OFFICE OF COLLECTIVE BARGAINING

In the Matter of the Impasse

- Between -

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION (LEEBA)

- And -

THE CITY OF NEW YORK.

REPORT AND RECOMMENDATIONS
Case No. I-2-09
(AMENDED JUNE 30, 2012)[1]

BEFORE: Alan R. Viani, Impasse Panel

APPEARANCES:

FOR LEEBA:
Richard J. Merritt, Counselor at Law
By: Richard J. Merritt, Esq.

FOR THE CITY OF NEW YORK:
Prosakuer Rose, LLP
By: Neil Abramson, Esq. and Daniel Altchek, Esq.

DATES OF HEARING:

October 20, 2010, October 28, 2010, November 1, 2010, November 3, 2010, December 6, 2010, January 26, 2011, January 31, 2011, February 7, 2011, February 15, 2011, March 17, 2010, May 12, 2011

On March 17, 2010, the undersigned was duly designated by the New York City Office of Collective Bargaining[2], pursuant to the Rules of the New York City Collective Bargaining

[1] Pursuant to a Decision and Order of the Office of Collective Bargaining, Board of Collective Bargaining issued on May 29, 2012, all references to the Smith Report, contained in this Panel's January 14, 2012 Report and Recommendations, have been expunged from this Amended Report and Recommendations. The parties are advised that this Panel's recommendations are based solely and exclusively on the testimony and documentary evidence in the record of this proceeding, which are extensively cited and referenced herein. The content of the Smith Report was not relied upon by this Panel for findings of fact, nor was that report considered substantive evidence as a basis for any of this Panel's recommendations. The reference to the Smith Report was made solely to note that a consultant employed by Department of Environmental Protection arrived at similar (but not identical) conclusions concerning personnel matters as arrived at by this Panel. This Panel, without any consideration of the Smith Report, would have (and has after a reconsideration of the evidence) arrived at the same conclusions, findings of fact, and recommendations as are contained in this Amended Report and Recommendations and this Panel's January 14, 2012 Report and Recommendations.

[2] By written notice from the Office of Collective Bargaining, dated March 17, 2010. (Joint Exhibit 12)

Law (hereinafter "NYCCBL") to serve as Impartial Chairman of an Impasse Panel to hear and decide terms and conditions of employment for the title of Environmental Police Officer, Levels I, II, and III (hereinafter "EPOs") employed by Department of Environmental Protection of The City of New York (hereinafter "City" or "DEP"), and represented by the Law Enforcement Employees Benevolent Association (hereinafter "Union" or "LEEBA").

In accordance with the Rules of the New York City Office of Collective Bargaining ("OCB"), the instant proceeding was conducted to resolve a collective bargaining impasse between the City and the Union concerning the appropriate wage pattern and other terms and conditions of employment for the EPO title at all levels.

Hearings in this matter were held on October 20, 2010, October 28, 2010, November 1, 2010, November 3, 2010, December 6, 2010, January 26, 2011, January 31, 2011, February 7, 2011, February 15, 2011, March 17, 2010, and May 12, 2011 at the offices of the Office of Labor Relations and the OCB, in New York, NY. The parties had a full opportunity to examine and cross-examine witnesses, to submit documentation and make written argument in support of their respective positions. In the course of the hearing, the parties submitted 13 Joint Exhibits, 16 City Exhibits, and 73 Union Exhibits.

The parties elected to submit written pre-hearing and post-hearing briefs, which were received by this Panel in a timely manner. The last submission was received in July 2011 and the record in this matter was thereby closed.

The parties are advised that all matters of record, while not necessarily cited or referred to herein, have been considered in the formulation of this Report and Recommendation.

STANDARDS OF REVIEW REQUIRED BY LAW

In determining terms and conditions of employment, an Impasse Panel is required by § 12-311c (3) (b) of the New York City Collective Bargaining Law ("NYCCBL") to "consider wherever relevant the following standards in making its recommendations for terms of

settlement:

(i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities;

(ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

(iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;

(iv) the interest and welfare of the public;

(v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings."

BACKGROUND

The title of Environmental Police Officer, Levels I, II, and III, was created on February 16, 2000 by amendment to the City's Classified Service by the Department of Citywide Administrative Services ("DCAS") (Joint Exhibit 1), which abolished the existing job titles of Special Officer (Aqueduct Patrol) and Associate Special Officer (Aqueduct Patrol) and reclassified incumbent employees of these former titles into the EPO classification.[3] The new EPO title was exempted from the Career and Salary Plan and placed into the Miscellaneous Service classification under Rule X of the City's Personnel Rules and Regulations.

Under both the former titles and the new title, the main responsibility of employees was to protect the City's water supply, waterworks, and aqueducts, and to enforce the City's

[3] Technically, DCAS created the title of EPO and its 3 levels, deleted the 2 former Aqueduct Patrol titles, and required the existing Aqueduct Patrol employees to be subject to an education and experience or promotional examination, by which they were scored and placed into the new title. (Tr. 117-121, 1009-15) As used in this Report and Recommendation, "reclassified" is meant broadly to mean this process by which the titles were changed and the employees redesignated. Similarly, herein the words "classification," "role," "position" and "title" are used interchangeably.

Watershed Rules and Regulations and other laws. The EPOs are defined as Police Officers under § 1.20(34) (o)[4] New York Criminal Law ("CPL"), with full authority to enforce the laws of New York State, with their main focus on protecting the water supply. (City Exhibit 6; Joint Exhibits 7, 13; Tr. 1380-81). Toward this end, the EPOs operate out of 10 geographical and functional Precincts in 9 counties, and patrol approximately 19 reservoirs, three controlled lakes and 2,000 square miles of watershed area. (City Exhibit 10; Tr. 1377-80) The EPO's Precincts and areas of responsibility are located both within New York City and in several counties outside the City.

The 2000 establishment of the EPOs arose from the City's recognition of evolutionary changes in several aspects of the roles of these employees, which warranted significant changes to their salaries, levels, hours of employment, scheduling, annual leave, structure, management, qualifications and many other terms and conditions of employment from what previously existed under the Career and Salary Plan. (Tr. at 1008-10) As DCAS Director Schultz made clear, the changes then being instituted were not typical for civilian municipal employees and could not be made given this group of employees' classification and, therefore, DCAS changed their existing rule and service classification and removed them from coverage by the Citywide Agreement and their new terms were established on a unit level. (Id. at 1010-11) DCAS had full discretion in deciding how to institute these changes, and these tactics "had nothing to do with" and "no relationship" to police officer status. (Tr. 1016) [5]

The reclassification added certain qualifications and requirements to the new EPO position, including a high school diploma or its equivalent, 30 semester college credits or two years of military service or one year of law enforcement experience, psychological screening,

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[4]CPL § 1.20(34)(o) defines "police officer" to include: "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."

[5] While much has been made of the import of the distinctions between the classifications of Rule X and Rule XI, as well as between "Miscellaneous Service" and "Police Service," Schultz made clear that these were merely administrative solutions to create the changes desired at the time. She explained that neither was of any consequence for whether these employees were police officers. (Tr. 1016)

background checks, random drug testing, and a 2 year probationary period. (City Exhibit 6; Joint Exhibits 3 and 13) And, to meet the requirements as Police Officers under CPL§ 1.20(34) (o), applicants must be "found qualified to serve as Police Officers." (City Exhibit 6 at 5; Joint Exhibit 13 at 6)

The ranks of EPOs has fluctuated over time to a current estimate of about 175 in total, including approximately 140 Level I patrolling Police Officers or Detectives, 27 Level II Sergeants, and 8 Level III Lieutenants (City Post-Hearing Brief at 25; Tr. 1378). Some 33 EPOs are further organized into working divisions –depending on their specialization and with some EPOs assigned to multiple units– including approximately 10-15 officers who are in the Detectives Bureau (founded in 1999), 14 in the Emergency Services Unit (or "ESU," founded in September 2003, which is SWAT-like in function, using riot gear, sniper rifles, high-capacity weaponry and gas masks), nine in the Strategic Patrol Unit (founded in June 2003[6] and patrolling on boats, ATVs, motorcycles, and snowmobiles), two in the Aviation Unit (founded in September 1999, patrolling with helicopters), six in the Canine Unit (founded in June 2003), and several in the Dive Unit (founded in January 2004).(Joint Exhibit 6 at 8; Tr. 132, 1378-79)

The EPO Precincts additionally are organized into four geographic and functional Divisions (including "the Special Operations Division"), each of which is overseen by a Captain, one Assistant Chief, and the EPO Chief, who reports directly to the DEP Deputy Commissioner, and, ultimately, the DEP Commissioner. (Tr. 1379-80)

The collective bargaining history of these parties is fairly complex, and the currently applicable terms and conditions of employment are a patchwork of provisions found in several documents (hereinafter collectively known as the "Collective Bargaining Agreement"). Aqueduct Patrol Officers were represented by Local 300, Service Employees International Union ("Local 300") at the time of their reclassification to EPOs. Local 300 and the City had entered

[6] Inspector Milazzo testified that, while these formal Units were formed later, ATVs and boats were used by Aqueduct Patrol Officers as early as 1995. (Tr. 1379)

into several successive collective bargaining unit agreements (hereinafter "Assistant Buyers Agreement") for the periods of January 1, 1995–December 31, 1999 (Joint Exhibit 2), January 1, 2000–March 31, 2002 (Joint Exhibit 4) and, lastly, April 1, 2002–March 31, 2005 (Joint Exhibit 5).

Effective March 26, 2000, immediately following and as a consequence of the City's creation of the EPO title, Local 300 and the City entered into a Supplemental Agreement to the 1995–1999 Assistant Buyers Agreement (hereinafter "Supplemental Agreement") (Joint Exhibit 3), which substantially modified the terms of the Assistant Buyers Agreement then in effect and applied those changes to all incumbent employees in their new title of EPO.[7] The Supplemental Agreement codified the administrative changes made to these employees under the new job title, including the creation of three levels within the one title, setting wages for each level, and establishing salary steps within Level I. It established a 42-hour work week and an 8 hour and 24 minute work day, with overtime based upon an excess of 171 hours within a 28-day cycle pursuant to the Fair Labor Standards Act ("FLSA"), and with an acknowledgment of management rights regarding scheduling. It lowered the uniform allowance to $250 per year, eliminated the "Advancement Increases," acknowledged the applicability of the established "Longevity Increase" and "Annuity Fund" of the Assistant Buyers' Agreements, and of the Citywide Agreement's annual leave, but reduced the shift differential provided by the Citywide Agreement to 5% and reduced by two hours the hours by which an EPO would be eligible for the differential. The agreement also instituted a "Command Discipline" process for EPOs and added the requirements for random drug testing.

In June 2001, Local 300 and the City entered into a Municipal Memorandum of Economic Agreement (hereinafter "2000 MMEA" or "Memorandum of Agreement") (Joint Exhibit 3 A), modifying the parties' economic terms and carrying forward all other terms of each

[7] As a part of the Supplemental Agreement, the City voluntarily recognized Local 300 as the Union for the EPOs.

individual bargaining unit agreement represented, including the newly created EPO title. (Id., §2 and 21)

Additionally, various terms of the 1995–2001 Citywide Agreement (hereinafter "Citywide Agreement") (City Exhibit 16), which was entered into by the City and District Council 37, AFSCME, AFL-CIO, on behalf of a preponderance of all New York City civilian municipal employees, were incorporated by reference into Local 300's Assistant Buyers unit agreement, except to the extent that the unit agreement specifically exempted or modified certain provisions of the Citywide Agreement for EPOs.

In October 2005 LEEBA was certified to represent EPOs (Joint Exhibit 6A) and the parties began a long and winding road of negotiations and disputes, summarized by the Board of Certification in its most recent related decision, as follows:

> Following LEEBA's certification, the Union and the City began negotiations for an initial collective bargaining agreement. The parties met to negotiate at least six times between the commencement of bargaining and October 2008. On November 9, 2009, LEEBA filed a Request for the Appointment of an Impasse Panel ("Impasse Request"). The Office of Collective Bargaining ("OCB") brought the parties together for two mediation sessions held in January 2010. The Board of Collective Bargaining, on January 25, 2010, declared that an impasse exists between the parties.
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> During the course of negotiations, and prior to the Board's declaration of impasse, both parties filed improper practice petitions relating to the conduct of the negotiations. Each party asserted that the other had engaged in bad faith bargaining. The charges raised included the City's claim that LEEBA was insisting on negotiating non-mandatory and prohibited subjects of bargaining, and LEEBA's assertion that the City was refusing to bargain over mandatory subjects. The Board has issued three decisions addressing and disposing of these claims: LEEBA, 79 OCB 18 (BCB 2007) (interim decision, including negotiability rulings); LEEBA, 2 OCB 2d 29 (BCB 2009) (final decision after hearings on bad faith bargaining claims); and LEEBA, 2 OCB2d 43 (BCB 2009) (Supplemental Order directing bargaining in good faith).[8]

(Joint Exhibit 10 at 3, footnotes omitted.) The City then petitioned the Board of Collective Bargaining on February 24, 2010 for a determination that certain proposals were outside the scope of mandatory bargaining and should not be submitted to an Impasse Panel and on June 29,

[8]Joint Exhibits 7, 8, and 9, respectively.

2010 the above quoted decision was issued with mixed findings. (Id.) In the interim, this Panel was appointed (Joint Exhibit 12) to determine the substance on all mandatory subjects of bargaining that reached impasse.

POSITION OF THE PARTIES[9]

The Union

LEEBA's claims throughout these proceedings can be largely summed up as a broad request that this Panel treat the EPOs as Police Officers, entitled to the City's uniformed pattern of settlement, if not the same agreement between the City and the New York City Patrolmen's Benevolent Association. At the heart of its argument is that "pattern bargaining is the standard by which an initial EPO CBA must be evaluated, and LEEBA offers that NYC has refused 'pattern bargaining' for EPOs who perform police services for NYC." (Union Post-Hearing Brief at 15-16) LEEBA asks this Panel to compare the relative duties, responsibilities, qualification requirements and employment examinations of the EPOs to the NYPD in order to determine that a "substantial similarity required the same pay and benefits as NYPD." (Id. at 16)

LEEBA sets out a list of factors that EPOs and NYPD share in common and concludes that "a shoe horn is not required to fit EPOs into the pattern with NYPD because EPO qualifications and duties are substantially similar to NYPD." (Id. at 17) Accordingly, the Union urges this Panel to "define Environmental Police Service, and to decide the issue of a proper comparison for pattern bargaining." (Id. At 25)

The City

The City argues, first and foremost, that there are critical aspects to this matter that underlay all the Union's demands and require their rejection. These are that: (1) the well-

[9] Excerpted from the parties' post-hearings briefs, which have been edited for attribution, brevity, and continuity.

established framework for collective bargaining that distinguishes uniformed from civilian municipal employees; (2) the consistent assignment of bargaining units into one or the other group must be upheld for the stability of labor relations; and (3) the fact that this bargaining unit historically has consented to a civilian settlement requires that they remain in that classification. Although the City makes a substantial effort to itemize and address the Union's individual demands, it ultimately relies heavily on these points.

The City urges, as an underlying matter, that the EPOs' demands be considered in context with all other municipal employees. It argues that the effect of a decision departing from the status quo and a granting of any of LEEBA's claims would be to encourage other bargaining units that might have some similarities to EPOs to come forward with similar demands for higher economic benefits or other more favorable terms and conditions. The result, it argues, would be serious harm to the City.

The City argues, in addition, that the City's financial difficulties have greatly diminished its ability over the last years to pay higher costs of wages and other economic benefits, and, as a result, it cannot afford the demands of this Union–nor those of others who may follow their lead, if successful.

The City concludes that this instant impasse hearing should not be a forum for reconsidering this bargaining unit's placement within the framework and the well-known preference to maintain the status quo with regard to established patterns of bargaining should ultimately prevent this Panel from granting the Union's demands.

Accordingly, the City's position is that this Panel should reject LEEBA's demand that EPOs are entitled to the uniformed pattern of settlement.

DISCUSSION

In arriving at my determinations with respect to the demands of the parties this Panel has attempted to arrive at a recommendation which addresses what it believes should be the primary

consideration in this dispute, to wit, establishing the appropriate pattern of settlement for determining wages, benefits, and other terms and conditions of employment for EPOs. In this regard, the criteria established under law have been carefully considered. This has not been an easy task given the divergence of critical concerns of the parties and given the lack of clarity with respect to the presentation of specific issues by the Union.

Much of the difficulty in disposing of the Union's indiscriminate proposal is the direct result of what this Panel views as an inadequate effort by the Union and its counsel to carefully and clearly define the Union's specific demands or to lay out structured arguments for its position. As a result, there has been confusion in the proceedings, record, and arguments. Nonetheless, there can be no doubt that LEEBA's position is ultimately discernable. It has been repeated many times over, in this and in prior proceedings, as well as from its very first negotiations with the City and consistently thereafter. (Joint Exhibit 7 at 5) Notwithstanding this Panel's criticism of the Union's presentation, it views one of its obligations as ensuring the Union's right to have its position considered, however inartfully proffered. The totality of the record, therefore, will be considered in assessing the Union's case.

Fundamentally, this Panel agrees with the statement by the City that it is well accepted that "a dramatic change in the bargaining framework is never justified unless there are 'unique, extraordinary, compelling, and critical circumstances.'" (City's Post-Hearing Brief at 43, quoting Impasse between Patrolmen's Benevolent Association and City of New York, IA201-027, M2-146 (Sept. 9, 2002)).

Notwithstanding this position, this Panel recognizes that unique to this dispute are several changes in circumstances that justify taking a fresh look at these issues at this moment in time and making determinations that would be appropriate given the current facts, evidence and legal standards. This Panel notes that there is no standard under the law that requires this Panel be bound by determinations or facts that are simply historical, but may no longer be applicable. Among the changed circumstances are a few salient points, discussed below.

1. LEEBA is a relatively new player in the longer history between the City and this group of employees. It was certified and elected by the EPOs as its Union only in October 2005. This union was not involved in negotiating any of the Agreements in effect between the EPOs and the City, including those that immediately followed the creation of the EPO title.

When the Board of Certification certified in 2005 that this group of employees was no longer appropriately a part of a civilian bargaining unit covered by the Career and Salary Plan, it recognized that significant changes had occurred within this unit of employees, at the time the job title was created and thereafter, particularly post 9/11. The Board also recognized that the interests of these employees significantly differed from the categories of employees with which it previously was grouped, thereby requiring a new bargaining unit.[10]

LEEBA has sought to represent the interests of this new bargaining unit by establishing significantly revised contract terms between it and the City. Since the time it began to represent the EPOs over six years ago, it has consistently asserted the claim for a "uniformed forces" pattern of settlement in different venues and in its contract negotiations. Its assertions are clearly at variance from the posture of is prior representative.

Requiring, as the City urges, that the status quo must always be upheld, based solely on prior bargaining history, would have the unintended consequence that any newly created bargaining unit would be estopped from presenting arguments that differ from a predecessor representative. This result would render the creation of a new bargaining unit a nullity, locked in, so to speak, to a pattern of settlement that may no longer be appropriate under the existing criteria of the NYCCBL. Circumstances may in fact change and prior arrangements may at some juncture become obsolete. Alternatively, there could be in fact no change at all, but one party may attain a new perspective that means that the prior agreement no longer reflects its view of its

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[10]Notably, the Board of Certification briefly mentioned a petition in 1990 that it had denied by another police-oriented union to represent the EPOs as Special Officers (Aqueduct Patrol), and which occurred before there was a recognized exception for law enforcement officers. (Joint Exhibit 6 at 15-16, citing *New York City Water Supply Police Benevolent Ass'n*, Decision No. 12-91).

rights or needs. This Panel rejects the notion that collective bargaining agreement terms are ever carved in stone and recognizes that the labor relations process allows for changes over time – that this is a part of the evolution of a the labor-management relationship.

Accordingly, the EPOs have a right to be heard on their assertions and this Panel is obligated to hear those demands impartially, without necessarily being precluded from issuing recommendations that might vary from the historical pattern of settlement that previously prevailed.

2. This is the first Impasse Panel between this Union and the City and the first time that the question of which pattern of bargaining applies to the EPOs has been properly raised as a matter to be decided by a Panel in a forum that is empowered to adjudicate and decide that precise matter.

LEEBA and the City have been involved in several proceedings, including three hearings before the Board of Collective Bargaining and one before the Board of Certification, as well as mediation, but none was fully focused on the appropriate pattern of bargaining. The prior decisions from the Boards of the Office of Collective Bargaining directly addressed other issues, including the appropriateness of the bargaining unit (Joint Exhibit 6), several improper practices charges regarding their behaviors during actual negotiations (Joint Exhibits 7, 8 and 9), and the appropriate scope of bargaining issues to determine which demands are mandatory or non-mandatory subjects of negotiation and which are prohibited (Joint Exhibit 10).

This proceeding arises after negotiations stalled over the precise proposals of settlement from each side. During these negotiations, the Union continued to insist that it was entitled to the unformed pattern of settlements and the City continued to assert that the Union was only entitled to the civilian pattern of bargaining. That impasse precipitated this proceeding in which each side has had the first real opportunity to fully present its case on pattern bargaining, as well as specific demands and this Panel has fully considered the arguments and evidence presented from both sides regarding these matters.

3. The evidence does not support, as the City posits, that "there is no dispute that the essential duties and responsibilities that EPOs perform have not changed in any material respect for decades" or that "there have been no changes since the EPO title was created and these parties agreed to three settlements...that conformed to the civilian pattern." (City's Post-Hearing Brief at 26, 46)

When the Board of Certification found in June 2005 (Joint Exhibit 6) that the EPOs' unit was no longer appropriately part of the civilian bargaining unit represented by Local 300 and directed a representation election, it articulated that it was in a position – similar to this Panel –to refrain from disturbing longstanding collective bargaining arrangements unless "convincing proof of changed circumstances demonstrates that the pre-existing unit is no longer appropriate." (Joint Exhibit 6 at 15) Upon reviewing the circumstances of the EPOs, it nonetheless found that such changes had in fact occurred to the EPOs, making them more akin to law enforcement than civilian employees, and that these changes were sufficient to create a separate bargaining unit. (Id. at 19)

The numerous factors and changes discussed by the Board of Certification at that time are equally relevant at this juncture, concerning this same group of employees. Moreover, testimony and evidence of many of these and additional changes were submitted before this Panel. The EPO's authority has been expanded. The City or its managerial employees have altered the EPO's actual daily work, assignments and scheduling, requirements and training, pay, benefits, administrative designations, organizational structure, and management. And they have been deployed for functions beyond the protection of the water supply. The question at hand is simply whether the changes are sufficient to affect the applicable pattern of bargaining.

Among the significant facts presented to this Panel, there are none that are controverted by the City, factually or otherwise. The City does not refute any assertion by the Union of specific activities, use of equipment, training, etc. Rather it simply would reach a different conclusion regarding their relevance or whether they meet the standard to require any change.

All parties agree that the EPOs now have law enforcement authority both city and statewide. The EPOs have long had the authority to enforce state laws and, under NYCPL§ 1.20(34)(o), are defined as Police Officers with full police powers and authority to enforce the laws of New York State, with their main focus on protecting the water supply. (City Exhibit 6; Joint Exhibits 7, 13; Union Exhibit 7; Smith Report at 13, 15; Tr. 1380-81).

Then, in May 2000, after the reclassification of the EPOs, a legislative change to the Criminal Procedure Law gave the EPOs the authority to patrol and have full police power inside New York City. (Union Exhibits 7, 40; Tr. 1387) Rudolph Giuliani, New York City's mayor at the time, wrote a letter to the Governor, urging approval of the legislation, in which he recognized the police and law enforcement role, as well as the expertise, of the EPOs and stated that these were needed within the City limits in order to "allow the police force most familiar with the intricacies of the water supply infrastructure and its regulations, and the police force that receive the most appropriate training to handle these unique watershed cases." (Id. at 2) Effectively noting the interchangeability in function of these two police forces, Mayor Giuliani stated that this change would also "preserve the resources of the NYPD for other law enforcement purposes" and "increase the security of the water supply system." (Id.)

In May 2005 the New York Court of Appeals in *People v. Van Buren* reviewed the question of whether the EPOs could enforce traffic laws within the City limits and found they had that authority because they were vested with "broad police powers," rather than being limited to "law enforcement activities related specifically to the protection of the water facilities or a direct water source...." (Joint Exhibit 6 at 20-21[11]) Deciding otherwise, it found, would be "inconsistent with the express delegation of police power to this force under the Criminal Procedure Law." (Id.) The Board of Certification in 2005 found *Van Buren*'s conclusion

[11] Cited by the Board of Certification as 2005 WL 1106075 (N.Y. May 10, 2005). Seealso 4 N.Y.3d 640, 797 N.Y.S.2d 802.

supportive of its own finding that EPOs were engaged in general law enforcement and that their interests are more aligned with police officers than civilians.

This Panel rejects the City's contention that the change in the EPOs' jurisdiction has "no effect on the amount of work done" and is merely a "revision of the status quo that existed prior to 1983." (Tr. 1387-88; City Post-Hearing Brief at 47) A change in their legal authority itself is a sufficient factor to be considered in determining whether the EPO's status is correctly defined. Moreover, such a change necessarily had an impact on the day-to-day activities of the group.

Regarding the changes in the EPO's actual work duties, it has been recognized that: "Since 1990, and following the bombing of the World Trade Center in 1993, the manner in which... [these Officers] performed their duties changed." (Joint Exhibit 6 at 5) Increasingly their focus was on police activities aimed at counter-terrorism and starting in 1995 EPOs were given access to the New York State Police Information Network ("NYSPIN"), a computer network providing communication between and among certified members of Interpol, the FBI, and the NYPD regarding criminal and terrorist activities. (Joint Exhibit 6 at 5)

In 1999, a paramilitary code was instituted, which resulted in differing assignments that were dependent upon changes to international threat levels, and roaming patrols were added to increase security at reservoirs. (Joint Exhibit 6 at 15)

In 2000, many changes to the EPO position occurred. The City voluntarily created the EPO title via the DCAS amendment and issued a new job specification, containing additional qualifications, discussed above, including educational requirements and/or work experience, screening and testing, and the ability to be "found qualified to serve as a Police Officer." (Joint Exhibits 1, 13 and discussed above) The workload increased and the DEP added dispatchers for better management, and "a designation of detectives...received extensive special training in interrogation, biochemical incidents, weapons of mass destruction, and homicide investigation." (Joint Exhibit 6 at 7)

Also in 2000, the City and Local 300 entered into the Supplemental Agreement, which modified the EPO's terms and conditions of employment in ways that brought the EPOs closer in line with other Police Officers and included terms that are unusual for civilian employees, such as including salary increment steps within a level, establishing a "Command Discipline" process and requiring drug testing, promotional examinations and attendance at a police academy. EPOs also were given a 42 hour work week and paid over a 28 day pay cycle to better manage their patrol shift scheduling.

After 9/11, the "EPOs law enforcement responsibilities increased because of heightened security concerns regarding the water supply and infrastructure that transports water into the City." (Joint Exhibit 6 at 8) More counter-terrorism related coordination with the FBI and other law enforcement agencies was required via NYSPIN and special deployments were also added, some with 12-hour tours of duty, during the initial months following the attacks and other times of heightened alerts throughout 2002. (Joint Exhibit 6 at 8, 20)

The 2005 Board of Certification made factual findings that supported the determination that the EPOs regularly performed general law enforcement duties, including that EPOs were recognized to:

> 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 traffic law. They have the duty to arrest a person for crime whether or not the crime was committed within the geographical area of their employment. Since the roaming patrols were institutes and more EPOs hired, EPOs have been making more arrests. The geographical areas EPOs patrol has expanded and EPOs have been involved with making felony arrests outside the watershed area.

(Joint Exhibit 6 at 6) Extensive testimony and evidence in this proceeding regarding these findings supports the same conclusion regarding the types of duties. For example, the evidence shows that the EPOs perform general police functions and are regularly involved in a large number of law enforcement activities – including over 443 arrests and the issuance of some 4,494 summonses between May 2000 and November 2003(Union Exhibit 7), as well as 800

arrests and some 6,157 summonses from 2006 –2009. (City Exhibit 12) It also shows that from 2006 –2009 they continued to be sometimes involved in law enforcement activities not directly related to the protection of the watershed, primarily property crimes and assault. (Id.)

The weapons generally used by EPOs have evolved over recent years to include items typical of law enforcement and police officers including, gas masks, riot helmets, riot suits, high caliber ammunition, sniper rifles, Glock handguns, etc. (Joint Exhibit 6 at 20)

Moreover, the evidence shows that the EPO's specialized policing and environmental skills – including such skills as swimming rescue and handling Hazmat materials–require that they now go through training so extensive that it has become more advanced than NYPD standards, with over 400 additional hours of academy training (Joint Exhibit 6 at 20; Tr. 239-40) and nearly 700 hours above the New York State requirement. (Tr. 239)

As discussed above, between 1999 and 2004 the EPOs established new internal "Specialized Units" common to law enforcement departments, including the Emergency Service Unit ("ESU"), Strategic Patrol, four Canine Units, an Aviation Unit and a SWAT team, and it increased its Marine Unit. (Joint Exhibit 6 at 8, 20; Tr. 132, 1378-80)

Each of these additional units and specializations logically must have altered the requirements of the EPOs' job, uniforms, and equipment. For example, when after 9/11 the DEP determined a need for a rescue capability, it developed the Emergency Service, Canine, and Strategic Patrol units, and gave EPOs in those units the additional training and weaponry required to carry out that responsibility – items that were above what other EPOs received. (Tr. 166-68) Additionally, EPOs who are in specialized units also are required to obtain additional items to supplemental their uniform. (Tr. 236)

As a part of the Board of Certification's reasoning in 2005 that a separate bargaining unit was required, it adopted a limited rule from a 1996 PERB decision that required those groups of employees primarily involved in law enforcement are generally excepted from the policy against disturbing bargaining units and concluded that the EPOs "'share a community of interest

growing out of the qualifications, training and duties unique to a police officer.'" (Id. at 19, 21, citing *County of Erie*[12]) The Board of Certification also noted the examples of other law enforcement units that had been similarly extracted, including the Housing Authority Police, which subsequently merged with the NYPD. (Id.)

EPOs regularly work alongside other law enforcement officers or respond to the scene and provide assistance until law enforcement arrives (Joint Exhibit 6 at 7, Tr. 1453-55) and coordinate within the City limits with NYPD on activities that are not on DEP property or at large events. (Tr. 1389) While in 2007 the EPO Chief issued an interim order to keep the EPOs "primarily focused on the protection of the water supply system" by requiring permission before responding to 911 calls and complaints (Tr. 1381-82),the EPOs' involvement in law enforcement unrelated to the watershed has nonetheless continued.(City Exhibit 12, Tr. 1449-55)

Over recent years, the City also has periodically deployed EPOs for law enforcement needs beyond their limited mission of protecting the water supply. For example, in 2004, during the Republican National Convention in New York, EPOs were assigned special deployments to supplement NYPD coverage at protest sites and their shifts were extended for three weeks (Joint Exhibit 6 at 20; Tr. 1288-89, 151-52). In 2005, the EPOs similarly were sent to a Hudson Valley Mall to respond to a shooting. (Tr. 294)

The Board of Certification in 2005 concluded from the facts before it that the EPOs' "exclusive or primary characteristic is law enforcement" or "the prevention and detection of crime and the enforcement of the general laws of the state." (Id. at 19) This Panel agrees that the evidence before the Board of Certification and the additional facts presented at these hearings are indicia that the EPOs are involved in a full range of police activities and duties. Since 2005, these trends have continued.

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[12] *County of Erie*, a 1996 PERB case, which was later confirmed by a court in 1998, involved the Environmental Conservation Officers of the New York State Department of Environmental Conservation.

Accordingly, this Panel finds, contrary to the City's position, that "there has been a change in circumstances of such degree and magnitude as to justify" the departure from the status quo placement of the EPOs in the civilian pattern of bargaining. (City's Post-Hearing Brief at 46) Instead, this Panel finds that the totality of the circumstances, discussed above, establish a sufficiently compelling basis to change the current status.

These circumstances are unique to the EPOs and have no direct bearing on other bargaining units employed by the City. The changes detailed above that this unit has experienced over more than a decade are substantial. It would be somewhat circular in reasoning to assert that the fact that the EPOs have spent the last six of those years trying to correct their status would somehow preclude them from a correction at this point in time.

This Panel finds unequivocally that, given the EPOs' specifically delineated duties required to perform their mission, legal authority to enforce state laws, official deployments by the City, and actual day-to-day tasks and efforts that are known to the City, accepted by the City and have never been objected to by the City, the EPOs are absolutely police officers involved in law enforcement. They, therefore, are entitled to wages, benefits and terms and conditions of employment commensurate with other municipal uniformed services employees.

This Panel, therefore, finds that the EPOs as police officers should be awarded a uniformed services pattern of settlement and will recommend terms that will start the process toward the goal of bringing them closer to parity in pay and benefits with uniformed services employees.

Although this Panel has the authority to recommend wages and benefits to these employees to provide them with full pay and benefit parity with police officers, and finds that there are sufficient grounds under the NYCCBL standards for doing so, it nonetheless will refrain from doing so because of the extraordinary costs that the City would incur and in recognition of the fact that the current police officer pay and benefits did not occur

overnight, but are a product of years of negotiations and impasse panel awards. This Panel does recommend, however, that the parties work together toward the goal of achieving relative parity in the future and that they take progressive steps towards this goal.

The Panel's recommended wage increases, when measured against the civilian pattern for the same period of time is relatively modest in that over a five year period the Panel's wage recommendations exceed the civilian pattern by 4.35% or less than 1% per year. These recommendations will have a negligible impact on the City's budget in that this recommendation only affects approximately 175 individuals. As Mark Page's testimony acknowledges:

> Clearly with a group of employees as small as this one and a budget as large as the city's budget, the issue is not really for this group...it's really a question of if this group is treated in a particular way, what sort of ramifications will that have in terms of the city's collective bargaining settlements with much larger portions of its workforce.

(City Exhibit 14 at 1, quoting Page's 2007 Testimony in a prior proceeding) That this Panel's findings are limited to the unique circumstances of the EPOs should preclude any undue spillover effect, thereby protecting the interests of both the EPOs and the City.

At the instant hearings, the City argued that the EPOs' law enforcement job is not as dangerous as that of the NYPD. While this may be true as a matter of day-to-day statistics, it is also true that the potential for danger to EPOs is omnipresent, given their duties and typical activities patrolling the watershed, the situations that otherwise arise from their authority to enforce New York State law and when performing their duties in specialized deployments for non-watershed purposes.

In fact, the risk is very real and significant, as revealed in the testimony and evidence regarding several EPOs who were seriously injured while on duty, including: Rice who injured his knee (Tr. 136-37); Novi, whose lacerated hand a required a month out of service and who spoke about the risk of diseases transmitted by blood and saliva, like Hepatitis B, during on-the-duty injuries or exposure (Tr. 282-85, 293-94); another EPO in the Emergency Services Unit who broke

his back (Tr. 341-42); Eric Hoffman, who was in a debilitating accident while on an ATV patrol and who had to come back to work after five months, well before he was fully recovered in order to preserve his job and maintain an adequate level of pay and benefits, neither of which were as much as they had been prior. (Tr. 476-99, 487-89, Tr. 783); and Ed Klan, who was severely injured during a car crash and whose months off without pay caused him to go into debt and resulted in an EPO benefit event to raise money for him. (Tr. 738-41, 783, Union Exhibits 53, 54)

Moreover, it is certainly true that the dangers EPOs face are no less inherent in their roles than for uniformed services or NYPD employees who are not assigned to patrols or active law enforcement, but rather perform administrative or training duties, and are nonetheless recognized as police officers with the potential for injury or danger. LEEBA President Wynder indicated that the lack of protection has the negative effect of deterring EPOs from responding to violent crimes or otherwise performing their duties (Tr. 731, 781-83), which does not serve the interests of the individuals involved, the City or the public.

Therefore, this Panel recommends as follows:

RECOMMENDATIONS

Accordingly, based upon the discussion above, the Panel recommends the following terms and conditions for a new agreement. Where no recommendation is made, all other proposals are denied. However, all other terms and conditions of employment provided in the previous Collective Bargaining Agreement– including terms from the Citywide Agreement, the prior Supplemental Agreement, the prior Assistant Buyers Agreements and the Memorandum of Agreement shall be incorporated into a new stand-alone Agreement except as specifically modified or provided below:

1) The term of the Agreement shall run from October 20, 2005 through March 31, 2010. The first effective date marks the date at which LEEBA gained recognition as the Union representing EPOs. The end date is aimed at serving

a dual purpose: First, to maintain the new agreement in the same timeframe as the prior contracts (that is, renewing each April 1), which has administrative benefits while maintaining continuity of terms and conditions of employment; second, to foster sound labor relations, it makes eminent sense to bring the collective bargaining agreement for this unit of employees into the same timeframe as their New York City municipal counterparts, all of whom have agreements that expire in 2010. This Panel recognizes that it is too far past 2008 to recommend an agreement that would end in 2008 and trigger, almost immediately, another round of bargaining. This recommended time frame will bring greater efficiency to the labor relations processes between the parties.

2) The wages for all levels and steps of EPOs shall conform to a uniformed services pattern. Under a new agreement, the general wages increases recommended below shall be applied to an employee's base salary, salary increment steps, current minimum and maximum salary rates, longevity increases, assignment differentials and existing advancement increases (if any).

– Effective 10/20/05, a wage increase of 5%;

– Effective 4/1/06, an additional wage increase of 4%;

– Effective 4/1/07, an additional wage increase of 4%;

– Effective 4/1/08, an additional wage increase of 4%; and

– Effective 4/1/09 and through 3/31/10, an additional wage increase of 4%.

3) Concerning the demands regarding a 40- hour workweek and overtime pay, this Panel has determined that while these terms might be appropriate, there is insufficient information in the record regarding this proposed change to

recommend any change in the length of the workweek and current overtime arrangements under the Fair Labor Standards Act.

4) The new agreement shall include the standard unit agreement Recognition Clause, which shall include all levels of EPOs for which Union possesses recognition, including all "in house" designations such as Detective, Sergeant, et al.

5) The annual contribution to the Union's Welfare Fund shall be the same as provided other bargaining units covered by standard unit agreements; to wit, $1540.00 effective 10/1/05 and $1640.00 effective 4/1/10 [13]

6) The remaining economic benefits, discussed specifically below, shall begin on March 31, 2010. This Panel has determined that it is reasonable to delay the start of these benefits until that date because they will have already been received in the past, the delay will ease their administration, and the delay helps reduce the cost to the City of these changes.

7) Effective March 31, 2010, the Uniform Allowance for all EPOs shall be increased to $1,000 under the same terms and conditions as currently provided to NYC Police Officers. This Panel finds that as police officers, who we find for collective bargaining purposes should be treated in a similar fashion to the uniformed services of the City, and who are required to wear complex uniforms that are virtually identical to the NYPD, there is no justifiable reason for providing the EPOs with a different uniform allowance than was agreed to with the NYPD. The cost incurred by the EPOs to purchase and maintain these

[13] The record is unclear as to these amounts. It is this Panel's intent that the prior welfare fund contribution shall be carried forward in a new agreement and adjusted to the amounts indicated above. However, it would appear that in 2006 there was a temporary reduction in standard contributions that were restored in 2007. This Panel's intent is that the new agreement track the contribution rates granted other City bargaining units.

required uniforms is substantial, regardless of initial provision of uniforms by the City (Union Exhibit 51), and beyond the $250 allowance currently provided. (Tr. 763, 722, 233-38) For example, EPO Adreani testified that after taxes, the allowance covers only the costs of one pair of seasonal boots and he estimated that he spends closer to $1,000-1,200 annually to maintain his on required uniform. (Tr. 685, 722-23)

8) Effective March 31, 2010, the Night Shift Differential shall be raised to 10% and the timing for eligibility for such payments shall begin at 8:00 p.m. These changes revert to the former terms, previously provided under the Citywide Agreement.

9) Effective March 31, 2010, the Injury on Duty leave shall be modified from the existing provisions of the Citywide Agreement to be 18 months leave of absence with pay for any injury occurring while on duty. This recommendation expands the assault-related provisions of Citywide Contract to cover all injuries whether by assault or other causes. Moreover, this leave shall be granted without charge to sick or annual leave. Because EPOs are police officers and are first responders in emergencies, there is great potential for serious injury in their daily duties and these modifications are intended to treat these employees in a manner more consistent with other emergency and uniformed services employees, such as with the NYPD or the Fire Department.

The need for such treatment was made apparent in testimony, discussed above, regarding a number of EPOs who have sustained serious injury and the resulting impact on the EPOs, including the conclusion by EPO Turk that: "But post injury, the protection – the only thing in our ability to protect them is fill out their New York State compensation paperwork as fast and efficiently and as accurately as possible to try to

expedite them through the New York State Compensation Board, which usually, it seems like it takes about a year until they get taken care of." (Tr. 342)

10) Effective March 31, 2010, the Union will be permitted to allocate from its Welfare Fund up to $75 per employee per year for the purpose of establishing a Legal Defense Fund to be used to defend EPOs from actions directly related to the performance of their duties.

Dated: June 30, 2012

Alan R. Viani, Impasse Panel

AFFIRMATION

State of New York)
County of Westchester) ss:

The undersigned, under penalty of perjury, affirms that he is the Impasse Panel in the within proceeding and signed same in accordance with the arbitration law of the State of New York.

Dated: June 30, 2012

Alan R. Viani