

LEEBA, 15 OCB2d 20 (BOC 2022)
(Rep) (Docket Nos. RU-1683-21 & RU-1684-21)

Summary of Decision: LEEBA filed a petition to fragment Special Officers and Supervising Special Officers employed at DCAS from a bargaining unit represented by Local 237 that includes Special Officers and Supervising Special Officers at various City agencies and at HHC. LEEBA argued that the Supreme Court's decision in *Janus* and additional law enforcement duties and training constituted changed circumstances such that placement of these titles in their current bargaining unit is no longer appropriate. Local 237 and the City argued that there were no new circumstances that warrant the fragmentation of the titles from the existing unit. The Board found the holding of *Janus* did not change the Board's long-standing fragmentation standard and that LEEBA's assertions do not establish changed circumstances warranting fragmentation. Accordingly, the petition was dismissed. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

-between-

**THE LAW ENFORCEMENT EMPLOYEES BENEVOLENT
ASSOCIATION,**

Petitioner,

-and-

**CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS AND THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES,**

Respondents.

DECISION AND ORDER

On October 28, 2021, and November 26, 2021, the Law Enforcement Employees Benevolent Association ("LEEBA") filed petitions, docketed as RU-1683-21 and RU-1684-21, respectively, to represent employees at the Department of Citywide Administrative Services

(“DCAS”) in the titles of Special Officer (Title Code No. 70810) and Supervising Special Officer (Title Code No. 70817), respectively. LEEBA’s petitions, which have been consolidated, seek to fragment the DCAS Special Officers and Supervising Special Officers (collectively “DCAS Special Officers”) from their current bargaining unit and represent them in a new bargaining unit.

LEEBA argues that there are changed circumstances since 2018, when the Board found that DCAS Special Officers were appropriately placed in their current bargaining unit, that warrant fragmentation: (1) the Supreme Court’s decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), and (2) additional law enforcement duties. Respondents argued that employees’ First Amendment right to not pay agency fees does not change the legal standard for fragmentation and that DCAS Special Officers did not have new law enforcement duties that warrant fragmentation from the existing bargaining unit. The Board finds that LEEBA’s assertions do not establish changed circumstances warranting fragmentation of DCAS Special Officers from other employees in the same titles. Accordingly, the petition is dismissed.

BACKGROUND

DCAS Special Officers are currently represented by the City Employees Union, Local 237, International Brotherhood of Teamsters (“Local 237”) in Certification No. 67-78, a bargaining unit that includes DCAS Special Officers at various City of New York (“City”) agencies, including but not limited to New York City Health + Hospitals (“HHC”) and the District Attorney’s Offices of the Bronx, Kings, and New York Counties, as well as supervisory and non-supervisory employees in various stock, custodial, inspectional, maintenance, skilled craft, and related titles.¹

¹ Special Officers and Supervising Special Officers who are subject to Local Law 56 of 2005 are represented by Local 237 in a different bargaining unit. See DC 37, 7 OCB2d 1, at 80 (BOC 2014), *affd.*, *Matter of City of New York v. Bd. of Certification of the City of New York*, Index No.

DCAS Special Officers have been in their current bargaining unit since at least 1996. On two prior occasions since 2014, unions have sought to remove some or all of these titles from this bargaining unit. *See LEEBA*, 11 OCB2d 13 (BOC 2018) (denying petition to fragment all Special Officers because petitioner failed to allege sufficient evidence of changed circumstances since the Board's decision in *HHC PBA, Inc.* to warrant fragmentation); *HHC PBA, Inc.*, 8 OCB2d 20 (BOC 2015) (denying petition to fragment only HHC Special Officers because they were not designated as police officers under the Criminal Procedure Law ("CPL") and the title's exclusive or primary duties did not include the enforcement of the general laws of the state).

Based on the affidavits, exhibits, and stipulated facts, we find the following:² The job specification for Special Officers provides that Special Officers are peace officers pursuant to CPL § 2.10 and that Special Officers must maintain a peace officer training certification as a condition of employment.³ It is undisputed that DCAS Special Officers' job duties are determined by the job specification, which states that certain assignments for Special Officers require that the officer carry a firearm while on duty. The job specification states that Special Officers perform work that

400199/2014; *Matter of CEU, L. 237 v. Bd. of Certification of the City of New York*, Index No. 100180/2014 (Sup. Ct. N.Y. Co. Jun. 15, 2015) (Moulton, J.). For a full history of the Special Officer bargaining unit, see *LEEBA*, 11 OCB2d 13, at 2-6 (BOC 2018).

² Following a conference, the parties stipulated to the undisputed facts. To the extent any assertions in the pleadings or affidavits are contrary to the parties' stipulated facts, we disregard such assertions.

³ Since 1980, Special Officers have been defined as peace officers under the CPL. As peace officers, Special Officers have the power to conduct searches and make arrests; issue appearance tickets, summonses, and complaints; take custody of firearms for disposing, guarding, or any other lawful purpose consistent with his or her duties; and any other power the Special Officer is otherwise authorized to exercise when acting pursuant to his or her duties. *See* CPL § 2.20. In accordance with CPL § 2.30, Special Officers receive peace officer training, with one portion that is prescribed by a municipal police training council and another portion that is prescribed by the employer.

relates to physical security, safety, loss prevention, and maintenance of order. It further provides that Special Officers' typical tasks may include: patrol of public buildings, other facilities, and surrounding areas to maintain order, preserve the peace, and safeguard life and property against fire, vandalism, theft, etc.; give routine information to visitors and clients and direct them to the proper individuals and offices; discourage and eject loiterers and disorderly persons when appropriate; arrest and issue summonses to law violators on premises; transport, escort and/or arrange for transport of persons in custody to police precincts; testify in court on arrests; report security instances and unusual occurrences by telephone or radio; provide assistance to the sick, injured, mentally and physically disabled, and call for ambulances and/or medical attention when necessary; make rounds; control vehicular traffic on grounds; operate a motor vehicle; monitor and control access by the means of electronic security systems and report unusual events; and perform related work. In addition, Special Officers may be responsible for completing, forwarding or maintaining certain written records such as: daily actions or logs, arrest reports and records, security and other incident reports, and building visitor registers. It is undisputed that DCAS Special Officers are not authorized to perform any job duties that are not described in the job specification. It is also undisputed that the job specification has not changed since April 2018, but for the addition of the sentence "Special Officers may be required to wear and operate a body-worn camera and employ the computer software that goes along with it."⁴ It is undisputed that any changes to DCAS Special Officers' training have not resulted in any changes to their job duties.

⁴ See <https://www1.nyc.gov/assets/dcas/downloads/pdf/noes/20222020000.pdf> (Last visited on July 7, 2022.)

DCAS Special Officers are assigned to DCAS-owned or leased properties (“DCAS properties”), and their jurisdiction is limited to DCAS properties.⁵ DCAS Special Officers are not authorized to respond to an incident that occurs outside of DCAS properties and their immediate surrounding areas.⁶ They are not authorized by DCAS to conduct off-duty arrests but are authorized to arrest individuals while on-duty. DCAS Special Officers have arrested individuals outside the bounds of DCAS properties on at least four occasions. In those incidents, the DCAS Special Officers were traveling to or from their assigned post at a DCAS property when they were approached by members of the public who reported an ongoing crime.

It is undisputed that DCAS Special Officers drive patrol vehicles, but DCAS does not dispatch Special Officers via patrol car to respond to ongoing incidents. DCAS vehicles driven by DCAS Special Officers are not classified as emergency vehicles and are not equipped with radios, emergency lights, or sirens. DCAS patrol cars are equipped with arrest cages. DCAS Special Officers are not authorized to violate the Vehicle and Traffic Law. DCAS Special Officers are also issued cell phones.⁷

⁵ We take administrative notice that DCAS manages 55 buildings in the City, 29 of which are courthouses. See <https://data.cityofnewyork.us/City-Government/DCAS-Managed-Public-Buildings/xx2p-4jnjq/data> (Last visited July 12, 2022.) Order, safety, and security at New York State courthouses is provided by New York State Court Officers, who must qualify for and remain eligible to purchase and carry firearms as a condition of employment and are designated as peace officers under the CPL. See <http://ww2.nycourts.gov/cot-trainee-exam-45-815-faqs-34306#g7> (Last visited July 12, 2022.)

⁶ Special Officers Justin Capote, Bryan Mulholland, and Supervising Special Officer Christian Calderon affirmed that their job duties are to protect tenants and visitors and properties owned, leased, and operated by DCAS, as provided on DCAS’ website. Supervising Special Officer Calderon affirmed that he is a certified firearms instructor and trains others, including DCAS Special Officers to use firearms.

⁷ Respondents contend that DCAS Special Officers have been issued cell phones since the late 1990s.

Since 2002, some DCAS Special Officers have carried firearms, specifically handguns, while on duty. Carrying a firearm is not a condition of employment for DCAS Special Officers. DCAS Special Officers can apply for a “Carry Guard License,” which is issued by the Police Department (“NYPD”), if they wish to carry a firearm while on duty.⁸ Currently, approximately 40% of DCAS Special Officers carry firearms on duty. All DCAS facilities but one have lock boxes for DCAS Special Officers to store their firearms when they are off duty. DCAS Special Officers at the one facility that does not have lock boxes carry their firearms to and from work.

Since 2002, DCAS Special Officers have been informed of the NYPD’s “color of the day,” which is used to allow law enforcement officials to identify undercover NYPD officers. Also since 2002, DCAS Special Officers have been assigned to conduct wellness checks and serve process on DCAS employees at their residences in the City as well as in Nassau, Westchester, Suffolk, Rockland, Orange, and Putnam counties. DCAS Special Officers have never entered the domicile of a DCAS employee while performing these duties.

A DCAS Daily Incident Report dated October 13, 2021, details four incidents that DCAS Special Officers responded to on that date. One of the entries describes how DCAS Special Officers responded to the entrance of their assigned post at Queensborough Hall after receiving reports of a shooting outside of the building. The Daily Incident Report details that NYPD officers responded to the entrance of Queensborough Hall and that the DCAS Special Officers assisted the

⁸ We take administrative notice that the NYPD describes a Carry Guard License as a license for “Security guards, etc.” and notes that the gun “[m]ay be carried only while the licensee is actively engaged in employment for the company whose name appears on the license and/or while licensee is in transit directly to or from residence and place of employment. At all other times, the handgun must be stored unloaded in a locked container, at either the address on the license or at the employee’s legal residence (within the state of New York.) See <https://licensing.nypdonline.org/new-app-instruction/> (Last visited on July 12, 2022.)

NYPD in gathering statements from potential witnesses. The Daily Incident Report also details a separate incident where a Special Officer investigated two vehicles that were parked next to Queensborough Hall in a reserved parking space and two other entries concerning incidents at two other DCAS properties. The Daily Incident Report does not state that any of the DCAS Special Officers left the grounds of any DCAS property when responding to any of the incidents.

The most recent class of DCAS Special Officers received 645.5 hours of training, which is a program that is more time intensive than the training that other classes of Special Officers receive. This training program included training in tactical situations. However, DCAS does not have a tactical team, has no plans to create a tactical team, and has not ordered any equipment for a tactical team. DCAS also requires its Special Officers to complete an annual recertification training program.⁹

At times, DCAS has maintained a Patrol Guide that described guidelines for how DCAS Special Officers should respond to the certain situations. In September 2019, the DCAS Patrol Guide was revised.¹⁰ It is undisputed that that the 2019 Patrol Guide was revoked in January of 2021 because some of the topics it included were outside the bounds of the job duties of DCAS Special Officers. However, while the Patrol Guide was in effect, it was used during training, and DCAS Special Officers were trained on topics including but not limited to active shooters, barricaded suspects, bomb threats, off duty arrests, and specialized units such as canine and aerial support units, which DCAS does not have. There is currently no active DCAS Patrol Guide, and no new classes of DCAS Special Officers will be trained until a new Patrol Guide has been issued.

⁹ In addition, LEEBA alleges that as a result of the COVID Pandemic, DCAS issued reporting details for Recruit Emergency Operational Deployment, which outlines the procedures by which DCAS Special Officer recruits are to report to duty in the event of an emergency.

¹⁰ LEEBA did not provide any evidence of any Patrol Guide that predates the 2019 Patrol Guide.

The 2019 DCAS Patrol Guide was never used as a basis for discipline for DCAS Special Officers. Disciplinary regulations for DCAS Special Officers are determined by the DCAS Code of Conduct.

In order to demonstrate the costs of Local 237's administration of its welfare funds, LEEBA submitted excerpts from the City Office of the Comptroller's Special Report on the Analysis of the Financial and Operating Practices of Union-Administered Benefit Funds with Fiscal Years ending in Calendar Year 2018 ("Comptroller's Report"). The excerpts from the Comptroller's Report detail the administrative expenses reported by Local 237 and other municipal unions compared to their reported revenues.

POSITIONS OF THE PARTIES

LEEBA's Position

LEEBA argues that there are changed circumstances since the Board's 2018 decision that warrant fragmentation of DCAS Special Officers from Local 237's bargaining unit. First, LEEBA contends that the *Janus* decision drastically changed the circumstances concerning public sector unions when it affirmed that public sector employees had a First Amendment right to not pay dues to a union. LEEBA further contends that strict fragmentation rules prevent these employees from exercising their First Amendment right to designate a union of their choosing. Due to these rules, members who no longer wish to support Local 237 are required to pay agency fees to a union that they do not wish to represent them or, alternatively, are forced to withhold agency fees and have an ineffective bargaining unit, in violation of *Janus*. LEEBA avers that both these scenarios violate City and New York State ("State") public policy and that the existing procedures and decisional law of the Office of Collective Bargaining ("OCB") did not contemplate the ability of employees

to opt-out of paying dues without the obligation to pay agency fees. LEEBA also argues that each employee receives contractually obligated annuity fund contributions and welfare fund benefits in exchange for their work and that they have a right to designate another union as their representative, so they do not have to provide Local 237 with these payments. Further, LEEBA avers that the First Amendment rights of the DCAS Special Officers who no longer wish to support Local 237 are being violated because Local 237 has the exclusive right to choose the financial advisors who control their funds, make benefit level choices, and control related investments. LEEBA points to the Comptroller's Report to argue that Local 237 is mismanaging the funds over which it exercises exclusive control. It argues that as a result, the Board's strict fragmentation rules and policies are a violation of the First Amendment rights of the DCAS Special Officers who no longer wish to support Local 237. LEEBA contends that its First Amendment argument concerning the impact of *Janus* is novel and therefore, is not barred by *res judicata*, as asserted by Local 237 and the City. Accordingly, LEEBA seeks a re-evaluation of the OCB's rules concerning the fragmentation and proliferation of bargaining units in light of *Janus*.

Second, LEEBA argues that fragmentation of DCAS Special Officers is now appropriate because since the Board's 2018 decision in *LEEBA*, 11 OCB2d 13, DCAS Special Officers now receive more training and have more law enforcement duties than any other type of Special Officer in the State. As a result, LEEBA asserts that DCAS Special Officers should qualify for the law enforcement exception that the Board adopted in 2005 when the Board fragmented Environmental Patrol Officers ("EPOs"). See *LEEBA*, 76 OCB 3 (BOC 2005). LEEBA argues that the length and nature of DCAS Special Officers' training demonstrate that fragmentation is appropriate. DCAS Special Officers receive slightly less training than NYPD recruits, but more training than the State Environmental Conservation officers discussed in *LEEBA*. DCAS Special Officers

receive training on a wide array of law enforcement topics, including training in tactical situations. According to Petitioner, the training that DCAS Special Officers receive is virtually equivalent to that of NYPD officers.

LEEBA also contends that it has demonstrated sufficient changed circumstances to the job duties of DCAS Special Officers. It alleges that DCAS Special Officers' duties far exceed those of other Special Officers in their bargaining unit, such as those employed by HHC. Specifically, DCAS Special Officers carry firearms and, LEEBA asserts, enforce the general laws of the state, which distinguishes them from HHC Special Officers. According to LEEBA, the primary duty of HHC Special Officers is to provide security to HHC facilities. LEEBA points to the nature of the equipment that that DCAS Special Officers utilize, including firearms, body armor, and marked patrol cars, and that they are required to respond to emergency calls twenty-four hours a day.

Based on its claim that the training and law enforcement duties of DCAS Special Officers have increased since 2018, LEEBA argues that the Board should find that DCAS Special Officers meet the same specialized law enforcement exception to fragmentation that EPOs qualified for in 2005. LEEBA asserts that EPOs are responsible for enforcing the general laws of the State anywhere within and outside the area of their jurisdiction. LEEBA argues that similarly DCAS Special Officers can respond to incidents anywhere in the City and can be the first and only law enforcement agency to respond.

LEEBA asserts that its showing of interest cards indicate that Local 237 members no longer wish to be represented by Local 237 and that these individuals revoked any designation of authorization they have previously made that they be represented by Local 237 for the purposes of collective bargaining. LEEBA requests that the Board hold an election so that the DCAS Special

Officers can exercise their constitutional and statutory rights to designate LEEBA as their bargaining representative.

Local 237's Position

Local 237 argues that the petition should be dismissed because LEEBA has not proffered any facts evincing a change of circumstances that would warrant overturning the Board's 2018 determination that DCAS Special Officers should not be fragmented from their current bargaining unit. It states that it has effectively represented all Special Officers since 1966. Local 237 cites to previous decisions by the Board ruling against the fragmentation of the Special Officer title, finding: (1) there was no conflict of interest with other titles in the unit; and (2) the Special Officer's command structure, training, job responsibilities, and duties did not warrant fragmentation.

With respect to LEEBA's argument concerning *Janus*, Local 237 asserts that *Janus* has no relevance to the question here, which is not about free speech or union dues, but the appropriate standard for bargaining unit fragmentation. Local 237 avers that bargaining unit members are not required to be union members, or pay dues or agency fees. It states that there are no Board cases that would support fragmentation here and that LEEBA has not pointed to any facts or law supporting its position. Local 237 notes that PERB has dismissed claims that were similar to LEEBA's claim in this case. In one of those cases, LEEBA argued that the holding in *Janus* necessitated a change to PERB's standard for fragmentation. Local 237 argues that each issue raised by LEEBA here has been fully litigated between the parties and that LEEBA should therefore be collaterally estopped from relitigating this issue before this Board.

Local 237 avers that LEEBA has not offered evidence of any new job duties that DCAS Special Officers must perform since the Board issued its last decision concerning the fragmentation

of DCAS Special Officers. Local 237 denies that any of the new training relied on by LEEBA has resulted in any changed duties for DCAS Special Officers and maintains that each of the new duties of DCAS Special Officers alleged by LEEBA are not duties, but rather, are examples of hypothetical situations about which DCAS Special Officers received training.

Further, as evidence that the jurisdiction of DCAS Special Officers is limited to DCAS properties, Local 237 notes that the Daily Incident Report has a column for “Building,” which contains the addresses of DCAS properties. Local 237 argues that this evidence and LEEBA’s affidavits acknowledge that DCAS Special Officers are assigned to guard DCAS property and are authorized to respond to incidents on their assigned properties and are not dispatched to respond to locations across the City.

City’s Position

The City argues that the petition should be dismissed because none of the relevant circumstances for DCAS Special Officers have changed since the Board’s 2018 decision and because the creation of a new bargaining unit would violate the Board’s longstanding policy against the proliferation of bargaining units. With respect to LEEBA’s argument concerning the impact of *Janus*, the City contends that LEEBA misreads *Janus*, which applies only to the payment of fees by non-members of public sector unions and does not constitute a changed circumstance that would necessitate creation of a new bargaining unit. The City notes that the Supreme Court recognized that it is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees. Additionally, the City asserts that *Janus* did not change the duties or training of DCAS Special Officers.

The City argues that the petition should be dismissed under the doctrine of *res judicata* since the issues alleged in this petition are “the exact same” as the previous representation petition

concerning DCAS Special Officers filed by LEEBA. (City Ans. ¶ 2). The City further contends that the total number of DCAS Special Officers is a small fraction compared to the total number of employees in the bargaining unit and that fragmenting them would be detrimental to labor relations generally.

The City avers that LEEBA has not offered evidence of any new duties since the Board's prior decision. For example, DCAS Special Officers have conducted wellness checks and service administrative notices since 2002. Further, with regard to the additional subjects on which DCAS Special Officers received training since 2018, the City argues that longstanding Board precedent holds that training is not determinative in establishing the actual job duties of a position. The City notes that LEEBA has not identified any Board precedent or case law that would support fragmentation based on the facts alleged.

DISCUSSION

Where, as here, the Board has made previous determinations that titles are appropriately placed in their current bargaining unit, it will not reconsider its decision “unless convincing proof of changed circumstances demonstrates that the pre-existing unit is no longer appropriate.”¹¹ *Ind. Law Enforcement Benevolent Assn.*, 14 OCB2d 27, at 12 (BOC 2021) (citations omitted).

We do not find that the Supreme Court's decision in *Janus*, 138 S. Ct. 2448, demonstrates that DCAS Special Officers are no longer appropriately placed in a bargaining unit with other

¹¹ Accordingly, *res judicata* does not preclude LEEBA from asserting that there are changed circumstances demonstrating that the existing unit is no longer appropriate.

Special Officers.¹² *Janus* holds that public sector employees, specifically those who choose not to be members of a union, do not have an obligation to pay agency shop fees to the certified bargaining representative.¹³ *See Janus*, 138 S. Ct. 2448, 2486.

Significantly, the issues of bargaining unit configuration or fragmentation were not before the Court in *Janus*. As a result, *Janus* does not alter the Board's exclusive, statutory authority "to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations." NYCCBL § 12-309(b)(1); *see also* OCB Rule § 1-02(k); *CUNY*, 53 PERB ¶ 4006 (ALJ 2020) (rejecting LEEBA's argument to fragment a peace officer title from its bargaining unit on the basis of *Janus*).

As this Board has recently explained, "[w]hile bargaining representatives are determined by the majority of employees in an appropriate unit, it is the Board that determines the configuration of bargaining units." *CWA, Local 1180*, 13 OCB2d 12, at 60 (BOC 2020) (citing NYCCBL § 12-309(b)(1) & (2)) *affd.*, Index No. 451864/20 (Sup. Ct. N.Y. Co. Nov 17, 2021) (Engoron, J.). It is well established that "we do not base our determination of an appropriate unit solely on an employee's right of self-determination." *NYSNA*, 54 OCB 2, at 50 (BOC 1994); *see*

¹² We do not rule on any constitutional claim under the First Amendment to the United States Constitution since such claims are beyond this Board's jurisdiction. *See IBT, Local 237*, 2 OCB2d 37, at 16 n.5 (BCB 2009).

¹³ In *Janus*, the Supreme Court held, in relevant part, that it was a violation of the First Amendment for a public sector union to assess agency fees from non-members:

Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.

138 S. Ct. 2448, 2486.

United Fedn. of Law Enforcement Officers, 40 OCB 14, at 15 (BOC 1987) (explaining that employees' opinions are not determinative of appropriate unit placement because their wishes must be "balanced against considerations of efficiency of operation of the public service and sound labor relations"); *City Empl. Union, L. 237, IBT*, 30 OCB 41, at 15 (BOC 1982) (noting that a showing of interest from employees "does not of itself establish a basis for unit placement"); *see also CUNY*, 53 PERB ¶ 4006 (quoting *State of New York – Unified Court System*, 22 PERB ¶ 3023 (1989)). Instead, appropriate bargaining units are established which "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" NYCCBL § 12-309(b)(1); *see also* OCB Rule § 1-02(k); *DC 37*, 7 OCB2d 1, at 64 (BOC 2014).

Since its inception, this Board has endeavored to keep the number of bargaining units to a minimum, "so as to develop a structure of bargaining that is coherent and viable." *United Fedn. of Law Enforcement Officers*, 40 OCB 14, at 14. Accordingly, the Board's long-articulated policy is one that favors consolidation of units and discourages unit fragmentation whenever possible. *See LEEBA*, 11 OCB2d 13; *HHC PBA, Inc.*, 8 OCB2d 20, at 18; *LEEBA*, 76 OCB 3, at 14 (citing *PBA-LIRR*, 24 OCB 24, at 7 (BOC 1979); *Municipal Elevator Workers Assn.*, 50 OCB 1, at 9 (BOC 1992)); *see also Municipal Police Benevolent Assn.*, 56 OCB 4, at 7-8 (BOC 1995).

Under the Board's traditional non-fragmentation standards, titles will not be fragmented from an existing bargaining unit unless there is evidence of conflicting or inconsistent interests between the petitioned-for title and other titles in the unit, or convincing proof that due to changed circumstances the continued inclusion of the petitioned-for title in the current bargaining unit would inherently prejudice the employees' rights. *See Ind. Law Enforcement Benevolent Assn.*, 14 OCB2d 27, at 13 (citations omitted).

In 2005, the Board adopted an additional, limited exception to its policy against fragmentation for employees whose exclusive or primary characteristic is “the prevention and detection of crime and the enforcement of the general laws of the state.” *LEEBA*, 76 OCB 3, at 19 (adopting *County of Erie*, 29 PERB ¶ 3031 (1996), *affd.*, 237 A.D.2d 671 (3d Dept. 1998)). In *LEEBA*, the Board fragmented the EPO title from its existing bargaining unit. The Board ruled that fragmentation was appropriate 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. Notably, EPOs are classified as Police Officers under CPL § 1.240(34)(o), and their jurisdiction spans the roughly 2,000 square miles of territory that constitutes the City watershed. They “perform general police functions,” such as investigating suspicious individuals and occurrences, collecting evidence, and testifying at trials, and have made arrests both inside and outside the watershed for a variety of offenses, including but limited to impersonating a police officer, driving while impaired, felony assault, robbery, and burglary. Other law enforcement agencies regularly ask for their assistance or backup, and they can respond scenes both inside and outside of the watershed. *LEEBA*, 76 OCB 3, at 19-20. EPOs must qualify for firearms usage and possession and maintain that qualification as a condition of employment. As an example of their broad law enforcement duties, the Board noted that during the 2004 Republican National Convention, EPOs served alongside NYPD officers and were assigned to twelve-hour tours throughout the City. EPOs serve in several specialized units, including an Emergency Services Unit, whose members carry sniper rifles with high-capacity ammunition, and utilize gas masks, riot helmets, riot suits, Strategic Patrol, K-9 units, and an Aviation Unit, which deploys helicopters when required to search for suspects. EPOs also have access to the New York State Police Information Network (“NYSPIN”), a computer network that allows national and

international law enforcement agencies such as Interpol, the FBI, and the NYPD to communicate and share information concerning criminal and terrorist activities.

Unlike the case involving EPOs, in *HHC PBA, Inc.*, 8 OCB2d 20, this Board held that the duties of Special Officers and Supervising Special Officers at HHC, who are in the same bargaining unit as the DCAS Special Officers at issue here, did not warrant fragmentation because their primary duty was not enforcing the general laws of the state. The Board found that HHC Special Officers, who are peace officers, perform law enforcement duties within HHC properties, but that such duties were incidental to their main duty of providing security and enforcing HHC orders and procedures at those properties.¹⁴ *Id.* at 21, 23. The Board noted that HHC Special Officers did not carry firearms and did not attend a police academy, like EPOs. *Id.* at 23.

In 2018, LEEBA petitioned to fragment all Special Officers, including DCAS Special Officers, from the existing bargaining unit due to alleged newly changed circumstances including training, command structure, and new duties. *See LEEBA*, 11 OCB2d 13, at 17. Specifically, LEEBA alleged that HHC Special Officers were now required to attend an academy where they received more rigorous training, including active shooter training. *Id.* LEEBA conceded that the new training did not result in any additional job duties for HHC Special Officers. *Id.* at 18. The Board declined to fragment Special Officers from their existing bargaining unit and upheld its previous finding that the purported change to training “is not significant in the context of a unit

¹⁴ The Board cited *Town of Islip*, 43 PERB ¶ 3003 (2010), in which PERB similarly held that Airport Guards should not be fragmented from their existing bargaining unit. PERB noted that while the Airport Guards were required to carry firearms and engaged in many law enforcement duties, their jurisdiction was limited to the airport and surrounding grounds.

determination” where it did not result in a significant change in bargaining unit members’ duties and responsibilities. *Id.* at 17 (quoting *PBA-LIRR*, 30 OCB 29, at 20).

Similarly, here we do not find convincing proof of changed circumstances that demonstrate that DCAS Special Officers are no longer appropriately placed in a bargaining unit with Special Officers from other City agencies and HHC. *See Ind. Law Enforcement Benevolent Assn.*, 14 OCB2d 27, at 13-14. It is undisputed that DCAS Special Officers are not authorized to perform duties that are not in their job specification and that their job specification has not materially changed. Like other Special Officers, some DCAS Special Officers are licensed to carry firearms while on duty and have done so since 2002. *See LEEBA*, 11 OCB2d 13, at 18. However, firearm possession is not a condition of employment for DCAS Special Officers, as it is for EPOs. Similarly, DCAS Special Officers have been conducting wellness checks and serving process on DCAS employees at their homes within and outside of the City since 2002. In short, there is no evidence before us that the job duties of DCAS Special Officers have changed since the Board’s 2018 determination.

LEEBA asserts that there has been an increase in training since 2018 that is reflected in the now rescinded 2019 Patrol Guide. Specifically, LEEBA notes that consistent with that document, DCAS Special Officers have received training in tactical response and on other law enforcement related topics, such as off-duty arrests, barricaded suspects, and domestic incidents.¹⁵ Nevertheless, it is undisputed that DCAS does not have a tactical team, and there is no evidence that it has plans to implement any such specialized unit. Further, the parties have stipulated that one of the reasons the 2019 Patrol Guide was revoked is because it contained topics that fell outside

¹⁵ We note that because the record does not contain the Patrol Guide in effect prior to 2019 we cannot ascertain whether these provisions are new, as LEEBA asserts. Nevertheless, we assume that this assertion is true for the purposes of this analysis.

the job duties of DCAS Special Officers. For instance, the Patrol Guide refers to specialized units, such as canine and aerial units, which DCAS does not have. Accordingly, we find that the increase in the training of DCAS Special Officers has not resulted in a change to their job duties. *See PBA-LIRR*, 30 OCB 29, at 20 (finding that an increase in the length and scope of Special Officers' training was insufficient to merit fragmentation when it did not result in a significant change in their duties and responsibilities).

Like HHC Special Officers, DCAS Special Officers' jurisdiction and duties are primarily limited to the property of their employer. Pursuant to the job specification, DCAS Special Officers "patrol designated areas of public buildings, other facilities, and surrounding areas to maintain order, preserve the peace, and safeguard life and property..." (L. 237 Ex. E) Similarly, while DCAS Special Officers have arrested individuals in the vicinity of DCAS properties when stopped on their way to or from work, this does not rebut the undisputed stipulated fact that DCAS Special Officers are not authorized to respond to scenes that occur outside of DCAS properties. Indeed, the entry on the Daily Incident Report concerning the incident at Queensborough Hall specifically notes that the DCAS Special Officers responded only to the entrance of Queensborough Hall while the reported shooting occurred outside the building. The affidavits of Special Officers Capote and Mulholland and Supervising Special Officer Calderon submitted by Petitioner further corroborate the limited jurisdiction of DCAS Special Officers. Each affirmed that "The DCAS Police Department protects tenants and visitors at properties owned, leased, and operated by DCAS." (LEEBA Ex. A) Therefore, we do not find that DCAS Special Officers' aiding the public on their way to or from DCAS properties are duties equivalent to those of EPOs.

We find that DCAS Special Officers, like HHC Special Officers, do not meet the law enforcement exception for fragmentation. Unlike EPOs, they are not defined as police officers

under the CPL. The exclusive or primary characteristic of DCAS Special Officers is not the prevention and detection of crime and the enforcement of the general laws of the State. *See LEEBA*, 76 OCB 3, at 19. Rather, the facts show that their primary responsibility and duty is the protection of DCAS properties and the people inside them. *See Town of Islip*, 43 PERB ¶ 3003 (finding that airport security guards who are peace officers whose jurisdiction is limited to the airport and surrounding property do not meet the law enforcement exception).

Significantly, we do not find that the evidence demonstrates a significant difference between DCAS Special Officers and other Special Officers in the bargaining unit. They are in the same civil service title and covered by the same job specification. All are peace officers pursuant to CPL § 2.10(40), and all are in the same level of bargaining. *See DC 37*, 7 OCB2d 1 (fragmenting only those Special Officers whose level of bargaining had been changed by Local Law 56 of 2005's amendments to the NYCCBL). LEEBA does not allege that DCAS Special Officers have any conflict of interest with other members of their bargaining unit, and there is no evidence that any conflict exists. *See HHC PBA, Inc.*, 8 OCB2d 20, at 28. Accordingly, we find that DCAS Special Officers are still appropriately placed in a bargaining unit with other Special Officers and dismiss the petition.

ORDER

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

ORDERED, that the consolidated petitions for representation of Special Officers and Supervising Special Officers employed by the Department of Citywide Administrative Services, filed by the Law Enforcement Employees' Benevolent Union, docketed as RU-1683-21 and RU-1684-21, are hereby dismissed.

Dated: July 19, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER