

**SBA, 14 OCB2d 7 (BOC 2021)**

(Rep) (Docket No. RU-1675-20)

***Summary of Decision:*** The SBA filed a petition to represent the Environmental Police Officers currently represented by LEEBA. It alleged that its petition was timely pursuant to an exception to the contract bar rule because LEEBA is neither functional nor effectively representing its members. The Board found that the exception for unusual or extraordinary circumstances was not applicable because LEEBA is not defunct and has not abandoned representation of unit members. Accordingly, it dismissed the SBA's petition as untimely. (*Official decision follows.*)

---

**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION**

**In the Matter of the Certification Proceeding**

***-between-***

**SERGEANTS BENEVOLENT ASSOCIATION,**

***Petitioner,***

***-and-***

**THE CITY OF NEW YORK and**

**LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,**

***Respondents.***

---

**DECISION AND ORDER**

On October 21, 2020, the Sergeants Benevolent Association (“SBA”) filed a petition, docketed as RU-1675-20, seeking to represent Environmental Police Officers (“EPOs”), currently represented by the Law Enforcement Employees Benevolent Association (“LEEBA”) in Certification No. 5-2005.<sup>1</sup> While the contract bar rule prohibits the filing of a representation

---

<sup>1</sup> The Environmental Police Benevolent Association is affiliated with the SBA for the purpose of representing EPOs.

petition after the expiration of a collective bargaining agreement covering the employees at issue, the SBA argues that its petition should be processed pursuant to the exception for unusual or extraordinary circumstances because LEEBA is neither functional nor effectively representing EPOs. The Board finds that an exception to the contract bar rule is not warranted since LEEBA is not defunct and has not abandoned representation of EPOs. Accordingly, the SBA's petition is dismissed as untimely.

### **BACKGROUND**

There are approximately 219 EPOs working for the Department of Environmental Protection ("DEP"). They are subject to a memorandum of economic agreement between LEEBA and the City of New York ("City") covering the period of April 1, 2010 through September 30, 2017 ("2010-2017 MEA").

In the fall of 2018, the City held LEEBA's welfare fund and annuity fund contributions in escrow and provided health, dental, and vision coverage directly to EPOs via its Management Benefits Fund.<sup>2</sup> In December 2019, LEEBA filed an improper practice petition, docketed as BCB-4363-19, with the Office of Collective Bargaining and a complaint in New York County Supreme Court regarding the City's actions. The improper practice and state court proceedings are both still pending.<sup>3</sup> LEEBA and the City met to discuss the welfare fund and annuity fund contributions in March 2020.

---

<sup>2</sup> The President of the Environmental Police Benevolent Association asserts that LEEBA has not given bargaining unit members information regarding how to access these benefits. Information regarding the benefits available under the Management Benefits Fund is on the Office of Labor Relations' website.

<sup>3</sup> Counsel for LEEBA and the City participated in case conferences regarding the improper practice proceeding in January and February 2021.

In an affidavit submitted by the SBA, Matthew Kruger, an EPO and President of the Environmental Police Benevolent Association, asserts that LEEBA has not negotiated a full collective bargaining agreement unique to EPOs since its certification in 2005. Instead, the “base collective bargaining agreement” for non-economic terms was negotiated by the prior bargaining representative for a unit comprised primarily of non-police titles. (Kruger Aff. ¶ 4) In addition, Kruger avers that LEEBA has refused to provide unit members with basic governance documents, including current bylaws, meeting minutes, and treasurer reports. He further alleges that LEEBA did not provide EPOs with annual reports or audited financial statements regarding its health and welfare fund, annuity fund, and civil legal fund or otherwise comply with the Office of the Comptroller’s Directive 12, which sets forth auditing and reporting requirements for employee benefit funds receiving money from the City. Kruger’s affidavit further avers that some unit members never received statements from LEEBA regarding the value of deferred compensation held for their benefit, some unit members received statements for the first time in December 2020, some of those statements inaccurately reflected the member’s years of service, and no money has been contributed to the deferred compensation fund since 2018.

On July 13, 2020, the United States Department of Justice charged LEEBA’s President with defrauding its annuity fund and its Treasurer with obstruction of justice and making false statements. Thereafter, the President and Treasurer were prohibited from interacting with LEEBA board members unless an attorney is present.

LEEBA submitted two affidavits from Jakwan Rivers, its First Vice President and Acting President. Rivers asserts that, following the federal indictments, he took steps to gain authorization to access LEEBA’s bank accounts and ensure the payment of LEEBA’s financial obligations and that LEEBA has continued to provide an attorney to defend EPOs in disciplinary charges and file

grievances.<sup>4</sup> Rivers claims that LEEBA caught up with filing its Directive 12 reports with the Comptroller in 2019 and is not required to send them to members. Further, he states that the City has been creating and distributing annuity fund statements, that LEEBA has been providing changes of address to the annuity fund for members who have moved, and that two dozen LEEBA members have recently received annuity fund distributions.

In addition, Rivers indicates that LEEBA's executive board has met multiple times. LEEBA executive board member Yolanda Moore is an EPO and the delegate appointed to assist the executive board in the daily representation of the EPO bargaining unit. In his affidavit, Rivers indicated that Moore interacts regularly with EPOs. Rivers also asserts that, in October 2020, LEEBA announced a legal plan that provides free or discounted legal services to members and their dependents in the areas of personal injury, landlord/tenant, real estate closings, foreclosure, loan modification, disability pension, Social Security disability, discrimination, divorce, child custody, wills/trusts/estates, traffic infractions, contract disputes, and workers' compensation.

On Saturday, October 17, and Sunday, October 18, 2020, prior to the filing of the SBA's petition, LEEBA held meetings with EPOs. The October 17 meeting was attended by 52 EPOs, and the October 18 meeting was attended by 27 EPOs.<sup>5</sup> In his affidavit, Rivers notes that Kruger attended the October 18 meeting and asked questions. Rivers also avers that he informed members

---

<sup>4</sup> Kruger asserts that LEEBA has not made legal representation for work-related issues available. However, LEEBA submitted a letter from Raoul Zaltzberg, its counsel for disciplinary matters, indicating that he had handled disciplinary cases at DEP, including a recent termination case in which he saved an EPO's job, has pending cases at the Office of Administrative Trials and Hearings, and has negotiated settlements. He asserts that he has been available at meetings, answered questions, and given delegates and unit members his personal phone number. He also spoke at the October 17, 2020 meeting regarding his duties.

<sup>5</sup> LEEBA submitted an affidavit from its tech and web support consultant regarding the number of DEP members he admitted into the Zoom meetings. LEEBA's bylaws specify quorum requirements for meetings of its board of directors or executive board but do not address a quorum requirement for membership meetings.

that, under his leadership, LEEBA will send the Union's annual financial statements to its members and will file its Directive 12 forms on time.

On October 21, 2020, the SBA filed its representation petition with a sufficient showing of interest. Kruger asserts, and Rivers denies, that more than 100 EPOs have withdrawn dues deduction authorization and membership from LEEBA. According to Rivers, "[o]nly a handful of employees have opted out of LEEBA." (Rivers Aff. ¶ 15)

On November 1, 2020, LEEBA published its first issue of a newsletter.<sup>6</sup> A subsequent newsletter was published on January 28, 2021.

The City sent LEEBA a counterproposal regarding welfare fund and annuity fund contributions on December 3, 2020. On January 27, 2021, LEEBA and the City met to discuss using a third-party administrator to restore LEEBA's control over the welfare and annuity funds and to restore benefits to LEEBA's members. Another meeting with the City on this topic was scheduled for February 8, 2021.

### **POSITIONS OF THE PARTIES**<sup>7</sup>

#### **SBA's Position**

The SBA argues that unusual and extraordinary circumstances warrant an exception to the contract bar rule and the processing of its petition. It asserts that LEEBA's President and Treasurer have been indicted for the misuse of union funds, that LEEBA has ceased servicing unit members, and that the overwhelming majority of bargaining unit members wish to be represented by the SBA.

---

<sup>6</sup> In response to Kruger's assertion that the newsletter was created in response to this petition, Rivers asserted that a draft of the newsletter was circulated internally on October 15, prior to the filing of the SBA's petition.

<sup>7</sup> The City takes no position on SBA's petition.

The SBA contends that LEEBA's failure to meet the minimum requirement of executing a full collective bargaining agreement that contains economic and non-economic terms unique to EPOs demonstrates its inability to provide representation. It asserts that LEEBA is incapable of safeguarding the contributions needed to provide health and welfare benefits for EPOs. According to the SBA, LEEBA's failure to provide information on how to access benefits from the Management Benefits Fund, comply with Directive 12 reporting requirements, and provide accurate deferred compensation statements further demonstrates that it is not functioning on behalf of unit members.

The SBA claims that the timing of the November 2020 newsletter, issued shortly after the filing of the SBA's petition, demonstrates that it was created solely to give the impression that LEEBA is functioning. According to the SBA, the newsletter indicates that nothing of substance has been done for EPOs and that there is no progress in restoring access to the welfare fund and annuity fund contributions. The SBA doubts that LEEBA's membership meetings satisfied its own quorum requirements and notes that there is no evidence that any business was conducted at those meetings.

### **LEEBA's Position**

LEEBA argues that the petition should be dismissed as untimely because it was not filed during the applicable window period. It asserts that the exception to the contract bar rule is not applicable because its status as the exclusive bargaining representative is clear and there has not been a loss or abandonment of representation. LEEBA denies that it has ceased representing the bargaining unit. It asserts that members of the executive board are capably handling day-to-day operations and that the Union has continued to hold meetings, pursue litigation, meet with the City, and provide legal representation for EPOs facing disciplinary charges at no cost. Notably, it also avers that the Board has held that criminal indictments and even convictions of union officials do

not constitute unusual and extraordinary circumstances warranting an exception to the contract bar rule when the union is still functioning.

While the President of the Environmental Police Benevolent Association and other EPOs have offered “constructive criticism,” LEEBA argues that it is not unusual for union support to “wax and wane” over time and that its ability to have “full discussion” at union meetings demonstrates that it is functioning and responsive to its membership. (Rivers Aff. ¶ 14) LEEBA asserts that the purpose of the contract bar rule is to avoid the chaos that would ensue if employees could change representatives outside of the window period. Accordingly, LEEBA maintains that no exception to the contract bar rule should be found.

### **DISCUSSION**

The contract bar doctrine “has been long and firmly established in the field of labor relations.” *City Employees Union Local 237, IBT*, 8 OCB 11, at 3-4 (BOC 1971). 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, Intl. Bhd. of Teamsters*, 10 OCB 27, at 5 (BOC 1972) (dismissing a petition filed after the expiration of a contract), *reconsideration denied*, 10 OCB 73 (BOC 1972); *see also 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).

Our contract bar rule is set forth in § 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”). It 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 [30-day] window periods” in which a representation

petition can be filed.<sup>8</sup> OCB Rule § 1-02(g). 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*; see e.g. *HHC PBA, Inc.*, 5 OCB2d 30, at 6 (BOC 2012) (affirming the dismissal of a petition filed after the expiration of a contract); *Patrolmen and Security Officers Section, Allied Services Div., BRAC*, 18 OCB 50, at 2 (BOC 1976) (dismissing a petition filed after the expiration of a contract). There is an exception to the contract bar rule that permits the processing of a petition that would otherwise be barred “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.” OCB Rule § 1-02(g).

---

<sup>8</sup> The applicable 30-day period in which to file a representation petition is determined by the duration of the contract, its expiration date, and on occasion the date the successor contract is signed:

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 is: 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 not 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, if a window period would be eliminated or shortened, such as when a public employer and a public employee organization sign a successor contract after that contract has expired or less than 180 days before it expires, 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.



The New York State Public Employment Relations Board has held that an employee organization is considered defunct under the Taylor Law when it “makes a clear and conscious decision to entirely stop representing employees with respect to their employment.” *Eastchester Union Free School Dist.*, 28 PERB ¶ 3064, at 3147 (1995) (finding a union defunct when it ceased all organizational activity and held “[n]o meetings of any kind for any purpose” for over two years); *see also Union-Endicott Central School District*, 28 PERB ¶ 3029 (1995) (finding that a union abandoned representation during negotiations for a successor agreement when its president sent a letter notifying the employer that it no longer represented the titles at issue after all its members resigned from the union and revoked their dues deduction authorizations).<sup>9</sup>

This Board has found that “allegations of fraud and corruption among various officers,” officer criminal indictments and convictions, and dissatisfaction with the current bargaining representative are insufficient to establish unusual and extraordinary circumstances warranting an exception to the contract bar rule. *Ind. Laborers Union of NYC*, 68 OCB 6, at 13-14. In *Ind. Laborers*, the Board reasoned that even in the presence of those factors, “the stability of the existing bargaining relationship was not undermined.” *Id.* at 13. It reached this conclusion based upon a finding that the national union had appointed an administrator to oversee the local’s operations and responsibilities, and the current union “continued to act as the bargaining representative of thousands of New York City employees -- it filed and arbitrated grievances and continued to negotiate collective bargaining agreements with the City.” *Id.*

It is undisputed that the SBA’s petition was filed after the expiration of the 2010-2017 MEA covering EPOs. Thus, the SBA’s petition is untimely under the contract bar rule unless there are

---

<sup>9</sup> In the private sector, “[a] union, even one which has lost all its members in the bargaining unit, is not defunct unless it is unable or unwilling to represent the employees.” *Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 184 (2d Cir. 1989) (citing *Kent Corp.*, 272 NLRB 115 (1984) (quoting *Hershey Chocolate Corp.*, 121 NLRB 901 (1958))).

“unusual or extraordinary circumstances” that would justify processing the petition. OCB Rule § 1-02(g). As LEEBA has continued to hold membership meetings, meet with the City on bargaining unit issues, and take other steps to represent EPOs, including providing counsel to members in disciplinary matters, we do not find that it is defunct. Similarly, we do not find that it has abandoned representation of the bargaining unit. It has and continues to demonstrate a willingness to represent EPOs.

In reaching this conclusion, we note that the adequacy of LEEBA’s representation is not properly before this Board. *See* NYCCBL § 12-309(b) (setting forth the Board of Certification’s powers and duties). It is well established that employee dissatisfaction with a union’s representation is not enough to warrant an exception to the contract bar rule. *See Ind. Laborers Union of NYC*, 68 OCB 6, at 13-14. Indeed, the contract bar rule is applicable even when the employer has “good faith doubt concerning the continued majority status” of the current bargaining representative. OCB Rule § 1-02(d)(4); *see* OCB Rule § 1-02(g). Thus, while we acknowledge the employees’ concerns with the quality of LEEBA’s representation, we find that an exception to the contract bar rule is not warranted on this ground.

Accordingly, the SBA’s petition is untimely. It is dismissed without prejudice to refile during an applicable window period under OCB Rule § 1-02(g).

**ORDER**

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

ORDERED that the petition, docketed as RU-1675-20, is hereby dismissed as untimely.

Dated: March 17, 2021  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER