

Law Enforcement Employees Benevolent Ass'n, 76 OCB 3 (BOC 2005)
[Decision No. 3-2005 (Docket No. RU-1247-03).]

Summary of Decision: LEEBA filed a petition to represent Environmental Police Officers (“EPOs”) in a separate bargaining unit. The title is included in an existing bargaining unit represented by Local 300, S.E.I.U. Local 300 and the City argued that the current unit placement is appropriate and that fragmentation of the unit would be contrary to Board policy. Recognizing developments in the law which created an exception for employees whose primary function is law enforcement, the Board found that the EPOs’ unit placement was no longer appropriate and that a separate bargaining unit was appropriate. It directed an election in order to ascertain the wishes of the EPOs as to their union representation. ***(Official decision follows.)***

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of

**LAW ENFORCEMENT EMPLOYEES
BENEVOLENT ASSOCIATION,**

Petitioner,

- and -

**CITY OF NEW YORK &
DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

Respondents,

-and-

**LOCAL 300, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,**

Intervenor.

DECISION AND DIRECTION OF ELECTION

On June 17, 2003, the Law Enforcement Employees Benevolent Association (“LEEBA”) filed a petition to represent employees in the title Environmental Police Officer (Title Code No.

70811) (“EPO”) in a separate bargaining unit. EPOs are employed by the City of New York (“City”) at the Department of Environmental Protection (“DEP”) and are currently included in Certification No. 8-85, a bargaining unit represented by Local 300, Service Employees International Union (“Local 300”). Local 300 argues that the current unit placement is appropriate and that the unit should not be fragmented. The City contends that fragmentation of the current unit would be contrary to Board policy. In light of recent developments in the law creating an exception for employees whose primary function is law enforcement, we find that the EPOs’ current unit placement is no longer appropriate. A separate bargaining unit is appropriate. Accordingly, we direct an election in order to ascertain the wishes of the EPOs as to their union representation.

BACKGROUND

Based upon the testimony of eight witnesses, including EPOs Christian Clinch, William Flynn, Paul Barrett, Joseph Andreani, Michael Reda, and Jason Shaw, over five days of hearing, the documentary evidence, and the pleadings, we make the following findings of fact.¹

EPOs, formerly called Special Officers (Aqueduct Patrol) and Associate Special Officers (Aqueduct Patrol), are responsible for protecting the City’s water supply and for enforcing the City’s Watershed Rules and Regulations and other laws. The City’s upstate water supply is comprised of 19 reservoirs and three controlled lakes, as well as the aqueducts and other waterworks. The approximately 2,000 square miles of watershed area contributes surface water

¹ LEEBA called all eight witnesses: most of the EPOs who testified have been employed by DEP for about four to six years. One EPO, Flynn, has been employed for approximately 17 years. Local 300 and the City declined to present witnesses.

to the reservoirs.

EPOs are defined as police officers in the New York Criminal Procedure Law (“CPL”) § 1.20(34)(o).² EPOs are currently covered by the 2000-2002 Assistant Buyers Agreement, which expired on March 31, 2002, and is in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). Local 300 represents approximately 900 to 1,000 employees in a single bargaining unit that includes titles such as: Elevator Starter, Assistant Purchasing Agent, Bookbinder, Laboratory Helper, Mortgage Tax Examiner, Window Cleaner, and Quality Assurance Specialist. Local 300 has represented these employees, including EPOs and their predecessor titles, Special Officer (Aqueduct Patrol) and Associate Special Officer (Aqueduct Patrol), in a consolidated unit since 1985. *Local 300, The Civil Service Forum, S.E.I.U.*, Decision No. 8-85. The only title this petition seeks to affect is the EPO title. As of July 10, 2003, there were 156 EPOs.

According to Joint Exhibit S-1, the job specification for Special Officer (Aqueduct Patrol), dated July 28, 1982, stated that the title:

[P]rotects the watershed areas and water supply systems of the City of New York; provides protection for the inhabitants of surrounding localities during periods of construction, repair or other similar situations; performs duties as may be required by law, rule, regulation or directive of or applicable to the Department of Environmental Protection and performs special duties or assignments as may be directed

² In defining “police officer,” CPL § 1.20(34) includes:

(o) A sworn officer of the water-supply police employed by the city of New York, appointed to protect the sources, works, and transmission of water supplied to the city of New York, and to protect persons on or in the vicinity of such water sources, works, and transmission.

There were no formal education requirements. Candidates were required to: meet “certain” physical and medical requirements; be at least 21 years but not more than 45 years of age on the date of appointment; be a U.S. Citizen; have proof of good character; and possess a New York State Driver’s License. The direct line of promotion was to Associate Special Officer (Aqueduct Patrol).

Examples of typical tasks included:

Patrols the watershed area, reservoir areas and other sites maintained by the Department of Environmental Protection for the purpose of safeguarding life and property and maintaining order by preventing breaches of the peace and unlawful depredations by arresting offenders.

Investigates suspicious persons and occurrences and makes arrests when reasonable cause exists; collects evidence and consults with superior officers about the preparation thereof for court presentation.

Testifies at trials and notes dispositions made by court of these cases.

Submits reports on all unusual incidents, including accidents, occurring during the tour of duty; may administer first aid when an accident occurs on the officer’s post.

Directs traffic to expedite construction operations.

Reports instances of contamination of streams and the incidence of infectious diseases in the area.

In 1990, the New York City Water Supply Police Benevolent Association (“Association”) filed a petition to be certified as the bargaining representative of the employees in the title of Special Officer (Aqueduct Patrol), arguing that the existing certification was inappropriate because Local 300 was not skilled in representing law enforcement officers. In *New York City Water Supply Police Benevolent Ass’n*, Decision No. 12-91, this Board dismissed the Association’s petition and held that the title Special Officer (Aqueduct Patrol), which performed

police duties and responsibilities, still shared a community of interest with Local 300's other bargaining unit members.

Since 1990, and following the bombing of the World Trade Center in 1993, the manner in which Special Officers (Aqueduct Patrol) and Associate Special Officers (Aqueduct Patrol) performed their duties changed. In 1995, they were given access to the New York State Police Information Network ("NYSPIN"), a computer network that allows national and international law enforcement, including Interpol, the FBI, and the New York City Police Department ("NYPD"), to communicate and share information regarding criminal and terrorist activities. NYSPIN is a tool that has a wealth of information for fact-finding, intelligence-gathering, background information, and rap sheets. One must become certified to use it, and can get different levels of security clearance on the system.

In 1999, a paramilitary code level was instituted, which corresponds to the level of threat from international problems. EPO Barrett testified that whenever the threat level rises, he is deployed to certain key locations. Around this same time and in light of heightened security concerns, roaming patrols were added because fixed posts left the reservoirs vulnerable to criminal activity or attack.

In early 2000, the City created the EPO title, which replaced the titles Special Officer (Aqueduct Patrol) and Associate Special Officer (Aqueduct Patrol). The EPO title, which has three assignment levels, was voluntarily recognized by the City and added to Local 300's bargaining unit on April 5, 2000. The City issued a job specification for the EPO title that states that EPOs supervise and perform duties involving the enforcement of "the City's Watershed Rules and Regulations and other laws," perform special duties or assignments as may be directed

by superior officers, and may perform aerial reconnaissance. Applicants are required to have a high school diploma or the equivalent and to have been “qualified to serve as Police Officers.” In addition to the same typical tasks previously listed for Special Officers (Aqueduct Patrol), the specification for EPOs in Assignment Level I now includes “[p]atrols and secures water supply facilities and lands,” and “[i]nvestigates and reports instances of contamination of water courses.” For EPO Assignment Levels II and III, various supervisory duties were listed as examples of typical tasks.

The EPOs’ testimony elaborated on the job description. Their primary duties involve patrolling the watershed and, if necessary, making arrests. In addition to enforcing the Watershed Rules and Regulations, EPOs have responded to or made arrests for impersonating a police officer, auto accidents, suicide attempts, driving while impaired, felony assault, robbery, burglary, grand larceny, stolen property, and misdemeanor assault, among other things. They also write summonses for violations of the penal law and vehicle and traffic law. They have the duty to arrest a person for a crime whether or not the crime was committed within the geographical area of their employment. Since the roaming patrols were instituted and more EPOs have been hired, EPOs have been making more arrests. The geographical area EPOs patrol has expanded and EPOs have been involved with making felony arrests outside the watershed area.

EPO Flynn testified that EPOs are called upon to perform their functions on a 24-hour basis and that he receives approximately ten to fifteen phone calls per week to respond to some sort of incident while off-duty. EPO Clinch testified that EPOs are regularly asked for assistance or backup by other law enforcement agencies or police facilities. EPOs are often in close

proximity to an event and can respond to the scene and provide assistance while awaiting the arrival of other law enforcement personnel.

Before new recruits are sent out on patrol, they must complete training at a police academy accredited by the New York State Department of Criminal Justice. EPOs carry a gun, wear body armor, and drive in marked cars in the course of their duties. They also carry HAZMAT kits to handle minor hazardous material spills.

It is undisputed that the City approached Local 300 to negotiate a supplemental contract, with unique terms for the EPOs. On March 10, 2000, the City and Local 300 entered into a Supplemental Agreement, which became effective on March 26, 2000. The Supplemental Agreement stated that the EPO title has three assignment levels, and a corresponding step-up wage schedule for each assignment level. It amended the Assistant Buyers Agreement to provide that the regular work week would be extended from 40 to 42 hours for all EPOs, and that all meal periods would be unpaid and outside the regular course of duty. It stated that eligibility for premium pay for overtime would be computed on the basis of hours worked in excess of 171 on a 28-day cycle. A uniform allowance was set at \$250.00. It further prescribed that DEP should institute, after consultation with Local 300, a “Command Discipline” process, and a random drug testing process.

Also in 2000, DEP added dispatchers to manage EPOs’ increasing workload. Around the same time, a designation of detective was created, and those EPOs received extensive special training in interrogation, biochemical incidents, weapons of mass destruction, and homicide investigation.

The EPOs’ law enforcement duties have taken on new significance since the attacks of

September 11, 2001. The EPOs' law enforcement responsibilities have increased because of heightened security concerns regarding the water supply and the infrastructure that transports water to the City. EPOs receive sensitive warning information via NYSPIN concerning potential criminal activity in and around the watershed from the FBI or other law enforcement agencies. EPO Andreani testified that EPOs have remained on code orange, an elevated terrorist alert, and he spent nearly all of 2002 on twelve-hour tours. EPOs were also deployed alongside NYPD for the Republican National Convention in 2004. During that time, EPOs assigned to the Convention were on twelve-hour tours throughout the City for three weeks, and were deployed to protest sites. EPO Clinch testified that EPOs in his precinct are now working in New York City on an overtime detail, and their duties within the City include securing DEP's facilities in the boroughs.

In addition, several specialized units, including the Emergency Service Unit ("ESU"), Strategic Patrol, four K-9 units and an Aviation Unit, which includes helicopters that have been used to search for suspects, were created. EPO Barrett testified that a previously existing marine unit was bolstered by adding new apparatus to patrol the water supply and that there are now more specialty deployment officers. EPO Andreani testified that the ESU, created in 2003, is similar to a "SWAT" team and is called upon to handle any matters above and beyond standard patrol situations. Members of that unit carry sniper rifles, utilize gas masks, riot helmets, riot suits, and their ammunition is a much higher capacity than that of other EPOs. Although EPOs had access to K-9 units and helicopters from neighboring counties prior to the creation of these specialized units, access depended upon county cooperation and availability.

A June 19, 2004, Notice of Examination for the EPO title states that an EPO must be a

U.S. Citizen, possess good character, meet medical and psychological guidelines, be able to pass a qualifying physical test, and be able to pass a drug test. The probationary period for the title is 24 months, and the appointee must pass the Police Academy firearms, academic, physical performance, and driving tests, and meet disciplinary and performance standards throughout the probationary period. It also states that appointees must qualify and remain qualified for firearms usage and possession as a condition of employment.

POSITIONS OF THE PARTIES

LEEBA's Position

LEEBA alleges that the current bargaining certificate is inappropriate for the EPO title. LEEBA argues that NYCCBL § 12-309(b)(1) prohibits placing EPOs, who are professionals, in the same unit as elevator starters, window cleaners, and window washers.³ By being compelled to remain in a clerical union, they are being denied the right to impasse and other standard police officer service benefits. According to LEEBA, EPOs' collective bargaining rights are submerged in a clerical union. LEEBA contends that Local 300 has failed to pursue numerous grievances regarding unequal treatment, adhere to its own constitution, and gain results for EPOs on crucial matters such as wages and benefits. Among other things, Local 300 has belittled the EPOs, made shop steward meetings nearly impossible for them to attend, fired the EPO shop stewards, and

³ NYCCBL § 12-309(b)(1) states that "the board of certification shall not include . . . professional employees in a bargaining unit which includes . . . non-professional employees respectively unless a majority of . . . professional employees voting in an election vote in favor thereof."

ignored grievous safety issues, uniform issues, and scheduling and manpower issues.⁴

LEEBA asks the Board to examine the legislative intent in enacting NYCCBL § 12-314(b).⁵ EPOs are defined as police officers in the CPL and, according to LEEBA, recognized as such in NYCCBL § 12-307(4).⁶ Although the City opposes this petition, it has publicly advocated full and complete police powers for EPOs.⁷ Furthermore, LEEBA asserts that inclusion in Local 300 is prohibited because their constitution and bylaws advocate the right to strike.

LEEBA argues that the EPOs' full police powers mandates that they obtain independent representation. Public Employment Relations Board ("PERB") decisions have consistently held

⁴ LEEBA also contended that there may have been collusion between the City and Local 300 when the City went from taking no position on the petition to opposing it.

⁵ NYCCBL § 12-314(b) reads, in pertinent part:

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.

⁶ NYCCBL § 12-307, "Scope of collective bargaining," reads, in pertinent part:

(4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, or any other police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who is also defined as a police officer in this code, shall be negotiated with the certified employee organizations representing the employees involved.

⁷ LEEBA refers to an *Amicus Curiae* brief presented by the Attorney General of the State of New York in *People v. Searles*, Index No. LL 8004614, which included an affidavit from the Chief of DEP. The suit challenged EPOs' authority to issue a speeding ticket, and the affidavit avers that while the primary role of EPOs is to patrol and protect the City's water supply system, a secondary and no less critical role is to perform general police functions within the watershed and other areas where water supply infrastructure exists.

that police officers have the right to separate representation from other non-police workers.

LEEBA contends that, as demonstrated by the record, there have been significant changes in the EPOs' duties since 1991. The Supplemental Agreement demonstrates that EPOs perform "police like" functions. It contains special provisions for certain law enforcement functions, and contains compensation and overtime provisions that are different from other titles in Local 300. The fact that the City initiated negotiations for separate and distinct terms and conditions of employment just for EPOs justifies a separate bargaining unit.

Local 300's Position

Local 300 argues that LEEBA has not established such changed circumstances resulting in conflict in the bargaining unit to warrant deviating from the Board's established policy against unit fragmentation. LEEBA erroneously relies on PERB cases involving initial establishment of bargaining units and not cases seeking to decertify a portion of an existing unit. This case does not involve initial unit placement, and therefore a structure that has functioned for many years should not be disrupted. Further, EPOs' special interests are not inconsistent with the interests of the other titles in the unit, and their interests have not been sacrificed or submerged. This is true even if police officer status has been attained or new training is required.

Local 300 asserts that there is no evidence that since *New York City Water Supply Police Benevolent Ass'n*, Decision No. 12-91, EPOs have lost a community of interest with other titles in their existing bargaining unit. At the time of that decision, the unit consisted of approximately 700 employees in more than 50 job titles and the only title that the petition sought to fragment was the Special Officer (Aqueduct Patrol) title. As they are now, the employees at issue were considered police officers under the CPL, protected the City's water supply, investigated

suspicious persons and occurrences, and made arrests. They collected evidence, prepared for and testified at trials, protected local residents, and performed duties and special assignments like those of NYPD. Although the petitioner in that case made arguments similar to those made here, the Board found no basis to warrant a deviation from the established policy against fragmentation of units. LEEBA has failed to produce any evidence as to why the longstanding bargaining unit is no longer effective. Removing the EPO title from the current bargaining unit would adversely affect the efficient operation of public service and sound labor relations and would be inconsistent with the Board's policy against fragmentation.

According to Local 300, its structure has and will continue to function for EPOs. It has negotiated collective bargaining agreements, including supplemental agreements which provided EPOs with, *inter alia*, Civil Service status, a step-up wage program and other financial benefits. It has advocated for and filed grievances on matters including health and safety, out-of-title, telephone and communications systems, uniforms and gear, manning, parity with NYPD, test sites, wages, locker rooms, justification, and training issues. Local 300 has written to newspapers, the Governor, and the Mayor in support of legislation promoting EPOs' interests and has kept EPOs advised of its actions. It has negotiated and maintains funds that provide benefits to employees and retirees in the EPO title, and lobbied successfully for an EPO-specific 25-year retirement plan (regardless of age) and a three-quarters disability retirement benefits for EPOs injured in the line of duty that was passed by both Houses of the State Legislature and the New York City Council, but the State bill was vetoed by the Governor. It has held on-site meetings with union attorneys and representatives, appointed and trained shop stewards to represent the interests of EPOs, and repeatedly demanded higher wages. Furthermore,

dissatisfaction with current representation is not relevant to the unit placement issue and is considered only when it can be shown that the alleged inadequate representation is a consequence of conflicting interest within the unit. It is clear from Local 300's active representation of EPOs that there is not a conflicting interest within the unit.

City's Position

Initially, the City stated that it would take no position regarding the petition. However, the City amended its position, requesting that the petition be denied in its entirety. The City argues that granting the petition would cause a separate bargaining unit to be established, which would undermine the Board's efforts to keep bargaining units consolidated. Efficiency of operations and sound labor relations are not supported by an approach that involves unit fragmentation. Although employee wishes may be considered as one factor in determining the appropriateness of a bargaining unit, such considerations must be balanced against considerations of efficiency of operation of the public service and sound labor relations. In the present case, allowing the fragmentation of this pre-existing bargaining unit would impede the efficiency of the operations of the City and would not advance the cause of sound labor relations.

DISCUSSION

LEEBA seeks to remove EPOs from their current bargaining unit, represented by Local 300, and represent them in a new bargaining unit. The issue here is whether the pre-existing bargaining unit in which these employees are situated is no longer appropriate. Based on recent developments in the law, we find that the placement of EPOs in the current bargaining unit is no longer appropriate. We find that a separate bargaining unit is appropriate and direct an election.

Section 12-309(b)(1) of the NYCCBL 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. . . .

Section 1-02(k) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”), which is designed to implement NYCCBL §12-309(b)(1), sets forth criteria that we apply in making initial determinations of appropriate unit placement of employees.⁸ These criteria are substantially equivalent to the provisions of the Taylor Law, governing unit determinations made by PERB. *See* N.Y. Civil Service Law (“CSL”) Article 14 § 207(1).

This Board has long articulated a policy that favors consolidation of bargaining units and discourages fragmentation whenever possible. *Police Benevolent Ass’n, Long Island Railroad*

⁸ 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 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.

Police, Inc., Decision No. 24-79 at 7, *aff'd*, *Police Benevolent Ass'n v. Anderson*, 78 A.D.2d 777 (1st Dep't 1980), *leave denied*, 53 N.Y.2d 602 (1981); *Municipal Elevator Workers Ass'n*, Decision No. 1-92 at 10. As a result, over the years, the Board has created large bargaining units in the City based on broad occupational groupings comprised of as many employees and titles as can effectively operate as single entities. *New York City Water Supply Police Benevolent Ass'n*, Decision No. 12-91 at 6.

The Board's policy is not to disrupt a longstanding bargaining unit unless convincing proof of changed circumstances demonstrates that the pre-existing unit is no longer appropriate. *Indep. Laborers Union of New York City*, Decision No. 5-2003 at 9, *aff'd*, *Indep. Laborers Union of New York City v. Office of Collective Bargaining*, No. 118937/03 (Sup. Ct. N.Y. Co. Apr. 13, 2004); *Municipal Police Benevolent Ass'n*, Decision No. 4-95 at 10. When, as here, a petitioner seeks to remove employees from a previously certified unit and represent them in a new bargaining unit, we determine whether a sufficient basis exists for a finding that it is no longer appropriate for the title to be included in the current bargaining unit. *Indep. Laborers Union*, Decision No. 5-2003 at 9. If we find that the current unit placement continues to be appropriate, then the petition must be dismissed. *Id.* If we find that the current unit is no longer appropriate, then we determine whether the petitioned-for unit or another pre-existing unit is appropriate. *Id.*

PERB similarly has a policy against fragmentation of bargaining units. *See, e.g., Town of Southampton*, 37 PERB ¶ 3001, at 3004 (2004); *Deer Park Union Free Sch. Dist.*, 22 PERB ¶ 3014, at 3036 (1989). However, in 1996, PERB established an exception to its own general fragmentation standards for employees whose exclusive or primary attribute is law enforcement. *See County of Erie*, 29 PERB ¶ 3031 (1996), *confirmed*, 247 A.D.2d 671 (3d Dep't 1998). This

decision was issued subsequent to the Board's decision in *New York City Water Supply Police Benevolent Ass'n*, Decision No. 12-91, in which we denied a petition to fragment the existing unit to permit the removal of the EPO's predecessor title, Special Officer (Aqueduct Patrol).

In *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 3069 (quoting CSL § 58(3)). Applying this test, PERB permitted the removal of employees in deputy sheriff-criminal titles from an existing unit that also included deputy sheriff-officers, who are primarily responsible for building security, the custody of inmates, or the service of civil service process. *Id.* The new unit established consisted of employees in the police services division of the sheriff's office including “road patrol officers, detectives, supervisory personnel, and others providing ancillary services which are directly and predominantly related to criminal law enforcement.” *Id.*

PERB explained in *County of Erie* that it was not “abandoning its fragmentation standards generally.” *Id.* at 3070. Rather, it was extending the standard previously applicable to municipal police officers alone, who are “fundamentally different from everyone else,” to other law enforcement officers “who are identically situated to those police officers in all relevant respects.” *Id.* (quoting *City of Amsterdam*, 10 PERB ¶ 3031, at 3061 (1977)).⁹ PERB noted that “the mere possibility, even likelihood, that there will be some labor relations or personnel issues created as a result of fragmentation . . . is not reason to deny them what is otherwise clearly the

⁹ In confirming *County of Erie*, the Appellate Division noted that “PERB has articulated a sufficient basis for any perceived departure from prior precedent.” *County of Erie v. New York State Public Employment Relations Board*, 247 A.D.2d 671, 673 (3d Dep't 1998).

most appropriate unit in view of the ‘strong prevailing practice of having separate bargaining units for policemen.’” *Id.* (quoting *City of Amsterdam*, 10 PERB ¶ 3031, at 3062).

PERB applied the *County of Erie* standard in *State of New York*, 34 PERB ¶ 3038 (2001). There, employees in the environmental conservation officer and environmental conservation investigator titles, as well those in forest ranger, university police, and park police titles, were fragmented from a Security Services Unit of nearly 20,000 employees who are mainly in corrections officers titles. *Id.* at 3093. The environmental conservation officers and investigators, employed at the New York State Department of Environmental Conservation, are police officers within the meaning of the CPL and are required to attend a residential training academy and complete at least 536 hours of in-service training. “While [the officers’] primary responsibility is to investigate violations of the Environmental Conservation Law, in the course of those duties, they are regularly called upon to enforce all other State laws, including the Penal Law and the Vehicle and Traffic Law.” *Id.* at 3089. The officers patrol the region to which they are assigned when they are not involved in an investigation, may issue tickets and arrest violators, wear full police uniforms, carry weapons and pepper spray, and drive fully-equipped police vehicles. The investigators conduct investigations of criminal violations of the hazardous and toxic waste provisions of the Environmental Conservation Law. The investigators train the officers in the “principles and procedures of investigating hazardous waste violations because the officers primarily conduct investigations of pollution which is not a criminal nature and does not involve hazardous waste.” *Id.* The investigators draft and execute search and seizure warrants, testify in court, perform undercover work, and may be involved in other criminal investigations.

In determining that the duties of the environmental conservation officers and investigator

titles fulfilled the *County of Erie* test, PERB noted that they are police officers within the meaning of the CPL and are “responsible for the detection and prevention of crime and the enforcement of the criminal laws of the State of New York, as well as a variety of other laws, including the Environmental Conservation Law,” and that “such duties are their exclusive or primary responsibility.” *Id.* at 3091. PERB rejected the State’s argument that the employees’ duties did not fulfill the *County of Erie* test because they are primarily involved in the enforcement of the Environmental Conservation Law. PERB stated that the environmental conservation officers are “all qualified, trained, equipped and expected to perform as police officers. That they are engaged in specialized law enforcement simply evidences the degree to which they are involved in criminal law enforcement as well as their involvement with ‘ancillary services.’ The expectation is that they are, or can be, exposed to criminal law enforcement in the course of performing their duties.” *Id.* at 3092 (quoting *County of Erie*, 29 PERB ¶ 3031, at 3069).

Similarly, in a more recent fragmentation case, *County of Nassau*, 37 PERB ¶ 4013, at 4054 (2004), an Administrative Law Judge found that the law enforcement duties of several investigators, including the title environmental conservation investigator, employed at the County’s District Attorney’s Office warranted fragmentation from a county-wide bargaining unit under *County of Erie*. The investigators are police officers under the CPL and are required to carry a weapon and meet annual firearm qualifications, wear bulletproof vests, and undergo law enforcement training. Although the County argued that the investigators undertake only specialized investigations, the ALJ found that the investigators are ““qualified and expected by the County to perform the full range of law enforcement work.”” *Id.* (citing *State of New York*,

34 PERB ¶ 3038, at 3091).

We are persuaded to adopt the exception to the policy against fragmentation articulated by PERB in *County of Erie*. Here, we find that the inclusion of EPOs in their current bargaining unit is inappropriate 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. However, in finding that inclusion of EPOs in their current bargaining unit is no longer appropriate, we are not abandoning our fragmentation standards generally. By this decision, we are simply adopting PERB's limited exception for employees whose exclusive or primary characteristic is law enforcement.

EPOs resemble the environmental conservation officers in *State of New York* in numerous respects. They are police officers within the meaning of the CPL. Although EPOs are engaged in specialized law enforcement, they are all qualified, trained, equipped, and expected to perform as police officers. The job specification mandates that applicants be qualified to serve as police officers, and applicants are required to pass police academy firearms, academic, physical performance, and driving tests. Qualifying and remaining qualified for firearms usage and possession is a condition of employment. EPOs attend an accredited police academy, carry guns, wear body armor, and drive in marked cars.

Additionally, in the course of patrolling and protecting the City's water supply system, they perform general police functions within the watershed. As indicated in the job specification, they patrol the watershed area "for the purpose of safeguarding life and property" and maintain order "by preventing breaches of the peace, despoilage and theft, and by arresting offenders." They investigate suspicious persons and occurrences, collect evidence, and testify at trials. EPOs

can issue a summons and have the duty to arrest a person for a crime, including felonies, regardless of whether the crime was committed within the geographical area of their employment. In the course of their watershed-related law enforcement duties, EPOs have responded to or made arrests for impersonating a police officer, auto accidents, suicide attempts, driving while impaired, felony assault, robbery, burglary, grand larceny, stolen property, and misdemeanor assault, among other things. They are regularly asked for assistance or backup by other agencies and can respond to the scene.

Also, EPOs serve in several specialized units common to law enforcement departments, including the ESU, Strategic Patrol, four K-9 units and an Aviation Unit. Members of the ESU carry sniper rifles with high capacity ammunition, and utilize gas masks, riot helmets, and riot suits. EPOs also have access to the same highly sensitive computer network, NYSPIN, that is used by Interpol, the FBI, and the NYPD, among other law enforcement agencies.

That EPOs perform general law enforcement duties is further underscored by the testimony regarding several special deployments. In the months after September 11, 2001, EPOs were on heightened alert, were deployed to key locations when the threat level rose, and worked special tours of duty. Moreover, during the Republican National Convention, EPOs served next to NYPD officers, were on twelve-hour tours throughout the City for three weeks, and were deployed to protest sites.

We note that recently the Court of Appeals recognized “the broad police powers vested in the DEP force” in a decision finding that DEP police officers are authorized to enforce traffic laws within the City watershed. *People v. Van Buren*, 2005 WL 1106075 (N.Y. May 10, 2005). The court stated the “claim that DEP police should be restricted to law enforcement activities

related specifically to the protection of water facilities or a direct water source . . . is inconsistent with the express delegation of police power to this force under the Criminal Procedure Law.” *Id.*

We further find that a separate bargaining unit of EPO employees is appropriate. EPOs “share a community of interest growing out of the qualifications, training and duties unique to a police officer.” *See County of Erie*, 29 PERB ¶ 3031, at 3069. In making initial bargaining unit determinations, we have created separate bargaining units for police officers. *See Patrolmen’s Benevolent Ass’n*, Decision No. 54-68 (finding a unit of Patrolmen and Policewoman titles appropriate); *see also Superior Officers Ass’n of the New York City Housing Authority Police*, Decision No. 13-92 (amending a bargaining unit consisting of sergeants, lieutenants and captains employed by the New York City Housing Authority Police Department); *Office of Municipal Labor Relations of the City of New York*, Decision No. 50-82 (modifying the nomenclature in a bargaining unit consisting of the title Police Officer, New York City Housing Authority); *New York City Deputy Sheriffs Ass’n*, Decision No. 94-73 (creating a consolidated unit of deputy sheriff titles). No alternative appropriate unit has been proposed. Thus, we establish a separate bargaining unit for EPOs. We note a separate bargaining unit would have a minimal effect on “the efficient operation of the public service and sound labor relations” as the City has already negotiated terms and conditions specific to EPOs in the Supplemental Agreement. OCB Rule § 1-02(k)(4).

The NYCCBL authorizes the Board to conduct elections “to determine the majority representative of the public employees in an appropriate collective bargaining unit by conducting secret-ballot elections or by utilizing any other appropriate and suitable method designed to ascertain the free choice of a majority of such employees, [and] to certify the same as the

exclusive bargaining representative.” NYCCBL § 12-309(b)(2). Therefore, we direct an election among the employees in the EPO title to determine the employees’ preferences for representation. If Local 300 desires to participate in the election, it may do so by making a request in writing to the Director of Representation, within 14 days after service of this Decision and Direction of Election.

ORDER AND DIRECTION OF ELECTION

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

ORDERED, that Certification No. 8-85 (as previously amended) be, and the same hereby is, further amended to delete the title Environmental Police Officer (Title Code No. 70811); and it is further

ORDERED, that a separate bargaining unit for the title Environmental Police Officer (Title Code No. 70811) is appropriate; and it is further

DIRECTED, that as part of the investigation authorized by the Board, an election by secret ballot be conducted under the Board’s supervision, at a date, time, and place to be fixed by the Board, among the employees in the Environmental Police Officer title employed by the City of New York and related public employers, to determine whether these employees wish to be represented by LEEBA for the purposes of collective bargaining. Employees in the Environmental Police Officer title employed during the payroll period immediately preceding this Direction of Election, other than those who have voluntarily quit, retired, or who have been discharged for cause before the date of the election, are eligible to vote; and it is further

DIRECTED, that if Local 300 wishes to be on the ballot, it may submit to the Director of Representation, within 14 days after service of this Decision and Direction of Election, a statement indicating that it wishes to represent the bargaining unit; and it is further

DIRECTED, that within 14 days after service of this Decision and Direction of Election, the City will submit to the Director of Representation an accurate list of the names and addresses of all the employees who are employed by the Department of Environmental Protection and who were employed during the payroll period immediately preceding the date of this Direction of Election.

Dated: June 20, 2005
New York, New York

MARLENE A. GOLD

CHAIR

GEORGE NICOLAU

MEMBER

CAROL A. WITTENBERG

MEMBER