

DC 37, L. 983, 18 OCB2d 11 (BCB 2025)
(IP) (Docket No. BCB-4548-24)

Summary of Decision: The Union argued that the NYPD failed to negotiate over the use of angle grinders by bargaining unit members in connection with their parking enforcement duties and claimed that mandating their use to cut motorcycle chains was a unilateral change in terms and conditions of employment. The Union also claimed that there was a practical impact on employee safety due to the mandated use of angle grinders. The City argued that determining the methods of parking enforcement is a managerial right under NYCCBL § 12-307(b) and that there was no change to the duties of the employees. The City also claimed that the Union had failed to prove a safety impact and that the City had effectively mitigated any safety impact that had existed. The Board found the use of angle grinders was not a mandatory subject of bargaining. The Board further found that the City took steps to alleviate the safety risks to employees and did not find evidence of a remaining practical impact on safety. Accordingly, the petition was dismissed. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 983,**

Petitioner

-and-

**CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,**

Respondents.

DECISION AND ORDER

On February 14, 2024, District Council 37, AFSCME, AFL-CIO, Local 983 (“Union”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Police Department (“NYPD”) alleging that the NYPD failed to negotiate over the use of angle

grinders by bargaining unit members in the context of parking enforcement, in violation of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) and (4). The Union claimed that the use of angle grinders to cut motorcycle chains was a unilateral change in terms and conditions of employment. The Union also claimed that there was a practical impact on safety due to the mandated use of angle grinders. The City argued that determining the methods of parking enforcement is a managerial right under NYCCBL § 12-307(b) and that there was no change to the duties of the employees. The City also claimed that the Union had failed to prove a safety impact and that the City had effectively mitigated any safety impact. The Board found the use of angle grinders was not a mandatory subject of bargaining. The Board further found that the City took steps to alleviate the safety risks to employees and did not find evidence of a remaining practical impact on safety. Accordingly, the petition was dismissed.

BACKGROUND

The Trial Examiner held two days of hearings and found that the totality of the record, including the pleadings, exhibits, transcripts, and briefs, established the relevant facts set forth below.

TEA III Duties and Removal of Motorcycle Chains

Three unions jointly represent the Traffic Enforcement unit for purposes of collective bargaining.¹ See DC 37, 7 OCB2d 15, at 2 (BOC 2014). Within that joint certification, the Union represents NYPD employees in the title of Traffic Enforcement Agent III (“TEA III”). The duties

¹ The three unions signed a stipulation in which they agreed, among other things, that each union would continue to have “the exclusive right to dues check off, to process grievances and to receive welfare fund payments for the employees in the titles for which it [was previously] certified.” See *ILEBA*, 14 OCB2d 27, at 4 (BOC 2021).

of a TEA III include operating a tow truck and removing illegally parked vehicles. The job description of a TEA III states that typical tasks include:

Operates a tow truck; removes illegally parked vehicles which are impeding traffic flow.
Affixes restraining or immobilizing devices to prevent operation of scofflaw-owned vehicles; removes such devices.

(Trial Examiner (“TE”) Ex. 2)

All TEA IIIs receive approximately six weeks of training prior to their first assignment. The training is conducted by experienced TEA IIIs. The subjects covered in the training include an overview of parking violations, how to operate a tow truck, and how to use burglar tools to enter a vehicle and disengage the transmission prior to towing.² The operation of an angle grinder is not covered in the initial training given to TEA IIIs.

In addition to automobiles, TEA IIIs are responsible for “motorcycle duty”, which is removing motorcycles and other two-wheeled vehicles with unpaid tickets or faulty registrations. Often the individual assigned to motorcycle duty will use a “rack truck” which is a tow truck specifically designed to tow two-wheeled vehicles. Towing these two-wheeled vehicles often requires removal of a heavy metal chain used to secure the motorcycle against theft.

Marvin Robbins is the Union’s First Vice-President and worked as a TEA III from 1991 to 2008, when he was released full-time to perform union duties. First Vice-President Robbins testified that the longtime procedure for removing motorcycle chains was for a TEA III to call in for NYPD’s Emergency Services Unit (“ESU”) personnel to come to the location and cut the chain. Once the ESU had cut the chain, the TEA III would then tow the vehicle.

² Burglar tools are the tools provided to the TEA IIIs that enable them to enter a locked car. These include a strap for securing the steering wheel as well as a long hook tool for gaining entrance to a locked vehicle.

Beginning in 2011, there were, at various times, between two to four of the 203 TEA IIIs who used an angle grinder to cut motorcycle chains. According to First Vice-President Robbins, the TEA IIIs who began using the angle grinders in 2011 did so voluntarily. First Vice-President Robbins testified that the Union did not protest the use of angle grinders in 2011 because the NYPD did not mandate their use. Robbins also stated that three of the employees identified as using angle grinders beginning in 2011 had, for several years prior to 2023, worked in assignments that did not require the use of angle grinders. It is undisputed that by October 2023, when the training discussed below occurred, at least two of those employees were no longer TEA IIIs.³

In October 2023, the NYPD ordered between 20-25 TEA IIIs to attend a mandatory training in the use of an angle grinder. Subsequently, they were assigned to motorcycle duty with the instruction to use the angle grinder to cut the motorcycle chains instead of calling ESU to remove them.

TEA III Use of Angle Grinder and Training

The October 2023 training was offered on two dates: October 13 or 17, 2023. Each TEA III assigned to the training was required to attend one day of training. Unlike the regular TEA III training, Detective Sean DeQuatro of the ESU conducted the angle grinder training instead of a TEA III. According to Detective DeQuatro, the training consisted of a PowerPoint presentation giving an overview of the angle grinder's parts and operation and then hands-on instruction on cutting motorcycle chains. Detective DeQuatro stated that the training covered safety precautions in addition to how to effectively cut the chains. Safety issues covered included using the angle

³ The City's witness, Traffic Manager Lemar King, has been employed by the NYPD since 2007. King testified that in 2011, when he was assigned to a tow pound, he was told to send some TEA IIIs for training on the angle grinder. King did not indicate whether the assignment of angle grinders to TEA IIIs was mandatory or whether it was only mandatory that employees who volunteered to use the angle grinders attend a training.

grinder's cutting wheel guard to direct sparks and material away from the operator, as well as how to recognize when the tool required servicing. Detective DeQuatro testified that he taught the TEA IIIs to make sure the chain was taut when cutting it, either by having their partner hold the chain or, where a TEA III is working alone, by using the burglar tools to create tension in the chain. Specifically, he taught the TEA IIIs that, when working alone, they should use the long hook from their burglar tools to hook one end of the chain, put one foot on the end of the hook to hold the chain taut, and then make the cut while keeping two hands on the angle grinder. He testified that the TEA IIIs were provided with protective gloves and plastic wraparound glasses for eye protection. Detective DeQuatro did not testify that any respiratory protection was provided during the training. No TEA III who attended the training testified.

Safety Concerns, Protocols, and Personal Protective Equipment

The record established that an angle grinder as used by the TEA IIIs is designed to cut through heavy metal chains and that operation of this tool causes sparks and heat as well as metallic debris to fly off the cutting surface. Traffic Manager King testified that the TEA IIIs are issued eye protection, earplugs, and protective gloves for use when using an angle grinder in the field. Traffic Manager King also testified that tow trucks all have first aid kits in them, although First Vice-President Robbins disputed this assertion.

The Union and the City each put on a witness who testified about the required measures needed to safely use an angle grinder. The Union produced Eduardo Rosario, who for the last five and a half years has been a Principal Program Director in the Union's Safety and Health Department. In this position, Rosario has conducted walk-through inspections of worksites, done research and document reviews, and conducted and developed health and safety trainings. In addition, he participates in the NYPD's labor-management health and safety committee, which holds quarterly meetings where safety and health issues are discussed. Based upon his review of

the manufacturer's instruction manual for the angle grinder, the Union's Principal Program Director testified that the sparks, dust, and debris emitted when using an angle grinder raised health and safety concerns regarding respiratory issues as well as the possibility of burns, abrasions, and injury from flying metal. In addition, he had safety concerns about the potential for kickback when using the tool and for possible hearing loss due to the volume of the angle grinder.

Principal Program Director Rosario also raised concerns that there was not adequate first aid available and that there was no emergency protocol put in place in case of an accident when operating an angle grinder. According to Rosario, there should be an established maintenance schedule for the angle grinder. Rosario also stated that it was dangerous for an operator working alone to cut a motorcycle chain because a chain is a movable piece of equipment and would require the TEA III to operate the angle grinder with one hand to secure the chain, or else risk a serious kickback from the angle grinder if the chain was not taut. He suggested that there should be a containment wall to create a barrier to contain sparks and debris. In addition, Rosario opined that appropriate personal protective equipment ("PPE") was needed to reduce the danger of operating an angle grinder. In particular, Rosario suggested that TEA IIIs should be provided with a full facemask and protective goggles to protect the TEA III from debris and from the light emitted when cutting a chain. According to Rosario, welder's gloves, a protective gown that protects the torso and legs, and proper protective boots were also needed. Rosario also stated that TEA IIIs who operate angle grinders need hearing protection. Rosario pointed out that according to the instruction manual, the angle grinders need to have maintenance and lubrication every six months performed by a manufacturer-certified technician.

In addition to Detective DeQuatro's testimony on safety issues, the NYPD produced Varghese Mathew, the Safety and Health Specialist assigned to the Safety and Health Section of the NYPD. The Safety and Health Section's main responsibility is to ensure that OSHA guidelines

and standards are followed, and it primarily addresses complaints and does annual testing, including respiratory and hearing testing. The Section also is responsible for the maintenance of logs, indoor air quality, and any other workplace hazard. Safety and Health Specialist Mathew testified that in July 2024 he investigated the use of angle grinders. He reviewed the PowerPoint used as part of the October 2023 safety training and had a TEA IV demonstrate the use of an angle grinder.

In his testimony, NYPD Safety and Health Specialist Mathew agreed that anyone using an angle grinder would need to be protected from the heat, sparks, and debris created by its use. Mathew testified that, when operating angle grinders, TEA IIIs should wear non-flammable clothes made of natural fibers and that their clothes should not be loose fitting. In addition, while conceding that TEA IIIs should have eye protection when operating an angle grinder, Mathew stated that the standard eye goggles provided by NYPD were sufficient. According to Mathew, a “face shield could be recommended but could be overkill for the job” of cutting motorcycle chains. (Tr. at 186-7) He testified that the proper way to use the angle grinder would be to use the cutting wheel guard to direct sparks and materials away from the operator. Mathew further opined that a full apron “could be recommended” but was not necessary for the time it takes to cut a chain. (Tr. at 187) Mathew agreed that hand protection for TEA IIIs using angle grinders was necessary; however he disagreed with the Union’s safety witness on the use of welder’s gloves. He asserted that welder’s gloves reduced the maneuverability and grip of the hands and, therefore, were not good for operating an angle grinder. Regarding respiratory protection, Mathew stated that a respirator was not needed because of the short duration required to cut a motorcycle chain. He also suggested that TEA IIIs would be hampered by a respirator because it might interfere with their ability to clearly see the object they are cutting. According to Mathew, although the noise level of the angle grinder exceeded 100 decibels, it did not raise a safety concern because such

concerns arise only when there is a volume of 115 decibels for a duration of fifteen minutes or longer. Mathew acknowledged that he had taken noise measurements during the demonstration of the angle grinder from several feet away because he did not want to be too close to the tool while it was cutting but noted that duration of use in the field would not approach 15 minutes

Neither Rosario nor Mathew attended the October 2023 training and neither has observed a TEA III using an angle grinder in the field. No TEA III who has been assigned to use an angle grinder or who was present at the training testified.

No angle grinder was presented for inspection at the hearing; however, the City introduced photographs of an angle grinder currently in use. The angle grinder pictured in the City's photographs did not have the cutting wheel guard attached over the cutting wheel. (*See* TE Ex. 9) Traffic Manager King said that in the past, when he was assigned to the Brooklyn Tow Pound, the angle grinders all had the safety cutting wheel guards attached. However, he could not explain why the angle grinder in the photographs submitted by the NYPD did not have the cutting wheel guard. Mathew agreed that the cutting wheel guard should always be attached to the angle grinder and did not know why it was missing in the photographs. Detective DeQuatro testified that when he conducted the training, the angle grinders had been delivered directly from the tow pounds and had the cutting wheel guard in place.

In addition, in its petition, the Union submitted the manufacturer's instructions which describe both the proper operation of the angle grinder and the manufacturer's recommendations on the required PPE

The instruction manual describes the proper operation of the tool for a variety of uses, including grinding, sanding, wire brushing, and cutting. (*See* TE Ex. 5) The record showed that TEA IIIs only performed cutting with the angle grinder. Regarding safety issues, the instruction manual section addressing proper use of cutting wheels specifies that the cutting wheel guard "is

required when using cutting wheels.” (TE Ex. 5 at 15) The instruction manual further requires the tool to have a complete cleaning, inspection, and lubrication every two to six months by a certified service center. (*Id.* at 16) There was no testimony regarding what constituted a certified service center. Traffic Manager King testified that the TEA IIIs and their supervisors are responsible for alerting management to the need to replace the cutting blades. There was no testimony addressing whether there is any other servicing performed on the angle grinders.

In addressing general safety procedures for any of the possible uses of an angle grinder, the instruction manual states:

WARNING: ALWAYS use safety glasses. Everyday eyeglasses are NOT safety glasses. Also use face or dust mask if cutting operation is dusty. **ALWAYS WEAR CERTIFIED SAFETY EQUIPMENT:**

- ANSI Z87.1 eye protection (CAN/CSA Z94.3),
- ANSI S12.6 (S3.19) hearing protection,
- NIOSH/OSHA/MSHA respiratory protection.

(TE Ex. 5 at 3)

In addressing the issue of respiratory protection in particular, the instruction manual further states:

WARNING: Some dust created by power sanding, sawing, grinding, drilling, and other construction activities contains chemicals known to cause cancer, birth defects or other reproductive harm. Some examples of these chemicals are:

- lead from lead-based paints,
- crystalline silica from bricks and cement and other masonry products, and
- arsenic and chromium from chemically-treated lumber (CCA).

Your risk from these exposures varies, depending on how often you do this type of work. To reduce your exposure to these chemicals: work in a well ventilated area, and work with approved safety equipment, such as those dust masks that are specially designed to filter out microscopic particles.

• **Avoid prolonged contact with dust from power sanding, sawing, grinding, drilling, and other construction activities. Wear protective clothing and wash exposed areas with soap and water.** Allowing dust to get into your mouth, eyes, or lay on the skin may promote absorption of harmful chemicals.

WARNING: Use of this tool can generate and/or disburse dust, which may cause serious and permanent respiratory or other injury. Always use NIOSH/OSHA approved respiratory protection appropriate for the dust exposure. Direct particles away from face and body.

Id. at 3.⁴

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the NYPD's October 2023 order that TEA IIIs begin using angle grinders was a unilateral assignment of non-unit duties affecting a mandatory subject of bargaining. The Union argues that the NYPD had not historically assigned TEA IIIs to use angle grinders and therefore the NYPD's requirement that TEA IIIs begin using angle grinders, and its refusal to bargain over that requirement, constituted an assignment of non-unit duties implicating safety and health in violation of NYCCBL § 12-306(a)(1) and (4).⁵

The Union claims that the NYPD did not assign TEA IIIs to use angle grinders in the course of their duties prior to October 2023. According to First Vice President Robbins, the longstanding practice of TEA IIIs when faced with a chained vehicle was to call the ESU to cut the chain. The Union also submitted the TEA III job description, which does not include removal of motorcycle chains or other security devices from vehicles. The Union acknowledges that a few TEA IIIs used

⁴ There was no evidence in the record about what the reference in the instruction manual to a "dusty" cutting operation or whether the use of the tool by TEA IIIs would be considered a dusty cutting operation by the terms of the instruction manual. In addition, there was no evidence in the record about whether the chemical compounds mentioned in the instruction manual, or similarly dangerous chemicals, are present in motorcycle chains or whether the TEA IIIs had "prolonged contact" with such dust.

⁵ NYCCBL § 12-306(a) provides, in pertinent part:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

angle grinders voluntarily prior to October 2023 but states that the NYPD never mandated the use of the tool. The Union further maintains that, even if it were the case that the NYPD had assigned a few TEA IIIs to operate angle grinders prior to October 2023, the record shows that this was a minor exception and does not establish that using an angle grinder was part of a TEA IIIs' assignment. At most, the Union claims, a small number of employees, four out of 203 total TEA IIIs, had been required to use the angle grinders. Therefore, the Union argues, the NYPD violated NYCCBL § 12-306(a)(1) and (4) when it "effected a unilateral change in TEA IIIs' terms and conditions of employment. . . . this change impacted TEA IIIs' health and safety, which is a mandatory subject of bargaining." (Pet. Br. at 24)

According to the Union, angle grinders are inherently dangerous devices because they are designed to use a high-speed sharp wheel to cut through metal. In addition, the Union argues that the operation of an angle grinder by necessity results in the emission of metallic debris, sparks, and dust, all of which pose health and safety risks to the operator. The Union states that all witnesses agree that operating an angle grinder requires training, the use of PPE, and proper maintenance of the angle grinder. According to the Union, the training and PPE provided by the NYPD is inadequate to protect TEA IIIs assigned to use the tool.

The Union further asserts that, even if the NYPD has the managerial right to assign the angle grinder, the use of the tool has a practical impact on employee safety and health, a mandatory subject of bargaining. The Union argues that the training, maintenance procedures, and PPE provided by NYPD do not mitigate the safety risks created using the tool.⁶

⁶ The Union also argues that there is a *per se* impact on safety because of, among other things, the risk of injury from the grinder resulting from kickback and projectiles, as well as from combustion caused by sparks, dust, or particles generated from cutting the chains. (Pet. ¶ 43)

In particular, the Union highlights what it claims are a variety of shortcomings in the safety precautions of the NYPD. First, the Union points to a photograph submitted by the NYPD in its answer that it represented to be an angle grinder used at one of the tow pounds. The Union points out that the angle grinder pictured has no cutting wheel guard on it, despite the NYPD's insistence that the angle grinders in use have the cutting wheel guards attached. The Union maintains that the NYPD's own witnesses testified that an angle grinder should not be operated without the cutting wheel guard. Therefore, the Union asserts, the NYPD's own evidence shows that the angle grinders are not being safely used and maintained. In addition, the Union relies on the fact that TEA IIIs will at times be using the angle grinders alone in the field. The Union refers to Detective DeQuatro's testimony that when a TEA III is alone, they should secure the chain by attaching the long hook they are provided as part of their "burglar tools" and then standing on the long hook to ensure that the chain is taut and therefore safe for cutting. The Union contends that a TEA III operating an angle grinder with two hands while standing on a hook attached to the chain being cut is vulnerable to being thrown off balance or injured by any abrupt jerk of the chain.

City's Position

The City maintains that the Union has failed to establish a violation of NYCCBL § 12-306(a)(4). The City argues that the Union has not met its burden because the subject about which it seeks to bargain is not a mandatory subject.

The City argues that the decision to use angle grinders is part of management's right to determine the methods and means of operation, including the right to assign the necessary equipment. According to the City, the record shows that the NYPD has assigned angle grinders to TEA IIIs since 2011, as confirmed by Union First Vice President Robbins. Because of this longstanding assignment of angle grinders to TEA IIIs, the City argues that there has been no unilateral change in job duties and, therefore, no change related to health and safety merely because

some additional individuals have been assigned to use angle grinders. The City asserts that the decision regarding the selection and use of equipment is a right granted to management under NYCCBL § 12-307(b).⁷

The City also claims that there is no violation of NYCCBL § 12-306(a)(4) arising from a failure to bargain over a practical impact on safety. The City argues that since a duty to bargain does not arise out of a claim of practical impact until the Board first finds that a practical impact exists, any claim that the NYPD has failed to bargain is premature since no bargaining duty has arisen. Further, the City asserts that the Union has not met its burden of proving a clear threat to health and safety. The City states that the Union has presented only vague and generalized testimony of the dangers of using an angle grinder. The City claims that such theoretical dangers are likely to be present with the use of any tool.

The City dismisses the testimony of the Union's witnesses, claiming that First Vice President Robbins admitted that he has never used an angle grinder or seen any of the newly-trained TEA IIIs using it in the field and that Principal Program Director Rosario's testimony consisted merely of conclusory allegations about safety risks based on no actual knowledge or expertise. The City also relies on the fact that Principal Program Director Rosario provided no

⁷ NYCCBL § 12-307(b) states, in relevant part:

It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over . . . the technology of performing its work. Decisions of the city . . . on those matters are not within the scope of collective bargaining, but . . . questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

appropriate qualifications to support his opinion on the safety risks of an angle grinder and that he acknowledges that he has never observed a TEA III using one in the field. The City maintains that First Vice-President Robbins and Principal Program Director Rosario's testimony is nothing more than unsupported allegations which cannot support a finding of a safety impact. Moreover, the City points out that Rosario acknowledged that proper PPE, training, and utilization would mitigate any safety risks.

The City argues that the record proves that the NYPD has taken adequate measures to reduce the impact on health and safety. The City points to the fact that the NYPD provided a day-long training program on using the angle grinder and issued PPE to the TEA IIIs assigned to operate the angle grinder, including gloves, eye protection, and ear protection. According to the City, even the Union's witnesses conceded that these items would alleviate some of the safety issues. The City further claims that the record showed that, in the thirteen years that angle grinders have been used by TEA IIIs, there has been no record of any injury from an angle grinder. This, the City claims, shows that the safety issues alleged by the Union have been satisfactorily addressed by the positive measures taken by the NYPD to mitigate the safety impact.

Finally, the City encourages the Board to not rely upon the manufacturer's operator's manual on the grounds that it "merely provides general usage instructions and warnings which would undoubtedly be found with any sort of tool or battery powered device." (Resp. Br. at 17)

The City argues that since the record shows that there has been no violation of NYCCBL § 12-306(a)(4), there can be no derivative violation of NYCCBL § 12-306(a)(1).

DISCUSSION

The Union asserts two claims regarding the assignment of angle grinders to TEA IIIs. First, it claims that NYPD violated NYCCBL § 12-306(a)(1) and (4) by refusing to bargain over the

assignment of angle grinders to TEA IIIs. Second, the Union asserts a claim that the assignment of angle grinders to TEA IIIs has a practical impact on their safety and is therefore a mandatory subject of bargaining under NYCCBL § 12-307.⁸

NYCCBL § 12-306(a)(4) provides that it is “an improper practice for a public employer . . . to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.” In applying the statute, the Board has “long held that a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith.” *UFA*, 10 OCB2d 5, at 13 (BCB 2017), *affd.*, *Matter of City of New York v. Uniformed Firefighters Assn., Local 94, IAFF, AFL-CIO*, 2018 NY Slip Op 30453(U) (Sup. Ct. N.Y. Co. Mar. 14, 2018) (Bluth, J.) (citations omitted). The party asserting a unilateral change to a mandatory subject of bargaining has the burden to prove “that (i) the matter sought to be negotiated is . . . a mandatory subject and (ii) the existence of such a change from existing policy.” *Id.* (quoting *ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014)); *see also UFA L. 94*, 13 OCB2d 9, at 29 (BCB 2020).

When determining whether a change has occurred, we accept evidence of a past practice to determine the existing policy. *See DC 37, L. 436*, 4 OCB2d 31, at 14 (BCB 2011). To establish the existence of a past practice, a party must show that the practice “was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged.” *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2008) (citing *County of Nassau*, 38 PERB ¶ 3005 (2005)); *see also SSEU*, 14 OCB2d 20, at 12 (BCB 2021). In analyzing the existence of a past practice, PERB has held that limited or minor exceptions to a longstanding practice do not

⁸ Although a scope of bargaining petition is the proper procedural mechanism through which to assert a claim of practical impact, the Board has exercised its discretion to consider scope claims alleged in an improper practice petition. *See, e.g., Local 1182, CWA*, 5 OCB2d 41, at 8 (BCB 2012); *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 13 (BCB 2012); *NYSNA*, 71 OCB 23, at 12 (BCB 2003).

serve to undermine the existence of the past practice. *See Cen. New York Regional Transp. Auth.*, 52 PERB ¶ 3008, at 3037 (2019); *Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005, at 3026 (2008). This Board has adopted PERB’s analysis in this regard. *See DC 37, L. 983*, 15 OCB2d 42, at 20 (BCB 2022). Therefore, we look to see whether there was a longstanding practice, with or without minor exceptions, that existed for a long period of time sufficient that employees could reasonably expect the practice to continue.

The record is clear that the longstanding practice was that the vast majority of TEA IIIs did not remove motorcycle chains themselves but rather called in for ESU, which would come remove the chains. The TEA IIIs’ job description clearly states that the only immobilizing devices they are charged with removing are those that the TEA IIIs themselves put on the cars, such as “boots.” (TE Ex. 2) Beginning in 2011, there were, at most, four out of 203 TEA IIIs who used angle grinders to cut motorcycle chains. Therefore, even though a handful of employees utilized angle grinders since 2011, requiring a substantially greater number of TEA IIIs to attend the October 2023 training on angle grinder use and the instructions given therein to use these tools thereafter represented a change in which TEA IIIs were now primarily responsible for removing chains on motorcycles. For that reason, we find that the Union has met its burden to show that there was a change from existing policy.

“However, not every decision by a public employer that affects a term and condition of employment is a mandatory subject of bargaining.” *New York City Deputy Sheriffs Assn.*, 14 OCB 2d 9, at 8 (BCB 2021) (finding that that the assignment of new duties was not a mandatory subject of bargaining when the duties were “generally consistent with the job description for the ... title and relate to the essential functions of the position”) (citing *Local 1182, CWA*, 61 OCB 4, at 6 (BCB 1998)). NYCCBL § 12-307(b) “reserves to the City exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining, such

as assigning and directing its employees, determining their duties during working hours, and allocating duties among its employees, unless the parties themselves limit that right in bargaining.” *COBA*, 63 OCB 26, at 9-10 (BCB 1999). It is well established that “[i]n order to maintain the efficiency of governmental operations, management may make appropriate assignments within the general job description for an employee’s title.” *UFA*, L. 94, 13 OCB2d 9, at 30 (finding no duty to bargain over assignment of Firefighters to counter-terrorism task force responsible for responding at the scene of active shooter incidents) (citing *PBA*, 73 OCB 12, at 19 (BCB 2004)); *LBA*, 49 OCB 14, at 7-8 (BCB 1992) (finding no duty to bargain over assignment of Lieutenants and Sergeants to solo supervisory patrols). “As long as the tasks assigned are an aspect of the essential duties and functions of the position, there is no mandatory obligation to negotiate when they are amended.” *UFA*, 47 OCB 61, at 10 (BCB 1991).

In the case at hand, it is undisputed that the job duties of TEA IIIs include the removal of illegally parked vehicles, including motorcycles and other two-wheeled vehicles. Indeed, there has long been a specific patrol, the “rack truck,” designed to tow motorcycles, including those motorcycles that were chained. The NYPD’s decision to have TEA IIIs remove the motorcycle chains, rather than call the ESU to do so, is the only change at issue. Removal of the chain is a necessary step to allow for the TEA’s removal of the motorcycle. Therefore, we find that the task of removing or cutting the motorcycle chain is “generally consistent with the job description for the . . . title and relates to the essential functions of the position.” *New York City Deputy Sheriffs Assn.*, 14 OCB2d 9, at 9. Accordingly, we find that the assignment of such duties is not a

mandatory subject of bargaining, and we dismiss the Union's refusal to bargain claim under NYCCBL § 12-306(a)(1) and (4). *See UFA, L. 94*, 13 OCB2d 9, at 30; *UFA*, 47 OCB 61, at 10.⁹

We turn next to the Union's claim that the use of the angle grinders creates a practical impact on employee safety requiring bargaining.¹⁰ As the Board has long held, "claims of practical impact, including safety impact, are not considered to be improper practice claims, since there is no duty to bargain unless and until the Board determines that a practical impact exists. *See SBA*, 41 OCB 56, at 15-16 (BCB 1988). Accordingly, such claims, even if filed as improper practice charges, are deemed or treated by the Board as scope of bargaining claims. *Id.*; *see NYSNA*, 71 OCB 23, at 12 (BCB 2003)." *UFA, L. 94*, 5 OCB2d 3, at 11 (BCB 2012).

To establish a practical impact on safety, the Board has held that a union must "offer allegations of specific facts in support of its claim of practical impact. Conclusory statements or vague or non-specific allegations are not sufficient to prove practical impact." *UFA*, 4 OCB2d 30, at 30; *see also EMS Superior Officers Assn.*, 75 OCB 15, at 17. The Board will also examine "whether the employer has adopted measures that offset any potential threat to safety" and whether "employees' adherence to management procedures and guidelines would obviate any safety concerns". *UFA*, 3 OCB2d 16, at 29-30 (BCB 2010) (internal citations omitted).

⁹ In concluding that the assignment to remove the motorcycle chains is not a mandatory subject of bargaining we do not reach the issue of whether the assignment would support a claim of out-of-title work under the collective bargaining agreement. The Board has no jurisdiction to adjudicate such a claim and thus our findings with respect to the Union's rights under the NYCCBL are limited to the specific holding here.

¹⁰ The Board need not rule on the allegation of a *per se* practical impact as a hearing was held to resolve factual questions necessary to determine the existence of a practical impact on safety. *See UFA L. 854*, 47 OCB 25, at 29 (BCB 1991) (holding that "a clear threat to employee safety constitutes a *per se* practical impact and, in such cases, no hearing is required because there are no outstanding factual questions to be resolved by the Board, ordering a hearing to determine whether a *per se* practical impact exists is a contradiction of terms.")

All witnesses agreed that the angle grinder has a high-speed sharp blade to cut through metal and can cause injury if not used properly. It is also not disputed that the operation of the tool results in the emission of metallic debris, sparks, and dust. Similarly, all witnesses acknowledged that use of an angle grinder requires training, PPE, and use consistent with certain procedures to minimize the risk of injury to the operator. Indeed, the manufacturer's instructions expressly state requirements for safe operation of the angle grinder, including use of certain PPE. It follows that failure to use this tool as described in the manufacturer's instructions and/or failure to use proper PPE could result in injury to the operator. Therefore, we must conclude that the angle grinder is a dangerous tool that requires certain PPE and adherence to instructions to safely use it.

Nevertheless, the record also shows that the City took a number of steps to ensure the safe operation of the angle grinder. The NYPD mandated a full day training on the safe operation of the tool. In addition, the NYPD provided PPE to TEA IIIs including eye protection, protective gloves, and ear protection.

The Union alleges that the PPE provided by the City was insufficient to ameliorate safety concerns and that the NYPD training was faulty. The evidentiary record in this case, however, is insufficient to support the Union's allegations. Neither the manufacturer's instructions nor any testimony produced about actual use of the angle grinders in the field provide a basis to conclude that additional equipment, such as welder's gloves, a full face mask or a containment wall, are needed. There is also nothing in the record to show that the PPE provided to the TEA IIIs does not conform to the manufacturer's instructions or any other applicable safety standard. Although the manufacturer's instructions recommend that respiratory protection might sometimes be needed, the record does not show that conditions requiring a respirator are present when the TEA IIIs are using the angle grinders. Moreover, while the NYPD's photograph of an angle grinder did not include the attached cutting wheel guard, there was no testimony that angle grinders in the

field are being used without guards. On the contrary, the only testimony about the field operation of the angle grinders suggested that the cutting wheel guards are attached as a matter of protocol. Further, the record does not contain evidence to conclude that the safety protocols established by the NYPD, including the requirement that the cutting wheel guard be attached to the angle grinder and used to direct sparks and material away from the operator, are not being properly implemented. Additionally, the record does not show that the NYPD training was in any way improper, or that the training did not adequately address the safety issues TEA IIIs encounter when using angle grinders in the field.

Therefore, we find that the record before us does not establish that the City failed to bargain over the assignment of angle grinders to TEA IIIs and does not establish a practical impact on employee safety. Accordingly, the petition is dismissed.

ORDER

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

DETERMINED, that the City of New York and the New York City Police Department did not violate § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law by requiring TEA IIIs to use angle grinders without first negotiating with the District Council 37; and it is further

DETERMINED, that the assignment of TEA IIIs to operate angle grinders to remove motorcycle chains did not involve a practical impact on safety; and it is further

ORDERED, that the improper practice/scope of bargaining petition filed by District Council 37, docketed as BCB-4548-24, be and the same hereby is, dismissed.

Dated: August 14, 2025
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLINES
MEMBER

ALAN M. KLINGER
MEMBER

JEFFREY L. KREISBERG
MEMBER