STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTH COUNTY COMMUNITY COLLEGE DISTRICT, Employer, and CHABOT-LAS POSITAS FACULTY ASSOCIATION, Exclusive Representative, and CALIFORNIA TEACHERS ASSOCIATION/ NEA, Employee Organization.	Case No. SF-AC-22 (R-1) Administrative Appeal PERB Order No. Ad-215 October 26, 1990

Appearances: Robert J. Bezemek and Katherine J. Thomson, Attorneys, for Chabot-Las Positas Faculty Association; A. Eugene Huguenin, Jr., Attorney, for California Teachers Association.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

CAMILLI, Member: The California Teachers Association (CTA) appeals the administrative determination of a Board agent, granting the request of the Chabot College Teachers Association (Association or CCTA)[1] to amend its certification under the Public Employment Relations Board (PERB or Board) Regulation

[1]In its initial petition, the Association was identified as the "Chabot College Teachers Association" (CCTA). The request was amended on February 2, 1990 to reflect CCTA's decision to change its name to the Chabot-Las Positas Faculty Association (CLPFA). Nevertheless, in order to remain consistent with the administrative record in this case, all references to CLPFA will appear as "CCTA." References to CCTA in its affiliated status will appear as "CCTA/CTA/NEA."

32761[2] to reflect CCTA'S disaffiliation with CTA. In granting CCTA'S request, the Board agent concluded 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 organization's Constitution. The Board agent also denied CTA's request for a formal hearing on the grounds no material facts were in dispute, no credibility issues needed to be resolved, and any legal arguments presented were thoroughly discussed by the parties in CCTA's petition and CTA's response.

For the reasons expressed below, we affirm the Board agent's administrative determination.

FACTUAL SUMMARY

CCTA was initially certified as the exclusive representative for the certificated bargaining unit in the South County Community College District on March 2, 1978. CTA and the National Education Association (NEA) were identified as affiliates of the Association in its certification with PERB. On December 11, 1989, CCTA filed a request for an amended certification to reflect its disaffiliation with CTA and NEA.

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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.

Article XII of CCTA's Constitution provides, in part, that the Constitution may be amended by: (1) a two-thirds vote at any regular meeting, or (2) a majority vote at a regular meeting followed by a ratification vote by a majority of the total membership of the Association. CCTA utilized the latter method to amend its Constitution in this case. Article III, which governs affiliation, provides that CCTA shall be a chartered chapter of CTA and an affiliated local Association of NEA.

The executive board of CCTA initiated discussions to amend Article III which would delete language establishing its charter and affiliation with CTA and NEA. The discussions were subsequently opened to the general membership at a meeting held on October 10, 1989. At the conclusion of the meeting, a formal motion to amend the Constitution by striking Article III was filed with CCTA's secretary, Joseph Kuwabara (Kuwabara).

A written notice to all CCTA members was issued by Kuwabara on November 6, 1989 and again on November 15, 1989, stating that the proposed amendment would be discussed at meetings scheduled for November 16, 1989 at Chabot College and November 17, 1989 at Las Positas College. The notices also stated that a vote would be taken at the conclusion of these meetings and, if the amendment passed, an election would be conducted among the membership present.

At the November 16 and 17, 1989 meetings, 24 of 37 members voted in favor of disaffiliation, 9 against disaffiliation, and 4 members abstained. On November 20, 1989, CCTA officials issued a

memo announcing the above results and stating that a secret ballot (ratification) election would be held among the membership during the week of November 27 through December 1, 1989. Of the 74 members of CCTA participating in the ratification election, 45 ballots were cast for disaffiliation, 20 against, and 9 voters abstained.

The total membership of CCTA is between 75 and 79 full-time faculty members and 4 part-time faculty members.[3] CCTA represents a bargaining unit of approximately 640 employees. The officers of CCTA, elected prior to disaffiliation, remain the same and continue to deal with the District management. The Association's chief negotiator remains the same and, aside from the deletion of Article III, the Association's Constitution and bylaws remain essentially the same.

THE ADMINISTRATIVE DETERMINATION

CTA asserted a variety of theories, before the Board agent, in support of its request that the amended certification be denied. First, CTA argued that disaffiliation is not covered by PERB Regulation 32761 and therefore cannot be accomplished through an amended certification procedure. The Board agent rejected this argument, noting that the Board has asserted its jurisdiction under Regulation 32761 over issues involving changes

[3]The Board agent noted there is a slight disagreement as to the size of CCTA's membership. The Association claims 79 full-time members and 4 part-time members belong to CCTA. CTA claims CCTA's membership consists of 75 full-time faculty members. The Board agent concluded, however, that the discrepancy is irrelevant since it had no effect on the outcome of the election.

to the exclusive representative in Ventura Community College District (1982) PERB Order No. Ad-130, and Anaheim City School District, et al. (1983) PERB Decision No. 349. The Board agent also noted, the National Labor Relations Board (NLRB) and federal courts have supported the use of amendment of certification procedures to reflect disaffiliations.

Next, CTA asserted that disaffiliation should be denied based on the opposition of the originally certified union. The Board agent rejected this argument noting that the originally certified exclusive representative is one and the same as independent CCTA. The Board agent also noted that the consent of the parent organization has not been cited by the NLRB or federal courts as a prerequisite for disaffiliation.

CTA also asserted that CCTA is not the same organization as CCTA/CTA/NEA because: (a) the dues structure, referring to the amount of dues assessed and expenditure for unified membership with CTA and NEA, is different; (b) the Association is not subject to the due process requirements for individual members imposed by CTA on local affiliates; (c) significant bylaw changes to the Association's Constitution have occurred; and (d) CTA/NEA services are no longer available to CCTA. The Board agent rejected these arguments noting that such changes did not significantly alter CCTA's identity.

The Board agent found that the only change in the dues structure related to the amount of dues assessed bargaining unit members. As a result of disaffiliation, members are no longer assessed CTA and NEA's affiliation fees. The Board agent further

noted that the Association continues to exercise control over its local dues and never had control over dues paid to CTA and NEA. The Board agent also noted that CCTA's Constitution and bylaws still require the same due process procedures imposed on locals affiliated with CTA (e.g., open nomination procedures, secret ballot elections, one-person/one-vote). With respect to the bylaws, the Board agent noted that CTA did not identify what changes have occurred other than the elimination of the affiliation article (Article III) of the Constitution. Further, the Board agent concluded that the elimination of CTA services and resources did not change the fundamental structure of CCTA.

The Board agent also rejected CTA's argument that due process considerations require denial of the amended certification because only Association members were permitted to vote in the disaffiliation election. The Board agent noted that the United States Supreme Court in NLRB v. Financial Institution Employees of America, Local 1182 (1986) 475 U.S. 192 [121 LRRM 2741] recently overturned several previous decisions of the NLRB which required a vote of the entire bargaining unit. Thus, the Board agent concluded the decision to disaffiliate based on a ratification election limited to members of the Association was procedurally valid.

Finally, the Board agent denied CTA's request for a formal hearing stating that no material factual matters were in dispute, no credibility issues needed to be resolved, and the parties submitted comprehensive briefs which thoroughly addressed the issues in this case.

DISCUSSION

CTA reasserts each of the above arguments in its appeal and further argues that the Board agent misstated the Supreme Court's holding in Financial, supra. Nevertheless, two fundamental issues are presented by the appeal. First, does PERB have authority under PERB Regulation 32761 to amend the certification of an exclusive bargaining representative to reflect its disaffiliation from a state or national organization such as CTA/NEA? Second, if PERB does have such authority, under what conditions is an amendment of certification appropriate to reflect the disaffiliation of a local from (or affiliation of a local with) a state or national organization?

1. PERB Authority under Regulation 32761

PERB Regulation 32761(a) provides, in pertinent part, that:

> An employee organization may file . . . a request to reflect a change in its identity in the event of a merger, amalgamation, affiliation or transfer of jurisdiction
> . . . .

This regulation is derived from the Educational Employment Relations Act (EERA)[4] section 3541.3(m) which describes the powers and duties of the Board as follows:

> 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.

The fact that disaffiliation is not specifically mentioned in PERB Regulations or EERA does not preclude the Board from

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

considering such changes under its amendment of certification procedures. In Ventura Community College District, supra, PERB Order No. Ad-130, the Board reviewed a request filed by the California League of City Employee Associations (CLOCEA) to amend its certification to reflect disaffiliation with the Service Employees International Union, AFL-CIO. Although CLOCEA's petition was denied on factual grounds, the Board noted that it arose under PERB Regulations 32760 through 32763. Moreover, the Board stated:

> These rules are the PERB equivalent of the amendment of certification provisions of the National Labor Relations Act and regulations promulgated thereunder.[2]
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> We are thus guided by precedent of the National Labor Relations Board (NLRB) and federal courts regarding appropriateness of amendment of certification.[3] [5]
> (Id., pp. 6-7.)

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[2]See Rules and Regulations and Statements of Procedure, series 8, as amended, of the National Labor Relations Board, section 101.17.

[3]It is appropriate for the Board to be guided by federal precedent when it is applicable to the public sector issue involved in a given case. Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].

[5]There is, however, one notable difference between the NLRB's and PERB's regulations in this area. Under NLRB Regulations 101.17 and 102.60(b), the employer may file a petition to clarify or amend the certification of the exclusive representative provided no question concerning representation exists. The employer has no such authority under PERB Regulations. Rather, under PERB Regulation 32762 the employer may only file a responding statement to the employee organization's request to amend certification.

In accord with this conclusion, numerous decisions of the NLRB and federal courts have reviewed petitions to amend certification in cases involving disaffiliation of a local from a parent organization to reflect a change in the identity of the exclusive representative and granted or denied those petitions based upon the particular facts of each case. (See e.g., Canterbury Villa of Waterford, Inc. (1986) 282 NLRB 462 [125 LRRM 1027]; St. Vincent Hospital v. NLRB (10th Cir. 1980) 621 F.2d 1054 [104 LRRM 2288]; J. Ray McDermott and Co., Inc. v. NLRB (5th Cir. 1978) 571 F.2d 850 [98 LRRM 2191]; Missouri Beef Packers, Inc. (1969) 175 NLRB 1100 [71 LRRM 1177].)

Similarly, in Anaheim City School District, et al., supra, PERB Decision No. 349, the Board reviewed whether its jurisdiction under section 3541.3(m) extended to issues of affiliation despite the absence of any such reference in the statute. Specifically, the Board stated:

> [W]e do not find [the omission of the word "affiliation" from section 3541.3(m) to be] an impediment to our resolution of the issues raised here.
> (Id., pp. 3-4.)

Thereafter, the Board concluded:

> [T]he existence of subsection 3541.3(m) makes it clear that the Legislature did not intend that decertification be the sole means by which a change in representation can be accomplished.
> (Id., p. 7.)

Accordingly, we conclude that since the Board has indicated its willingness to follow precedence established by the NLRB and federal courts in this subject area, the absence of the word

"disaffiliation" from EERA section 3541.3(m) and PERB Regulation 32761 does not preclude it from considering such a change in the identity of the exclusive representative under the amendment of certification procedures.

2. Amendment of Certification to Reflect Disaffiliation

The general rule established by cases decided in the private sector is that amendment of certification is appropriate to reflect an affiliation [or disaffiliation] where there is no change in the basic identity of the representative chosen by the employees. (Ventura Community College District, supra, PERB Order No. Ad-130.) Such an amendment is justified because the change involved does not alter the essential identity of the exclusive representative. (Ibid.) However, an amendment of certification in cases of affiliation or disaffiliation is not appropriate where, as a result of that change, a question concerning the identity or authority of the representative is created.[6] (Id., pp. 7-8.)

Decisions of the NLRB and the U.S. Supreme Court utilize a two-prong analysis to determine if a question concerning representation exists.[7] First, is there "substantial continuity"

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[6]In accord with NLRB precedent, we define "question concerning representation" as "sufficient doubt about the union's continuing status as the legitimate representative of employees in a particular unit [such] that a new election should be conducted to determine employee sentiment." (Seattle-First National Bank v. NLRB (1989) 892 F.2d 792, 797 [133 LRRM 2193, 2197].)

[7]We note that the Court in Financial neither endorsed nor rejected the two-prong substantial continuity and due process analysis, but merely noted the NLRB's historical application of

of representation and identity between the pre- and post-affiliated union? The focus of this inquiry is whether the affiliation[8] substantially changed the Association. (NLRB v. Financial Institution Employees, supra, 475 U.S. 192, 199.) Significant factors recognized by the NLRB include:

> . . . continued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency of membership meetings, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated; and the preservation of the certified union's physical facilities, books, and assets. [Fn. omitted.] (Western Commercial Transport, Inc. (1988) 288 NLRB No. 27, slip opn. p. 11 [127 LRRM 1313, 1316].)

A second consideration is whether Association members have had an adequate opportunity to vote on the change. Generally, the NLRB considers this "due process" portion of the analysis

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the test. (See Financial, supra, 475 U.S. 192, 199, fn. 6, and 200, fn. 7.) We further note that the NLRB has continued after Financial to consider both due process and continuity when determining whether a question concerning representation arises, but has placed emphasis on the latter. (May Department Stores v. NLRB (7th Cir., 1990) 897 F.2d 221, 226, fn. 6 [133 LRRM 2745, 2748, fn. 6].)

[8]Although the term "affiliation" is used here, decisions of the NLRB and PERB indicate this same inquiry is applicable to disaffiliation cases. (See J. Ray McDermott & Co., Inc. v. NLRB, supra, 571 F.2d 850; Canterbury Villa of Waterford, supra, 282 NLRB 462; Missouri Beef Packers, Inc., supra, 175 NLRB 1100; St. Vincent Hospital v. NLRB, supra, 621 F.2d 1054; Ventura Community College District, supra, PERB Order No. Ad-130; Anaheim City School District, supra, PERB Decision No. 349.)

satisfied if the election was conducted with adequate safeguards, including notice of the election, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. (NLRB v. Financial Institution Employees, supra, 475 U.S. 192, 199.)

Substantial Continuity

CTA contends that substantial changes have occurred in CCTA/CTA/NEA's identity as a result of disaffiliation. CTA asserts that changes in the dues structure, access to professional resources, bylaw changes, and loss of required due process safeguards to members of the Association lead to the conclusion independent CCTA is a new organization.

The Supreme Court held in Financial, supra, that changes resulting from an affiliation must be "sufficiently dramatic to alter the union's identity." (Id., p. 206.) We agree with the Board agent's determination that the changes in this case did not meet that test. Moreover, a critical factor in determining whether there has been a change in identity of the exclusive representative is to examine the organization's day-to-day interaction with management. Thus, in American Bridge Division, U.S. Steel Corp. v. NLRB (3rd Cir. 1972) 457 F.2d 660 [79 LRRM 2877] the court denied an amended certification because, after affiliation:

> . . . the people who conduct a substantial part of the unit's dealings with management are no longer the association's officers, and the power of the unit's members to control those agents has radically changed.
> (Id., p. 663, emphasis added.)

Similarly, in Retail Store Employees Union, Local 428 v. NLRB (9th Cir. 1975) 528 F.2d 1225 [91 LRRM 2001] the court refused to amend a certification to reflect a merger of a local association with an international because:

> . . . the officers did not remain the same. While the old local officers did participate in communications with management in seeking negotiations, none participated in the actual negotiations. This leadership change suggests an absence of continuity where it counts, in a bargaining relation . . . . (Id., p. 1228, emphasis added.)

Following this same reasoning, the California Court of Appeal stated in North San Diego County Transit Development Board v. Vial (1981) 117 Cal.App.3d 27 [172 Cal.Rptr. 440], that it is not only the contract and local officers and employees that must be the same, "the rights of the parties must be the same." (Id., p. 33.) Thus, when evaluating the identity of an organization after a change in affiliation, case law reveals that the NLRB does not run down a checklist of cited criteria; instead, it considers "the totality of a situation." (News/Sun Sentinel Co. v. NLRB (D.C. Cir. 1989) 890 F.2d 430, 432 [132 LRRM 2988, 2990]; Yates Industries., Inc. (1982) 264 NLRB 1237, 1250 [112 LRRM 1231]; May Department Stores v. NLRB, supra, 897 F.2d 221, 228.) Factors considered significant, however, 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. (See, e.g. May Department Stores v.

NLRB, supra, 897 F.2d 221; News/Sun Sentinel Co. v. NLRB, supra, 890 F.2d 430; J. Ray McDermott and Co., Inc. v. NLRB, supra, 571 F.2d 850.)

These factors are satisfied in this case. The Board agent found there has been no change in CCTA's officers since its disaffiliation, and the individual who has historically negotiated with the District on behalf of CCTA remains the same. The Board agent also concluded that CTA has had no direct contact with District management in negotiations and only very minimal involvement in administration/enforcement of the contract (i.e., provided advice on two occasions to CCTA officers concerning a pending grievance and offered its research facilities). Further, there are no facts to indicate CCTA's interaction with management has been altered as a result of the disaffiliation; nor is there evidence that the ability of local members to control the actions of their elected representatives has changed. Thus, we find there is a substantial continuity of representation because, in this case, CCTA is the same organization as it was when it was affiliated with CTA/NEA.

We also agree with the Board agent's determination that the changes in the dues structure, deletion of the affiliation article from CCTA's Constitution, and the loss of CTA services and resources do not raise a question of representation since they were not sufficiently dramatic to alter the Association's identity. (NLRB v. Financial Institution Employees, supra,

475 U.S. 192, 206; May Department Stores, supra, 897 F.2d 221, 228; Western Commercial Transport, supra, 288 NLRB 27, slip opn. pp. 6-13.) As a result, CCTA, in its disaffiliated status, inheres to all the rights, obligations and duties it had while affiliated with CTA and NEA. (St. Vincent Hospital v. NLRB, supra, 621 F.2d 1054; National Carbon Company (1956) 116 NLRB 488, 504, fn. 16 [38 LRRM 1284].) We note further that certain changes due to an association's affiliation or disaffiliation with another organization, such as those occurring in this case, are inherent in the reorganization and should not be accorded significant weight in deciding the question of continuity. (Seattle-First National Bank v. NLRB, supra, 892 F.2d 792, 798.)

Due Process

CTA does not contend that the decision to disaffiliate was made without an opportunity for CCTA members to discuss the issue, nor does it contend the election was held without adequate notice. Rather, CTA argues that the decision must reliably indicate that a majority of the members of the bargaining unit, as opposed to a majority of CCTA members, support the new organization as its exclusive representative. CTA also argues the Board agent failed to consider that no more than 75 employees out of a bargaining unit of 640 members participated in the decision to disaffiliate. This error, according to CTA, ignores the principles announced by the Board in Ventura Community College District, supra, PERB Order No. Ad-130, which, in its view, establish that the exclusive representation of employees is

founded upon the "majority view" of unit employees. CTA asserts that this notion of majority view is deeply embedded in EERA.[9] CTA, quoting from Ventura, then urges the Board to adopt a flexible test to determine whether due process has been satisfied that considers "whether and in what form the employees [not merely members] have expressed their approval of the change in form." (Id., p. 9.) Thus, in cases where a majority of the bargaining unit had an opportunity to participate in the decision, PERB could find that the union's internal decision reflected the "majority view." However, where, as here, the balloting is restricted to less than twelve percent of bargaining unit employees, the Board could find that the decision does not reflect the "majority view." CTA further contends that the Board agent misstated the Supreme Court's holding in NLRB v. Financial Institution Employees, supra, 475 U.S. 192, by interpreting it as precluding PERB from ever considering whether the number of employees voting "was so small as to render the decision an unreliable gauge of the majority view." Finally, CTA argues that the Board agent failed to consider case law indicating that the NLRB will deny certification amendments where the election procedures used to indicate the majority view are unreliable.

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[9]CTA, in support of this argument, cites language contained in sections 3544(a)("a majority of employees in the appropriate unit," "majority support"); 3544(b) ("majority support," "majority support"); 3544.3 ("majority support"); 3544.7(a) ("majority of the valid votes cast," "majority of the votes cast").

Notwithstanding CTA's argument to the contrary, the principles underlying the Board's decision in Ventura, supra, PERB Order No. Ad-130, do not imply the entire bargaining unit is entitled to participate in the decision to modify the organization's affiliation. Addressing that specific issue, the Board in California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S stated:

> We have yet to consider whether a vote of the membership would be required to comply with the adequate due process standard for a certification change as set forth in Ventura, supra.
> (Id., p. 8.)

In accord with our discussion below, that question is now answered.

Moreover, to the extent that Ventura, supra, and its progeny can be construed as establishing a voting requirement inconsistent with Financial, supra, and our analysis in this decision, the decision is overruled. Specifically, we refer to Ventura's apparent adoption of the language appearing in North San Diego County Transit Development Board v. Vial, supra, 117 Cal.App.3d 27 that before an amended certification will issue it must, in part, be demonstrated:

> (3) the employees are shown to be able to fully and democratically consider and vote on affiliation, i.e., in accordance with due process.
> (Ventura, supra, p. 9, emphasis added.)

The court in North San Diego relied on American Bridge Division, U.S. Steel Corp. v. NLRB, supra, 457 F.2d 660 as its authority for this portion of the test. A review of American Bridge,

supra, reveals, however, there is an important difference in the NLRB's test from that quoted by the North San Diego court. In American Bridge, the Third Circuit Court of Appeals noted that under NLRB law no question concerning representation is presented where:

> . . . (3) the members of the union . . . are given an opportunity to consider and vote on the question of affiliation through a democratic process and in accordance with the union's constitution and by-laws. (Id., p. 663, emphasis added.)

North San Diego, in contrast, substituted the word "employees" for the phrase "members of the union." The differing characterizations of the NLRB test by the two courts is highly significant because they describe different groups of employees entitled to vote in the election. Whether the North San Diego court's modification was inadvertent or by design is of no import because, in light of the Supreme Court's decision in Financial, supra, and subsequent decisions of the NLRB, it is clear that under NLRB law the Association has the right to limit the voting on internal organizational changes to its members only. Thus, the Board agent did not ignore the principles announced in Ventura but, rather, interpreted them consistent with the analysis in Financial.

Also without merit is CTA's contention that the Board agent misstated the holding in Financial, supra. The Board agent did not conclude, as contended by CTA, that PERB may never consider whether the number of employees voting was so small as to render

the decision an unreliable indicator of the majority view. Rather, she stated:

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

A careful reading of Financial reveals the Board agent's conclusion is consistent with the Court's holding.

In Financial, the Supreme Court overturned several prior decisions of the NLRB which had required that all members of the bargaining unit be given an opportunity to vote on the association's decision to reorganize. Specifically, the Court stated:

> [The NLRB] exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election. This violated the policy Congress incorporated into the Act against outside interference in union decision-making.
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> . . . . . .
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> While the Board is charged with responsibility to administer . . . [the amendment of certification] procedure, the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes.
> (Id., p. 204, emphasis added.)

The Court also stated:

> Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters

> like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." [Citation.] We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support.
> (Id., p. 205, emphasis added.)

PERB has similarly recognized that interference in internal union affairs is beyond the legislative intent underlying EERA. Specifically, in Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, the Board stated:

> The EERA does not describe the internal workings or structure of employee organizations nor does it define the internal rights of organization members. We cannot believe . . . the Legislature intended this Board to create a regulatory set of standards governing the solely internal relationship between a union and its members.
> (Id., p. 16.)

Thus, since in the instant case no question concerning representation exists, and since CCTA was within its rights as an employee organization in limiting the vote to its members, the Board agent correctly determined that CCTA's decision to disaffiliate need not be submitted to a vote of all members of the bargaining unit.

Finally, CTA's argument that the NLRB will deny petitions to amend certification where the election results do not reliably reflect the majority view is rejected. The Seventh Circuit Court of Appeals, in May Department Stores v. NLRB, supra, 897 F.2d 221, stated:

> It has been and continues to be well established that post-merger or post-affiliation unions need not show, as a precondition to their recognition, that a majority of employees in a particular employer unit voted in favor of the change. (Id., p. 226.)

In addition, the Court in Financial Institution Employees, supra, 475 U.S. 192 stated that in order to raise a question of representation it must be demonstrated:

> . . . by objective considerations that . . . some reasonable grounds [exist] for believing that the union has lost its majority status. (Id., p. 198.)

Similarly, the NLRB in Western Commercial Transport, supra, stated:

> In determining whether a "question concerning representation" exists because of lack of continuity, the Board is not directly inquiring into whether there is majority support for the labor organization after the changes at issue, but rather is seeking to determine whether the changes are so great that a new organization has come into being---one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance. (Western Commercial Transport, supra, 288 NLRB 27, slip opn. pp. 10-11, emphasis added.)

In the present case, CTA has identified no facts that indicate CCTA's decision to disaffiliate does not reflect the majority view, other than its statement concerning the size of the bargaining unit compared to the number of members of the Association voting in the election. Moreover, we agree with the approach taken by the NLRB in Western, supra, that our inquiry is

to focus on whether a "question concerning representation exists because of a lack of continuity" and not into whether there is majority support for the change.

Accordingly, we find no grounds to deny CCTA's petition to amend certification for failure to observe due process.

Opposition of Originally Certified Union

CTA also contends that the amended certification should be denied based on the opposition of the originally certified union, CCTA/CTA/NEA, which it purports to represent. According to CTA there exists in this case:

> the rivalry or hostility that characterizes the relationship between an incumbent and an organization seeking decertification . . . which the ACT's [EERA's] time bars are designed to prevent. [Citation.]

CTA's argument that consent of the originally certified organization is required in disaffiliation cases appears to be based, in part, on the Board's decision in Ventura Community College District, supra, PERB Order No. Ad-130. In Ventura, the Board quoted from North San Diego County Transit Development Board v. Vial, supra, 117 Cal.App.3d 27, 33-34, the following three-part analysis as requirements of the NLRB and federal courts for amending certification:

> . . . (1) there must be acceptance by the original certified union, (2) the bargaining unit must remain substantially the same, i.e., there is continuity of bargaining representatives, and (3) the employees are shown to be able to fully and democratically consider and vote on affiliation, i.e., in accordance with due process. (Ventura, supra, pp. 8-9.)

While we believe this analysis is, in part, consistent with the Supreme Court's decision in Financial, supra, and subsequent decisions of the NLRB, we disapprove of Ventura's apparent characterization of "acceptance by the original certified union" as a third prong.[10]

The appropriate test for determining whether a question concerning representation exits in a case of affiliation or disaffiliation is the NLRB's traditional "substantial continuity" and "due process" analysis. In the instant case, CCTA, as the local organization, is recognized as the exclusive representative; CTA and NEA are merely affiliates of the local and, in accord with prior decisions of the Board, clearly not the exclusive representative. (Fresno Unified School District (1982) PERB Decision No. 208; Link v. California Teachers Association and National Education Association (1981) PERB Order No. Ad-123; Washington Unified School District (1985) PERB Decision No. 549; California Teachers Association (Abbot) (1988) PERB Decision No. 665.) Further, decisions of the NLRB and federal courts indicate it is the consent of the exclusive representative (original certified union) that is required to effect an

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[10]Whether Ventura actually holds that "acceptance by the original certified union" is a requirement for an amended certification is open to question. The Board in Ventura merely recited, but never explained or applied the analysis to the facts before it, the requirement of "acceptance by the original certified union." Similarly, in California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S the Board, citing Ventura, laid out the three-part analysis quoted above, but did not discuss or apply "acceptance of the certified union." Thus, the Board's references to the "acceptance by the original certified union" as a requirement may constitute mere dicta.

organizational change such as affiliation[11] or disaffiliation. (See e.g., Missouri Beef Packers, Inc., supra, 175 NLRB 1100; Hamilton Tool Company (1971) 190 NLRB 571 [77 LRRM 1257]; North Electric Company (1967) 165 NLRB 942 [65 LRRM 1379]; Bedford Gear & Machine Products, Inc. (1964) 150 NLRB 1 [58 LRRM 1069].) The cases also reveal that identification of the entity purporting to be the original certified union is not always clear. As a result, the NLRB conducts an investigation to determine if the entity requesting the amended certification is substantially the same organization as the one originally certified as the exclusive representative. If the investigation reveals they are not the same organization and the originally certified union opposes the change, a question concerning representation is created and the amended certification is denied. In this case, however, the Board agent determined that CCTA/CTA/NEA is the same organization as independent CCTA in its disaffiliated status, thereby satisfying substantial continuity of bargaining representative, and that CCTA observed adequate due process procedures in arriving at its decision to disaffiliate. Thus, since CCTA is the same organization as CCTA/CTA/NEA, and CCTA requested the amended certification, it is clear there has been acceptance by the original certified union. Additionally, there is no evidence in this case of the "the rivalry or hostility that

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[11]With respect to affiliation, we note that PERB has held it does not have the power to compel an unwilling state or national employee organization to accept the affiliation of a local exclusive representative. (Poway Unified School District (1982) PERB Order No. Ad-127.)

characterizes the relationship between an incumbent and an organization seeking decertification." No facts have been alleged to show the existence of a fierce division between CCTA's officers or membership, CCTA continues to administer and enforce the contract as before, the same individuals continue to deal with the district in matters of contract negotiations, and no allegations of election irregularities have been filed. Thus, CTA's contention that the amended certification should be denied because there is opposition from the originally certified union is rejected.

3. Request for Formal Hearing

CTA requests a formal hearing "on the various issues presented herein." PERB Regulation 32763 provides, in pertinent part, as follows:

> (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. (Emphasis added.)

Thus, the Board has discretionary authority to conduct hearings which it deems necessary to resolve questions raised by the parties. As a general rule, such hearings are conducted to gather factual evidence and to determine the credibility of witnesses. Although CTA disputes the Board agent's determination that CCTA is the same organization as the originally certified representative, CTA alleges no facts in support of its contention. CTA does not dispute that the same officers and bargaining representatives continue in their positions with CCTA

after its disaffiliation. Nor does CTA dispute that CCTA has not modified any articles or bylaws to its Constitution, other than Article III governing affiliations. Finally, CTA does not dispute the factual allegations by CCTA that its decision to disaffiliate was conducted by secret ballot election after adequate notice was given to, and discussions conducted by, members of the Association. The only questions raised by CTA in this case concern legal issues which both parties fully addressed in their briefs. Thus, we agree with the Board agent's conclusions and do not find a hearing is necessary to resolve any of the issues raised in this case.

CONCLUSION

We conclude the Board agent correctly determined 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 organization's Constitution.[12]

ORDER

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

[12]We do not address here the issue of the effective date of the disaffiliation as the issue was fully briefed and is addressed in the case of San Jose-Evergreen Community College District (1990) PERB Order No. Ad-___ (SF-AC-23).

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

Chairperson Hesse joined in this Decision.

Member Shank's concurrence begins on page 28.

Shank, Member, concurring: While I do not disagree with the result reached by the majority, I write separately to address more fully CTA's argument that: (1) both PERB and NLRB case law establish that an amendment to certification reflecting a disaffiliation cannot be granted if the original certified union opposes the disaffiliation; (2) CTA is the original certified union; and, therefore, (3) since CTA opposes the amendment to certification, the amendment should be denied. As explained more fully below, I would find that law does establish that an amendment to certification reflecting a disaffiliation cannot be granted if the original certified union opposes the disaffiliation. I would also find, however, that as CTA is not the original certified union in this case, its opposition to the disaffiliation is not controlling.

CTA relies on that portion of Ventura Community College District (1982) PERB Order No. Ad-130, that quotes North San Diego County Transit Development Board v. Vial (1981) 117 Cal.App.3d 27, as establishing the test to be applied in amendment of certification cases:

> (1) there must be acceptance by the original certified union, (2) the bargaining unit must remain substantially the same, i.e., there is continuity of bargaining representatives, and (3) the employees are shown to be able to fully and democratically consider and vote on affiliation, i.e., in accordance with due process.
> (Id. at pp. 8-9.) (Emphasis added.)

The majority disapproves of Ventura's listing of "acceptance by the original certified union" as part of the test for

determining whether an amendment to certification should be granted.

The majority's disapproval of this portion of Ventura is puzzling, especially in light of its recognition that Ventura is consistent with the Supreme Court's decision in NLRB v. Financial Institution Employees of American, Local 1182 (1982) 475 U.S. 192 [121 LRRM 2741] and subsequent decisions of the NLRB which apply the "substantial continuity" and "due process" analysis. Furthermore, the majority expressly recognizes that several NLRB cases do indicate that the consent of the exclusive representative, i.e., original certified union, is required to effect a disaffiliation or affiliation. I submit that the omission of the "acceptance by the original certified union" requirement from the analysis in many of the NLRB decisions in this area be explained by the fact that it may be fairly uncommon for a petitioning union to splinter in such a way that the original certified union remains in existence after the affiliation or disaffiliation and opposes a pending petition for an amendment to the certification. In a majority of such cases, the facts would most likely indicate a lack of substantial continuity or due process as well as opposition from the original certified union.

Having repudiated that portion of Ventura that it claims establishes[1] "acceptance of the original certified union" as part

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[1]As recognized by the majority, page 23, footnote 10, whether Ventura actually holds that "acceptance by the original certified union" is a requirement for amended certification is open to question.

of the test for determining the appropriateness of an amendment to certification, the majority then observes that if "the original certified union opposes the [amended certification], a question concerning representation is created and the amended certification is denied." Since the majority apparently acknowledges that, under certain circumstances, the acceptance or opposition of the original certified union may be relevant as to whether an amendment to certification should be granted, its disapproval of Ventura for mentioning the "acceptance" issue is unwarranted.

Clearly, NLRB case law recognizes that opposition of the original certified union can raise a question concerning representation and therefore create an impediment to the granting of an amendment to certification. Thus, in Missouri Beef Packers, Inc. (1969) 175 NLRB 1100 [71 LRRM 1177], the board of directors and a majority of officers of the original certified union which had petitioned for affiliation had a change of heart and decided to repudiate the affiliation. In dismissing the petition for amendment of the certification, the NLRB stated:

> Where, as here, there is no guaranty of continuity of representation and the certified labor organization is a functioning, viable entity, and opposes amendment, it cannot be granted without doing violence to the purposes of the Act, which include the promotion of stability in labor-management relations. . . .
> (Id. at p. 1101.)

In contrast, in Hamilton Tool Co. (1971) 190 NLRB 571 [77 LRRM 1257], the NLRB distinguished the facts before it from Missouri Beef noting:

> However, the facts of this case are opposite to the facts presented in Missouri Beef Packers, Inc., supra. Here, the certified labor organization does not oppose amendment and is not a presently functioning viable entity. In fact, the certified Union has now become the Petitioner.
> (Id. at p. 575.)

The above NLRB cases are helpful in that they not only illustrate the significance of the acceptance or opposition of the original certified union to a determination of whether a question concerning representation exists, but they illustrate what is meant by the phrase "original certified union." In the instant case, CTA is under the misapprehension that it is the "original certified union" and that, therefore, its opposition to the disaffiliation is relevant. The Board agent found, and I agree, that CTA is not the "original certified union," within the established meaning of that phrase. The "original certified union" in this case is the local organization, identified in the original certification as CTAA/CTA/NEA. After the disaffiliation occurred, CTAA/CTA/NEA no longer existed as a separate entity but was replaced by the petitioning party in this case, CTAA. (See Hamilton Tool Co., supra.) Thus, since CTAA/CTA/NEA no longer exists, it can not be said that the "original certified union" in this case opposes the amended certification.[2]

Furthermore, the mere fact that CTA, as a parent organization of the original certified union, opposes the

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[2]Had CTAA emerged as a splinter group of CTAA/CTA/NEA, and had CTAA/CTA/NEA remained in existence after the disaffiliation, as a separate and dissenting entity, then the Board would have been faced with a question concerning representation and an amendment to certification would not have been an appropriate means of resolving the dispute. (See Missouri Beef Packers, Inc., supra.)

disaffiliation is irrelevant to a determination of whether an amendment to certification is appropriate. CTA's reliance on affiliation cases to support its argument that its opposition is relevant is misplaced. In a case where a local original certified union seeks to affiliate with a national or international parent organization, the opposition of the parent organization might well be determinative of whether an amendment to certification should be granted. Obviously, the foisting of a local upon an unwilling parent would hardly foster stability in labor relations. (See Poway Unified School District (1982) PERB Order No. Ad-127.) In contrast, the opposition of the parent organization is inherent in a disaffiliation case and therefore should not be a factor in determining whether amendment of certification is appropriate.

In summary, I depart from the majority in that I do not find it necessary to disapprove of those portions of Ventura, or its progeny, that refer to "acceptance of the original certified union" as a precondition to granting an amendment to certification. In an appropriate case, the opposition of the original certified union to a disaffiliation could be determinative of the outcome of an amendment to certification proceeding. Since CTA is not the original certified union in this case, its opposition to the disaffiliation is irrelevant to a determination of whether an amendment to certification is appropriate. In any event, I would find that under existing law, an amendment to certification is proper in this case.