978 PERB was known as the Educational Employment Relations Board.

the National Union of Hospital Care Employees, RWDSU, AFL-CIO. The NLRB Regional Director granted the certification amendment on April 28, 1978. Based upon its finding that there was a continuity of representation, the court held:

> . . . when PPA's members expressed their desire to affiliate with the National Union and become members of District 1199 NM on February 28, 1978, District 1199 NM became the successor to PPA as the bargaining representative of the hospital's nurses. (Id. at 104 LRRM 2291, emphasis added.)

This principal is similarly recognized in decisions of the NLRB. In National Carbon Company (1956) 116 NLRB 488, the NLRB reviewed the effect of a consolidation agreement between two employee organizations on the board's order, issued prior to consolidation directing the employer to bargain with one of the organizations. In concluding that the consolidated organization was a continuation of the original union, the board stated the organization succeeded to the status of the original organization as the duly designated bargaining representative of the employer's employees. (Id., at p. 502.) Moreover, in directing that an amending certification should issue, the board stated at footnote 17:

> This is not to be construed as a new certification or as an extension of the certification heretofore issued. Furthermore, the representative status of OCAW in this case inheres by virtue of its successorship on March 14, 1955, to the bargaining right of its certified predecessor, and does not flow from, or take effect on the date of, this amended

certification.
(Id., at p. 504; emphasis added.)[15]

Thus, we conclude that when there is no question of representation raised, the rights of the exclusive bargaining agent (including its entitlement to dues deductions) flow from the date of affiliation/disaffiliation and not from the date of the Board's granting the amendment of certification.[16]

The District, in responding to the Association's position, contends that reliance on NLRB precedent is misplaced since cases previously cited by the Association dealt with a different issue, i.e., the obligation of the employer to negotiate with a successor of the original exclusive representative.[17] The District attempts to buttress this position by pointing out that EERA's section 3543.1(d) is unique and has no NLRA parallel.

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[15]The statement that an amended certification is not to be construed as a new certification has been incorporated into PERB Regulation 32763(c), which states in pertinent part, "Such certification shall not be considered to be a new certification for the purpose of computing time limits pursuant to section 32754 of these regulations." Additionally, March 14, 1955 was the date the consolidation agreement was completed.

[16]In this case, the date of disaffiliation is December 14, 1989, the date the ballots were counted.

[17]The District notes that the PERB Regional Office during the course of the present proceeding, but prior to the conclusion on the Board agent's investigation, refused a request for impasse determination/appointment of mediator because PERB records did not reflect the Association was the currently certified exclusive representative of the unit in question. The Board agent's determination regarding the impasse request, pending her investigation of the request for amended certification, was appropriate.

This argument is rejected. Although initially many cases arising under the NLRA were based on a refusal to bargain,[18] the NLRB and the federal courts have found that the violations constituted both an employer's refusal to recognize and bargain with a successor union. (For example, see St. Vincent Hospital v. NLRB, supra, 621 F.2d 1054 [104 LRRM 2288]; May Department Stores v. NLRB (7th Cir. 1990) 897 F.2d 221 [133 LRRM 2745]; and NLRB v. Insulfab Plastics, Inc. (1st Cir. 1986) 789 F.2d 961 [122 LRRM 2105].) Further, the concepts of exclusivity and recognition, together with an employer's duty to bargain with the exclusive representative, are part and parcel of the basic rights provided employees and their chosen representative, under both EERA and the NLRA. EERA section 3543.1(d), although having no direct parallel to the NLRA, provides the recognized bargaining representative of public school employees with no less important protection of exclusivity than does section 159(a) of the NLRA.[19]

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[18]The issue of whether the District committed an unfair labor practice by refusing to bargain with the exclusive representative did not arise in this case. In fact, the parties have indicated that the Association and District reached an agreement on a collective bargaining contract subsequent to the Association's request for an amendment to certification.

[19]29 U.S.C. section 159(a) states:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees

Thus, the duty to bargain with an employee organization is essentially a corollary to the employer's duty to recognize that organization. (See Morris, The Developing Labor Law (2d ed. 1983), p. 601.)

The District further contends that if the effective date of disaffiliation is the date of the Association's internal vote, two problems are created. First, the District would be forced to closely monitor the local Association's disaffiliation efforts. Second, the District would be required to correctly determine whether the successor organization should be recognized, e.g., whether there is substantial continuity of the exclusive representative.[20] If it incorrectly determined the validity of the disaffiliation, the District argues, it could be charged with

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> shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.
> (Emphasis in original.)

[20]Specifically, the District contends it would be fundamentally unfair to require districts to analyze and decide complex legal issues without guidance from PERB concerning:

> . . . whether the change in identity (1) was procedurally valid, (2) conformed to the organization's internal rules, (3) was accomplished through democratically conducted ratification by unit employees, and, (4) reflected a continuation of the original entity as opposed to a "substantially different" organization, requiring scrutiny of the structure and leadership of the new and succeeding organization.

violating its duty, under Government Code section 3543.1(d), to forward dues deductions solely to the exclusive representative, or its duties under the Education Code related to deduction of membership dues.[21] In support of these arguments, the District relies on San Mateo Community College District (1985) PERB Decision No. 543 wherein the Board stated:

> Section 3543.1(d) essentially sets out two independent rules: one is that an employer must honor dues deduction authorizations for an exclusive representative; the other is that the employer must not honor dues deduction authorizations for any other employee organization when the employees are represented by an exclusive representative.
> (Id., p. 6, emphasis in original.)

While the District's concerns are not unwarranted, its arguments are nevertheless unpersuasive. As the above cited portion of the Board's decision in San Mateo indicates, the essence of section 3543.1(d) is the recognition of an employee organization as the exclusive representative, albeit in the domain of dues deductions. The question is not whether a public school employer must choose between two competing organizations. Rather, it is at what point do the rights of a "successor" organization assume the status of exclusivity, including all of the rights guaranteed an exclusive representative under EERA? Since we have found a "question of representation" did not exist in this case, the Association, in its disaffiliated status, inhered to all the rights, obligations, and duties it had prior

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[21]See Education Code section 87833 providing, in part, that certificated employees may authorize, by written revocable authorizations, deductions of membership dues.

to disaffiliation. (See South County Community College District, supra, PERB Order No. Ad-215, p. 15.) Consequently, the Association had the right to collect dues in its disaffiliated status as of the date of disaffiliation.[22]

Finally, we recognize that an employer informed of a disaffiliation vote may be faced with a dilemma as to the proper disbursement of dues deductions. We also note that an employer acts at its own peril if it refuses to bargain with or recognize the exclusive representative without demonstrating "by objective considerations that it has some reasonable grounds for believing the union has lost its majority status." (NLRB v. Financial Institution Employees (1986) 475 U.S. 192, 198 [121 LRRM 2741].)

Further, as noted in our decision in South County Community College District, supra at footnote 5, a public school employer has no authority, under PERB's regulations, to independently file a petition to raise the question of representation. The only opportunity a public school employer has to raise a question of representation under the regulations is when an employee organization files for an amended certification. The NLRB, conversely, expressly provides that an employer can initiate the investigation by filing its own petition as to whether the change in the status of the exclusive representative creates a question concerning representation. The differences in the regulations underlying the NLRA and EERA are significant, in this instance, in formulating a workable rule to guide public school employers

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[22]See footnote 16, infra.

faced with competing claims for the enforcement of rights granted to employee organizations under section 3543.1. Because it is not the employer's responsibility to monitor the local Association's disaffiliation efforts, a matter the federal courts and PERB have held to be "internal" (See South County Community College District, supra, p. 20.), when faced with competing claims on dues deduction rights due to changes resulting from an affiliation/disaffiliation, we find that an employer may take reasonable steps to avoid improper disbursement pending the Board's decision, such as placing the disputed membership dues in an interest bearing account.

## CONCLUSION

We find the Board agent correctly determined that there was no question of representation raised by the petition for amendment of certification inasmuch as the changes resulting from disaffiliation of the Association from CTA were not sufficiently dramatic to alter the Association's identity, and that the disaffiliation election was conducted with adequate due process safeguards. Furthermore, the Board agent had before her sufficient uncontested facts to make a determination without the need for formal hearing. Finally, we find the amendment of certification effective as of December 14, 1989, the date of the disaffiliation vote.

## ORDER

Upon the foregoing decision and the entire record in this matter, the Board hereby GRANTS the Association's petition for an

amended certification and DENIES the request by CTA for a formal hearing.

Member Camilli joined in this Decision.

Member Shank's concurrence begins on page 23.

Shank, Member, concurring: I agree with the majority to the extent it is consistent with my concurrence in South County Community College District (1990) PERB Order No. Ad-215.

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| SAN JOSE/EVERGREEN COMMUNITY COLLEGE DISTRICT FACULTY ASSOCIATION,<br><br>Exclusive Representative,<br><br>and<br><br>CALIFORNIA TEACHERS ASSOCIATION/NEA,<br><br>Employee Organization,<br><br>and<br><br>SAN JOSE-EVERGREEN COMMUNITY COLLEGE DISTRICT,<br><br>Employer. | Case No. SF-AC-23 (R-365)<br><br>ADMINISTRATIVE DETERMINATION<br><br>April 19, 1990 |

## BACKGROUND

On December 21, 1990, the San Jose/Evergreen Community College District Faculty Association (Association) filed with this office a request for an amended certification pursuant to PERB regulation 32761[1] to reflect its disaffiliation with the California Teachers Association/National Education Association (CTA). The request indicated that the Association had changed its name from the San Jose Community College District Chapter of the California Teachers Association (SJCCDCCTA).[2] SJCCDCCTA has

[1]PERB regulation 32761 provides, in pertinent part:

(a) An employee organization may file with the regional office a request to reflect a change in its identity in the event of a merger, amalgamation, affiliation or transfer of jurisdiction affecting it.

[2]CTA asserts that the name change is ineffective, since the Chapter's Executive Board announced the change in October, 1989, prior to undertaking any Constitutional proceedings to do so. However, this ignores the fact that the name change was

been recognized as the collective bargaining representative of the certificated unit in the San Jose-Evergreen Community College District (District) since 1977.

On December 21, 1989, the District and CTA were informed by the undersigned that an investigation regarding the proposed disaffiliation had been initiated and responding statements from both parties were requested.

On January 4, 1990, the District filed a responding statement indicating that, based on the information currently available, it had no objections to the changes. However, the District reserved the right to alter its position if necessary.[3]

On January 29, 1990, CTA, purporting to represent both the California Teachers Association and SJCCDCCTA, its affiliated chapter, filed a brief in opposition to the request. The Association filed a responding brief on February 20, 1990.

CTA'S Objections

CTA's objections to the request for amended certification reflecting disaffiliation are summarized as follows:

First, that disaffiliation is not covered by PERB regulation 32761.

Second, that even if disaffiliation is covered, it should not be allowed in the face of opposition from the originally

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subsequently voted upon in accordance with the Chapter's Constitution prior to the filing of the instant request, as discussed herein.

[3]The District has not altered this position.

certified exclusive representative, which CTA purports to still represent.

Third, that the Association is a substantially different organization than SJCCDCCTA, the originally certified exclusive representative, and should therefore not be granted successor status.

Fourth, that due process safeguards were not met in the disaffiliation process since the bargaining unit as a whole was not afforded the opportunity to vote on the disaffiliation.

Finally, CTA requests a hearing "on the various issues" raised in this case, absent a denial of the request for an amended certification.

Facts

The investigation in this matter has revealed the following information:

1. Article Nine-Amendments of the SJCCDCCTA Constitution provides:

> 1. Changes in this Constitution or its Bylaws must be by written ballot distributed by the president to all members of the Association.
>
> 2. If school is not in session, these ballots must be mailed to the last known address of all Association members.
>
> 3. The period of voting shall be ten days from the distribution or mailing of such ballots.
>
> 4. Proposed changes in the Constitution and Bylaws shall be submitted to the membership at the request of a majority of the members of the executive board, or at the written petition received by the executive board signed by one-third of the membership of the Association, itemizing specific changes.

5. Changes in the Constitution shall require a two-thirds majority of the ballots received.

6. Changes in the Bylaws shall require a vote of over fifty percent (50%) of the ballots received.

2. Discussions regarding disaffiliation began approximately in mid-October. Informational meetings were announced on October 6 and held on October 26, 1989 at both campuses. Representatives of several independent faculty associations spoke at the meeting. Although invited, CTA Representative Judy Mason was unable to attend. The issue of disaffiliation was discussed in two Association newsletters prior to the election, and in at least eight CTA fliers and one Association flier after the ballots were mailed and prior to the ballot count.

3. On November 29, 1990, secret ballots were placed in Association members' mailboxes at both campuses. One ballot was mailed to a member's last known address. The ballot informed the voter that a vote in favor of the amendments to the Constitution would be a vote for disaffiliation with CTA, and a vote against the amendments would be a vote for continuing affiliation. The wording on the ballot was as follows:

1. ARTICLE ONE-NAME CHANGE FROM:
The name of this organization shall be the San Jose/ Evergreen Community College District Faculty Association of the California Teachers' Association, hereafter called the Association.

TO:
The name of this organization shall be the San Jose/Evergreen Community College District Faculty Association, hereafter called the Association.

_____YES _____NO

2. DELETE:
ARTICLE TWO-AFFILIATION

The Association shall be affiliated with the California Teachers' Association and the National Education Association.

_____YES _____NO

3. ARTICLE THREE-MEMBERSHIP DELETE SECTION 2: Associate Members: Certificated employees who are not eligible to become members of the San Jose/Evergreen Community College District Faculty Association of the California Teachers' Association may, upon payment of state and NEA dues, become associate members of the state organization of the California Teachers' Association and of the NEA.

_____YES _____NO

4. ARTICLE FOUR-DUES CHANGE FROM: Section 2: Unified dues shall be sufficient to cover membership in this local chapter, the California Teachers' Association, and the National Education Association.

TO:

Unified dues shall be sufficient to cover membership in this local chapter.

_____YES _____NO

4. Separate ballot counts were conducted at each campus on December 14, 1989. Of the approximately 125 Association members, 76 returned ballots. 61 votes were cast in favor of the amendments; 15 votes were cast against the amendments. Thus, over two-thirds of the ballots returned were in favor of amending the Constitution to reflect disaffiliation with CTA/NEA.

5. The officials of the Association elected prior to the disaffiliation vote remain in office and continue to deal with the District management. The bargaining team is comprised solely of local Association members.

6. In its affiliated status, the exclusive representative is eligible for a variety of professional assistance and services from CTA.

7. According to CTA, during fiscal years 1987-88 and 1988-89, CTA Field Representative Judy Mason regularly represented

SJCCDCCTA with employer representatives in employee grievance meetings, other employment-related meetings, arbitration and both formal and informal contract negotiations. CTA Attorney Ramon Romero represented SJCCDCCTA in two unfair practice cases before PERB.

8. According to the Association, Mason attended only one or two bargaining sessions in three years as an observer, not a participant. In the 20 - 25 negotiating sessions which have taken place over the six months prior to the filing of the instant request, Mason has had minimal contact (one telephone call) with the District's negotiator. Of the two unfair practice charges filed by the Association with Romero's assistance in the last four years, one was withdrawn shortly after filing in 1989. Only two formal grievances have been filed by unit members in the past four years. In one of these grievances, one of the grievants, an attorney, represented the grievants at the arbitration. While CTA may have been requested to assist in the investigation of two or three potential grievances in 1987-88, none went to arbitration. Approximately ten faculty complaints in the past three to four years have been resolved by local Association officers without the assistance of CTA.

## DISCUSSION

### PERB Regulation 32761

As CTA noted in its brief, PERB regulation 32761 does not expressly include the word "disaffiliation." However, In Ventura Community College District (1982) PERB Order No. AD-130, PERB

asserted its jurisdiction over such cases by considering an appeal of an administrative determination denying a request to amend a certification to reflect a disaffiliation of a local union from an international union. While the Board upheld the determination, it did so based on the facts in the case, not on a lack of jurisdiction under EERA. Citing decisions of the National Labor Relations Board (NLRB), the Board determined that the issuance of an amended certification to reflect a change in the identity of an exclusive representative, absent an election, is only appropriate in cases where no question concerning representation exists.

In Anaheim City School District (1983) PERB Decision No. 349, the Board expressly addressed its jurisdictional policy regarding disaffiliation under regulation 32761, holding that while "[n]ormally, a change of exclusive representative occurs as a consequence of a decertification proceeding . . . the existence of subsection 3541.3(m)[4] makes it clear that the Legislature did not intend that decertification be the sole means by which a change in representation can be accomplished."

The NLRB and the federal courts also support the use of amendment of certification procedures to reflect disaffiliations

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[4]Section 3541.3(m) provides that the PERB shall have the power and duty:

> To consider and decide issues relating to rights, privileges and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

of local unions from parent unions when applicable standards are met. See, e.g., McDermott and Co., Inc. v. NLRB (CA 5 1978) 571 F2d 850 and Canterbury Villa of Waterford (1986) 282 NLRB 462, 125 LRRM 1021. As it stated in Ventura, supra, the Board is "guided by precedent of the NLRB and federal courts regarding appropriateness of amendment of certification." Thus CTA's argument that an amendment of certification pursuant to a disaffiliation is improper under PERB regulation 32761 is without merit.

As stated above, the issuance of an amended certification, absent an election, is appropriate when it is determined that no question concerning representation exists. The existence of a question concerning representation is contingent upon a determination of "whether the entity seeking amendment of certification is merely a continuation of the certified entity under a new name, or is a substantially different organization." Ventura, supra. Such a determination rests upon two basic factors. First is whether the change was procedurally valid, conforming to the organization's internal rules, and accomplished through democratically conducted ratification by unit employees. Ibid. Recently, the U.S. Supreme Court overturned previous NLRB cases and modified this factor, finding that only union members are entitled to vote in such elections. NLRB v. Financial Institution Employees (1986) 475 US 192, 121 LRRM 2741.

The second factor in determining whether a question concerning representation exists is whether "the entity seeking

an amendment of certification is merely a continuation of the certified entity under a new name or is a substantially different organization." Ventura, supra. Factors which the Board found significant in deciding whether a substantially different organization has been created include whether that organization has "the same structure, the same officers, and the same stewards and other representatives for dealing with the employer and employees." Ibid.

The Supreme Court has held that changes to an organization pursuant to an affiliation must be "sufficiently dramatic to alter the union's identity" in order to raise a question concerning representation. NLRB v. Financial Institution, supra. Following the Court's reasoning, the NLRB has found that it must determine whether the "changes are so great that a new organization has come into being . . ." It held that the "continuity requirement thus ensures that no one can substitute an entirely different representative in disregard of the established mechanisms for making such a change." Western Commercial Transport (1988) 288 NLRB No.31.

In considering whether to approve a request for an amended certification to reflect a disaffiliation, PERB must review the facts of the case to determine whether the organization filing the request is substantially the same organization as it was prior to the disaffiliation and whether the disaffiliation process itself included adequate due process safeguards. If the organization is found not to be substantially the same, then the

request must be dismissed and the petitioning organization would be required to follow the decertification procedures in order to achieve certification as the exclusive representative. If the organization is found to be substantially the same, but the disaffiliation process lacked adequate due process safeguards, the request would also be denied.

Due Process

In the instant case, all SJCCDCCTA members were afforded the opportunity to vote in a secret ballot election, according to the provisions of the Constitution. The membership had ample opportunity to discuss the issue and to read the various printed materials regarding the pros and cons of disaffilation prior to the election, which was adequately noticed.

CTA's argument that all bargaining unit members should have been afforded the opportunity to vote in the disaffiliation election is without merit in light of NLRB v. Financial Institution, supra.

In light of the above, it is found that due process safeguards were adequately ensured during the disaffiliation procedure.

Substantial Organizational Continuity

CTA argues that the Association is not substantially the same employee organization as SJCCDCCTA. It bases this argument on four grounds: (1) that there will be a significant change in the identity of the persons conducting the business of the exclusive representative; (2) that the dues structure, as

well as the control over the dues amount and expenditure, is different; (3) that the Association is not subject to the due process requirements for individual union members that CTA requires of local affiliates; and (4) that there have been significant by-law changes.

As stated above, an important factor in determining organizational continuity is whether the successor organization has retained the same representatives for dealing with the employer and employees. Ventura, supra. In this case, the same officers remain in place and the negotiating team continues to be comprised of local Association members. Although CTA field representative Judy Mason and attorney Ramon Romero will no longer be available to the local, their participation in past activities has been minimal.

The sole change in the dues structure for members of the Association appears to result from the elimination of dues paid to and determined by the state and national affiliates, CTA and NEA. No change has been made to Section 1 of Article Four, which states that the "annual unified dues for this Association shall be set annually by its executive board." The Association continues to exercise control over its local dues, and never had such control over the dues paid to CTA and NEA.

A federal appellate court has held that a change in dues structure, by itself or in conjunction with other minor organizational changes, will not prevent a finding of continuity of representation. NLRB v. Commercial Letter, Inc. (8th Cir.,

1974) 496 F.2d 35,40. In this case, the change is one which results de facto from disaffiliation, as, conversely, would the payment of additional dues likely result from an affiliation. As the Ninth Circuit Court of Appeals discussed in Seattle-First National Bank v. NLRB 89 C.D.O.S. 9270 (12/20/89), certain organizational changes are inherent in an affiliation (or, conversely, disaffilation) and should not be accorded significant weight in deciding the decision of continuity. The Court held that "[t]he very ordinariness of such factors strongly suggests that something more must change before an affiliation raises a question concerning representation."

CTA claims that the Association, as an independent, is not subject to the due process requirements for individual union members that are required of all CTA-affiliated locals, including open nomination procedures, secret ballot elections, one-person/one-vote principle, etc. However, a review of the Association's Constitution and Bylaws reveals that, in fact, such safeguards are contained therein. Article Two (Nominations and Elections) of the Bylaws, for example, provides for open nominations for Association officers, as well as secret ballot elections.

CTA asserts that there have been significant bylaw changes, but neglects to point out what those changes are. In fact, it appears that there have been no bylaw changes and the only changes to the Constitution have been to change the name of the organization under Article One, the elimination of Article Two

(Affiliation), and changes in Articles Three (Membership) and Four (Dues) to reflect disaffiliation.

CTA also argues that by disaffiliating, the local organization will no longer be able to avail itself of the services provided by the state and national organizations. However, the elimination of services and resources provided by its affiliate, CTA, does not change the fundamental structure of the Association. This is merely a factor which the membership must consider when deciding whether to disaffiliate. In the instant case, this issue was addressed fully in the publicity preceding the elections, and did not dissuade a majority of the SJCCDCCTA members from voting to disaffiliate.

For the reasons stated above, it is found that the Association is substantially the same organization as it was prior to disaffiliation from CTA/NEA.

Opposition by the Originally Certified Exclusive Representative

In its brief, CTA asserts that the request for an amended certification should also be denied based on the opposition of the originally certified exclusive representative, SJCCDCCTA, which it purports to represent. However, as discussed above, the originally certified exclusive representative is one and the same as the Association. Only a name change from San Jose Community College District Chapter of California Teachers Association to San Jose/Evergreen Community College District Faculty Association has occurred. The Association is not represented by CTA, but, rather, by the law offices of Robert J. Bezemek, as stated on the

original filing in this proceeding. CTA's status has merely been that of a parent organization to the exclusive representative.

Furthermore, even if CTA is arguing that the disaffiliation should not be allowed in the face of opposition from the parent organization, the cases which it cites in support of this argument are inapposite, involving affiliation of a local with an unwilling parent organization. See, e.g., Poway Unified School District (1982) PERB Decision No. Ad-127.

As stated on page 5 of CTA's brief, "[a]ffiliation nearly always involves mutual agreement between the predecessor unaffiliated union and the parent with which it is affiliating. In the case of disaffiliation, however, as here, there will almost always be disagreement between the two entities." NLRB and federal case law reasonably hold that a parent organization must not be forced to unwillingly accept the affiliation of a local and the responsibilities that follow. However, the consent of the parent organization has not been cited as a criterion for disaffiliation, presumably because such a requirement would make almost any attempt at disaffiliation realistically impossible.

Request for a Hearing

In its brief, CTA requests a formal hearing in the event that the request for amended certification is not denied. However, since there are neither material factual matters in dispute nor credibility issues to be resolved in this case, and since the parties have submitted comprehensive, thorough briefs in the matter, a formal hearing is unwarranted.

## CONCLUSION

The request for an amended certification to reflect a disaffiliation may be appropriately filed under PERB regulation 32761. An analysis of the facts in this case has revealed that: (1) the changes resulting from the disaffilation of the Association from CTA are not sufficiently dramatic to alter the local organization's identity; and (2) the disaffiliation election was conducted with adequate due process safeguards and in accordance with the organization's Constitution. Thus, no question concerning representation has been raised. While CTA does not "accept" the disaffiliation, such acceptance is not a requirement for approval of an amended certification to reflect a disaffiliation. For the reasons stated herein, the Association's request for an amended certification is GRANTED. An amended certification will be issued by this office.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision (PERB regulation 32360). To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

MEMBERS, PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street, Suite 200
Sacramento, CA 95814-4174

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 set for filing . . ." (regulation 32135). Code of Civil Procedure section 1013 shall apply.

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (regulation 32360(c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (regulation 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within then (10) calendar days following the date of service of the appeal (regulation 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the San Francisco regional office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see regulation 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Jerilyn Gelt
Labor Relations Specialist