

LEEBA, 11 OCB2d 7 (BOC 2018)

(Rep) (Docket No. RU-1649-17).

Summary of Decision: LEEBA appealed the dismissal of its petition for lacking a sufficient showing of interest. The Board upheld the dismissal. (*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,

Respondent,

-and-

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

Intervenor.

DECISION AND ORDER

On October 25, 2017, the Law Enforcement Employees Benevolent Association (“LEEBA”) filed a petition pursuant to § 1-02(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”) to represent employees in the title of School Safety Agent (Title Code No. 60817), currently represented by the City Employees Union, Local 237, International Brotherhood of Teamsters (“Local 237”) in

Certification No. 1-14A. On December 26, 2017, the Director of Representation dismissed the petition because it lacked a sufficient showing of interest. On January 10, 2018, LEEBA appealed the dismissal on the ground that there were errors on the list of employees provided by the City of New York (“City”). The City asserts that the list included all employees on active pay status immediately preceding the filing of the petition. We uphold the dismissal.

BACKGROUND

With its petition, LEEBA submitted cards from individuals authorizing LEEBA to represent them for purposes of collective bargaining. Some of the authorization cards were handwritten, and others were submitted electronically. Pursuant to OCB Rule § 1-02(i), the City included “an alphabetized list of all the employees in the unit(s) sought” in its response. By comparing the authorization cards to the list of employees, the Director of Representation determined that LEEBA had not submitted evidence that at least 30% of the employees wished to be represented by LEEBA, as required by OCB Rule § 1-02(c)(2)(i).¹ Accordingly, the Director of Representation dismissed the petition pursuant to OCB Rule § 1-02(j)(2).²

¹ OCB Rule § 1-02(c)(2) provides, in relevant part:

Simultaneously with the filing of the petition petitioner shall:

(i) In the case of a petition for certification, submit to the Board evidence that at least 30 percent of the employees in the appropriate bargaining unit, or in each appropriate bargaining unit, desire petitioner to represent them for the purposes of collective bargaining[.]

² OCB Rule § 1-02(j)(2) provides:

If, after a petition or motion has been filed pursuant to § 1-02 of these rules and at any time prior to the close of the record, it appears to the Director of Representation that no further proceedings are

In its appeal, LEEBA identified 36 individuals who it asserts should have been on the list of employees. In response to LEEBA's appeal, the City asserts that the list included all employees on active payroll status as of October 20, 2017, the last day of the payroll period immediately preceding the date the petition was filed. Regarding the 36 individuals LEEBA identified, the City asserts that 16 were on the list and that eight had resigned, retired, or been appointed to another title as of October 20, 2017. Another eight were not on the active payroll at that time because of worker's compensation leave, suspension without pay, or unpaid family leave.³

POSITIONS OF THE PARTIES

LEEBA's Position

Pursuant to OCB Rule § 1-02(j)(2), LEEBA appeals the Director of Representation's finding that there was an insufficient showing of interest. LEEBA alleges that there is a serious error on the list of employees provided by the City, which resulted in a miscalculation of the sufficiency of the showing of interest. LEEBA identifies 36 individuals who it asserts were "members of the bargaining unit" when they signed authorization cards within seven months of the filing of the petition. According to LEEBA, it would have a 30% showing of interest if these 36 individuals were added to the list of employees in the bargaining unit. It requests that the Office

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...

³ The City was unable to find four of the individuals in its payroll system.

of Collective Bargaining investigate why the 36 individuals were left off the list provided by the City and recalculate the sufficiency of its showing of interest.

In addition, LEEBA argues that the certification process is fatally flawed because a union seeking to represent employees does not receive the list of employees in the bargaining unit until after the showing of interest is submitted. According to LEEBA, requiring a rival union to guess how many employees are in a bargaining unit is unfair to employees who want to exercise their statutory right to switch bargaining representatives and prohibitive to the unions they wish to have represent them. Further, LEEBA alleges that the City denied their request for a list of employees in advance of filing their petition. Consequently, LEEBA contends that the City colluded with the incumbent bargaining representative to help that union remain certified in perpetuity.

City's Position

The City contends that the list it provided included all employees on active pay status on the last day of the pay period immediately preceding the filing of the petition. It noted that 16 individuals, whose name LEEBA misspelled or overlooked, were already on the list; eight had resigned, retired, or changed titles; another eight were on inactive pay status; and four could not be found in the payroll system. Attaching LEEBA's request for an employee roster in a different case, the City asserts that it never received a request for a list of employees at issue here. Further, noting that the City and Local 237 opposed the petition on different grounds, the City argues that LEEBA's allegations of collusion are unfounded.

Local 237's Position

Local 237 did not address the 36 individuals or their pay status. Instead, it requests that the Board review LEEBA's showing of interest for indicia of fraud when assessing the validity of LEEBA's appeal. As it did in response to the petition, Local 237 alleges that LEEBA made false

and misleading representations to employees regarding the purpose of the authorization cards and that LEEBA's on-line authorization card form is susceptible to fraud.

DISCUSSION

The purpose of the showing of interest is to enable the Board to avoid the needless expenditure of public funds in the investigation and processing of cases in which the petitioner does not have substantial support of the employees. *See Council 82, 2 OCB2d 22*, at 10-11 (BOC 2009); *see also Matter of Suffolk Ch., Civil Serv. Empls. Assn., Inc. v. Helsby*, 63 Misc2d 403, 404 (Sup. Ct. Suffolk County 1970), *affd* 35 AD2d 655 (2d Dept 1970). Accordingly, the Director of Representation is empowered to administratively dismiss a petition that lacks a sufficient showing of interest. *See* OCB Rule § 1-02(j)(2).

It is well established that “[s]ufficiency of interest shall not be litigated.” OCB Rule § 1-02(c)(3). In the field of labor law, the showing of interest in support of representation petitions is “universally held to be a non-litigable matter the determination of which is left to the sound discretion of the administrative agency and thus is not subject to review.” *DC 37, 16 OCB 23*, at 16 (BOC 1975) (citing federal court cases); *see Suffolk Ch., Civ. Serv. Empls. Assn.*, 63 Misc2d at 403-4 (upholding Rule 201.4 of the Public Employment Relations Board, which similarly precludes litigation of the sufficiency of the showing of interest). For this reason, we do not address the Director of Representation's conclusion that an insufficient number of valid authorization cards was submitted. *See* OCB Rule § 1-02(f).⁴

⁴ OCB Rule § 1-02(f), entitled “Proof of interest – current,” provides:

Designation and authorization cards and petitions, submitted as proof of interest under §§ 1-02(c), 1-02(e)(2) or 1-02(l) of these rules, must be signed and dated by employees not more than seven

OCB Rule § 1-02(f) provides that “[p]roof of interest shall be based *on the payroll* immediately preceding the date of filing of the petition, unless the Board deems such period to be unrepresentative.” (emphasis added) We find that utilizing a list of employees on active pay status on the last day of the pay period prior to the filing of the petition is a reasonable interpretation of this rule. The Board has noted that cards signed by individuals who were not employed “during the relevant payroll period” are invalid.⁵ See DC 37, 16 OCB 23, at 17-18. Moreover, requiring a petitioner to obtain proof of interest from individuals who are not on active pay status would be unduly burdensome and is not necessary to effectuate the purpose of the showing of interest.⁶

Further, we do not agree with LEEBA’s claim that production of a list of employees with the employer’s response is unfair to a rival union and employees. The purpose of this provision in OCB Rule § 1-02(i), which has been part of the OCB Rules for decades, is to assist the agency in determining the sufficiency of the showing of interest, not to put a rival union or employees on notice of the size of the bargaining unit.⁷

months prior to the commencement of the proceeding before the Board. Proof of interest shall be based on the payroll period immediately preceding the date of filing of the petition, unless the Board deems such period to be unrepresentative.”

⁵ In essence, LEEBA is seeking the inclusion of individuals not based on their status on or off the payroll but because they signed authorization cards within seven months of the filing of the petition. Such an interpretation would nullify the express language of the rule and be contrary to its purpose. See OCB Rule § 1-02(f) (requiring proof of interest to be “current”).

⁶ The individuals LEEBA seeks to add to the list of employees are not the only bargaining unit members on inactive status. If all bargaining unit members on inactive status were included for purposes of checking the showing of interest, LEEBA would still not have a 30% showing of interest.

⁷ Since individuals may be hired or leave employment throughout an organizing campaign, any list of employees generated prior to the filing of the petition would vary to some degree from the list generated to check the showing of interest. As a result, petitioners frequently submit far more authorization cards than the 30% required.

Lastly, we do not find that further investigation of Local 237's allegation of fraud is warranted. We note that the authorization cards submitted clearly state that signing indicates the desire to be represented by LEEBA for purposes of collective bargaining. *See State of New York*, 31 PERB ¶ 3058 (1998). In addition, while Local 237 asserts that electronic gathering of cards creates the *possibility* of fraud, mere speculation is an insufficient basis to cast doubt on the authenticity of the submission. *See State of New York*, 10 PERB ¶ 3108 (1977).

Accordingly, we reject Petitioner's claims on appeal and uphold the dismissal of the petition.

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-1649-17, is hereby dismissed.

Dated: March 7, 2018
New York, New York

SUSAN J. PANEPENTO

CHAIR

ALAN R. VIANI

MEMBER