

Law Enforcement Employees Benevolent Ass'n, 78 OCB 9 (BOC 2006)

[Decision No. 9-2006

(Rep) (Docket No. RU-1252-06).]

Summary of Decision: LEEBA appealed from the dismissal of its petition to represent Special Officers, Senior Special Officers, and Hospital Security Officers employed at HHC as untimely under the contract bar rule. The Board upheld the dismissal because the petition was not filed in the 30-day period following the signing of a memorandum of agreement that was expiring in less than 180 days. ***(Official decision follows.)***

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

- between -

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

- and -

**CITY OF NEW YORK and
NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,**

Respondents,

-and-

**CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**

Intervenor.

DECISION AND ORDER

On July 14, 2006, the Law Enforcement Employees Benevolent Association (“LEEBA”) filed a petition, amended on July 27, 2006, to represent employees in the titles of Special Officer (Title Code No. 708100), Senior Special Officer (Title Code No. 708150), and Hospital Security Officer

(Title Code No. 70830) employed at the New York City Health and Hospitals Corporation (“HHC”). These employees are currently represented by the City Employees Union, Local 237, International Brotherhood of Teamsters (“Local 237”), which had entered into a memorandum of agreement with the City of New York (“City”) on April 18, 2006, regarding the terms for a successor collective bargaining agreement covering the period of August 7, 2005, to September 22, 2006. On August 18, 2006, the Director of Representation found LEEBA’s petition untimely 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”) and dismissed the petition pursuant to OCB Rule § 1-02(j)(2).¹ On August 31, 2006,

¹ OCB Rule § 1-02(g) provides:

Petitions – contract bar; time to file. 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 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.

OCB Rule § 1-02(j)(2) provides:

If, after a petition or motion has been filed pursuant to § 1-02 of these rules

LEEBA appealed the dismissal of its petition to the Board of Certification (“Board”). We uphold the dismissal of the petition since it was not filed during the applicable window period.

BACKGROUND

Special Officers, Senior Special Officers, Hospital Security Officers, and employees in other titles are represented by Local 237 in a bargaining unit created by Certification No. 67-78. Employees in this bargaining unit were subject to a 52 page collective bargaining agreement between the City, HHC, and Local 237 covering the period of April 1, 2002, to August 6, 2005 (“2002-2005 Agreement”).

On April 18, 2006, the City and Local 237 signed a Memorandum of Agreement (“MOA”), a two page document setting forth the terms of a successor collective bargaining agreement for the period of August 7, 2005, to September 22, 2006. The MOA states that the parties intend the agreement to cover all economic and non-economic matters and to incorporate the MOA’s terms into the successor agreement. The MOA further provides that the parties intend to continue all the terms and conditions of the 2002-2005 Agreement except as modified by the MOA’s specified effective term, general wage increase, and welfare fund contribution increase. The MOA notes that “[t]his

and at any time prior to the close of the record, it appears to the Director of Representation that no further proceedings are warranted because the petition does not raise a question concerning representation or is otherwise insufficient due to untimeliness, contract or certification bar or lack of a sufficient showing of interest, the Director of Representation may dismiss the petition or deny the motion by administrative action, and will so advise the parties in writing, setting forth the grounds for dismissal. Within 10 business days after service of a letter dismissing a motion or petition, the petitioner may obtain review of the dismissal by filing with the Board an original and three copies of a statement in writing setting forth the reasons for the appeal together with proof of service upon all other parties.

concludes the negotiations of the Collective Bargaining Agreement between the parties for the 2005-2006 round of bargaining.”

On April 26, 2006, Local 237 sent its members notice of the terms of the MOA and sought ratification of the agreement. The notice indicates the effective dates, the general wage increase, and the welfare fund increase provided in the MOA.

On May 17, 2006, Local 237’s membership ratified the terms of the MOA.

On May 18, 2006, the City issued pay authorizations pursuant to the MOA to implement the general wage increase effective August 7, 2005.

On July 14, 2006, LEEBA filed the underlying petition, amended on July 27, 2006, to represent Special Officers, Senior Special Officers, and Hospital Security Officers at HHC in a separate bargaining unit on the grounds that the employees are peace officers with law enforcement duties who are improperly submerged in a clerical union.² In the initial petition, LEEBA inaccurately asserted that the petition was filed 150 to 180 days before the expiration of the employees’ contract in October 2006. The amended petition inaccurately stated that the current contract expired on August 7, 2006.³

On August 3, 2006, Local 237 filed an answer requesting that the petition be dismissed under the contract bar doctrine because it was not filed 150 to 180 days before the expiration of the collective bargaining agreement between the City, HHC, and Local 237 covering the period of August 7, 2005, and September 22, 2006. Local 237 attached an unsigned and undated copy of the

² While LEEBA seeks to represent only those Special Officers and Senior Special Officers employed at HHC, those titles are also utilized in a variety of City agencies.

³ For administrative convenience, the Director of Representation permitted LEEBA to amend its petition to correct any errors or omissions.

36 page collective bargaining agreement effective from August 7, 2005, to September 22, 2006 (“2005-2006 Agreement”). The 2005-2006 Agreement incorporates the terms of the MOA as well as the terms and conditions of the 2002-2005 Agreement that were not modified by the MOA.

On August 9, 2006, LEEBA filed a response in which it argued that the window period of 150 to 180 days prior to the expiration of the 2005-2006 Agreement could not be the window period and that there had been no window period in which LEEBA could have filed a petition because the prior agreement expired on August 6, 2005, and the successor agreement was signed on April 18, 2006. LEEBA attached the MOA.

On August 14, 2006, the City filed an answer in which it asserted that the petition should be dismissed because it was not filed in the applicable window periods available under the 2002-2005 Agreement and the contract bar prohibits filing a petition after the expiration of a contract. The City noted that, while a successor to the 2002-2005 Agreement had been negotiated, it had not yet been fully executed or registered.

On August 18, 2006, the Director of Representation dismissed the petition as untimely under OCB Rule § 1-02(g). In her letter to the parties, the Director of Representation noted that the MOA setting forth the terms for the 2005-2006 Agreement was signed on April 18, 2006, and stated, in relevant part:

Generally, a petition seeking to represent employees subject to a contract expiring on September 22, 2006, would be timely under OCB Rule § 1-02(g) if filed between March 26, 2006, and April 25, 2006. However, the 2005-2006 MOA did not come into existence until it was signed on April 18, 2006, seven days before the end of the prescribed window period. Accordingly, under Board precedent, a timely petition could have been filed in the 30-day period following the execution of the 2005-2006 MOA, in other words, the period of April 19, 2006, to May 18, 2006. *See Terminal Employees Local 832, International Brotherhood of Teamsters*, Decision No. 27-72 at 6 (finding that, when a contract was issued less than three months prior to its expiration date, a timely petition could have been filed in the one month period after

issuance of the contract and holding that a petition filed after this period was untimely). Filed almost two months after the end of the applicable window period, LEEBA's petition is untimely and is hereby dismissed.

On August 31, 2006, LEEBA filed the instant appeal.

On September 5, 2006, the City, HHC, and Local 237 executed the 2005-2006 Agreement incorporating the terms of the MOA.

On October 3, 2006, Local 237 and the City filed replies to LEEBA's appeal. Local 237 attached its notice to its members regarding the terms of the MOA. The City attached the May 18, 2006, pay authorizations and a copy of the executed 2005-2006 Agreement.

POSITIONS OF THE PARTIES

LEEBA's Position

LEEBA argues that Director of Representation erred in finding that the applicable window period was 30 days following the execution of the MOA because the City admitted that as of August 2006 the 2005-2006 Agreement had not yet been executed and registered. According to LEEBA, no official notice of the signing was ever posted, and the membership was never given the opportunity to ratify the terms of the agreement. LEEBA asserts that without registration of a successor agreement, there is no notice of the agreement and, accordingly, no window for filing a petition. LEEBA argues that the Director of Representation's decision must be rescinded because it was based on erroneous facts.

LEEBA contends that Local 237's position would require them to look to the future to determine when a successor agreement would be signed and to predict when the 150 to 180 day period prior to the signing would fall. According to LEEBA, Local 237 and the City desire the status

quo without providing an opportunity for a representation petition.

LEEBA asserts the Director of Representation's decision reflects bias against LEEBA and requires an independent body's review of the denial of a representational vote for HHC's Special Officers, Senior Special Officers, Hospital Security Officers, whom LEEBA refers to as "Hospital Police." Citing the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), LEEBA notes that it is the power and duty of the Board "to determine the majority representative of public employees in an appropriate 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 such employees . . ."⁴

LEEBA argues that HHC's Special Officers, Senior Special Officers, and Hospital Security Officers are peace officers and, as such, are entitled to a separate bargaining unit because their law enforcement functions are incompatible with the other members of Local 237 employed by HHC.

Finally, LEEBA requests that if any member of the Board has an affiliation with the International Brotherhood of Teamsters that he or she recuse himself or herself as bias would result when voting on the issue of a separate bargaining unit for the employees at issue.

Local 237's Position

Local 237 requests that the dismissal of the underlying petition be upheld. Local 237 asserts that the petition was untimely because it was not filed during the statutory window period: March 26, 2006, to April 25, 2006.

Local 237 argues that LEEBA cannot claim to be unaware of the expiration date of the 2005-

⁴ LEEBA incorrectly identified the Board of Collective Bargaining, rather than the Board of Certification, as having this authority.

2006 Agreement or that Local 237's membership was not given the opportunity to ratify the terms of that agreement. In accordance with Local 237's practice, it sent its membership a notice on April 26, 2006, that indicated that an agreement had been reached, included a summary of the terms and effective dates of the agreement, and gave the membership the opportunity to approve or reject the agreement.

According to Local 237, LEEBA ignores the Board precedent cited by the Director of Representation and relies on unsubstantiated claims of bias in lieu of legitimate legal argument. Local 237 argues that the fact that the agreement was signed during the statutory window period does not entitle LEEBA to file a decertification petition at any time. Under the Board precedent, since the agreement was signed on April 18, 2006, LEEBA had until May 18, 2006 to file its petition. Even if the window period were 30 days from notice to the membership (April 27, 2006, to May 26, 2006) or 30 days following ratification by the membership (May 18, 2006, to June 16, 2006), LEEBA's petition was untimely when filed on July 14, 2006, and amended on July 27, 2006.

Local 237 does not address LEEBA's arguments regarding the merits of the dispute since such arguments are not responsive to the dismissal of the petition as untimely.

City's Position

The City requests that the Board deny LEEBA's appeal. According to the City, its prior statement that the successor agreement had not been executed or registered was not inconsistent with the dismissal of LEEBA's petition as untimely.

Citing the decision of the New York Supreme Court, Nassau County, in *Sheriff Officers Ass'n*, 29 PERB ¶ 7505 (1996), the City argues that it was appropriate to use the April 18, 2006, signing of the MOA to determine the applicable filing period because the MOA contained substantial

terms and conditions of employment and the steps necessary for finalization. The MOA provides for a general wage increase, welfare fund contributions, and the continuation of the terms and conditions of the 2002-2005 Agreement. It states that it covers all economic and non-economic matters and reflects the intention of the parties to incorporate its terms into a successor collective bargaining agreement. Both the City and Local 237 took measures to implement the MOA. The City issued pay authorizations covering the titles at issue here, and Local 237 and the City executed and registered a successor collective bargaining agreement, which remains in *status quo*.

The City contends that LEEBA has failed to provide support for its timeliness argument and that LEEBA's petition is untimely regardless of whether the 2002-2005 Agreement, the MOA, or the 2005-2006 Agreement is used to calculate the window period. According to the City, the onus is on LEEBA to determine whether the employees it seeks to represent are covered under a valid contract. The City asserts that OCB Rule § 1-02(g) is clear and unambiguous and that LEEBA should have been aware of its burden.

DISCUSSION

The issue before us is whether the Director of Representation erred in finding that LEEBA's petition is untimely. We find that the petition is untimely under the contract bar doctrine set forth in OCB Rule § 1-02(g) and uphold the dismissal of the petition.

The contract bar doctrine "has been long and firmly established in the field of labor relations." *City Employees Union, Local 237, IBT*, Decision No. 11-71 at 3-4. Its purpose is to "balance the statutory objective of stability in bargaining relationships with the statutory right of employees to freely designate or change their representatives." *Terminal Employees Local 832, Int'l Bhd. of Teamsters*, Decision No. 27-72 at 5, *reconsideration denied*, Decision No. 73-72; *accord*

Indep. Laborers Union of New York City, Decision No. 6-2001 at 6, *aff'd*, *Indep. Laborers Union of New York City v. Office of Collective Bargaining*, No. 113973/01 (Sup. Ct. N.Y. Co. Apr. 3, 2002).

OCB Rule § 1-02(g) provides that “[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.” If the duration of the contract is three years or less, the applicable window period to file a petition pursuant to OCB Rule § 1-02(c), (d), or (e) is “not less than 150 or more than 180 calendar days before the contract’s expiration date.”⁵ OCB Rule § 1-02(g). If the duration of the contract is more than three years, a petition can be filed either “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.” *Id.* The rule specifies that “[n]o petition for certification, decertification or investigation of a question or controversy concerning representation may be filed after the expiration of a contract.” *Id.* In the event that a successor agreement is signed after it has already expired, in other words, if the successor agreement is signed after the end of the period that it covers, a petition “may be filed in the 30-day period following the date the successor contract is signed by all parties.” *Id.*⁶

⁵ Although LEEBA refers to its petition as a decertification petition filed pursuant to OCB Rule § 1-02(e), the petition does not seek to decertify the entire bargaining unit and is, therefore, appropriately considered a petition for representation pursuant to OCB Rule § 1-02(c). See *Indep. Laborers Union of New York City*, Decision No. 6-2001 at 6 (noting that a petition to carve out titles from an existing bargaining unit is properly filed as a representation petition pursuant to OCB Rule § 1-02(c) and not as a decertification petition pursuant to § 1-02(e)), *aff'd*, *Indep. Laborers Union of New York City v. Office of Collective Bargaining*, No. 113973/01 (Sup. Ct. N.Y. Co. Apr. 3, 2002).

⁶ OCB Rule § 1-02(g) also includes the following provision, which is not at issue here: “if the Board finds that unusual or extraordinary circumstances exist, such as when there is reason to believe that a recognized or certified employee organization is defunct or has abandoned

When a successor agreement is signed less than 150 days before its expiration, this Board has found that a petition could be filed in the one month period following the issuance of the successor agreement. *See Terminal Employees Local 832, Int'l Bhd. of Teamsters*, Decision No. 27-72 at 6 (dismissing a petition filed ten months after the issuance of a personnel order reflecting a successor contract that was expiring in three months), *reconsideration denied*, Decision No. 73-72. We have rejected the use of the otherwise applicable window period in such circumstances because the employees or a rival union cannot determine the appropriate filing period until a successor contract comes into existence. *See id.*; *Detective Investigators Benevolent Ass'n of New York City, Inc.*, Decision No. 35-73 at 5.

We have also stated that “employees and their representatives who intend to timely challenge the status of an incumbent have a responsibility to ascertain the existence of agreements and to be aware of the current status of the bargaining for renewal agreements and their execution or of Personnel Orders which evidence such agreements.” *Detective Investigators Benevolent Ass'n of New York City, Inc.*, Decision No. 35-73 at 6 (dismissing a petition not filed within the one month period following the issuance of a personnel order reflecting a collective bargaining agreement that had already expired); *see also Terminal Employees Local 832, Int'l Bhd. of Teamsters*, Decision No. 27-72 at 6 (recognizing that “in some instances Personnel orders or collective bargaining contracts are not immediately published or made generally known on the date of issuance”).

In evaluating whether an agreement serves as a contract bar to the filing of a petition, we have considered whether the agreement contains “substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.” *City Employees Union, Local 237*,

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.”

I.B.T., Decision No. 12-77 at 7 (quoting *Appalachian Shale Products Co.*, 1221 N.L.R.B. 1160, 1163 (1958)) (petition not barred by a Comptroller's Determination and a related welfare fund agreement regarding the wages and supplements for prevailing wage employees, a subject excluded from the scope of bargaining under NYCCBL § 12-307(a)(1)); see *City Employees Union, Local 237, I.B.T.*, Decision No. 11-71 at 5 (petition barred by an agreement for prevailing wage employees regarding non-economic terms such as grievance arbitration procedures, seniority, release time for union representatives, and check-off of union dues). In *Detective Investigators Benevolent Ass'n of New York City, Inc.*, the Board found that a personnel order that provided for retroactive wage adjustments, a 35 hour work week, annual wage increases, a minimum and maximum salary range, and contributions to the union welfare fund effective for a term of three and a half years was "sufficient to constitute a contract." Decision No. 35-73 at 3.

Applying the contract bar doctrine to the facts presented here, the Director of Representation correctly found that LEEBA's petition was untimely since it was not filed in the 30-day period following the signing of a memorandum of agreement that was expiring in less than 180 days.

The MOA is appropriately considered a contract capable of barring a rival petition. Continuing all the terms of the prior collective bargaining agreement with modifications only regarding the effective term and increases in wages and welfare fund contributions, the MOA contained substantial terms and conditions of employment sufficient to stabilize the bargaining relationship.⁷ This determination is consistent both with our precedents and those of the New York State Public Employment Relations Board ("PERB"). In applying its contract bar, PERB has found

⁷ We note, as further indication that the MOA stabilized the parties' bargaining relationship, that the City authorized payment of the wage increases provided in the MOA on May 18, 2006, months before the execution of the formalized 2005-2006 Agreement.

that a memorandum of agreement can bar rival petitions. *See County of Nassau*, 29 PERB ¶ 3035, at 3081 (1996); *Greece Central School District*, 23 PERB ¶ 4037, at 4052 (1990) (ALJ dismissed a petition as barred by a signed, written memorandum of agreement containing substantial terms and conditions of employment even though the parties “contemplated signing a formal, integrated document at some later date”).

Here, the MOA came into existence one week before the conclusion of the otherwise applicable window period. A strict application of OCB Rule § 1-02(g) would limit the window period to only seven days. However, such a result is contrary to the intended purpose of the contract bar doctrine. The principles underlying OCB Rule § 1-02(g) and our prior decisions militate in favor of granting a rival union a 30-day period in which to challenge representation. Accordingly, we find that when a successor contract is signed during the otherwise applicable window period, a rival petition is timely if filed in the 30-day period following the signing of the contract. This is consistent with the calculation of the window period when a successor agreement is signed less than 150 days before its expiration and when a successor agreement is signed after its expiration. *See* OCB Rule § 1-02(g); *Terminal Employees Local 832, Int’l Bhd. of Teamsters*, Decision No. 27-72. Since the MOA was signed on April 18, 2006, the applicable filing period was April 19, 2006, to May 18, 2006. LEEBA’s petition was filed on July 14, 2006, and amended on July 27, 2006. Accordingly, the petition was untimely and properly dismissed.

No precedent supports LEEBA’s assertion that there is no window period when there is no notice of a successor agreement.⁸ Notice is not determinative when calculating the applicable window period under OCB Rule § 1-02(g), which establishes filing periods in reference to the

⁸ LEEBA’s assertion is also unsupported by the facts as notice of the MOA, which LEEBA itself submitted in the underlying proceeding, was provided to Local 237’s members on April 26, 2006, and the members ratified the agreement on May 17, 2006.

expiration date of an agreement and, in certain circumstances, to the signing date of an agreement. As this Board has previously stated, the rival union has the burden to ascertain the existence of collective bargaining agreements and to be aware of the status of bargaining for successor agreements and the execution of successor agreements. *See Detective Investigators Benevolent Ass'n of New York City, Inc.*, Decision No. 35-73 at 6.

LEEBA's reliance on our statutory authority is also misguided. While we are empowered to conduct elections in cases in which we have determined that they are appropriate, that authority in no way relieves a party of its obligation to file petitions in a timely manner.

Finally, we find that LEEBA's arguments that the Director of Representation relied on erroneous facts or displayed bias are completely unsupported by any factual evidence. To the contrary, the contract expiration and signing dates upon which the Director of Representation relied are accurate, and her determination is consistent with OCB Rule § 1-02(g), prior Board decisions, and precedent in other forums.

As LEEBA's petition was not filed within the applicable window period, we uphold the dismissal of LEEBA's petition as untimely.

ORDER

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

ORDERED, that the appeal filed by the Law Enforcement Employees Benevolent Association challenging the dismissal of its petition, docketed as RU-1252-06, as untimely is hereby dismissed.

Dated: December 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER