

HHC PBA, Inc., 8 OCB2d 20 (BOC 2015)
(Rep) (Docket No. RU-1587-14)

Summary of Decision: HHC PBA filed a petition to represent the Special Officer titles employed by HHC in a separate bargaining unit. HHC PBA argued that HHC Special Officers should be fragmented from their current bargaining unit, because they perform “police-like functions” and have a conflict of interest with other titles in the bargaining unit. Respondents argued that the exception to the Board’s traditional policy against fragmentation applies only to titles that are defined as “police officers” under the New York Criminal Procedure Law and not “peace officers.” Furthermore, Respondents argued that the HHC Special Officers’ unit placement remains appropriate. The Board found 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. Therefore, the HHC Special Officers’ placement in their current unit remained appropriate. Accordingly, the petition was dismissed. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

HHC PBA, Inc.,

Petitioner,

-and-

**THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and
CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Respondents.

DECISION AND ORDER

On September 4, 2014, HHC PBA, Inc. (“HHC PBA”) filed a petition to represent New York City Health and Hospitals Corporation (“HHC”) employees in the titles Special Officer (Title Code No. 70810) and Supervising Special Officer (Title Code No. 70817) (“HHC Special

Officers”) in a separate bargaining unit.¹ The HHC Special Officers are currently included in Certification No. 67-78, a bargaining unit represented by City Employees Union, Local 237, International Brotherhood of Teamsters (“Local 237”), which also includes employees in the same civil service titles employed in multiple other agencies (“the Special Officer titles”), among others. HHC PBA argues that HHC Special Officers should be fragmented from their current bargaining unit, because they perform “police-like functions” and have a conflict of interest with other titles in the unit. Respondents argue that the exception to the Board’s traditional policy against fragmentation applies only to titles that are defined as “police officers” under New York Criminal Procedures Law (“CPL”) § 1.20(34)(o). Because the Special Officer titles are defined as “peace officers,” Respondents argue that this petition should be dismissed as a matter of law. Furthermore, Respondents argue that the HHC Special Officers’ unit placement remains appropriate. The Board finds that fragmentation is not warranted in this case because 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. Therefore, the HHC Special Officers’ placement in their current unit remains appropriate. Accordingly, the petition is dismissed.

BACKGROUND

Special Officer and Supervising Special Officer are Citywide titles used by HHC and a variety of City agencies. HHC Special Officers are currently represented by Local 237 in a

¹ The petition listed “(HHC) Special Officer” and “(HHC) Senior Officer” as the titles that HHC PBA seeks to fragment. However, the Senior Special Officer title, along with a Hospital Security Officer title, was deleted from the bargaining unit in 2010. *See IBT, L. 237, 3 OCB2d 46 (BOC 2010)*. Thus, we construe the petition to be for the only two remaining Special Officer titles employed by HHC.

bargaining unit that includes Special Officers at certain New York City (“City”) agencies, as well as supervisory and non-supervisory employees in various stock, custodial, inspectional, maintenance, skilled craft, and related titles.²

The Job Specification for Special Officers lists the title’s “General Statement of Duties and Responsibilities” as follows:

Under supervision, performs Special Officer duties of ordinary difficulty and responsibility to provide physical security, safety, loss prevention and maintenance of order in accordance with agency orders and procedures. Uses computer and operates electronic security and safety monitoring systems and other equipment and devices. May operate a motor vehicle to perform duties. All personnel perform related work.

(City/HHC Ans., Ex. 1) The Job Specification also lists the following “Examples of Typical Tasks:”

Patrols designated areas of assigned locations utilized by city agencies, public buildings and facilities, and surrounding areas to maintain order, preserve the peace, and safeguard life and property against fire, vandalism, theft, etc. Reports observed security and safety hazards and conditions, including, but not limited to, fire safety.

Screens employees and visitors. Operates, and monitors security equipment. Reports equipment needing maintenance or repair. Gives routine information to visitors and clients and directs them to the proper individuals and offices.

² Special Officers employed by the Administration for Children's Services/Department of Juvenile Justice, the Department of Health and Mental Hygiene, the Department of Homeless Services, and the Human Resources Administration, whose level of bargaining was changed by Local Law 56 of 2005 (“Local Law 56”), were removed from this unit. *See DC 37, 7 OCB2d 1, at 80-82 (BOC 2014)*. The remaining employees in the Special Officer titles are in the Citywide level of bargaining and are employed at the New York Police Department (“NYPD”), the Department of Citywide Administrative Services, the Department of Finance, the Department of Environmental Protection (“DEP”), the New York City Housing Authority (“NYCHA”), the Bronx District Attorney’s Office, and HHC.

Discourages and ejects loiterers and disorderly persons. When appropriate, arrests and issues summonses to law violators on premises.

Transports, escorts and/or arranges for transport of persons in custody to police precinct and has arrest recorded on police blotter. Prepares and transmits all necessary documents relating to arrest. Testifies in court and at other tribunals.

Responds to and reports emergency and security incidents and unusual occurrences and submits written reports. Assists in implementing the Emergency Action Plan. Coordinates with Fire Safety Directors.

As required, provides assistance to the sick, injured, mentally and physically disabled, and calls for emergency assistance, ambulance and/or medical attention when necessary. If properly certified and authorized by the agency, may administer first-aid. Completes and forwards requisite paperwork.

Records daily actions in memo book. Maintains records/daily logs of persons entering or leaving buildings. Maintains bulletin boards by adding and removing materials to keep information current.

May make clock rounds, as required; may control vehicular traffic on grounds and/or premises.

Monitors and reports unusual events from security systems as required; distributes monitors, maintains and secures assigned equipment and property. Coordinates Requests [for] repair of such equipment.

Attends, completes, and maintains State and Agency training requirements.

[] May assist in supervising contracted security guards and reports issues arising from the work they perform.

In the temporary absence of the supervisor may perform the supervisor's duties.

(*Id.*)

The Board, in *DC 37, 7 OCB2d 1*, recently summarized the general duties of HHC Special Officers, stating that:

[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 and these titles direct the work of Special Officers. The Job Specification for Supervising Special Officers lists the title's "General Statement of Duties and Responsibilities" as follows:

Under varying levels of supervision with varying degrees of difficulty and latitude for independent judgment, supervises and performs work to provide physical security, safety, loss prevention and maintenance of order, in accordance with agency orders and procedures. Uses computers and operates electronic security and safety monitoring systems and other equipment and devices. May operate a motor vehicle to perform duties. There are three Assignment Levels within this class of positions. All personnel perform related work, including performing the duties of lower Assignment Levels and subordinates. May perform duties of a certified Fire Safety/Emergency Action Plan Director.

(City/HHC Ans., Ex. 2)

The Board in *DC 37* summarized the duties of the various levels as follows:

Supervising Special Officers can perform Special Officer duties but can also direct or supervise a unit or larger area. There are three assignment levels in the Supervising Special Officer title. Level Is are directly responsible for supervision of Special Officers. They assign posts, patrol, evaluate performance, coordinate contracted security guards, and respond to emergencies. Level IIs supervise a broader area; are responsible for security arrangements and procedures; conduct regular inspections, in-service training, and special studies; and serve as liaisons with law enforcement agencies. Level IIIs perform many of the same tasks as Level IIs but are involved in a higher level of administration for a larger area or operation. Level IIIs also direct investigations and supervise the maintenance of security records.

7 OCB2d 1, at 32 (footnote omitted).

The Special Officer titles are designated as “peace officers” under the Civil Procedures Law (“CPL”). Specifically, CPL § 2.10(40) defines as a peace officer:

Special officers employed by the city of New York or by the New York city health and hospitals corporation; 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. The New York city health and hospitals corporation 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.

Bargaining Unit History

There is a long history of various unions seeking to fragment the Special Officer titles from their bargaining unit. Before 1976, Special Officers, Senior Special Officers, Supervising Special Officers, and Hospital Security Officers were in a separate bargaining unit (“Special Officer unit”). In 1976, the Board granted the City’s petition to consolidate the Special Officer unit with another existing bargaining unit also represented by Local 237.³ *See City of New York*, 18 OCB 55 (BOC 1976). Three years later, the Police Benevolent Association, Long Island Railroad Police, Inc. (“PBA-LIRR”) filed a petition seeking fragmentation of the Special Officer titles. The PBA-LIRR claimed that no other employees in the City perform the same or similar duties as the Special Officers and, therefore, a separate bargaining unit was justified. After a hearing, the Board found that there were occupational similarities between the Special Officer

³ In 1977 and 1978, the Board further consolidated the unit with other units represented by Local 237. *See City of New York*, 20 OCB 9 (BOC 1977); *City of New York*, 22 OCB 67 (BOC 1978).

title and other titles in the bargaining unit. The Board therefore held that “[i]n the absence of any convincing proof that inclusion of the current unit prejudices the collective bargaining status of the employees involved, we find that the creation of an additional bargaining unit with which the City must deal would be in derogation of both the public interest and the legislative intent of the drafters of the NYCCBL.” *PBA-LIRR*, 24 OCB 24, at 6 (BOC 1979), *affd.*, *Patrolmen’s Benevolent Ass’n v. Anderson*, 78 A.D.2d 777 (1st Dept. 1980), *lv. denied*, 53 N.Y.2d 602 (1981).

In 1981, PBA-LIRR filed another petition seeking fragmentation of the Special Officer titles, claiming that the petition was based upon new facts that could not have been presented to the Board in 1979. *See PBA-LIRR*, 30 OCB 29 (BOC 1982). In particular, the PBA-LIRR claimed that the amendment of the CPL to grant Special Officer titles peace officer status (“Peace Officers Law”) constituted a new fact that resulted in the titles having a “24 hour right and obligation to take action” as well as an increased minimum training requirement. *Id.* at 7. The Board once again held a hearing and found that the enactment of the Peace Officers Law did not lead to a significant change in the Special Officers’ duties and responsibilities. The Board noted that “[n]o evidence was submitted that the employer has required Special Officers to take police action while off duty and away from their places of employment, as is the case with Police Officers.” *Id.* at 21. Thus, the Board found that the fact that Special Officers had been granted peace officer status did not warrant a change in unit placement.

Regarding the additional evidence presented, the Board stated:

Much of the PBA - LIRR’s presentation focused on a detailed illustration of the duties, responsibilities, risks, needs, and goals of Special Officers. The thrust of the PBA - LIRR’s case is that Special Officers perform[] duties nearly identical to those performed by Police Officers, and that as a consequence of those duties, they, are exposed to various risks (e.g., assault, injury, false criminal charges) which have created special needs and goals which differ from those of other bargaining unit employees. The

witnesses presented by the PBA - LIRR consider themselves to be the equivalent of Police Officers without guns, and they desire many of the benefits enjoyed by Police Officers, such as firearms, bulletproof vests, unlimited sick leave, better pension benefits, better training, 24 hour[] legal service for job-related problems, and an increased uniform allowance. They are dissatisfied and frustrated because their present unit representative, Local 237, has been unable to obtain these benefits for them.

Id. at 21. The Board found that while this evidence clearly 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. The Board emphasized that it was not dealing with 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 was unwilling to disrupt a structure that had functioned effectively for many years.

In 1995, the Municipal Police Benevolent Association (“MPBA”) filed a petition seeking to fragment and represent the Special Officers. The MPBA claimed that Local 237 did not sufficiently represent the unique interests of the Special Officers, which it claimed were incompatible with the interests of other employees in the unit. The Board reviewed the Special Officers’ historical bargaining structure, and stated that “before we would seriously consider fragmenting the Local 237 bargaining unit, 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 NYCCBL.” *Municipal Police Benevolent Ass’n*, 56 OCB 4, at 11 (BOC 1995). The Board stated that the MPBA had not presented any such proof and held that “under the circumstances that exist currently, and lacking sufficient evidence of inconsistency between Special Officers and other titles in their current unit, we will not deviate from our established policy against unit fragmentation[.]” *Id.* The Board therefore dismissed the petition.

The Instant Petition

On September 4, 2014, HHC PBA filed a petition seeking to represent the HHC Special Officers in a separate bargaining unit. HHC PBA contends that HHC Special Officers perform “police-like functions” and thus fit into an exception to the Board’s general policy against fragmentation that this Board adopted in *LEEBA*, 76 OCB 3, at 15 (BOC 2005).⁴ After the petition was filed, Local 237, the City, and HHC presented defenses raising legal issues. HHC PBA was then given the opportunity to respond to these arguments and to submit an offer of proof of changed circumstances to demonstrate that the HHC Special Officers’ existing unit placement is no longer appropriate.⁵ In support of its position, HHC PBA presented the following information:

HHC PBA asserts that HHC Special Officers “are authorized to enforce the N.Y. Penal Law by patrolling, arresting individuals and/or issuing summonses, and transporting individuals to police precincts.” (HHC PBA Offer at 6) Arrests regularly involve serious felonies, such as gun possession. HHC Special Officers also: conduct investigations; respond to emergencies; coordinate with police departments, emergency medical staff, and firefighters; record criminal activity in the police blotter; testify in court; and work in and supervise Investigative and Crime Prevention units within HHC. HHC PBA asserts that, unlike other Special Officers, HHC

⁴ *LEEBA* involved a petition to fragment Environmental Police Officers (“EPOs”) working at DEP from their bargaining unit. The Board in that case followed precedent from the Public Employment Relations Board (“PERB”) and adopted a limited exception to its traditional anti-fragmentation standard for employees whose “exclusive or primary attribute is law enforcement.” *LEEBA*, 76 OCB 3, at 15 (BOC 2005) (citing *County of Erie*, 29 PERB ¶ 3031 (1996), *confirmed*, 247 A.D.2d 671 (3d Dept. 1998)).

⁵ The Board and the Director of Representation have broad authority to resolve questions concerning representation and in determining whether such proceedings require a hearing. See Section 1-02 (j)(1) and (2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”)

Special Officers have their own jurisdiction, which is recognized by the New York State Unified Court System. Furthermore, HHC Special Officers regularly utilize the same online network as the NYPD and the District Attorneys' Offices and have their own code within this network. HHC Special Officers also fill out an NYPD Complaint Report form, which lists "Health & Hospitals Corp. Police" as one of 15 choices under the "Jurisdiction of Complaint." (HHC PBA Offer, Ex. A)

Further, HHC PBA presented evidence that it asserts demonstrates that HHC Special Officers have many similarities with NYPD police officers. For example, HHC Special Officers carry batons and pepper spray and wear uniforms with an emblem that closely resembles the NYPD emblem, labeled "POLICE." HHC Special Officers have a similar ranking structure as the NYPD, and the shields for the various ranks closely resemble those of the NYPD. HHC PBA also submitted as evidence an HHC advertisement for the Special Officer position, which labels Special Officers as "law enforcement officer[s]." (HHC PBA Offer, Ex. C) Furthermore, Local 237 commissioned a study entitled "The Case for Arming Hospital Police Officers in New York City Public Hospitals," which found that "Hospital police in New York City need to be armed because they perform the same duties as the NYPD." (HHC PBA Offer, Ex. D)

Regarding changed circumstances, HHC PBA asserts that since Local 237 began representing the Special Officer titles in 1973, HHC Special Officers have experienced a heightened risk of on-the-job violence. As evidence of this claim, HHC PBA submitted a 1989 New York Times article titled "Hospital Police: No Guns, No Respect, Lots of Trouble," which discussed a number of dangerous situations HHC Special Officers were faced with; as well as a 2012 article which detailed an incident in which an HHC Special Officer was dragged along the pavement by an illegal cab outside a Bronx hospital. (HHC PBA Offer, Exs. G, H) HHC PBA

also points to the passage of Local Law 56 as additional evidence that there has been a change in circumstances affecting HHC Special Officers.⁶

HHC PBA further asserts that fragmentation is warranted here because that there is a conflict of interest between HHC Special Officers and other Local 237 titles since HHC Special Officers have a duty to investigate and arrest employees in such titles if necessary. It claims that Local 237 employs a policy of discouraging these arrests by threatening HHC Special Officers with disciplinary charges if they take such action. As evidence of this conflict, HHC PBA asserts that despite regular complaints of Local 237 members, there have only been two noted arrests of these members by HHC Special Officers.

Finally, HHC asserts that Local 237 has exhibited a history of inadequate representation of HHC Special Officers and has neglected to pursue issues of importance to them, such as their desire to be equipped with firearms and gain line-of-duty benefits. As evidence of this claim, HHC PBA points to a pilot program that occurred a few years ago in which HHC equipped 38 HHC Special Officers located across several different hospitals with firearms. HHC PBA asserts that during one altercation, an HHC Special Officer drew his firearm to disarm a dangerous individual and Local 237 officials pressured the officer to avoid noting in his reports that he had done so. HHC also claims that Local 237 has abandoned HHC Special Officers when they needed representation. As evidence of this, HHC PBA asserts that Local 237 raised no defense during a disciplinary hearing involving an HHC Special Officer, which resulted in his

⁶ Local Law 56 amended NYCCBL § 12-307(a)(4) to add certain titles to the uniformed level of bargaining and create a new level of bargaining. This new (“similar-to-uniformed”) level of bargaining was created for “employees working in various departments and agencies in the City of New York [who] have certain job characteristics similar to those of employees working in the City’s uniformed services, such as police, fire, sanitation and correction services,” and who “should be afforded the same unique bargaining rights as those afforded to individuals working in such services[.]” HHC Special Officers were not subject to Local Law 56, and thus their level of bargaining and unit placement were not changed as a result of the law’s passage.

termination while charges were still pending and relieved Local 237 from providing further assistance.⁷ HHC PBA claims that this is only one example, and if given a hearing it would present the testimony of others who had received inadequate union representation.

POSITIONS OF THE PARTIES

Local 237's Position

Local 237 asserts that this petition should be dismissed as a matter of law for a number of reasons. In particular, Local 237 contends that because the Special Officer titles are defined as “peace officers,” they do not fit into the Board’s narrow exception to its policy against fragmentation, which Local 237 contends applies only to statutorily-defined “police officers.” Thus, there is no need for a hearing to examine any issues of fact. In support of this argument, Local 237 relies on a recent decision by a PERB Administrative Law Judge (“ALJ”), in which the ALJ granted the respondent’s motion to dismiss because the title sought to be fragmented was not defined as a “police officer” under CPL § 1.20(34). *See CUNY*, 47 PERB ¶ 4007 (ALJ 2014) (exceptions filed). Furthermore, Local 237 argues that even if the Board were to examine HHC Special Officers’ duties, it is clear that they do not enforce the general laws of the state, or otherwise meet the exception for fragmentation articulated by the Board in *LEEBA*.

Local 237 also contends that the petition should be dismissed because HHC PBA has not presented evidence that there have been changed circumstances demonstrating that the existing bargaining unit is no longer appropriate. Local 237 argues that HHC PBA’s allegation regarding a heightened risk of on-the-job violence is conclusory and based only on individual incidents of

⁷ HHC PBA admits that Local 237 arranged for the individual to receive *pro bono* legal services in a related criminal proceeding and eventually the individual was acquitted of all criminal charges after trial.

violence, some of which are decades old. Furthermore, these allegations do not constitute a change in circumstances because they do not represent a change in HHC Special Officers' job duties. Similarly, Local Law 56 did not affect HHC Special Officers' duties or bargaining rights, as the law specifically excluded them from the new "similar-to-uniformed" level of bargaining.

Regarding HHC PBA's allegation of a conflict of interest between HHC Special Officers and other members of the bargaining unit, Local 237 contends that this allegation is speculative, and the Board has rejected similar evidence as a basis upon which to fragment a bargaining unit. Additionally, Local 237 argues that HHC PBA's allegations of the HHC Special Officers' dissatisfaction with current representation are baseless and irrelevant. Such dissatisfaction is considered only when it can be shown that inadequate representation is a consequence of conflicting interests within the unit, and such is not the case here.⁸

Finally, Local 237 argues that HHC PBA is affiliated with LEEBA, and it contends that HHC PBA cannot represent the Special Officer titles because doing so would violate NYCCBL § 12-314(b).⁹ LEEBA represents EPOs employed by DEP. According to Local 237, it is therefore "clear" that LEEBA represents "members of the police force of the police department" as defined under NYCCBL § 12-314(b). (Local 237 Feb. 24, 2015 Letter at 3)

⁸ Local 237 also contends that the ratification vote in September 2014, approving a new collective bargaining agreement that covers HHC Special Officers, demonstrates "overwhelming satisfaction" with its representation. (Local 237 October 20, 2014 Letter at 10)

⁹ NYCCBL §12-304(b) states:

No organization seeking or claiming to represent members of the police force of the police department shall be certified if such organization (i) admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than members of the police force of the police department, or (ii) advocates the right to strike.

City/HHC's Position¹⁰

The City and HHC contend that the petition should be dismissed as a matter of law because HHC PBA has not alleged facts sufficient to establish changed circumstances and, as such, a hearing in this matter is not necessary. HHC PBA's allegations regarding a heightened risk of occupational violence are conclusory and irrelevant, since they do not indicate that the nature of HHC Special Officers' duties have changed. The City and HHC also assert that Local Law 56 does not constitute a change in circumstances because HHC Special Officers were not included in the law.

The petition seeks to further fragment Special Officers by creating a new, third bargaining unit of Special Officers solely for HHC employees. However, the City and HHC assert that doing so would clearly violate the Board's longstanding policy against the proliferation and fragmentation of existing bargaining units and would disrupt sound labor relations in the City. According to the City and HHC, HHC Special Officers perform effectively the same duties as their counterparts at Mayoral agencies and NYCHA. The needs and goals of HHC Special Officers, which are specific to their duties, are shared by other Special Officers. Furthermore, the Board has ruled that there is no inherent inconsistency with placing peace officers in mixed units.

The City and HHC assert that the Board's very narrow exception to its longstanding policy against fragmentation applies only to statutorily-defined police officers. They argue that HHC PBA's arguments to the contrary are misplaced, and the cases it relies upon do not stand for the proposition that the Board will fragment bargaining units simply because they contain members that are peace officers.

¹⁰ The City and HHC filed joint submissions in this matter.

Finally, the City and HHC argue that fragmentation of HHC Special Officers is not warranted under the Board's traditional standards. HHC PBA's allegations regarding a conflict of interest between bargaining unit members is supported by nothing but conclusory allegations. The City and HHC also assert that HHC PBA's allegations regarding inadequate representation are unfounded. Rather, a recent collective bargaining agreement covering HHC Special Officers demonstrates that Local 237 is a successful advocate for its members.

HHC PBA's Position

HHC PBA argues that HHC Special Officers should be fragmented from their current bargaining unit because they perform "police-like functions" and thus fit into an exception to the traditional policy against fragmenting bargaining units that was adopted by the Board in *LEEBA*, 76 OCB 3. HHC PBA argues that the fact that the CPL defines the Special Officer titles as "peace officers" rather than "police officers" should not bar its petition. (HHC PBA Offer at 2) HHC PBA contends that PERB and the Appellate Division have both analyzed this issue and held that CPL definitions are not controlling. Rather, an analysis of the specific job functions must be performed in order to determine whether the titles at issue perform "police-like functions." HHC PBA asserts that a PERB case relied upon by Local 237 to support its argument that a hearing is not warranted in this case is "completely at odds with the standard (and outcomes)" of controlling authority. (*Id.* at 4) Consequently, HHC PBA contends that the Special Officer titles' peace officer status is only one factor to be considered in a multi-faceted analysis. It argues that when engaging in this analysis, it becomes clear that the HHC Special Officers perform "police-like functions" and should be fragmented.

HHC PBA argues that Local Law 56's inclusion of Special Officer titles employed at certain agencies in a new "similar-to-uniformed" level of bargaining is additional evidence that

HHC Special Officers perform “police-like functions.” (*Id.* at 8) According to HHC PBA, HHC Special Officers perform the same functions as the Special Officers who were subject to Local Law 56. HHC PBA speculates that HHC Special Officers were only excluded from Local Law 56 because they work for HHC and not the City.

HHC PBA further contends that there have been changed circumstances which warrant a hearing in this matter. According to HHC PBA, since Local 237 began representing the Special Officer titles in 1973, HHC Special Officers have experienced a heightened risk of on-the-job violence, which has been well documented in the press. Furthermore, HHC PBA argues that the enactment of Local Law 56 constitutes an additional change in circumstances.

HHC PBA also contends that HHC Special Officers should be fragmented because there is an inherent conflict of interest between the HHC Special Officers and other Local 237 members, both inside the bargaining unit and out. HHC PBA asserts that HHC Special Officers are obligated to investigate and arrest employees in these titles if necessary. However, HHC PBA alleges that there is a disincentive for HHC Special Officers to do so, because Local 237 representatives “employ a strict policy of squashing any police action by [HHC Special Officers] against other Local 237 members.” (HHC PBA Offer at 9) Specifically, if HHC Special Officers pursue “police action” despite Local 237 warnings, HHC PBA alleges that Local 237 threatens them with disciplinary charges and refuses to provide the member with adequate representation in the future.¹¹ (*Id.*) HHC PBA also contends that Local 237 has a history of inadequately representing HHC Special Officers and the current administration has failed to support their desire to be equipped with firearms and receive line-of-duty benefits.

¹¹ HHC PBA contends that if this matter went to hearing, it would present the testimony of several current and former HHC Special Officers who “were abandoned by Local 237 when they personally needed representation.” *Id.* at 10.

Finally, HHC PBA contends that there is no evidence to suggest that it is directly or indirectly affiliated with LEEBA and, therefore, Local 237's argument that HHC PBA cannot represent HHC Special Officers is without merit.¹²

DISCUSSION

The issue before the Board of Certification is whether the pre-existing bargaining unit in which HHC Special Officers are placed is no longer appropriate. We find that, even if true, the facts plead by HHC PBA do not demonstrate that the existing unit is no longer appropriate.¹³

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.¹⁴ These criteria are substantially equivalent to the provisions of the Taylor Law, governing unit determinations made by PERB. *See* N.Y. Civil Service Law Article 14 § 207(1).

¹² HHC PBA also made arguments regarding the "political implications" of Local 237's position that HHC Special Officers are not police officers that are not relevant to the instant matter and, thus, are not detailed here. (HHC Offer at 10).

¹³ Accepting as true the detailed offer of proof submitted by HHC PBA, we find that a hearing is not necessary in this particular case because there are no material issues of disputed facts. *See DC 37, 79 OCB 20, at 11 (BCB 2007)* (no hearing required where there are no material issues of disputed facts) (citing OCB Rule § 107(c)(8)).

¹⁴ OCB Rule § 1-02(k) provides:

The long-articulated policy of this Board is one that favors consolidation of bargaining units and discourages fragmentation whenever possible. *See LEEBA*, 76 OCB 3, at 14 (BOC 2005) (citing *PBA-LIRR*, 24 OCB 24, at 7 (BOC 1979); *Municipal Elevator Workers Ass'n*, 50 OCB 1, at 10 (BOC 1992)). Thus, over the years, we “created larger units based on broad occupational groupings, comprising as many employees and titles as can effectively operate as single entities.” *Municipal Police Benevolent Ass'n*, 56 OCB 4, at 7-8 (BOC 1995). Further, the Board generally will not disrupt or fragment a longstanding bargaining unit “unless convincing proof of changed circumstances demonstrates that the pre-existing unit is no longer appropriate.” *LEEBA*, 76 OCB 3, at 15 (citing *Indep. Laborers Union of New York City*, 72 OCB 5, at 9 (BOC 2003), *affd.*, *Independent Laborers Union of New York City v. Office of Collective Bargaining*, No. 118937/03 (Sup. Ct. N.Y. Co. Apr. 13, 2004)); *see also Municipal Police Benevolent Ass'n*, 56 OCB 4, at 11.

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 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.

In 2005, the Board in *LEEBA*, adopted a limited exception to its traditional non-fragmentation standard for employees whose “exclusive or primary attribute is law enforcement.” *LEEBA*, 76 OCB 3, at 15 (citing *County of Erie*, 29 PERB ¶ 3031 (1996), *confirmed*, 237 A.D.2d 671 (3d Dept. 1998)). In doing so, the Board analyzed and adopted PERB precedent, as initially set forth in its *County of Erie* decision. The Board stated that, “[i]n *County of Erie*, PERB held that a separate bargaining unit is appropriate for employees who are ‘responsible for the prevention and detection of crime and the enforcement of the general laws of the state’ when those duties are the ‘exclusive or primary characteristic’ of the position.” *Id.* at 16 (quoting *County of Erie*, 29 PERB ¶ 3031, at 3069). The Board conducted an analysis of the EPOs’ duties and found that it was appropriate to fragment EPOs “because the primary characteristic of the EPO title is the prevention and detection of crime and the enforcement of the general laws of the state, within the watershed and elsewhere.” *Id.* at 19. In making this finding, however, the Board was careful to note that it was “not abandoning [its] fragmentation standards generally.” *Id.* at 19.

In the years since the Board adopted this narrow exception to its general anti-fragmentation policy, PERB has clarified, and in some respects, altered its test for meeting the law enforcement exception it articulated in *County of Erie*. In *State of New York (Division of Parole)*, 40 PERB ¶ 3011 (2007), PERB stated that “Board precedent firmly establishes that fragmentation is appropriate for public employees who are police officers or hold a title that has also been granted police officer status by the Legislature *and* whose exclusive or predominant duties are the enforcement of the State’s general criminal laws.” *Id.* at 3042 (emphasis added). PERB reasoned that, although many titles perform important law enforcement-related duties involving public safety, “[t]he Legislature, in drafting the [CPL], has established a clear

dichotomy between the respective scope of law enforcement authority of police officers and peace officers confirming the unique authority and responsibilities of individuals with peace officer status.” *Id.* Thus, PERB clarified that “whether a position has been granted police officer status under CPL § 1.20(34) remains the initial factor to be considered in determining whether fragmentation is appropriate based on the performance of those duties.”¹⁵ *Id.*

This was a departure from some of PERB’s previous cases, in which it was implied that a title’s CPL designation as a “police officer” was only one factor to be considered in the analysis. For example, in *County of Rockland*, 32 PERB ¶ 3074 (1999), PERB declined to decide whether Investigative Aides fit into the definition of “police officers” under the CPL and instead found that fragmentation was appropriate based solely on their training and job responsibilities. Additionally, in *State of New York*, 34 PERB ¶ 3038 (2001), PERB found that fragmentation was appropriate for Forest Rangers, despite the fact that at that time they were defined as “peace officers” under the CPL.¹⁶ Consequently, in clarifying its standard in *State of New York (Division of Parole)*, PERB stated that to the extent that these or any of its past decisions implied that a title’s designation as a “police officer” under the CPL was not a necessary component of the test for fragmentation, it was declining to follow them. 40 PERB ¶ 3011, at 3042.

In adopting the narrow law enforcement exception for fragmentation in *LEEBA*, this Board did not state that a title’s designation as a “police officer” under the CPL was a pre-requisite to our examination of the title’s actual duties, and we have not had the occasion to apply or examine this issue in the years since *LEEBA* was decided. Local 237 argues that the Board should adopt PERB’s test in *State of New York (Division of Parole)* and dismiss the

¹⁵ CPL § 1.20(34) defines 22 categories of specific employees as police officers.

¹⁶ The Legislature later amended the CPL to expressly grant Forest Rangers police officer status. *See* CPL §1.20(34)(v).

instant petition without a hearing. However, we do not find it necessary at this time to determine whether to adopt *State of New York (Division of Parole)* in this case because, even accepting HHC PBA's factual allegations as true, we find that the HHC Special Officers' exclusive or predominant duties are not the enforcement of the State's general laws. Consequently, we dismiss the petition.

First, the CPL expressly recognizes the Special Officer titles as "peace officers" and not "police officers." The CPL specifies the amount of training that peace officers must undergo.¹⁷ Peace officers are not required to attend an accredited police academy or to pass police academy firearms testing. Although the CPL states that an employer can allow its peace officers to carry and use firearms if they receive proper training and certification by the municipal police training council, HHC has not chosen to require such of its employees in these titles. Instead, HHC Special Officers are only equipped with batons and pepper spray.

HHC PBA asserts, and the Special Officer job descriptions demonstrate, that HHC Special Officers perform some general law enforcement functions in their area of employment. These include patrolling designated areas to safeguard life and property against fire, vandalism, and theft; arresting or issuing summonses to law violators on premises; transporting, escorting or arranging for transport of individuals to police precincts; testifying in court and other tribunals; responding to and reporting emergency and security incidents; and providing assistance to the sick, injured, and mentally and physically disabled and calling for emergency assistance when necessary. *See City/HHC Ans., Ex. 1.* However, there is no indication that HHC Special

¹⁷ CPL § 2.30 mandates that peace officers undergo training which consists of a portion that is prescribed by the municipal police training council, which cannot exceed 180 hours and is required for all types and classes of peace officers, and a portion prescribed by the employer, which relates to "the special nature of the duties of the peace officers employed by it."

Officers' arrest powers extend beyond those conferred upon all peace officers as defined by the CPL. Similarly, there is no claim or evidence that the HHC Special Officers' assigned duties are broader than those set forth in the job specification for the Special Officer titles. While HHC Special Officers may utilize an online network and complaint report worksheet also utilized by NYPD police officers, these facts alone do not establish that HHC Special Officers' exclusive or primary duty is the enforcement of the general laws of the state.¹⁸

Based on these factual assertions, we find that HHC Special Officers have many similarities with titles that PERB has found do not meet the law enforcement exception for fragmentation. In *Town of Islip*, 43 PERB ¶ 3003 (2010), PERB affirmed an ALJ decision finding that Security Guards at an airport do not exclusively or primarily engage in general law enforcement duties.¹⁹ PERB stated that, because the Security Guards were designated as peace officers under the CPL, by definition, their law enforcement authority was limited. Nevertheless, PERB went on to analyze the title's duties. Like HHC Special Officers, Security Guards are assigned to specific posts and are required to patrol those areas. Their duties included "securing the Airport's air operations area, screening access of employees and passengers to secure areas, responding to emergencies and disturbances, enforcing the Vehicle & Traffic Law, and acting in response to requests for assistance involving airport and passenger safety." *Id.* at 3010. The Security Guards also detained, searched, and arrested individuals at the Airport for possession of drugs, weapons and large amounts of cash. Furthermore, while on duty, Security Guards were armed and wore bulletproof vests. In finding that these duties were not "predominantly the

¹⁸ Additionally, we note that although HHC Special Officers' uniforms and shields might make them appear similar to NYPD police officers, such facts also do not demonstrate that HHC Special Officers' primary duty is the enforcement of the general laws of the state.

¹⁹ The decision also discussed a group of Park Rangers that were found not to meet the law enforcement exception for fragmentation.

enforcement of New York's criminal law," PERB stated that the Security Guards' duties were instead limited to the airport, and their training related to their role as peace officers and their responsibilities at the airport. *Id.* at 3011.

In this case, HHC Special Officers' primary responsibility is limited to providing security to the hospital and medical center buildings and those inside. Like the airport Security Guards discussed above, if the HHC Special Officers effectuate an arrest or perform other law enforcement-related duties, it is incidental to their main duty of providing security and enforcing HHC orders and procedures. There is no allegation that HHC Special Officers' duties extend beyond their area of employment; that is, HHC hospitals, facilities, and their grounds.

In addition, a comparison of the facts in *LEEBA* to the facts proffered here demonstrates that, while HHC Special Officers share some similar duties with EPOs, they do not have the same level of responsibilities, training, or authority as EPOs, such that it can be found that their exclusive or primary duties are the prevention and detection of crime and the enforcement of the general laws of the state.

EPOs are defined as police officers under the CPL and are "qualified, trained, equipped, and expected to perform as police officers." *LEEBA*, 76 OCB 3, at 19. EPOs attend an accredited police academy, where they are required to pass firearms, academic, physical performance and driving tests. EPOs are authorized to carry guns and must qualify and remain qualified for firearms usage and possession as a condition of employment. They also wear body armor and drive in marked cars. This is in stark contrast to HHC Special Officers who do not attend a police academy and, as mentioned above, are not qualified for firearms usage and carry only batons and pepper spray.

Like HHC Special Officers, EPOs perform some general law enforcement functions in the course of implementing their duties in the watershed. However, the Board found that the evidence demonstrated that EPOs were also involved in arrests of individuals for crimes committed outside of the watershed and regardless of whether the crime was committed within their geographical area of employment. EPOs also served “in specialized units common to law enforcement departments, including the [Emergency Service Unit (“ESU”)], Strategic Patrol, four K-9 units and an Aviation Unit.” *Id.* at 20. Additionally, the Board found that EPOs were regularly assigned to assist or backup other law enforcement agencies. For example, EPOs were assigned to a number of special deployments, during which they served next to NYPD officers and were responsible for enforcing the general laws of the state. Here, there is no assertion that HHC Special Officers serve in such specialized units or regularly work deployments alongside NYPD police officers, providing general law enforcement assistance. Further, there is no claim that HHC Special Officers have been assigned to exercise any law enforcement functions while off-duty or away from HHC’s premises.²⁰

Taking all of the above into consideration, we find that, although HHC Special Officers perform some general law enforcement functions, unlike EPOs their primary duties do not rise to the same level of “law enforcement duties.” Rather, their duties are ultimately limited to HHC property and ensuring the “physical security, safety, loss prevention and maintenance of order” *See City/HHC Ans., Ex. 1.* Consequently, we find that the proffered facts do not establish that HHC Special Officers’ duties warrant fragmentation from their existing bargaining unit

²⁰ In a prior case involving the Special Officer titles the Board noted that “[n]o evidence was submitted that the employer has required Special Officers to take police action while off duty and away from their places of employment, as is the case with Police officers.” *PBA-LIRR*, 30 OCB 29, at 21. HHC PBA has not asserted in this case that this fact has changed.

based on the exception to our general anti-fragmentation policy for employees whose primary duty is law enforcement.

We further find that HHC PBA has not plead sufficient facts to establish that fragmentation of the HHC Special Officers is appropriate under our traditional standards. In the most recent case in which we examined whether to fragment the Special Officer titles from their existing bargaining unit, we stated that “before we would seriously consider fragmenting the Local 237 bargaining unit, 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 NYCCBL.” *Municipal Police Benevolent Ass’n*, 56 OCB 4, at 11. In the instant petition, HHC PBA did not articulate any changed circumstances demonstrating that the existing unit is no longer appropriate. In its offer of proof, HHC PBA asserted that since Local 237 began representing HHC Special Officers in 1973, “there has been a much heightened risk of encountering on-the-job violence for HHC Police Officers,” and it submitted as evidence a number of newspaper articles documenting specific incidents of violence. (HHC PBA Offer at 12). Nevertheless, these examples neither demonstrate that the risk of on-the-job violence has increased since the last time we examined the appropriateness of this bargaining unit in 1995, nor do these allegations show that such violence had led to a change in HHC Special Officers’ duties. *Cf. LEEBA*, 76 OCB 3 (stating that “[t]he EPOs’ law enforcement responsibilities have increased because of heightened security concerns regarding the water supply and the infrastructure that transports water to the City”). Consequently, we do not find that this allegation constitutes a change in circumstances that would warrant fragmentation.

Similarly, we do not find that the passage of Local Law 56 in 2005 constitutes a changed circumstance that warrants fragmentation of HHC Special Officers. In an earlier decision

involving the Special Officer titles, the union seeking fragmentation of the titles argued that because the CPL had recently been amended to grant peace officer status to the Special Officer titles, this constituted a change in circumstances. The Board, however, stated that the actual effect of a law's enactment is "far more relevant than the mere fact of enactment of the law," because the relevant inquiry is a title's actual duties and responsibilities that the employer has or may require the employees to perform. *PBA-LIRR*, 30 OCB 29, at 20 (finding that the changes that resulted from the amendment of the Peace Officers Law to include Special Officer titles did not affect their duties in a way that would warrant a change in unit placement). HHC Special Officers are not subject to Local Law 56, and their bargaining rights were not changed as a result of it. Consequently, Local Law 56 did not change their duties or circumstances.

HHC PBA's remaining arguments as to why the HHC Special Officers should be fragmented are similarly unpersuasive. HHC PBA argues that there is a conflict of interest between the HHC Special Officers and other titles in the bargaining unit because HHC Special Officers are "required to investigate and arrest other HHC employees." (HHC PBA April 3, 2015 Offer, at 9). This precise argument has been raised and rejected in a number of previous cases denying fragmentation. *See Municipal Police Benevolent Ass'n*, 56 OCB 4, at 2; *PBA-LIRR*, 30 OCB 29, at 8, 22; *Town of Brookhaven*, 33 PERB ¶ 4035 (ALJ 2000) ("The Association's speculation that a security guard might occasionally issue an appearance ticket or summons to another Town employee is insufficient to demonstrate a potential conflict of interest.").

HHC PBA also alleges that there is a conflict of interest between HHC Special Officers and other Local 237 members, because Local 237 discourages HHC Special Officers from taking "police action" against these members by threatening them with disciplinary charges if they do

so and refusing to provide them with effective legal representation in the future if necessary. Even if true, we find that this claim is not relevant to the determination here. Rather, a conflict of interest that may support fragmentation concerns a conflict between the negotiating interests of employees within the same bargaining unit. *See Inc. Vill. of Lake Success*, 38 PERB ¶ 3013 (1995) (“[O]nly diverse employee interests showing a *conflict of negotiating interests*, either actual or potential, warrant establishment of smaller units.”) (emphasis added); *PBA-LIRR*, 30 OCB 29, at 22 (petition to fragment Special Officers dismissed where there was no showing that their “community of interest conflicts with or is inconsistent with the interest of *other titles in the unit.*”) (emphasis added).²¹

HHC PBA’s remaining arguments in support of fragmentation raise claims regarding inadequate representation that are unpersuasive. HHC PBA’s complaints that Local 237 has failed to properly defend members in disciplinary matters are irrelevant to the issue of unit placement; they are evidence only of dissatisfaction with Local 237’s performance. *See PBA-LIRR*, 30 OCB 29, at 29 (upholding Trial Examiner’s exclusion of testimony regarding dissatisfaction with the adequacy of the union’s representation in certain grievances based on relevance).²² Furthermore, regarding complaints about a union’s performance at the bargaining

²¹ To the extent that HHC PBA alleges a conflict of interest that is a consequence of actions by Local 237 intended to favor certain members, we note that these allegations concern internal union matters, which are not within the jurisdiction of this Board. *See Indep. Laborers Union of New York City*, 72 OCB 5, at 12 n. 5 (citations omitted) (finding that internal union matters are not subject to the Board’s jurisdiction).

²² Further, we note that to the extent that there are complaints about Local 237’s fulfillment of its legal duties, HHC Special Officers “have proper legal recourse through the filing of a duty of fair representation charge under the Board’s improper practice procedures or, with sufficient support, by petitioning to decertify the entire bargaining unit.” *Indep. Laborers Union of New York City*, 72 OCB 5, at 12 (citing *Municipal Elevator Workers Ass’n*, 50 OCB 1, at 11; NYCCBL § 12-306(b); OCB Rule § 1-02).

table, we have previously stated: “It is well-settled that allegations of evidence of inadequate representation are not relevant to the issue of unit placement unless it can be shown that the inadequacy is a consequence of conflicting interests within the unit.” *Municipal Elevator Workers Ass’n*, 50 OCB 1, at 10 (citations omitted) (denying a request for fragmentation of Elevator Mechanic titles despite allegations that the union had submerged that title’s interests in favor of other titles in the unit and allowed the Elevator Mechanics to receive wages and benefits at lower levels, because allegations did not stem from conflict of interest between titles). In the instant matter, while HHC PBA claims that Local 237 has refused to support the HHC Special Officers’ desire to be equipped with firearms or receive line-of-duty benefits, it does not allege that this refusal is related to a conflict of interest with other members of the bargaining unit.²³

As a final matter, we note that we do not find Local 237’s argument regarding HHC PBA’s alleged affiliation with LEEBA persuasive, because NYCCBL § 12-314(b) is inapplicable to the instant matter. LEEBA represents EPOs who are employed by DEP; not the NYPD. NYCCBL § 12-314(b) is expressly limited to “the police department.” Thus, the question of whether HHC PBA has any affiliation with LEEBA is wholly irrelevant to the instant matter. *See PBA-LIRR*, 24 OCB 24, at 2 (stating that NYCCBL § 12-314(b) applies only to unions seeking to represent members of the NYPD).

In conclusion, taking all of HHC PBA’s allegations as true, we find that the placement of HHC Special Officers in the existing bargaining unit remains appropriate. Consequently, we dismiss the petition.

²³ In this regard, evidence proffered by HHC PBA shows no such conflict with other bargaining unit members inasmuch as Local 237 commissioned a study entitled “The Case for Arming Hospital Police Officers in New York City Public Hospitals,” which concluded that HHC Special Officers should be armed. (HHC PBA Offer, Ex. D)

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 Health and Hospitals Corporation filed by HHC PBA, Inc., docketed as RU-1587-15, be, and the same hereby is, dismissed.

Dated: July 7, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

CAROL A. WITTENBERG
MEMBER