LEEBA, 9 OCB2d 26 (BOC 2016)

(Rep) (Docket No. RU-1636-16).

Summary of Decision: LEEBA filed a petition to represent Sanitation Enforcement Officers and Associate Sanitation Enforcement Officers, currently represented by CWA. The City argued that, since the memorandum of agreement between the City and CWA was not ratified, the petition was untimely under the contract bar rule. In this interim decision, the Board found that LEEBA 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

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

- and -

THE CITY OF NEW YORK,

Respondent,

-and-

COMMUNICATION WORKERS OF AMERICA,

Intervenor.

INTERIM DECISION AND DIRECTION OF ELECTION

On July 26, 2016, the Law Enforcement Employees Benevolent Association ("LEEBA") filed a petition to represent employees in the titles of Sanitation Enforcement Agent (Title Code No. 71681) ("SEA") and Associate Sanitation Enforcement Agent (Title Code No. 71682) ("ASEA"). SEAs and ASEAs are currently represented by Communications Workers of America

("CWA") in Certification No. 25-74.[1] On August 31, 2016, the City filed a response arguing that, since the memorandum of agreement between the City and CWA was not ratified, the petition was untimely under the contract bar rule.[2] The Board finds that LEEBA submitted a timely petition supported by a sufficient showing of interest and directs an election in order to ascertain the wishes of SEAs and ASEAs as to their union representation.

BACKGROUND

For several decades prior to 2014, SEAs and ASEAs were represented by CWA in two bargaining units that were covered by a single collective bargaining agreement. The 2008-2010 collective bargaining agreement ("2008-2010 Agreement") between CWA and the City of New York ("City") covered ASEAs for the period of March 16, 2008, to March 15, 2010, and SEAs for the period of March 10, 2008, to March 9, 2010.

On January 10, 2014, the Board consolidated SEAs and ASEAs into a single bargaining unit. *See DC 37*, 7 OCB2d 1, at 85 (BOC 2014) (reconfiguring bargaining units in light of Local Law 56 of 2005), *affd. sub nom. Matter of City Empls. Union, Local 237, Intl. Bhd. of Teamsters v. NYC Off. Bd. of Collective Bargaining*, Index No. 100180/2014 (Sup. Ct. N.Y. Co. Jul. 28, 2015) (Moulton, J.). The bargaining unit is currently comprised of 182 SEAs and 55 ASEAs.

On March 21, 2016, the City and CWA signed a memorandum of agreement covering only SEAs, who comprise 77% of the bargaining unit, for the period of March 10, 2010, to December

[1] CWA is the certified bargaining representative of both titles, which constitute a single bargaining unit. As an internal union matter, CWA designated its affiliate Local 1182 to represent SEAs and its affiliate Local 1181 to represent ASEAs.

[2] LEEBA and CWA were given the opportunity to respond to the City's argument.

30, 2017. On July 18, 2016, the City and CWA signed a memorandum of agreement covering only ASEAs ("MOA").[3] According to the City, the MOA states that "[t]his Agreement is subject to union ratification." (City Ans. at 2) On July 25, 2016, CWA notified the City that its members did not ratify the MOA. On July 26, 2016, LEEBA filed a petition supported by a showing of interest of more than 30% of the entire unit of SEAs and ASEAs.[4] The City and CWA continue to discuss terms for a new memorandum of agreement.

POSITIONS OF THE PARTIES

City's Position

The City argues that LEEBA's petition is premature and should be dismissed as 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"), known as the "contract bar rule."[5] The contract bar rule prohibits the filing of a petition after the expiration of a contract and until a successor agreement is signed. The City claims that the MOA is not a "successor agreement" because it

[3] The parties did not provide a copy of the MOA or indicate the exact dates of its term. We take administrative notice that, historically, the City and CWA's collective bargaining agreements have covered SEAs and ASEAs for the same time period. However, for the 2006-2008 term, ASEAs were covered for six days longer.

[4] We take administrative notice that LEEBA filed five petitions to represent this unit between March and July 2016. Two of these petitions were withdrawn, and two were dismissed by the Director of Representation because they were filed after the expiration of the 2008-2010 Agreement but not within 30 days of the signing of a memorandum of agreement for a subsequent term. *See LEEBA*, 8 OCB2d 29, at 2 n. 1 (BOC 2015). The fifth petition is the subject of this proceeding.

[5] CWA did not challenge the timeliness of LEEBA's petition.

was not ratified. Because the MOA states that it is "subject to union ratification," the City argues that ratification is an express condition precedent to the formation of a contract. (City Ans. at 2) Accordingly, the City concludes that the MOA was a tentative agreement or conditional contract that is void for failure to meet an express condition precedent. The City claims that a conditional agreement cannot be a "successor contract" that opens a filing period until it is both signed and ratified.

The City asserts that allowing LEEBA's petition to proceed at this time would disrupt the ongoing bargaining process and delay settlement of an agreement for the bargaining unit. The City alleges that processing a representation petition in the middle of bargaining is contrary to the purpose of the contract bar rule, which the City claims is to maintain the continuity and stability of bargaining units. Further, processing the petition at this time could result in part of the unit being covered by an agreement negotiated by CWA while the other part might be subject to an agreement to be negotiated by LEEBA. According to the City, if the memoranda of agreement are negotiated by different unions, combining them into one coherent collective bargaining agreement would be more difficult.

LEEBA's Position

LEEBA seeks to represent the bargaining unit of SEAs and ASEAs. LEEBA contends that its petition is timely since it was filed within 30 days of the signing of a memorandum of agreement for a successor agreement, as provided by the Board's decisions and the Director of Representation's letters dismissing petitions filed outside this period. Noting that the City was a party to these proceedings and aware of the Board's application of the contract bar rule, LEEBA contends that it cannot be instructed as to one standard and then held to a shifting standard in a

subsequent proceeding.

LEEBA argues that ratification has no bearing on whether LEEBA's petition is timely. LEEBA asserts that it is well established in labor law that technical rules of contract do not control the determination of whether a collective bargaining agreement has formed. Further, LEEBA notes that the case cited by the City to support its position does not involve labor law and is factually distinguishable. While that case involved conditions precedent to the *formation* of a sublease, LEEBA contends that the ratification language in the MOA is more similar to a condition precedent to a party's obligation to *perform* under an existing contract.

In accordance with Board precedent regarding the appropriate filing period when there are multiple contracts for a single bargaining unit, LEEBA asserts that its petition is timely as to both ASEAs and SEAs, who previously settled a contract. Accordingly, it seeks the scheduling of an election.

DISCUSSION

The contract bar doctrine "has been long and firmly established in the field of labor relations." *City Empls. Union, L. 237, IBT*, 8 OCB 11, at 3-4 (BOC 1972). 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." *Term. Empls. L. 832, IBT*, 10 OCB 27, at 5 (BOC 1972), *reconsideration denied*, 10 OCB 73, at 4 (BOC 1972); *see also* New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") §§12-302, 12-305, 12-311(d); *Ind. Laborers Union of NYC*, 68 OCB 6, at 6 (BOC 2001), *affd., Ind. Laborers Union of NYC v. Off. of Collective Bargaining*, No. 113973/01 (Sup.

Ct. N.Y. Co. Apr. 3, 2002).[6]

To that end, the contract bar rule provides for window periods during the duration of collective bargaining agreements when employees can exercise their right to choose a new bargaining representative. Absent unusual or extraordinary circumstances, a petition concerning employees covered by a collective bargaining agreement may be filed during a 30-day window period, approximately every three years. *See* OCB Rule § 1-02(g).[7] When that 30-day window

---

[6] NYCCBL § 12-302, entitled "Statement of Policy," provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

NYCCBL § 12-305, entitled "Rights of public employees and certified employee organizations," provides, in part:

> Public 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 § 12-311(d), entitled "Preservation of status quo," provides, in part:

> During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, … the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organizations induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions.

[7] 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

period occurs depends on three factors: the duration of the expiring collective bargaining agreement, its expiration date, and the date a successor agreement is signed. If the duration of the expiring agreement is three years or less, the applicable window period is 150 to 180 days before the contract's expiration date. *Id.* If the duration of that agreement is more than three years, a petition can be filed during two window periods: 150 to 180 days before the end of the third year or 150 to 180 days before the contract's expiration date. *Id.*

OCB's contract bar rule is unique in that once a contract has expired, no petition can be filed until a successor agreement is signed. *See* OCB Rule § 1-02(g); *see also Ind. Laborers Union of NYC,* 68 OCB 6, at 6-11 (acknowledging that OCB's contract bar rule differs from those of the New York State Public Employment Relations Board and the National Labor Relations Board); *Term. Empls. L. 832, IBT,* 10 OCB 27, at 4-5. This prohibition was included in the rule because, historically, the City and its unions have not always been able to conclude negotiations

---

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.

for successor agreements prior to the expiration of the current contract. *See, e.g. NYSNA*, 2 OCB 68 at 3 n. 2 (BOC 1968). The City and the municipal unions can and do negotiate successor agreements that are largely or entirely retroactive at the time they are signed.

While there are no time limitations on contract negotiations, this Board has noted that the contract bar rule will not be interpreted to create "an indefinite or unreasonable bar to the representation rights of employees." *Term. Empls. L. 832, IBT*, 10 OCB 27, at 7; *see also Local 1180, CWA*, 40 OCB 18, at 14 n. 15 (BOC 1987). Throughout its history, the Board has applied the contract bar rule to strike a balance between bargaining stability and employee free choice in order to provide employees with a predictable 30-day window period. Instead of an unduly literal approach that would eliminate the window period when a successor agreement did not exist 150 to 180 days before it expired, the Board found that the proper time to file was 30 days from the issuance of a personnel order reflecting the parties' successor agreement.[8] *See Detective Investigators Benevolent Assn. of NYC, Inc.*, 12 OCB 35, at 4 (BOC 1973) (noting that the date of the personnel order was the earliest time a petitioner could have known about the existence of the agreement); *Term. Empls. L. 832, IBT*, 10 OCB 27, at 6. Similarly, the Board rejected a strict application of the contract bar rule that would have shortened the window period to only seven days. *See LEEBA*, 78 OCB 9, at 13 (BOC 2006) (finding a petition timely when filed in the 30-day period following the signing of a memorandum of agreement for a successor agreement).

The situation presented here is also unique. Most of the City's collective bargaining

[8] Subsequently, the contract bar rule was amended to provide that "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." OCB Rule § 1-02 (g) (emphasis added).

agreements expired in 2010. Under the contract bar rule, there was a window period to file a representation petition prior to expiration of most of these contracts in 2010, but no other filing period until new agreements were signed. When the current Mayor's term began in 2014, the City began negotiating agreements for a duration of seven to nine years.[9] When the duration of a contract is greater than three years, the contract bar rule permits the filing of a petition 150 to 180 days before the end of the third year. OCB Rule § 1-02(g). However, in this recent round of bargaining, there were no agreements in existence during that third-year window period. Accordingly, in order to provide employees with the opportunity to exercise their statutory right to select or change their bargaining representative at reasonable time intervals, the Board has been processing petitions filed within 30 days of the signing of a memorandum of agreement.[10] *See LEEBA*, 8 OCB2d 29, at 2 n. 1 (noting that a petition was timely when filed within 30 days of the signing of a memorandum of agreement in 2015 for a 2010-2018 term).

The circumstances of this case are complicated by the fact that the City and CWA

[9] We take administrative notice that no collective bargaining agreements were negotiated during the former Mayor's third term. The City's Office of Labor Relations, which negotiates on behalf of the Mayor, files copies of its collective bargaining agreements with the Office of Collective Bargaining and posts them on its website. *See* New York City Charter § 1175 (requiring the publication of collective bargaining agreements in the City Record); OCB Rule § 1-03(d) (requiring public employers to file copies of collective bargaining agreements and providing that such agreements are public records available for inspection).

[10] The contract bar rule has been consistently applied in this manner since 2014. As a result, three petitions were deemed timely when filed within 30 days of the signing of a memorandum of agreement, and 24 petitions, 17 of which involved the City, were dismissed by the Director of Representation because they were not filed within this window period. *See LEEBA*, 8 OCB2d 29, at 2 n. 1; *see also LEEBA*, 9 OCB2d 14 (BOC 2016) (petition timely when filed within 30 days of the signing in 2016 of a memorandum of agreement for a 2008-2017 term); *HHC PBA, Inc.*, 8 OCB2d 20 (BOC 2015) (petition timely when filed within 30 days of the signing in 2014 of a memorandum of agreement for a 2010-2018 term).

negotiated separate memoranda of agreement for SEAs and ASEAs even though both titles comprise one bargaining unit. However, this complication does not support a finding that the petition is untimely. 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." *Emergency Med. Benevolent Assn.*, 46 OCB 7, at 5 (BOC 1990). When, as here, more than one agreement covers employees in a single bargaining unit, a petitioner is entitled to choose one open window period under any of the agreements in which to file a petition concerning the entire unit.[11] *Id*. at 7; *see also Mun. El. Workers Assn.*, 50 OCB 1, at 5 (BOC 1992) ("[W]e will not permit the protected rights of employees, including the right to select or change bargaining representatives, to be diminished by the fact that discrete groups of employees within a single certified collective bargaining unit are covered by separate collective bargaining agreements with differing durations and termination.").

Here, the collective bargaining agreement covering SEAs and ASEAs expired in 2010. Therefore, under OCB § 1-02(g), there has been no window in which to file a petition for over six years. The parties' bargaining history suggests that the duration of the MOA covering ASEAs is similar, if not identical, to the memorandum of agreement covering SEAs: a term of over seven years that has not yet expired. The petition at issue was filed within 30 days of the signing of the MOA covering the ASEAs. Consistent with prior cases in which there was no agreement in existence 150 to 180 days before the end of its third year, we find that the signing of the MOA was sufficient to trigger a 30-day window period and that the petition was timely filed. *See LEEBA*,

[11] It is uncontested that a petition filed within 30 days following the signing of the memorandum of agreement covering SEAs on March 21, 2016, would have been timely even though there was no successor agreement of any kind covering ASEAs at that time. (City Ans. at 4)

8 OCB2d 29, at 2 n. 1. To conclude otherwise would require the affected employees to wait an indefinite length of time in order to permit the incumbent union and the City to reach another agreement. *See Local 1180, CWA*, 40 OCB 18, at 14 n. 15. Under the circumstances presented, we cannot say that employee free choice should be delayed to permit this additional period of bargaining. The stability of the collective bargaining process has been preserved by virtue of the application of the contract bar rule for six years, and the statutory rights of employees to file a representation petition should now take precedence.

In reaching this conclusion, we reject the City's argument that the petition is untimely because, seven days after the City and CWA signed the MOA, the union members declined to ratify it. According to the City, the MOA was therefore not a successor contract that should trigger a window period. However, in determining the appropriate time period to file a representation petition, we do not evaluate whether the agreement between the employer and incumbent union meets the technical requirements of contract law. *See Local 1180, CWA*, 40 OCB 18, at 12-14 (concluding that a coalition agreement that contemplated that its terms would be incorporated into separate unit agreements was "a valid and enforceable contract notwithstanding the absence of a fully executed written document"). Indeed, the Board has found City personnel orders sufficient to trigger a filing period. *See Detective Investigators Benevolent Assn. of NYC, Inc.*, 12 OCB 35, at 3 (finding that the provisions of an Implementing Personnel Order are sufficient to constitute a contract for the purposes of resolving questions of representation); *Term. Empls. L. 832, IBT*, 10 OCB 27, at 6 (filing period triggered by the issuance of a Court System Personnel Order).

Based on the facts presented, we do not find that a window period under our contract bar

rule is triggered only if the memorandum of agreement was ratified. The language of the rule does not refer to ratification as a trigger for a window period. *See* OCB Rule § 1-02(g). Further, as the Board of Collective Bargaining has repeatedly stated, "the circumstances under which union ratification is required are not defined by the NYCCBL, but constitute a matter internal to the union." *Shapiro*, 37 OCB 9, at 18 (BCB 1986) (holding that a union's failure to submit a settlement to membership ratification cannot constitute an improper practice under the NYCCBL); *see Brengel*, 65 OCB 10, at 11-12 (BCB 2000); *Miller*, 53 OCB 21, at 16 (BCB 1994); *see also Carolan*, 43 OCB 56, at 7-8 (ES 1989) (Executive Secretary dismissed an improper practice petition asserting noncompliance with the contract ratification procedures in the union's constitution). A ratification vote can occur at any time after the signing of a memorandum of agreement. *See, e.g.*, *Miller*, 53 OCB 21, at 3-5 (ratification process took three months when the union invalidated the first vote and conducted a second vote). Therefore, to make a window period conditional upon the parties' agreement that ratification is required, not the date the memorandum of agreement was signed, places unnecessary control with the incumbent union as to when the filing period for a representation petition would commence. Similarly, allowing non-ratification to nullify a window period at any time within or after 30 days of the signing of the memorandum of agreement is impractical and defeats the goal of giving employees a predictable window period in which to file a petition.

In this instance, the signing of the memorandum of agreement alone is evidence of sufficient bargaining stability such that the opportunity for employees to exercise free choice in representation should now be granted.[12] Moreover, we do not find the result here destabilizing

[12] It is undisputed that the petition would have been timely, and the bargaining unit members would

to the bargaining process. 77% of this bargaining unit is already covered by an agreement. In addition, the potential inconvenience of "reconciling" two memoranda of agreement with different unions into one collective bargaining agreement flows from the decision of the City and CWA to negotiate multiple contracts for a single bargaining unit, not the Board's application of its rules. (City Ans. at 4); s*ee also Emergency Med. Benevolent Assn.*, 46 OCB 7, at 6.

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 LEEBA'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 Council 82*, 2 OCB2d 22, at 12 (BOC 2009); *Local 333, United Mar. Div., Natl. Mar. Union*, 12 OCB 22, at 6 (BOC 1973).

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 titles of Sanitation Enforcement Agent (Title Code No. 71681) and Associate Sanitation Enforcement Agent (Title Code No. 71682) employed by the City of New

---

have the opportunity to vote in an election, if they had ratified the MOA. Under these unique circumstances, a rejection of the MOA by the bargaining unit members should not disqualify them from exercising their right to choose their bargaining representative.

York to determine whether these employees wish to be represented by the Communications Workers of America or the Law Enforcement Employees Benevolent Association for the purposes of collective bargaining. Employees in the Sanitation Enforcement Agent and Associate Sanitation Enforcement Agent titles employed during the payroll period immediately preceding this Interim 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 the Communications Workers of America may have its name removed from the ballot by filing with the Board, within 14 days after service of this Interim Decision and Direction of Election, a written request that its name be removed from the ballot; and it is further

DIRECTED, that within 14 days after service of this Interim 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 Sanitation Enforcement Agent and Associate Sanitation Enforcement Agent titles who are employed by the City of New York and who were employed during the payroll period immediately preceding the date of this Interim Decision and Direction of Election.

Dated: November 17, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER