Council 82, 2 OCB2d 22 (BOC 2009)

(Rep) (Docket No. RU-1260-09).

Summary of Decision: Council 82 filed a petition to represent Environmental Police Officers, currently represented by LEEBA. Opposing the petition, LEEBA argued that Council 82's petition was barred by the previous bargaining representative's contract, that the petition did not raise a question concerning representation, that the bargaining unit continued to be appropriate, that Council 82 and the City had committed improper practices, and that a portion of the showing of interest was invalid. The Board found that Council 82 filed a timely petition supported by a sufficient showing of interest and ordered an election. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matter of the Certification Proceeding

COUNCIL 82, NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION,

Petitioner,

- and -

THE CITY OF NEW YORK and
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents,

-and-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Intervenor.

DECISION AND DIRECTION OF ELECTION

On June 10, 2009, Council 82, New York State Law Enforcement Officers Union ("Council 82") filed a petition to represent employees in the title Environmental Police Officer (Title Code No. 70811) ("EPO"). EPOs are currently represented by the Law Enforcement Employees Benevolent Association ("LEEBA") in Certification No. 5-2005. Opposing the petition, LEEBA argues that

Council 82's petition is barred by the previous bargaining representative's contract. Further, LEEBA asserts that the petition does not raise a question concerning representation, that the bargaining unit continues to be appropriate, that Council 82 and the City have committed improper practices, and that a portion of Council 82's showing of interest is invalid and constitutes an improper practice. The Board finds that Council 82 submitted a timely petition supported by a sufficient showing of interest and directs an election in order to ascertain the wishes of the EPOs as to their union representation.

BACKGROUND

EPOs are employed by the City of New York ("City") at the Department of Environmental Protection ("DEP"). The title was previously represented by Local 300, Service Employees International Union ("Local 300"), in a bargaining unit that included titles that did not have law enforcement duties. EPOs were covered by a collective bargaining agreement between Local 300 and the City effective for the period of April 1, 2002, to March 31, 2005.

In a prior proceeding, LEEBA filed a petition to represent EPOs in a separate bargaining unit. The Board held that EPOs were no longer appropriately placed in Local 300's bargaining unit. *LEEBA*, 76 OCB 3, at 19 (BOC 2005). As no alternative bargaining unit was proposed, the Board found that a separate bargaining unit was appropriate and ordered an election to determine the EPOs' preference for representation. *Id.* at 21-22. Based on the results of the election, LEEBA was certified to represent the EPO bargaining unit on October 20, 2005. *LEEBA*, 76 OCB 5 (BOC 2005).

It is undisputed that, in the approximately four years since LEEBA was certified as the bargaining representative of EPOs, LEEBA and the City have not executed their first collective

bargaining agreement. On June 10, 2009, Council 82 filed the instant petition, supported by a sufficient showing of interest, to represent the EPO bargaining unit.

POSITIONS OF THE PARTIES

LEEBA's Position

LEEBA first asserts that there is no question or controversy concerning the representation of EPOs.

LEEBA argues that Council 82's petition is untimely since it is barred by Local 300's collective bargaining agreement with the City under § 1-02(g) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[1]

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[1] OCB Rule § 1-02(g), entitled "Petitions – contract bar; time to file," provides:

> A valid contract between a public employer and a public employee organization will bar the processing of any petition filed outside of the window periods described below. The time period for filing a petition for certification, designation, decertification or revocation of designation pursuant to § 1-02(c), (d), or (e) of these rules shall be: for a contract of no more than three years' duration, a petition can be filed not less than 150 or more than 180 calendar days before the contract's expiration date; for a contract of more than three years' duration, a petition can be filed no less than 150 or more than 180 calendar days before the contract's expiration date, or not less than 150 or more than 180 calendar days before the end of the third year of that contract. No petition for certification, decertification or investigation of a question or controversy concerning representation may be filed after the expiration of a contract. However, in the event that a public employer and a public employee organization sign a successor contract after that contract has expired, then a petition for certification, decertification or question or controversy concerning representation may be filed in the 30-day period following the date the successor contract is signed by all parties. Moreover, if the Board finds that unusual or extraordinary circumstances exist, such as when there is reason to believe that a recognized or certified employee

LEEBA contends that the window period in which to file a petition was prior to the expiration of Local 300's contract in 2005. The contract bar rule prohibits the filing of a petition after the expiration of a contract. LEEBA notes that OCB Rule § 1-02(g) does not indicate whose contract serves as a bar. As the successor union, LEEBA is substituted for its predecessor as the administrator of any contract until a new one is negotiated. Accordingly, LEEBA argues that it needs to be given the opportunity to actively negotiate without interference from a rival union or employees who feel that the process is drawn out.

According to LEEBA, the purpose of the contract bar rule is to protect and insulate a certified union and to afford employers and unions ample time to bargain. LEEBA claims that this Board has refused to entertain representation petitions that would cause an unwarranted intrusion upon the bargaining process and has set no time limits upon negotiations or the right to invoke impasse procedures. Noting the Board's recognition that the negotiation of collective bargaining agreements with the City can result in lengthy delays, LEEBA argues that the fact that negotiations are on-going does not grant a rival union an additional window period in which to file a petition.

LEEBA contends that the unusual or exceptional circumstances exception set forth in OCB Rule § 1-02(t), which has been incorporated into the contract bar rule set forth in OCB Rule § 1-02(g), is inapplicable because LEEBA is not defunct and has not abandoned representation, there is no schism within LEEBA, and the unit has not been substantially expanded.[2] Since November

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> organization is defunct or has abandoned representation of the employees in the unit for which it was recognized or certified, the Board may process a petition otherwise barred by this rule.

[2] OCB Rule § 1-02(t), entitled "Certification; designation – life; modification," provides:

2005, LEEBA has actively represented EPOs by negotiating with the City, filing grievances, handling disciplinary matters, filing improper practice petitions, and providing health care and disability benefits. LEEBA argues that OCB Rule § 1-02(t), under which it claims Council 82 is seeking to force an election, is inapplicable and an inappropriate measure in light of its bargaining certificate. The filing of a representation petition supported by a 30% showing of interest, which is not a majority, is not an unusual or extraordinary circumstance. According to LEEBA, there are no precedents for allowing a healthy incumbent union actively representing its members to be subject to a petition during the time-barred period.

LEEBA claims that the current bargaining unit continues to be appropriate and that there are no changed circumstances demonstrating that the current bargaining unit is no longer appropriate. Therefore, according to LEEBA, consideration need not be given to the question of LEEBA's

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> When a representative has been certified by the Board, such certification shall remain in effect for one year from the date thereof and until such time thereafter as it shall be made to appear to the Board, though a secret ballot election conducted in a proceeding under §§ 1-02(c), (d), or (e) of these rules, that the certified employee organization no longer represents a majority of the employees in the appropriate unit. When a representative has been designated by the Board to represent a unit for the purposes specified in paragraphs two, three or five of § 12-307(a) of the statute, such designation shall remain in effect for one year from the date thereof and until such time as it shall be made to appear to the Board that the designated employee organization no longer represents a majority of the employees in the appropriate unit. Notwithstanding the above bar on challenging a certification within one year of its issuance, in any case when unusual or extraordinary circumstances require, such as when there is reason to believe that a recognized or certified employee organization is defunct or has abandoned representation of the employees in the unit for which it was recognized or certified, the Board may modify or suspend, may shorten or extend the life of the certification or designation.

continuing as the EPOs' certified representative. LEEBA notes that the bargaining unit continues to be involved in contract negotiations with the City.

LEEBA alleges that Council 82 has committed an improper practice in violation of § 12-306(b)(1) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[3] Further, LEEBA asserts that the Council 82 has been aided by the City, which LEEBA alleges has violated NYCCBL § 12-306(a)(1), (2), and (3), in order to force an invalid election.[4]

Lastly, LEEBA maintains that a percentage of the signatures obtained by Council 82 for its showing of interest violated the NYCCBL and constitute another improper practice on the part of Council 82. LEEBA claims that authorization cards from the 14 EPOs in the DEP police academy's 2009 class are invalid.

For these reasons, LEEBA opposes an election. LEEBA requests that the Board dismiss Council 82's petition as untimely and order further relief as may be just and proper.

Council 82's Position

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[3] NYCCBL § 12-306(b) provides, in relevant part, that "[i]t shall be an improper practice for a public employee organization or its agents: (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so."

[4] NYCCBL § 12-306(a) provides, in relevant part:

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

Council 82 seeks to represent the EPO bargaining unit. Council 82 contends that its petition is timely since the one-year certification bar provided by OCB Rule § 1-02(t) has expired. Further, Council 82 argues, the contract bar rule is inapplicable because LEEBA has not negotiated a contract and is not insulated by Local 300's contract. Council 82 asserts that its showing of interest is valid and that the employees' preference for representation should be determined by an election.

City's Position

The City takes no position in this proceeding.

DISCUSSION

The NYCCBL provides that "[p]ublic employees shall have the right to self-organize, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities." NYCCBL § 12-305.

Accordingly, this Board has the power and duty to determine the employees' preference for representation when employees or a rival union file a timely representation petition supported by a sufficient showing of interest in an appropriate bargaining unit. NYCCBL § 12-309(b)(2); *see, e.g., Local 333, United Marine Division, Nat'l Maritime Union*, 12 OCB 22, at 6 (BOC 1973) (ordering an election when the petition was supported by a sufficient showing of interest and not barred by a contract). Contrary to the assertions of LEEBA, the certified incumbent union, this Board finds that Council 82, a rival union, has filed a timely representation petition supported by a sufficient showing of interest.

As an initial matter, we note that Council 82's petition does present a question concerning

representation. The petition raises a factual question as to whether the bargaining unit employees wish to be represented by LEEBA, Council 82, or neither. *See DC 37*, 6 OCB 64, at 3 (BOC 1970).

We find that Council 82's petition is timely. Council 82's petition is not barred by the one-year certification bar rule. OCB Rule § 1-02(t) insulates a newly-certified union from challenge by employees or a rival union for "one year" absent unusual or extraordinary circumstances. "The thrust of the one year-portion of Rule [§ 1-02(t)] is to provide for a newly-certified representative a reasonable period during which it may consummate a collective bargaining agreement for unit employees." *Indep. Traffic Employees Union*, 14 OCB 16, at 3 (BOC 1974). As LEEBA was certified to represent EPOs almost four years ago, the one-year time period in which LEEBA was free from challenge has passed.[5] *See CSTG, Local 375*, 56 OCB 6, at 17 (BOC 1995) (finding that the certification bar was inapplicable when a rival union's petition was filed four years after the incumbent union's certification year ended), *aff'd sub nom. Civil Serv. Tech. Guild v. Anderson*, 249 A.D.2d 74 (1st Dep't 1998).

Similarly, Council 82's petition is not barred by the contract bar rule. OCB Rule § 1-02(g) provides that a valid contract between an employer and a union will bar the processing of a representation petition filed outside of the applicable 30-day window period unless unusual or extraordinary circumstances exist, such as when the "recognized or certified" union is defunct or has abandoned representation. The contract bar rule is inapplicable here since it is undisputed that

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[5] LEEBA does not dispute that the certification bar does not apply to this matter. Rather, LEEBA's arguments concerning OCB Rule § 1-02(t) pertain to the exception to the contract bar rule. Prior to the revision of the OCB Rules in 2004, the contract bar rule set forth in § 1-02(g) incorporated the exception for unusual or extraordinary circumstances by referencing § 1-02(t). *See Indep. Laborers Union of New York City*, 68 OCB 6, at 8 (BOC 2001), *aff'd sub nom. Indep. Laborers Union of New York City v. Office of Collective Bargaining,* No. 11397/01 (Sup. Ct. N.Y. Co. Apr. 3, 2002).

LEEBA and the City have not executed a collective bargaining agreement concerning this bargaining unit. *See Emergency Medical Benevolent Ass'n*, 46 OCB 7, at 5 (BOC 1990) (noting that the contract bar rule is "based upon the premise that a single collective bargaining agreement applies to the relationship between the employer and the *certified* representative") (emphasis added); *cf.* Civil Service Law Article 14 ("Taylor Law") § 208.2 (providing that a written agreement between the employer and the "recognized or certified" union bars a petition filed before the Public Employment Relations Board ("PERB") outside of the appropriate filing period).

LEEBA has cited no precedent, and this Board can find none, to support the proposition that the City's contract with a prior bargaining representative, Local 300, can serve as a contract bar to insulate LEEBA from challenge by employees or a rival union. Indeed, LEEBA's reliance on Local 300's contract is contrary to the policy and principles behind the contract bar rule. "The primary purpose of the contract bar is to provide the *contracting* parties a reasonable period of stability in their bargaining relationship while still affording the employees an opportunity to change or eliminate their bargaining agent, if that be their wish." *County of Schenectady*, 26 PERB ¶ 3044, at 3073 (1993) (emphasis added); *see City Employees Union, Local 237, IBT*, 20 OCB 12, at 5 (BOC 1977) (noting that a contract serves as a bar only when it stabilizes the parties' bargaining relationship by allowing them to look to the "actual terms and conditions of *their contract* for guidance in their day-to-day problems") (quoting *Appalachian Shale Products Co.*, 1221 N.L.R.B. 1160, 1163 (1958)) (emphasis added).

LEEBA argues that the contract bar rule should apply because OCB Rule § 1-02(g) does not specify whose contract can act as a bar and because LEEBA is the administrator of Local 300's contract pending its negotiations for a new agreement. We find these arguments unpersuasive. If

a prior union's contract were sufficient to warrant application of the contract bar rule, a newly certified or recognized union would be granted, as LEEBA requests here, an unlimited time in which to actively negotiate an initial contract free from challenge by unit employees or a rival union.[6] Such a proposition is in direct contradiction with the well-established one-year certification bar rule. *See* OCB Rule § 1-02(t) (discussed above). We decline to interpret the contract bar rule in a manner that negates the one-year certification bar rule. *See Terminal Employees Local 832, IBT*, 10 OCB 27, at 7 (BOC 1972) (noting that the Board does "not believe that the contract bar rule should be used as an indefinite or unreasonable bar to the representation rights of employees").

Since the contract bar rule is inapplicable in the circumstances presented here, we need not consider whether the rule's exception for unusual or extraordinary circumstances applies. OCB Rule § 1-02(g).

We further find that Council 82's petition is supported by a sufficient showing of interest. OCB Rule § 1-02(c)(2)(i) requires a showing that at least 30% of the employees at issue are interested in being represented by the petitioner. Council 82 submitted authorization cards indicating that 44% of the employees are interested in being represented by Council 82. The sufficiency of the showing of interest is administratively determined and not subject to litigation as its purpose is "to permit this Board to screen out those cases in which there is no showing of a

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[6] Quoting Board decisions out of context, LEEBA misconstrues our case law by focusing on only one of the two policies behind the contract bar rule. As this Board has stated, the purpose of the contract bar rule is "to accommodate two sometimes conflicting objectives: first, to protect the freedom of employees to select or change bargaining representatives; and, second, to give continuity and stability to an established bargaining relationship by protecting the relationship from challenge during the term of a valid contract of reasonable duration." *Emergency Medical Benevolent Ass'n*, 46 OCB 7, at 5; *see LEEBA*, 78 OCB 9, at 9 (BOC 2006) (noting that the contract bar rule balances stability in bargaining relationships with "the statutory right of employees to freely designate or change their representatives") (citations omitted).

substantial support of the petitioner by the employees, so that public funds will not be needlessly expended in the investigation and processing of those cases. It is not designed to protect an incumbent employee organization." *State of New York (Division of State Police)*, 15 PERB ¶ 3014, at 3148 (1982) (citation omitted); *see United Fed'n of Law Enforcement Officers*, 40 OCB 11, at 6 (BOC 1987); *see also* OCB Rule § 1-02(c)(3) ("Sufficiency of interest shall not be litigated.").

In regard to LEEBA's assertion that authorization cards from the 14 EPOs in the DEP police academy's 2009 class were tainted, we note that, even if 14 authorization cards were removed from Council 82's showing of interest, Council 82 would still have a 35% showing of interest. This is sufficient to warrant an investigation into the employees' preference for representation.

Any alleged improper practices on the part of Council 82 or the City are not properly before this Board or appropriately addressed in a representation proceeding. *See PBA*, 24 OCB 29, at 17 n. 7 (BOC 1979) (not addressing improper practice claims because they are not within this Board's jurisdiction). It is the Board of Collective Bargaining, not the Board of Certification, that has the power and duty "to prevent and remedy improper public employer and public employee organization practices."[7] NYCCBL § 12-309(a)(4); *cf.* Taylor Law § 305.5(d) (providing that the pendency of improper practice charges before PERB "shall not be used as the basis to delay or interfere with determination of representation status").

Lastly, we note that the appropriateness of the bargaining unit is not before the Board. Council 82 is not seeking to remove titles from or add titles to the EPO bargaining unit. LEEBA's contention that the bargaining unit continues to be appropriate is uncontested and does not raise an

[7] We take administrative notice that LEEBA has raised its improper practice claims before the Board of Collective Bargaining in the petition docketed as BCB-2772-09.

issue for consideration.[8]

This Board has the statutory power and duty "to determine the majority representative of the public employees in an appropriate collective bargaining unit by conducting secret-ballot elections or by utilizing any other appropriate and suitable method designed to ascertain the free choice of a majority of the employees." NYCCBL § 12-309(b)(2). Since Council 82's petition is both timely and supported by a sufficient showing of interest, we direct an election to determine the employees' preference for representation. *See Local 333, United Marine Division, Nat'l Maritime Union*, 12 OCB 22, at 6. If LEEBA desires to participate in the election, it may do so by making a request in writing to the Director of Representation, within 14 days after service of this Decision and Direction of Election. *See LEEBA*, 76 OCB 3, at 22.

ORDER AND DIRECTION OF ELECTION

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

DIRECTED, that as part of the investigation authorized by the Board, an election by secret ballot be conducted under the Board's supervision, at a date, time, and place to be fixed by the Board, among the employees in the title of Environmental Police Officer (Title Code No. 70811) employed by the City of New York and related public employers, to determine whether these

[8] To the extent that LEEBA argues that a bargaining unit must found to be no longer appropriate before this Board can consider the employees' preference for representation, we note that the appropriateness of a bargaining unit is an issue separate and distinct from the timeliness of a representation petition. *See, e.g.*, *Pavers and Road Builders District Council*, 17 OCB 15, at 1 (BOC 1975) (directing an election when a rival union filed a timely petition, supported by a sufficient showing of interest, to represent a unit that was the same as the certified unit).

employees wish to be represented by Council 82 for the purposes of collective bargaining. Employees in the Environmental Police Officer title employed during the payroll period immediately preceding this Decision and Direction of Election, other than those who have voluntarily quit, retired, or who have been discharged for cause before the date of the election, are eligible to vote; and it is further

DIRECTED, that if LEEBA wishes to be on the ballot, it may submit to the Director of Representation, within 14 days after service of this Decision and Direction of Election, a statement indicating that it wishes to represent the bargaining unit; and it is further

DIRECTED, that within 14 days after service of this Decision and Direction of Election, the City will submit to the Director of Representation an accurate list of the names and addresses of all the employees in the Environmental Police Officer title who are employed by the Department of Environmental Protection and who were employed during the payroll period immediately preceding the date of this Decision and Direction of Election.

Dated: September 2, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER