

LEEBA, 11 OCB2d 13 (BOC 2018)
(Rep) (Docket No. RU-1650-17)

Summary of Decision: LEEBA filed a petition to represent Special Officer titles in a new bargaining unit. LEEBA argued that Special Officers should be fragmented from their current bargaining unit because changes to the organization of the Special Officers' command structure, training, job responsibilities, and duties make their current placement no longer appropriate. Respondents argued that the petition should be dismissed because LEEBA has not presented sufficient evidence of changed circumstances to demonstrate that the Special Officers' bargaining unit is no longer appropriate. The Board found that LEEBA did not proffer sufficient evidence of changed circumstances that would warrant reconsideration of the Board's previous holdings that placement of the Special Officers in their existing bargaining unit is appropriate. Accordingly, the petition was dismissed. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

**THE LAW ENFORCEMENT EMPLOYEES BENEVOLENT
ASSOCIATION,**

Petitioner,

-and-

**THE CITY OF NEW YORK; THE DISTRICT ATTORNEYS' OFFICES OF BRONX,
KINGS, AND NEW YORK COUNTIES; THE NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION; THE NEW YORK CITY HOUSING AUTHORITY; and
CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Respondents.

DECISION AND ORDER

On October 25, 2017, the Law Enforcement Employees Benevolent Association ("LEEBA") filed a petition to represent employees in the titles Special Officer (Title Code No.

70810) and Supervising Special Officer (Title Code No. 70817) (“Special Officers”) in a new bargaining unit. These Special Officers are employed in various agencies throughout the City of New York (“City”), as well as in the District Attorneys’ Offices of Bronx, Kings, and New York Counties (collectively, “DAs’ Offices”); New York City Health + Hospitals (“HHC”); and the New York City Housing Authority (“NYCHA”).¹ They are currently included in Certification No. 67-78, a bargaining unit represented by City Employees Union, Local 237, International Brotherhood of Teamsters (“Local 237”). LEEBA argues that the Special Officers should be fragmented from their current bargaining unit because changes to the organization of the Special Officers’ command structure, training, job responsibilities, and duties make their current placement no longer appropriate. Respondents argue that the petition should be dismissed because LEEBA has not presented evidence of changed circumstances demonstrating that the Special Officers’ bargaining unit is no longer appropriate. The Board finds that LEEBA did not proffer sufficient evidence of changed circumstances that would require the Board to reconsider its previous holdings that placement of the Special Officers in their existing bargaining unit remains appropriate. Accordingly, the petition is dismissed.

BACKGROUND

Special Officer and Supervising Special Officer are Citywide titles used by the DAs’ Offices, HHC, NYCHA, and various City agencies.² Since 1980, Special Officers have been

¹ We refer to the New York City Health and Hospitals Corporation as “New York City Health + Hospitals” or “HHC” throughout this Decision and Order.

² These agencies include the New York City Police Department (“NYPD”), the Department of Citywide Administrative Services (“DCAS”), the Department of Finance (“DOF”), and the Department of Environmental Protection (“DEP”).

defined as “peace officers” under the Criminal Procedure Law (“CPL”).³ As peace officers, Special Officers have the power to conduct searches and make arrests; to issue appearance tickets, summonses, and complaints; to take custody of firearms for disposing, guarding, or any other lawful purpose consistent with his or her duties; and any other power the Special Officer is otherwise authorized to exercise when acting pursuant to his or her duties. *See* CPL § 2.20. In accordance with CPL § 2.30, Special Officers receive peace officer training, with one portion that is prescribed by a municipal police training council and another portion that is prescribed by the employer. Additionally, HHC requires its Special Officers to complete an annual recertification training program that is referred to as “in-service” training.⁴

The Board held hearings regarding the unit placement of Special Officers, among others, from 2009 to 2011. *See DC 37, 7 OCB2d 1* (BOC 2014). In analyzing their duties, the Board found that, generally, Special Officers are responsible to maintain the safety and security of City

³ Specifically, CPL § 2.10(40) defines as a peace officer:

Special officers employed by the city of New York or by [HHC]; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law. [HHC] shall employ peace officers appointed pursuant to this subdivision to perform the patrol, investigation, and maintenance of the peace duties of special officer, senior special officer and hospital security officer, provided however that nothing in this subdivision shall prohibit managerial, supervisory, or state licensed or certified professional employees of the corporation from performing such duties where they are incidental to their usual duties, or shall prohibit police officers employed by the city of New York from performing these duties.

⁴ The job specification for Special Officers employed at HHC, which has been in effect since 2010, states that “[c]ontinuous employment with HHC is contingent upon satisfactory completion of both entry level and annual recertification training programs.” (City Response, Ex. C)

facilities and property, and the public, clients, or occupants thereof. They patrol designated areas and report observed security and safety hazards and conditions. They also screen employees and visitors entering facilities. If necessary, Special Officers may arrest or issue summonses to law violators and transport them to a police precinct for further action. They prepare necessary documents relating to the arrest and may testify in court or other tribunals in relation to the arrest. Special Officers carry batons, handcuffs, gloves, and flashlights. *Id.* at 31. Regarding Special Officers employed by HHC, the Board in *DC 37, 7 OCB2d 1*, summarized their duties as follows:

[HHC] employs Special Officers who function as hospital police to ensure the safety of patients, staff, visitors, and property within HHC's facilities. Similar to other Special Officers, HHC Special Officers are assigned either a fixed or patrol post, monitor ingress and egress, conduct searches, and respond to and investigate incidents. They wear uniforms like the other non-HHC Special Officers, carry batons, are certified as special patrolmen, issue summonses, and make arrests.

Id. at 36. There are three levels of Supervising Special Officers that direct the work of Special Officers. *Id.* at 32.

Special Officers have been represented by Local 237 in a bargaining unit that also includes supervisory and non-supervisory employees in various stock, custodial, inspectional, maintenance, skilled craft, and related titles since 1976, when the Board granted the City's petition to consolidate Special Officer titles with another existing bargaining unit also represented by Local 237.⁵ *See CEU, L. 237, IBT, 18 OCB 55 (BOC 1976)*. Since then, multiple unions have tried to fragment the Special Officer titles from their unit. In the first two attempts, the Board held a hearing to

⁵ In 1977 and 1978, the Board further consolidated the unit with other units represented by Local 237. *See CEU, L. 237, IBT, 20 OCB 9 (BOC 1977); CEU, L. 237, IBT, 22 OCB 67 (BOC 1978)*. The Unit Agreement between Local 237 and the City is titled the "Special Officers, et. al Agreement."

determine the appropriateness of the unit. *See PBA-LIRR*, 24 OCB 24, at 6 (BOC 1979), *affd.*, *Matter of Patrolmen's Benevolent Assn. v. Anderson*, 78 A.D.2d 777 (1st Dept. 1980), *lv. denied*, 53 N.Y.2d 602 (1981). The Board determined that, although the evidence established a community of interest among Special Officers, it did not demonstrate that this community of interest conflicted or was inconsistent with the interests of other titles in the bargaining unit. *See PBA-LIRR*, 30 OCB 29 (BOC 1982). The Board further emphasized that the issue presented was not one of an initial unit placement and, therefore, in the absence of any convincing proof that inclusion in the current unit prejudiced the collective bargaining status of Special Officers, it would not disrupt a structure that had functioned effectively for many years. *Id.* at 25. Thereafter, the Board determined that before it would consider fragmenting the bargaining unit again, “a petitioner would have to produce convincing proof that due to changed circumstances, the inclusion of Special Officers in the unit inherently prejudices their rights under the [New York City Collective Bargaining Law (‘NYCCBL’)].” *Municipal Police Benevolent Assn*, 56 OCB 4, at 11 (BOC 1995) (dismissing a petition to fragment Special Officers without a hearing where there was insufficient evidence of conflicting interests caused by placement of Special Officers with other titles in the unit).

In 2005, Local Law 56 amended the NYCCBL to move some titles from the Citywide level of bargaining to the uniformed level of bargaining and grant other titles at specific agencies the right to bargain in a new “similar-to-uniformed” level of bargaining. As a result, certain Special Officers, who were expressly placed in this new level of bargaining, were removed from the existing bargaining unit in 2014.⁶ *See DC 37*, 7 OCB2d 1. The current petition concerns all the

⁶ Local Law 56 amended the NYCCBL to add only those Special Officers employed at the Department of Homeless Services, the Department of Health and Mental Hygiene, the Department of Juvenile Justice, the Human Resources Administration, and the Administration for Children Services to the “similar-to-uniformed” level of bargaining. *See NYCCBL* § 12-307 (a)(5)(i)-(v). The Board placed those Special Officers in the “similar-to-uniformed” level of bargaining in a

Special Officers in the Citywide level of bargaining who remained in the original bargaining unit after the 2014 Board decision.

The Board last examined the unit placement of some Special Officers in 2015. *See HHC PBA, Inc.*, 8 OCB2d 20 (BOC 2015) (“*HHC PBA*”), *affd.*, *Matter of HHC PBA, Inc. v. Office of Collective Bargaining*, Index No. 101484/15 (Sup. Ct. N.Y. Co. Jan. 18, 2017) (Hagler, J.), *and reh’g denied*, Index No. 101484/15 (Sup. Ct. N.Y. Co. June 5, 2017). In that case, HHC PBA filed a petition seeking to represent only the Special Officers employed by HHC (“HHC Special Officers”) in a separate bargaining unit. In the petition, HHC PBA contended that HHC Special Officers perform “police-like functions” and thus fit into an exception to the Board’s general policy against fragmentation that it adopted in *LEEBA*, 76 OCB 3, at 15 (BOC 2005). The Board solicited, and HHC PBA submitted, an offer of proof in support of changed circumstances that would demonstrate that the HHC Special Officers’ existing unit placement was no longer appropriate. HHC PBA also presented evidence purporting to support its assertion that HHC Special Officers had many similarities with NYPD police officers.

The Board considered the entirety of HHC PBA’s factual assertions as true and determined that there were no material issues of disputed fact that required the Board to hold a hearing. *See HHC PBA, Inc.*, 8 OCB2d 20, at 17, n. 13. The Board found that the proffered facts did not establish that HHC Special Officers’ duties warranted fragmentation either under traditional fragmentation standards or under the exception for employees who are defined as police officers in the New York Criminal Procedure Law and whose “exclusive or primary duties are the prevention and detection of crime and the enforcement of the general laws of the state.” *Id.* at 23.

separate bargaining unit, which is also represented by Local 237, with other titles in the “similar-to-uniformed” level of bargaining. *See DC 37*, 8 OCB2d 27 (BOC 2015).

The Instant Petition

After filing the instant petition, LEEBA was directed to submit an offer of proof of changed circumstances to demonstrate that the Special Officers' existing unit placement is no longer appropriate. The Respondents were given the opportunity to respond to LEEBA's arguments. In support of its petition, LEEBA presented the following as evidence of changed circumstances for HHC Special Officers:

LEEBA asserts that since the Board's 2015 decision in *HHC PBA*, "there have been many changes in the organization of the HHC Special Officer titles['] command structure, training, job responsibilities[,] and duties" that warrant fragmentation. (LEEBA Offer at 6) In particular, since November 2016, Special Officers who work for HHC attend the NYC Health and Hospitals Police Academy ("Academy"). This training was previously conducted by the City University of New York ("CUNY"). LEEBA relies upon an HHC newsletter discussing the launch of the Academy to show the differences in this new training. The newsletter states that the Academy is "the first of its kind, devoted exclusively to developing the unique skill set needed to keep order in a public hospital system." (LEEBA Offer, Ex. 1) The newsletter also notes that "in-house training offers improved specialization and greatly speeds time-to-hire." (*Id.*) Furthermore, the new Academy no longer has to adhere to CUNY's pre-determined schedule or minimum class size requirements, offering HHC greater flexibility. The Academy's curriculum is comprised of "New York State-certified coursework in such areas as criminal justice, penal codes, and other law-enforcement disciplines, augmented with hospital-centric courses" (*Id.*) In particular, the training includes courses in the following categories: "Introduction to Law Enforcement," "Introduction to Law," "New York State Penal Law Offenses," "Justification," "New York State Criminal Procedure Law," "Law Enforcement Skills," "Penal Law Section 265.20," "Off Duty and Plain Clothes

Police Encounters,” “Investigations,” and “Local (Hospital) Training.” (LEEBA Offer, Ex. 2) The curriculum for Supervising Special Officers includes topics such as “Leadership in a Just Culture,” “Corrective Action & Progressive Discipline,” and “Time & Leave Violations.”⁷ (*Id.*)

HHC Special Officers do not carry firearms. Nevertheless, LEEBA asserts that “[a]dditional firearm training has been at the forefront of HHC Special Officer training” since the Academy was established.⁸ (LEEBA Offer at 7) The City, HHC, and Local 237 contend, however, that firearm training at the Academy consists of instruction on safe handling of a firearm in the event that Special Officers interact with one during the course of their duties. LEEBA also claims that training on surveillance, undercover work, and traffic stops “is now being provided for responsibilities that have existed for Special Officers in this title but ha[ve] not become integral to the duties of these titles.” (*Id.* at 7) The City and HHC deny that such training occurs. LEEBA additionally points out that peace officer certification and re-certification training is “mandatory and a continuing condition of employment” for Special Officers. (*Id.* at 9)

LEEBA also proffered evidence that it asserts demonstrates that HHC Special Officers have similarities with NYPD police officers. For example, it claims that in 2017, HHC created a title of Police Commissioner to oversee the Special Officer titles with the aid of a Deputy Commissioner of Training and another Deputy Commissioner. LEEBA also asserts that HHC created Inspector and Deputy Inspector ranks, which LEEBA claims are identical to the ranks of

⁷ LEEBA submitted as evidence HHC’s Police Academy Course Curriculum index and excerpts from the training materials. LEEBA did not submit any curriculum from HHC’s previous training program.

⁸ LEEBA submitted an affidavit from Victor Ashe, a Supervising Special Officer employed at HHC, who stated that Active Shooter training has been newly provided at the Academy. (*See* LEEBA Offer, Ex. 3) LEEBA also submitted a page from the Active Shooter training course curriculum, which states that “[w]hile no two [active shooter] incidents are identical, our plan must be based on specific principles that can be learned and practice[d] so we have an automatic response to extreme danger of this kind.” (LEEBA Offer, Ex. 2)

the NYPD. The City, however, denies that HHC Special Officers are given the in-house designations of Inspector or Deputy Inspector. Additionally, LEEBA alleges that the computerized reporting system used by Special Officers, as well as service ribbons and awards they receive, are the same as those utilized by the NYPD. The City and HHC deny this assertion, stating that there have not been any changes made to the service and award ribbons or the computerized reporting system utilized at HHC since 2015. Furthermore, the City and HHC contend that the reporting system is “significantly less sophisticated than the system operated by the NYPD.” (City Response at 9, n. 3)

LEEBA further contends that, similar to HHC Special Officers, NYCHA Special Officers’ duties have changed as a result of an increase in crime at NYCHA developments. As evidence of this claim, LEEBA submitted an August 8, 2015 report from NY1 discussing NYCHA’s creation of a new position of Vice President of Public Safety, which was filled by retired NYPD Commander Gerald Nelson. NY1 reported that the position was created as a result of continuing concerns about crime in NYCHA developments and the Mayor’s promise to improve conditions. The Vice President of Public Safety was reported to also be responsible for overseeing disaster response, code enforcement, and emergencies such as power blackouts and storms.

LEEBA does not make any factual claims regarding changes in command structure, training, or job responsibilities and duties for Special Officers employed at the DA’s offices, NYPD, DCAS, DOF, or DEP.⁹

⁹ LEEBA’s legal arguments with respect to these Special Officers are noted below in their position and addressed in the discussion.

POSITIONS OF THE PARTIES

LEEBA's Position

LEEBA contends that it has demonstrated changed circumstances that warrant the fragmentation of Special Officers. In particular, it claims that changes in HHC Special Officers' training, command structure, service awards, and peace officer training "clearly establish that the main responsibilities of these titles are law enforcement." (LEEBA Offer at 7) It asserts that "[t]here simply cannot be one vast bargaining unit that represents law enforcement officers and non-peace officer titles, [because] there is no community of interest and there is clear inherent prejudice in collective bargaining as a result of forcing these titles to remain in a single unit." (*Id.*) LEEBA also argues that the enactment of Local Law 56 resulted in a change of circumstances for Special Officers.

LEEBA points out that the Board in *LEEBA*, 76 OCB 3 (BOC 2005), stated that a likelihood or possibility that fragmentation would create some labor relations or personnel issues was not reason enough to deny Environment Police Officers ("EPOs") placement in what is otherwise the most appropriate unit "in view of the strong prevailing practice of having separate bargaining units for policemen."¹⁰ (LEEBA Offer at 8) (quoting *LEEBA*, 76 OCB 3, quoting *County of Erie*, 29 PERB ¶ 3031, 3070 (1996), *confirmed*, 247 A.D.2d 671 (3d Dept. 1998)). LEEBA contends that this same consideration coupled with the similarities of job duties between EPOs and Special Officers warrants fragmentation. LEEBA asserts that "there is a direct correlation between EPOs' duties, responsibilities and training and those [of] peace officers in the title of Special Officer."

¹⁰ LEEBA mistakenly asserts that Local Law 56 was the Board's basis for fragmenting the EPOs and ordering an election in the 2005 *LEEBA* case when it found that the placement of EPOs in their unit was no longer appropriate. However, Local Law 56 does not apply to EPOs and was never mentioned or discussed in that case. See *LEEBA*, 76 OCB 3.

(*Id.* at 8) Specifically, it claims that the similarities between EPOs and Special Officers “includes the creation of specialized units, firearm training and certification, [and] establishment of police academies.” (*Id.* at 9) Furthermore, LEEBA contends that New York City Employees Retirement System (“NYCERS”) Special Officer 25-year retirement plan for Tier 2 members “recognize[s] the law enforcement element” of Special Officers.¹¹ (*Id.*)

LEEBA also contends that an increase in crime in NYCHA developments has led to changes in Special Officers’ duties and responsibilities. It argues that “[f]ragmentation must be granted for all the petitioned for Special Officers and Supervising Special Officers and the matter [scheduled] for a representation election based upon the showing of interest filed by LEEBA.” (LEEBA Offer at 9)

City’s Position¹²

The City contends that the petition should be dismissed as a matter of law because LEEBA has failed to allege a change in circumstances that would warrant disturbing the Board’s 2015 determination in *HHC PBA* that Special Officers at HHC should not be fragmented from their bargaining unit. The City also alleges that LEEBA failed to submit any proof of changes to the job duties of Special Officers and Supervising Special Officers assigned to NYCHA, the District Attorney’s Offices, NYPD, DEP, DOF, or DCAS. Furthermore, Local Law 56 did not constitute a change in circumstances because none of the Special Officers at issue here are covered by Local Law 56. The City also argues that the availability of a separate retirement plan for Special Officers

¹¹ Since 2001, NYCERS has offered an optional 25-year retirement plan for Special Officers who were already Tier 2 Members in 2001 or 2002, depending on their agency.

¹² HHC and the District Attorneys’ Offices joined the City’s submission in this matter.

does not represent a change of circumstances since the plan has been in effect since 2001. Moreover, the retirement plan does not have any bearing on an employee's job duties.

Regarding HHC Special Officers, the City argues that there has been no change in any of the job duties or responsibilities to warrant fragmentation. In particular, there has been no change in the certification requirements for these Special Officers, since they are required to annually re-certify as peace officers. Additionally, LEEBA's allegation regarding the newly-created titles of Police Commissioner and Deputy Commissioner of Training, even if true, does not establish a change in circumstances for Special Officers.¹³

The City contends that any changes to the training curriculum for HHC Special Officers is consistent with their long-standing job duties and their job specification. According to the City, any firearm training HHC Special Officers receive concerns only firearm *safety*. These Special Officers are not equipped with firearms, and their responsibilities concerning seizure of firearms remains the same. Furthermore, the City alleges that contrary to LEEBA's assertion, there is no training conducted on surveillance, undercover work, or traffic stops. With respect to LEEBA's allegations regarding the reporting system used by HHC Special Officers and the service and award ribbons, the City contends that even if these allegations were true, neither concerns a change in job duties or responsibilities, and LEEBA has not specified when these alleged changes were made. Since the Board only holds hearings where there are factual allegations that would demonstrate a change in job duties for the titles at issue, the City asserts that no hearing is necessary and asks that LEEBA's petition be dismissed as a matter of law.

¹³ The City also contends that both of the alleged new "titles" are unofficial, "in house" functional designations.

NYCHA's Position

NYCHA contends that the petition should be dismissed because the Board's policy is to avoid fragmenting bargaining units unless there is convincing evidence of changed circumstances demonstrating that the existing unit is no longer appropriate and LEEBA has failed to allege any such changes in the duties and responsibilities of Special Officers employed by NYCHA.

NYCHA argues that the article submitted by LEEBA announcing the hiring of a Vice President of Public Safety does not constitute a change in the duties and responsibilities of Special Officers. Rather, NYCHA contends this article concerns a title that is not at issue in this proceeding and the duties of that position encompass far more than issues relating to security. Additionally, the fact that peace officer certification is mandated by the CPL is not a new requirement. Furthermore, the Board has previously found that the Special Officers' status as peace officers does not warrant a change in their unit placement.

Local 237's Position

Local 237 asserts many of the same arguments as the City and NYCHA. Regarding the new Academy training, Local 237 asserts that, as peace officers certified as Special Patrolmen pursuant to CPL § 2.10, Special Officers have always received training related to law enforcement. Furthermore, Local 237 argues that LEEBA has not explained how HHC's decision to reorganize its training and bring it in-house has affected the substance of Special Officers' training. In fact, the press release LEEBA relies upon states that the goal of the Academy is to "develop[] the unique skill set necessary to keep order in a public hospital system." (Local 237 Response at 3) (quoting LEEBA Offer, Ex. 1) Therefore, Local 237 argues that if anything, the Academy clarifies that the "HHC Special Officers' primary duty is providing hospital security and not the prevention and

detection of crime and the enforcement of the general laws of the state.”¹⁴ (*Id.*) (quoting *HHC PBA, Inc.*, 8 OCB2d 20 at 2) Additionally, Local 237 claims that any training that Special Officers receive related to firearms relates to how to safely handle a gun in the event that they find one during the performance of their duties. The training does not relate to utilizing firearms, since Special Officers are not equipped with them.

Local 237 also asserts that LEEBA has failed to demonstrate that HHC’s decision to assign training oversight responsibilities to new, non-unit titles or NYCHA’s hiring a Vice President of Public Safety to supervise Special Officers has changed Special Officers’ duties. Local 237 additionally argues that HHC’s assigning internal “ranks,” issuing performance ribbons, or utilizing a computer database similar to NYPD has not effected a change in Special Officers’ job duties. Moreover, Local 237 points out that the Board in *HHC PBA* already determined that having a similar ranking structure and utilizing a similar online network as the NYPD did not warrant fragmentation. Regarding Special Officers’ eligibility to participate in NYCERS’ Tier 2 pension plan, Local 237 argues that in order to be eligible for this plan, Special Officers must have been Tier 2 members as of December 19, 2001, or October 2, 2002, depending on the agency. Furthermore, Special Officers’ membership in a pension plan does not affect their job duties. Consequently, Local 237 asserts that these allegations “concern peripheral matters that have not had any substantial impact on the day to day job responsibilities of HHC Special Officers.” (*Id.* at 4)

¹⁴ Local 237 also argues that the pages from the Police Academy manual submitted by LEEBA should not be accepted as evidence since they consist of only the first page of the chapters or portions of the manuals.

DISCUSSION

LEEBA seeks to remove Special Officers from their current bargaining unit, represented by Local 237, and represent them in a new bargaining unit. The issue before the Board of Certification is whether LEEBA has alleged changed circumstances that, if true, would show that the existing bargaining unit in which Special Officers are placed is no longer appropriate.

NYCCBL § 12-309(b)(1) provides that this Board shall have the power and duty:

to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of the public service, and sound labor relations

OCB Rule § 1-02(k) is designed to implement NYCCBL §12-309(b)(1) and sets forth criteria that we apply in making initial determinations of appropriate unit placement of employees.¹⁵ These criteria are substantially equivalent to the provisions of the Taylor Law

¹⁵ OCB Rule § 1-02(k) provides:

In determining appropriate bargaining units, the Board will consider, among other factors:

- (1) Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;
- (2) The community of interest of the employees;
- (3) The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;
- (4) The effect of the unit on the efficient operation of the public service and sound labor relations;
- (5) Whether the officials of government at the level of the unit have the power to agree or make effective recommendations to other

governing unit determinations made by the New York State Public Employment Relations Board (“PERB”). *See* N.Y. Civil Service Law Article 14 § 207(1).

The Board’s long-articulated policy is one that favors consolidation of bargaining units and discourages fragmentation whenever possible. *See HHC PBA, Inc.*, 8 OCB2d 20, at 18; *LEEBA*, 76 OCB 3, at 14 (citing *PBA-LIRR*, 24 OCB 24, at 7 (BOC 1979); *Municipal Elevator Workers Assn*, 50 OCB 1, at 10 (BOC 1992)). As a result, over the years, we have “created larger units based on broad occupational groupings, comprising as many employees and titles as can effectively operate as single entities.” *Municipal Police Benevolent Assn*, 56 OCB 4, at 7-8 (BOC 1995). Under the Board’s traditional non-fragmentation standards, a bargaining unit will not be fragmented unless there is evidence of conflicting or inconsistent interests between the petitioned-for title and other titles in the unit, or evidence that the special interests of the petitioned-for title have been sacrificed or submerged. *See PBA-LIRR*, 30 OCB 29, at 22 (BOC 1982); *Municipal Elevator Workers Assn*, 50 OCB 1, at 10; *Municipal Police Benevolent Assn*, 56 OCB 4, at 11; *Indep. Laborers Union of New York City*, 72 OCB 5, at 10. In 2005, the Board adopted an additional, limited exception to its policy against fragmentation for employees whose exclusive or primary characteristic is “the prevention and detection of crime and the enforcement of the general laws of the state.” *LEEBA*, 76 OCB 3, at 19 (adopting *County of Erie*, 29 PERB ¶ 3031 (1996), *confirmed*, 237 A.D.2d 671 (3d Dept. 1998)). Where, as here, the Board has made a previous determination that a title is appropriately placed in its current bargaining unit, it will not reconsider

administrative authority or the legislative body with respect to the terms and conditions of employment which are the subject of collective bargaining;

(6) Whether the unit is consistent with the decisions and policies of the Board.

its decision “unless convincing proof of changed circumstances demonstrates that the pre-existing unit is no longer appropriate.” *HHC PBA, Inc.*, 8 OCB2d 20, at 18 (quoting *LEEBA*, 76, OCB 3, at 15). In the instant case, LEEBA’s proffered evidence of changed circumstances for the Special Officer titles consists of alleged changes in training, command structure, and job responsibilities and duties.¹⁶

The vast majority of LEEBA’s factual assertions in support of fragmentation concern only HHC Special Officers. The Board recently examined at length the duties of Special Officers employed at HHC and rejected the allegation that they were no longer appropriately placed in the bargaining unit with other titles. *See HHC PBA, Inc.*, 8 OCB2d 20. Thus, as concerns the HHC Special Officers, the relevant inquiry here is whether there have been changed circumstances since the Board’s determination in 2015 that they remained appropriately placed in their unit.

Regarding training, the proffered evidence demonstrates that HHC has indeed restructured its program and now conducts training in-house rather than through CUNY. This evidence shows that HHC’s purpose for establishing the Academy was to improve the specialization of the courses to make them more HHC-oriented and to provide HHC with greater flexibility in conducting the training, thereby allowing it to hire Special Officers in a more efficient manner. The Board has previously found that a change in Special Officers’ training is “not significant in the context of a unit determination” where it did not result in a significant change in their duties and responsibilities. *PBA-LIRR*, 30 OCB 29, at 20.

LEEBA alleges that “Active Shooter” training has been newly implemented since the Academy was established in 2015. Assuming this to be true, LEEBA did not produce any

¹⁶ In deciding the instant matter, where there has been a dispute between LEEBA and Respondents as to material facts, the Board took the factual assertions of LEEBA as true. Accordingly, a hearing was not required in this matter. *See HHC PBA, Inc.*, 8 OCB2d 20, at 17, n. 13.

evidence, nor allege, that Active Shooter training has altered HHC Special Officers' duties or responsibilities.¹⁷ LEEBA also alleges that training has been newly provided on surveillance, undercover work, and traffic stops.¹⁸ Assuming that such training exists and is new, however, LEEBA claims only that these "responsibilities have existed for Special Officers in this title but ha[ve] not become integral to the duties of these titles." (LEEBA Offer at 7) As such, LEEBA concedes that this type of training, even if new, has not resulted in new duties or responsibilities. Similarly, LEEBA's statement that "attendance at annual peace officer recertification training is mandatory and a *continuing* condition of employment" does not represent a change in circumstances since LEEBA does not allege that recertification is a new requirement. (LEEBA Offer at 7) (emphasis added); (*See also* City Response, Ex. C)

LEEBA additionally asserts that HHC Special Officers have similarities with NYPD police officers and EPOs that warrant fragmentation. This same allegation was considered by the Board in *HHC PBA, Inc.*, 8 OCB2d 20, in 2015. The Board determined that HHC Special Officers performed "some general law enforcement functions in their area of employment." *Id.* at 21. The Board also noted that HHC Special Officers wore uniforms and shields that closely resemble those of the NYPD, have a similar ranking structure as the NYPD, and utilize a computer network similar to the NYPD's. Nevertheless, Special Officers are not defined as police officers under the CPL and do not have exclusive or primary duties that include the enforcement of the general laws of the state. Rather, the Board found that HHC Special Officers' primary duty was "limited to

¹⁷ In this regard we note that HHC Special Officers do not carry guns. However, since 1980, Special Officers have the authority under CPL § 2.20 "to possess and take custody of firearms not owned by the peace officer, for the purpose of disposing, guarding, or any other lawful purpose, consistent with his duties as a peace officer."

¹⁸ HHC and the City, on the other hand, deny that training for these courses exists. LEEBA did not submit any evidence to corroborate its assertion.

providing security and enforcing HHC orders and procedures.” *Id.* at 23. Consequently, alleged similarities with the NYPD or EPOs were not sufficient to meet the exception to the Board’s general anti-fragmentation policy.

Here, in support of the HHC Special Officer’s alleged similarities with the NYPD, LEEBA points to the newly-created titles of Police Commissioner, Deputy Commissioner, and Deputy Commissioner of Training to oversee the HHC Special Officers; newly-created ranks of Inspector and Deputy Inspector; service and award ribbons that “have been brought in line with those awarded by the NYPD”; and a retirement plan for Special Officers that LEEBA alleges “is aligned with [the plans of] other law enforcement officers.”¹⁹ (LEEBA Offer at 7, 9) Again, taking these allegations as true, we do not find that these facts establish that HHC Special Officers’ exclusive or primary duty has expanded to encompass enforcement of the general laws of the state. Thus, these allegations do not represent a relevant change in circumstances that warrants further consideration by the Board.

With regard to LEEBA’s allegations that there have been changes in Special Officers’ duties due to an increase in crime at HHC facilities and NYCHA developments, we do not find that the proffered evidence supports fragmentation. According to the NY1 report LEEBA submitted, the position of NYCHA Vice President of Public Safety was created to address general public safety concerns such as building conditions, power blackouts, and storms, in addition to crime at NYCHA developments. Further, even assuming that crime at NYCHA developments has increased, LEEBA has not explained how this has altered the duties of Special Officers. *See HHC*

¹⁹ LEEBA also alleged that the computerized reporting system used by the Special Officers “mirrors” that used by the NYPD, but it did not assert that this was a new or different system from that utilized and considered by the Board in 2015.

PBA, Inc., 8 OCB2d 20, at 25 (finding that allegations of an increased risk of on-the-job violence did not show that such violence had led to a change in HHC Special Officers' duties and therefore did not constitute a change in circumstance that would warrant fragmentation).²⁰

Finally, we do not find that changes in levels of bargaining established in Local Law 56 created a change in circumstances that warrants fragmentation of all the non-Local Law 56 Special Officers. We rejected this same argument in *HHC PBA* since the HHC Special Officers were not subject to Local Law 56 and their bargaining rights did not change as a result of it. *See id.* at 26. Local Law 56 did not affect the actual duties and responsibilities of the Special Officers at issue here. Therefore, we do not find that the statutory amendment affected the placement of these Special Officers in their existing bargaining unit or renders that unit inappropriate. *See id.*

In conclusion, we find that LEEBA did not proffer sufficient evidence of changed circumstances that would warrant reconsideration of the Board's previous holdings that placement of the Special Officers in their existing bargaining unit remains appropriate. Consequently, we dismiss the petition.

²⁰ Moreover, no evidence of an increase in crime at HHC was proffered.

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 petition for representation of Special Officers and Supervising Special Officers employed by The City of New York; the District Attorneys' Offices of Bronx, Kings, and New York Counties; the New York City Health and Hospitals Corporation, and the New York City Housing Authority, filed by the Law Enforcement Employees Benevolent Association, docketed as RU-1650-17, be, and the same hereby is, dismissed.

Dated: May 30, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER