

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

POLICE BENEVOLENT ASSOCIATION OF :
THE CITY OF NEW YORK, INC., :

Petitioner, :

DOCKET NO. PES 18-008

To Review Under Section 101 of the Labor Law: :
A Final Investigation Narrative dated June 27, 2018, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Police Benevolent Association of the City of New York, Inc., New York (David W. Morris, Associate General Counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Steven J. Pepe of counsel), for respondent.

WITNESSES

Joseph Alejandro, Jin Kim, Thomas Sullivan, Morgan Richard Ballis, and Ana Simon for petitioner.

Supervising Public Employee Safety and Health Bureau Inspector Kwo Lam, Amir Rasheed, Eddie O'Brien, and Public Employee Safety and Health Bureau Program Manager 1 Raynard Caines, for respondent.

WHEREAS:

On September 7, 2018, petitioner Police Benevolent Association of the City of New York, Inc. (hereinafter "PBA") filed a petition with the Industrial Board of Appeals (hereinafter "the Board") seeking review of a final investigation narrative dated June 27, 2018 issued by the Public Employee Safety and Health (hereinafter "PESH") Bureau of the New York State Department of Labor (hereinafter "DOL"). Respondent Commissioner of Labor answered the petition on October 9, 2018. Petitioner filed a reply to the answer on November 8, 2018. Upon notice to the parties, a

hearing was held on June 15, 17, 18 and 24, and October 1, 2021, before Molly Doherty, the Chairperson of the Board and the designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

Respondent issued violations of the Public Employee Safety and Health Act, Labor Law § 27-a (hereinafter “PESH Act” or “PESHA”) and the federal Occupational Safety and Health Act (hereinafter “OSHA”) standards on February 16, 2017 and later found that the New York City Police Department (hereinafter “NYPD”) abated those violations, as stated in the contested final investigation narrative dated June 27, 2018 and of which petitioner seeks review. The violations issued included: (1) the NYPD did not assess the workplace to determine what type of personal protective equipment (hereinafter “PPE”) was required for police officers to respond to an active shooter incident; (2) the NYPD did not conduct a hazard assessment of the workplace for active shooter incidences; and (3) the NYPD did not provide adequate training of police officers for active shooter incidences. The petition asserts that with respect to the first and second violations, the certification of hazard assessment was inadequately researched by the NYPD, the NYPD did not demonstrate to DOL that it had adequate support for the certification of its hazard assessment, and, thus, DOL incorrectly determined the NYPD abated that violation. The petition further states that the PPE provided pursuant to the hazard assessment was inadequate both in its effectiveness to address an active shooter hazard and because it was not provided to all officers required to respond to active shooter incidents. Petitioner further asserts that contrary to the certification of the hazard assessment, those police officers not assigned to a Radio Motor Patrol Unit (hereinafter “RMP”) do not have access to the Active Shooter Patrol Kits (hereinafter “ASPK”)¹ and petitioner requests that the NYPD be required to provide the PPE necessary for patrol officers to engage with an active shooter by having extra sets of the ASPK in every RMP so that officers not assigned to an RMP will have access to the ASPK. Petitioner also asserts that DOL incorrectly determined that the ballistic vests included in the ASPK were sufficient to abate the violation because those vests are inadequate protection from the type of weapons likely to be used by active shooters. Petitioner requests that the NYPD be required to include Level IV ballistic plates in the ASPK. Petitioner also asserts that DOL failed to consider petitioner’s complaint that the PPE does not include an adequate firearm for use in an active shooter incident in the PPE and only considered the helmet and ballistic vest that the NYPD selected to be included in the PPE when determining that the violation be abated. Petitioner requests that the NYPD be required to include patrol rifles in the PPE.

Petitioner additionally asserts that PESH failed to fully investigate the adequacy of the NYPD’s active shooter training that purportedly abated the violation. Petitioner alleges that the training falls short of the industry standards and requests that the Board direct the NYPD to adopt an active shooter training program that is consistent with what petitioner asserts is the industry standard, as well as to require such training to be refreshed on an annual basis.

¹ Active Shooter Patrol Kit, or ASPK, and Active Shooter Response Kit, or ASRK, were used interchangeably throughout the hearing. We find that, for purposes of this hearing, an ASPK and an ASRK are the same thing and we use the term ASPK throughout the decision.

SUMMARY OF EVIDENCE

Documentary Evidence

The following documents were entered in the record. They are not necessarily listed below in the order that they were entered in the record:

1. February 16, 2017 Notice of Violation and Order to Comply issued to the NYPD by respondent.
 - a. Citation 1 Item 1 (29 CFR 1910.132[d][1]) finds a serious violation for the NYPD's failure to assess the workplace for hazards that require PPE, and to select and issue PPE that will protect employees from the identified hazards. The narrative portion of this citation item explains that the NYPD did not conduct a hazard assessment for "all Police Officers (specialized and non-specialized) assigned to respond to an Active Shooter Incident." It also states that the police officers who had not been assigned to a specialized unit were still required to respond to active shooter situations with their 9mm handgun and a National Institute of Justice (hereinafter "NIJ") "Threat Level 3A" vest which was not designed to protect from high velocity bullets shot from rifles and other long guns whereas members of NYPD specialized units such as counterterrorism and the Strategic Response Group (hereinafter "SRG") were provided with "Threat Level 1" vests. It further states that to abate the violation, the NYPD needed to select and make available for use the PPE that would protect employees from the hazards identified in the hazard assessment, communicate the PPE selection to affected employees, and be sure the PPE fits the employees. The abatement date listed in the document is May 17, 2017.
 - b. Citation 1 Item 2 (12 NYCRR Part 800.6[f]) finds a serious violation for to the NYPD's failure to conduct a workplace violence risk assessment. The narrative portion of the citation item states that the prior workplace violence risk assessment did not evaluate the risks of active shooter incidences or include the risks of an active shooter in the workplace violence prevention program. The abatement date listed in the document is May 17, 2017.
 - c. Citation 1 Item 3 (12 NYCRR Part 800.6[h]) finds a serious violation for the NYPD's failure to provide information and training on the risks of workplace violence in the workplace. The narrative portion of the citation item states that not all officers were provided with training on active shooters. The abatement date listed in the document is May 17, 2017.
2. Final investigation narrative created by the PESH Bureau, dated May 24, 2017 and signed on June 27, 2018, which states that respondent found the NYPD to have abated the three above-referenced citations.
 - a. Citation 1 Item 1 was abated because the NYPD "selected active shooter equipment that would protect the UMOS (Uniformed Members of Service) during an active shooter incident," the appropriateness of which was indicated by the certification of hazard assessment submitted by the NYPD and walk-throughs that the DOL conducted. That document also states that the affected officers were notified of the

purchase of protective equipment such as vests and helmets and trained on their use. The document further states that the vests chosen by the NYPD were appropriate because they were lightweight and easily adjusted for proper fit.

- b. Citation 1 Item 2 was abated because the NYPD conducted a hazard assessment by which it determined risk factors from active shooter situations and updated its workplace violence prevention program to show “the hazards associated with active shooters were identified and the proper mitigation factors were in place.”
 - c. Citation 1 Item 3 was abated because the NYPD provided records showing that uniformed officers were being trained on the risk factors associated with active shooter situations. The narrative further states that the risk factors identified both prior to the hazard assessment and in the “new hazard assessment conducted and certified on May 19, 2017.” The document further states that “active shooter training is continually being conducted during tactical training.”
3. NYPD Active Shooter Response Protocol document dated January 23, 2015.
 4. April 25, 2016 PBA Notice of Alleged Safety and Health Hazard.
 5. January 20, 2017 DOL Investigation Narrative which indicates that citations were issued.
 6. May 2017 DOL PESH Bureau Summary Inspection Report.
 7. May 24, 2017 DOL Attendance Sheet and Inspection Field Notes.
 8. August 25, 2017 PBA letter to DOL.
 9. NYPD Course Design Document, Initial Patrol Response to an Active Shooter.
 10. NYPD Physical Training and Tactics Instructor Guide, Chapter 11, Module 3, Rapid Deployment/Active Shooter 1.
 11. NYPD Certification of Hazard Assessment for NYPD ASPK.
 12. NYPD Workplace Violence Prevention Policy Statement.
 13. NYPD Active Shooter Recommendations and Analysis for Risk Mitigation, 2016 Edition.
 14. July 19, 2017 NYPD Message to all commands regarding ASPK.
 15. Excerpts from Law Enforcement Management and Administrative Statistics published by the Inter-University Consortium for Political and Social Research in 2013.
 16. July 27, 2016 PBA email to James Rogers at DOL including an email thread between the PBA and DOL.
 17. US Department of Justice National Institute Of Justice Ballistic Resistance of Body Armor Standard.
 18. Photographs of NYPD ballistic vests included with ASPK.
 19. Manufacturer’s description of ballistic vests and helmets included with the NYPD ASPK.
 20. DOL Inspection Interview Notes with dates in 2016 and 2017.

21. NYPD Counter-terrorism Bureau Course Design Document, Initial Patrol Response to an Active Shooter.
22. ALERRT Terror Response Tactics, Active Shooter Level One training document for instructors.
23. ALERRT Level One Manual.
24. Curricula Vitae for Jin Kim and Morgan Ballis.
25. August 24, 2012 *New York Times* article, “Gunman Dies After Killing at Empire State Building;” June 30, 2017 *New York Times* article, “Doctor Opens Fire at Bronx Hospital, Killing a Doctor and Wounding 6;” July 2, 2017 *New York Times* article, “Details Emerge in Deadly Shooting at Bronx-Lebanon Hospital.”
26. United States Department of Justice Federal Bureau of Investigation (hereinafter “FBI”) document identifying and describing active shooter incidences in United States from 2000 to 2018; United States Department of Justice FBI document detailing statistics related to active shooter incidences in United States from 2000 to 2018.
27. FBI chart of law enforcement officers killed and assaulted from 2010 to 2019; FBI document “Active Shooter Incidents 20-Year Review 2000-2019.”
28. National Institute of Justice Armor Protection Levels one-page document.
29. Journal articles including, “The Police Patrol Rifle: Training Standards of American Law Enforcement Agencies” published in 2017 by the International Journal of Police Science and Management; “The Evolution of Active Shooter Response Training Protocols Since Columbine: Lessons Learned from the Advanced Law Enforcement Rapid Response Training Center” published in 2019 in the Journal of Contemporary Criminal Justice.
30. Transcript of July 25, 2016 press conference at which the NYPD announced the ASPK.

Petitioner’s Evidence

Testimony of Joseph Alejandro

Joseph Alejandro (hereinafter “Alejandro”) testified that he has been employed by the NYPD since January 4, 1984, working in neighborhood stabilization units, his permanent command in the Bronx, the Bronx Task Force, and most recently on an SRG based in the Bronx, which came to be after the task forces were eliminated. Alejandro also currently holds the position of Second Vice President of the PBA and testified that he is familiar with the working conditions, including health and safety issues, of the police officers of New York City.

Alejandro testified that the SRG responds to citywide mobilizations, which he described as large demonstrations or other large events that need crowd control, responds rapidly to situations such as terrorist incidents, and are called to coordinate with other elite emergency units. When not deployed to specific situations, members of the SRG patrol daily. Alejandro testified that SRG officers are highly trained, including to use specialized equipment, such as M4 carbines. He detailed that the SRG training includes responding to chemical, biological, radiologic, nuclear and explosion situations and use of M4 carbines, which are not trainings provided to foot patrol

officers. Alejandro testified that the NYPD used to provide an active shooter training course for patrol officers but no longer provides that training.

According to Alejandro, the PBA filed a complaint with PESH asserting that an active shooter protocol had been promulgated by the NYPD without input from the PBA. Alejandro testified that PESH issued violations based on that complaint, which included findings that the NYPD did not provide PPE for the officers consistent with the active shooter protocol. Alejandro was later at a meeting with the NYPD in which the NYPD explained that a helmet and ballistic vest would be provided and kept in patrol cars, to which officers on foot patrol would not have access. Alejandro testified that foot patrol officers are required to respond to active shooters and an SRG team would also be dispatched. He further stated that the foot patrol officers are not armed with a rifle, but only with a 9mm sidearm, and they wear a lighter variety of ballistic vest that can only stop a lower-power sidearm, such as the kind the patrol officer was carrying. Alejandro explained that the SRG team is equipped with a more protective vest, a helmet, and an M4 carbine with which an officer could take out a target at a much greater range than the seven to ten feet within which the 9mm pistol is effective.

Alejandro explained that the NYPD requires every officer to immediately respond to an active shooter threat and to stop the threat, including foot patrol officers and other officers who do not have immediate access to a patrol car. Alejandro testified that he brought up the issue of foot patrol officers not having access to the ASPK maintained in the patrol cars and he suggested the solution of having an extra set of the ASPK in the patrol cars for use by foot patrol officers. Alejandro stated that the NYPD refused to consider that as a solution. Alejandro testified that without training or ASPK, foot patrol officers are still required to immediately respond to an active shooter to stop the threat.

Alejandro testified that the PBA was not invited to a meeting that the NYPD had in the summer 2016 regarding PPE but, the PBA was invited to a meeting related to the SRG in August 2016, although the PBA did not attend. He described the SRG meeting as “a walk-through of the building and to show the equipment that was being utilized and show the tactics being utilized by members of the [SRG].” Subsequently, Alejandro testified that he did not know if the PBA was invited to the August 2016 meeting regarding the SRG and he testified that press attended that meeting. Alejandro testified that in July 2016, the NYPD had a press conference to announce the PPE selection, including ballistic vests and helmets, for patrol officers but he did not recall if the PBA attended or was invited to that press conference.

Testimony of Jin Kim

Jin Kim (hereinafter “Kim”) testified regarding his education and professional background. Kim testified that he was previously employed by the FBI and that he retired in 2018. Kim stated that while with the FBI, he was assigned to the New York division investigating crimes, and in 2002, after 9/11 happened, he was assigned to the training unit at Fort Dix in New Jersey, where they helped with development and deployment of tactical units to deal with domestic terrorism threats. In that assignment, Kim was a full-time firearms and tactical instructor, which included conducting trainings for active shooter situations. Kim testified that he founded a private risk management and security business after retiring from the FBI.

Kim believes that active shooter training is warranted for all law enforcement personnel in this country, and he believes that active shooter training should be refreshed at least annually to keep the learned skills from diminishing because active shooter events have been on the rise in the United States. According to Kim, the national standard for active shooter training for police officers is the Advanced Law Enforcement Rapid Response Training (hereinafter referred to as “ALERRT”), which Kim took part in creating in 2013 when he worked at the FBI.

Kim testified that active shooter response requires urgent action and that he agrees with the NYPD’s active shooter protocol, which he reviewed and which requires initial patrol officers to “prompt[ly] and swift[ly]” engage with the active shooter. Kim also testified that the NYPD’s Counterterrorism Initial Patrol Response to an Active Shooter course differed from the ALERRT course in several respects although he acknowledged that he assumes parts of the NYPD’s active shooter training course came directly from ALERRT based on the similarities he detected. According to Kim, Level 1 of the ALERRT course was 16 hours, over two days, and consisted of 12 modules, while the NYPD course was only 8 hours, and the NYPD course omitted some of the 12 modules included with the ALERRT training. Kim testified that one of the omitted modules includes single officer tactical training that teaches an individual patrol officer how to respond to an active shooter situation by themselves. Kim further stated that another omitted module includes training on a 5-officer formation, which Kim testified is the ideal formation to implement in active shooter incidents. He also testified that other omitted modules include, the module regarding the difference between a hostage situation and an active shooter incident; the module about the impact of international domestic terrorism on an active shooter event; and the module on the significance of an improvised explosive device. Kim testified that in his opinion, the active shooter training offered by the NYPD was too short and should be refreshed for officers at least annually although he acknowledged that he did not know if the NYPD did offer a refresher course.

Kim testified that the National Institute of Justice standard indicates that a higher level of protective vest than that provided by the NYPD for patrol officers is required to stop a round from an AR-15, which was “often used in active shooter events throughout the United States over the last few decades.” Kim testified that an AR-15 is used by the United States military and by law enforcement. He stated that it is commonly known as “America’s rifle” and it is the most popular rifle in the United States. Kim testified that a Level IV armor plate in a ballistic vest can “mitigate” AR-15 ammunition. Kim also testified that a Level III armored plate, according to the NIJ, will “mitigate a rifle round.”

Testimony of Thomas Sullivan

Thomas Sullivan (hereinafter “Sullivan”) testified that he was a police officer with the NYPD from 1994 until he retired in 2020. He worked predominantly as a midnight patrol officer in the 30th precinct, which meant he “responded to radio runs and took care of what’s known as a sector, which is an area of blocks inside a precinct.” Sullivan testified that he received firearms and CPR training twice a year, and he received other specialized trainings as well, such as Critical Incidents Response Team training, Auto Crime School, and active shooter training. He estimated that a police officer spends about five days in training per year. Sullivan stated that he carried a 9mm handgun and had to qualify to carry it twice a year, which required training at the shooting range twice per year. Sullivan testified that the training at the shooting range to qualify him for use of his weapon did not include training on active shooters.

Sullivan testified that he received a one-day, eight-hour active shooter training once, in March 2017. He stated that during that training, Sullivan was instructed that even if alone, a patrol officer was to immediately engage with an active shooter and eliminate the threat. Sullivan testified that while the preference is for patrol officers to work as partners, there are some assignments for which a patrol officer is assigned alone or effectively alone, such as polling places, parades, or street festivals. Sullivan testified that the active shooter training began with classroom teaching, progressed to interactive demonstrations, and ended with a realistic simulation in which there is a weapon that does not shoot out bullets but makes the sound of bullet and shoots out a “projective” that is not a bullet. He also testified that the simulation had them work in groups of two and then four officers. Sullivan thought the active shooter training was the best training he received from the NYPD because it was realistic and he was taught to move as a team during it; but Sullivan believed the active shooter training needed to be longer and refreshed annually.

Testimony of Morgan Richard Ballis

Morgan Richard Ballis (hereinafter “Ballis”) testified that he worked in intelligence and in the Weapons Field Training Battalion in the Marine Corp from 2004 to 2015. Ballis was pursuing his doctorate in Emergency Management at Capella University, concentrating on active shooter and mass murder events in the United States, and he anticipated finishing that degree program in 2021. Ballis also testified that he started and operated businesses in the fields of firearms training, defensive tactics, emergency management, and school safety. Ballis testified that he reviewed the NYPD’s active shooter training protocols; the active shooter training course design; the certificate of hazard assessment; a 2016 NYPD Active Shooter Recommendations and Analysis for Risk Mitigation; the NYPD’s ASPK description and a picture of the body armor which was a part of the kit; the ALERRT Level 1 course documents, course outline, course PowerPoint; ;the NIJ standards; statistical reports; and journal articles regarding active shooters, training, weapons, and body armor.

Ballis testified that the goal in active shooter incidences is to stop the killing, thus, the protocol and training for such events has evolved to prepare solo officers to have the skills, knowledge, and equipment to respond alone, if needed, as well as to prepare police officers to respond in tactical teams. According to Ballis, more recently, specialized units are not necessarily the first responders to active shooters, rather front-line law enforcement, such as patrol officers are. He stated that the ALERRT training for active shooter incidences is the industry standard for active shooter training and a comparable training to ALERRT, known as the Law Enforcement Active Shooter Emergency Response (hereinafter “LASER”), also, in his opinion, meets the industry standard. Ballis was not able to identify another active shooter training that is comparable to ALERRT or LASER. According to Ballis, the NYPD’s active shooter training protocol requires officers to be trained to stop the killing as quickly as possible; however, it also tells officers to wait to form two- or four-person teams to respond. Ballis testified that is not consistent with the best practices established by ALERRT. Ballis also testified that the NYPD’s active shooter training is a one-day, 8-hour course whereas ALERRT is a two-day, 16-hour course, and one component of the training that was removed is the training for a solo officer response, which Ballis believes is an essential part of any active shooter training. Ballis also noted that the NYPD’s active shooter training does not teach officers how to breach buildings, whereas the ALERRT training does, and this is despite the NYPD active shooter protocol discussing the potential need to breach a building in responding to an active shooter. He also testified that the NYPD’s training does not teach about

improvised explosive devices, while the ALERRT training does because they have been used by active shooters. Ballis also testified that he thinks the NYPD offering active shooter training as a one-time training, sometimes only at the police academy, is insufficient.

Ballis explained some types of ballistic vests or plates for vests and he explained the differences in some ammunition vis-à-vis the ballistic vests or plates he described. Ballis testified that the Level III soft vests that the NYPD provides to patrol officers would not prevent penetration by steel tipped bullets that are available for purchase on the open market. He further stated that the body armor likely to be used by active shooters would not be penetrated by the ammunition from the 9mm semi-automatic pistols issued to NYPD patrol officers. According to Ballis, the 9mm pistols issued to patrol officers put those officers at a disadvantage when dealing with an active shooter who uses a long gun or rifle because of the ammunition which can be used in the rifle, the distance at which the rifle is effective, and the superior accuracy of a rifle.

Testimony of Amir Rasheed

Amir Rasheed (hereinafter “Rasheed”) testified that he has been the Executive Director of Occupational Safety and Health Safety for the NYPD since 2000. In that position, he is responsible for compliance with all federal, state, and city safety and health regulations in the NYPD work environment, including OSHA. Rasheed testified that the DOL called him in 2016 regarding a complaint that the PBA filed over the NYPD’s active shooter protocol, particularly that “regular beat cops” did not have access to the ASPK, and that there was no active shooter training for patrol officers. Rasheed testified that a conference was held on May 18, 2016 at the NYPD’s Office of Labor Relations regarding the complaint. Rasheed’s recollection was that NYPD Commissioner Bratton, Lieutenant Whalen from the NYPD’s Office of Labor Relations (hereinafter “OLR”), Deputy Commissioner John Burns from the NYPD’s OLR, Rasheed, Kwo Lam (hereinafter “Lam”), and David Morris (hereinafter “Morris”) from the PBA attended the meeting. Rasheed testified that in January or February 2017, DOL issued a notice of violation to the NYPD. According to Rasheed, prior to the violations being issued and because of some active shooter incidents throughout the United States, the NYPD started an “equipment selection committee” which was comprised of the Chief of Department, who Rasheed explained is the top uniformed officer in the NYPD, as well as patrol officers, officers from response teams, such as the SRG, and he testified that “they have input from the labor unions also.” When asked if members of the labor unions were on the equipment selection committee, Rasheed responded, “I think they are. I’m not sure though. I think they are. They’re being consulted all the time.” Rasheed stated that he was not on the equipment selection committee, which was looking for PPE for patrol officers for use in active shooter incidences, but he communicated with them and sometimes they spoke with him about safety and health regulations and compliance with those regulations. Rasheed testified that he was told that the equipment selection committee was informed of the PBA’s PESH complaint. He further testified that he observed Lieutenant Whalen from the NYPD’s OLR tell DOL that the PBA refused to participate in the selection of PPE sometime between December 2016 and March 2017.

Rasheed testified that the violations issued by respondent had to do with the general duty clause of OSHA, which requires employers to provide a safe and healthy work environment for employees. He also stated that the violations cite to the OSHA regulation regarding proper PPE and the requirement to perform a hazard assessment to identify known hazards and PPE.

Rasheed testified that in summer 2016, he was informed by Lieutenant Whalen of the NYPD's OLR that Deputy Commissioner Burns of OLR, the Chief of Department, and the Chief of Patrol "invited all the labor unions to look at the . . . personal protective equipment which they are planning to procure for their patrol officers who [were] involved – or who are involved with [active] shooting." Rasheed stated that he was neither invited to attend, nor did he attend, the event to which he believed the unions had been invited. Rasheed later testified that he did not know if labor unions were involved in selecting the PPE for the ASPK but he did know that the labor unions were notified of the selection of PPE. He also testified that Lieutenant Whalen forwarded him a string of emails wherein the NYPD's OLR stated that the labor unions were invited to an event on August 9, 2016 in the Bronx at which Commissioner Bratton announced the PPE included in the ASPKs. Those emails were not entered in evidence.

Rasheed testified that he conducted the certification of the hazard assessment of the NYPD's ASPK and he stated that he did so, "[b]y looking into the specs of the equipment chosen by the department," and he stated, "whatever has been picked, helmet and additional plate, they meet the NIJ requirement for active shooter kit." When asked how the selection committee used the hazards assessment to choose PPE "in light of the violations issue," Rasheed replied, in part, "[i]t just worked out that way, okay," and further stated that NIJ standards were used. When asked how the hazard assessment signed by Rasheed in May 2017 could have been the basis for the PPE selection made in the summer of 2016, Rasheed stated "[i]t had just happened to – just happened to be whatever was selected, it was meeting the requirement of the hazard assessment." Rasheed explained that his hazard assessment "recommended whatever equipment – those were the ones that were produced by [the NYPD]." Rasheed testified that the ASPK selection was based on the hazard assessment that he completed for patrol officers almost a year after the ASPK was announced. Rasheed also testified that he has not done a hazard assessment for the SRG or other specialized units. Rasheed stated that he believed the NYPD had "some kind of mechanism, which I was not aware of – how – if God forbid – if there's an active shooter incident and a foot patrol officer is responding to – how he or she should do . . . can have an active shooter patrol gear on while doing the regular . . . foot patrol." Rasheed did not recall if information about that procedure was been provided to the PBA or to the DOL. Rasheed also acknowledged that he would "need to modify this," referring to his hazard assessment because it incorrectly stated that each uniformed patrol officer, including those on foot patrol, were provided with an ASPK.

Rasheed stated that Lieutenant Whalen of the NYPD's OLR told him that the NYPD Counterterrorism Bureau customized an active shooter training for patrol officers. Rasheed did not have any direct role in developing that training because the NYPD's OLR "took the lead." Rasheed stated that he assessed compliance by looking at the training manual given to him and saw that "whatever was described in that violation, those areas were covered in those training manuals," but he acknowledged that he is not an expert on that area. Subsequently, Rasheed testified that he did not review the training manual but that he relied on experts in the NYPD to determine if the training abated the violation issued by the DOL, which he explained that he did by communicating to Lieutenant Whalen, who communicated with a lieutenant in the Counterterrorism Bureau. Rasheed testified that the labor unions representing NYPD employees were not involved in developing the active shooter training for patrol officers as far as he knew and that he also did not know if the labor unions were informed that an active shooter training program was developed for patrol officers. Rasheed stated that trainings must be fluid and change with the times in response to being asked if the active shooter training for patrol officers that was in effect at the time of his testimony was the same as the training that was presented to the DOL in May 2017. Rasheed did

not know if he or anyone else from the NYPD told the DOL that a refresher active shooter training would be provided.

Rasheed testified that he was present at the May 24, 2017 closing conference of the investigation, as was Lieutenant Whalen from NYPD's OLR, Paul McCalla, Lam, and Morris from the PBA, along with another person from the PBA. During this conference, according to Rasheed, the NYPD provided written information to address the violations, including "[o]ur status of pending order we submitted for our hazard assessment, . . . the training record, and we told them how we have [supplied] all the RMPs with [the ASPKs]." When asked if everyone at the meeting was provided with "documentation of the PPE selected, . . . certification of abatement, . . . [a]nd . . . documentation of the active shooter training developed by the NYPD," Rasheed responded, "[y]es." Rasheed testified that no one at the meeting gave their approval or disapproval of the PPE and he subsequently testified that he did not recall if the PBA representatives approved or disapproved of the PPE during that meeting. According to Rasheed, another closing conference was held at the end of June 2017, by telephone, and during it respondent indicated that a report was being issued but it was not until Rasheed received the report about two or three days later that he learned that the DOL determined that the NYPD abated the violations. Rasheed testified that the labor unions were not part of the June 2017 telephone conference and then he explained that Lam called him and that he understood that Lam called Morris too, but in separate phone calls.

Testimony of Kwo Lam

Associate Safety and Health Inspector Lam testified that he works for the PESH Bureau and he testified that in April 2016, he was a Senior Safety Health Inspector. In that position, he conducted more advanced inspections. Lam testified that, among other regulations, the PESH Bureau enforces the OSHA's general duty clause and the PESH Act's workplace violence provisions. Lam testified that after PESH receives a complaint, an inspection² is conducted, which includes an opening conference with the employer and employee representatives and a walk-through. He continued and stated that if violations, also referred to as citations, are issued, an abatement date is given for the employer to cure the violations, and then another visit is conducted after the abatement date. If during that next visit, the violations are not fixed, penalties are issued. Lam stated that unions are invited to any conferences that are held so the participants can "hash it out."

Lam was assigned to investigate the PBA's complaint regarding the NYPD's active shooter training and PPE. The opening conference was held on May 18, 2016 and the NYPD and the PBA were present at that conference. Respondent then conducted "walk throughs" of different NYPD locations on multiple occasions to observe conditions and interview witnesses. PBA representatives were present at some of those walk-throughs, according to Lam. Lam testified that the violations were issued against the NYPD for not conducting a hazard assessment to determinate what PPE should be made available to all police officers in the event of an active shooter. According to Lam, ASPKs were already placed in some, but not all, police cars when he did his initial walk-throughs and he testified that between June 2016 to May 2017, they were placed in more cars.

² Lam testified that the entire process is called an inspection not an investigation in a matter such as the one under review here.

In discussing the PPE for active shooters, Lam stated that PESH did not “have any knowledge whatsoever or any expertise in that matter. We can only go by what the standard required in terms of personal protective equipment. So it seemed that it appeared to be lacking a bit, whether they had a thirty percent amount of vests in the vehicles or ninety percent vests in the vehicle, then the – the employer was supposed to do the hazard assessment in order to be able to make a determination that they assessed the worksite, they assessed the conditions, and based on that, they have to pick the type of PPE that their members are required to have.” Lam stated that, during the inspection, there was one meeting at PBA headquarters, and he continued that during that meeting, the PBA did not make any statement regarding how the PBA thought the inspection was progressing.

Lam testified that he determined that one of the citations was abated by the NYPD because the NYPD provided the DOL with a certification of a hazard assessment for active shooter incidences. Lam explained “[w]e don’t make the determination as to what they put in place in order to abate the hazard. That’s the responsibility of the employer. And that’s what the risk – I mean, in this case, the hazard assessment certification is for. The employer certifies – the hazard assessment that they conduct, and they make the determination as to whether the PPE that they chose is the one that’s going to afford their employees the protection that they’re required to have based on the assessment that they conducted.” Lam further explained that PESH did not make any determination as to whether the PPE in the ASPK was sufficient, because they are not experts, but PESH looks at, in this instance, “the standard required that the employer was supposed to have a written certification professing to the facts that the hazards were – were looked at.” Lam testified that PESH only determines whether the PPE choice is what the employer certified is sufficient. He further explained, that if the employer determines that the PPE “meets with the intent of the PPE standard required, then that’s as far we go when – when it comes to PESH.” Subsequently, Lam testified that the DOL could rely on the NIJ standard to review whether the employer’s chosen PPE is effective but the NIJ standard is a guideline and not the law. Lam testified that he did not consult with any experts regarding ASPKs but he only consulted with his supervisors. Lam also testified that PESH determined that the training violation was abated and he stated that PESH does not determine how long the training should be or what information it should include but defers to the employer’s determination that the active shooter training that was offered to patrol officers was sufficient to protect those officers from workplace violence as per a workplace violence risk assessment.

Lam initially did not recall if the PBA, other unions, or anyone from the NYPD voiced concerns or objections to the NYPD’s active shooter training or the ASPK as part of his inspection. Lam further testified that he did not know if the labor unions participated in the development of the active shooter training program. Subsequently, Lam acknowledged that at the May 24, 2017 closing conference, the PBA voiced concerns that not all police officers had access to ASPKs. Lam testified that at the closing conference, the NYPD likely provided training records but they would not have been required to provide the training curriculum. Lam indicated in his notes that he was told by the NYPD that active shooter refresher training was offered yearly and Lam acknowledged that PESH did not ask for records to verify that refresher training was being provided. Lam thought it may have been Lieutenant Whalen who told him during a walk-through that the NYPD active shooter training was based on the ALERRT training program. Lam acknowledged that during the inspection, the union raised the concern that foot patrol officers should have access to the PPE contained in the ASPK, but respondent did not receive any information from the NYPD about whether that issue had been addressed. Lam testified that if all

employees are exposed to a risk, they should all be offered the same PPE to protect them from that risk. Lam also acknowledged that the certification of hazard assessment submitted to respondent by the NYPD was “probably” inaccurate because it states that all patrol officers were required to use the ASPK in an active shooter situation, but not all officers have access to the ASPK. He also acknowledged that similarly, the workplace violence prevention statement incorrectly states that an ASPK is available to each uniformed officer. He further acknowledged that the certification of hazard assessment should happen before the PPE is selected. Lam testified that Lieutenant Whalen told him that the PBA was invited to join the selection of PPE and a sergeant that he spoke to told him that the PBA was not present when the PPE was selected. Lam did not recall whether he reached out to the PBA, which was very helpful in providing information during the inspection, to ask whether it had, in fact, refused to participate in the PPE selection process. Lam also acknowledged that the “the standard requires that [the PPE chosen after the hazard assessment] has to be effective.”

Testimony of Eddie O'Brien

Eddie O'Brien (hereinafter referred to as “O'Brien”) testified that he was an NYPD sergeant special assignment assigned to the Counterterrorism Division Training Section, and he was previously assigned to the Threat Reduction Infrastructure Protection Section of the Counterterrorism Division. In his current position, O'Brien is responsible for the management, development, and delivery of training to NYPD patrol officers for counterterrorism-related issues. O'Brien testified that the NYPD developed a two-day active shooter training in 2010, which he stated was based on the ALERT training but there were differences. He became involved with it in April 2014. According to O'Brien, “we realized that the retention level for a two-day class with the force-on-force option just was not . . . adequate for the size and scope of our department. Through our analysis of the training, we realized we wanted to focus more on the basic skill sets and leverage the totality of training that NYPD officers were getting throughout the job that still fit in the same tactical . . . and for into the command aspect of it.” O'Brien testified that the training was changed in late 2016 from the two-day training to “a one-day to focus on the key elements that were relevant for patrol-based officers” and that one-day training was implemented in late January 2017. O'Brien testified that the training was offered to a class of 24 officers three or four times per week. The one-day training, according to O'Brien, was based on “the required skill set for your initial officers on scene for an active shooter, based on a totality of the resources at hand for the NYPD,” as well as a review of other programs certified by “DHS and DOJ.” O'Brien explained that the training was based on the unique size and make-up of the NYPD, as well as its ability to deploy large numbers of officers to active shooter situations and he testified that it does not include solo officer tactics. O'Brien also explained which parts of the two-day active shooter training were removed from the one-day training, and why. He testified that the one-day training focuses on the initial response of patrol officers rather than all aspects of active shooter response, and it does not duplicate information or subjects covered by other NYPD training modules, which were not specifically designed for active shooter situations. O'Brien testified that IED was never part of the NYPD's active shooter training, even when it was a two-day training, and it is instead a subject covered in other trainings, including a course at the academy. He further testified that the subject of life-support was removed because officers are trained on that elsewhere, including in the academy. O'Brien stated that a lecture portion on active shooters was removed, as was a lot of what he called a “history lesson” during which seven active shooter case studies were presented, and a detailed discussion comparing a hostage situation with an active shooter situation.

O'Brien explained that this course was only going to be used for another couple of months, at which point they would use a different training. O'Brien testified that the training would change from a model based on ALERRT, LASER, and/or FLETC³ to a model based more on LASER and a federal Department of Homeland Security-certified course known as the National Center of Biological Research and Training. O'Brien testified that because about 19,000 officers were already trained in active shooter protocol and because the NYPD model is to work in pairs, the new training focuses on two- and four-person tactical movements when there is an active shooter. He stated that room entry and clearing tactics are also part of the training, and that after stopping the killing, the focus shifts to stopping the dying.

O'Brien testified that he did not have any part in the selection of the components of the NYPD's ASPK. He also testified that the labor unions did not have input in the development of the NYPD's active shooter training. O'Brien also testified that, at the time of the hearing, no officer had received a mandatory refresher active shooter response training course.

Testimony of Downstate Program Manager I Raynard Caines

Raynard Caines (hereinafter referred to as "Caines") testified that he is a PESH Bureau Downstate Program Manager 1 and he has held that position for three and one-half years, at the time of his testimony. Previously he was the New York City district supervising safety and health inspector and he held that position when the inspection in this matter occurred. As the supervising inspector in 2016, Caines assigned inspections and enforcement activities, supervised inspections, reviewed completed inspections, and determined when citations would, and would not, be issued based on safety and health complaints. Caines stated that high profile cases such as this one would also be elevated up his chain of command to the director of DOL's Division of Safety and Health for review.

Caines testified that in this matter, three citations were issued to the NYPD, (1) for "a PPE hazard assessment," (2) for failure to conduct a risk assessment under the workplace violence standard, and (3) for failure to provide training as required under the workplace violence standard. Caines explained that for the violation regarding the hazard assessment under the OSHA general duty clause, PESH looks to see that an employer such as the NYPD looked at what type of hazard an employee is exposed to, "communicate the hazards to the affected employees," determined what PPE was necessary to address the hazards found and made sure the PPE fits properly. Caines testified that PESH found that the first citation was abated because the NYPD submitted a signed certification that a hazard assessment was conducted, and field visits were conducted during which it was observed that the NYPD provided the PPE it chose, thus, PESH determined that the necessary steps for a hazard assessment that Caines described in his testimony had been completed by the NYPD. Caines explained that the employer was the subject matter expert so PESH reviewed what types of hazards NYPD officers would be exposed to daily and in special circumstances, and then abides by whatever PPE "the employer determined was proper, unless the PPE fails."

When asked about the citations that PESH issues related to the workplace violence regulations, Caines testified that the OSHA general duty clause requirement for a certification of

³ FLETC is the acronym for Federal Law Enforcement Educational Training Committee. O'Brien did not explain FLETC and its similarities or differences to ALERRT and LASER.

a hazard assessment and the workplace violence risk assessment under the PESH Act are “basically tied together. So if the employer initially did -- and I’m not sure which one they did first. If they initially did the assessment for the PPE, they would have to make that assessment for the workplace environment, which would fall under doing assessment for a workplace violence assessment.”

Caines testified that when inspecting the violation related to training for active shooter incidents under the PESH Act workplace violence standards, PESH does not require that the employer provides written training documents but since employers do have training documents, “the staff would ask for do you have a training curriculum?” He further stated that PESH would ask the employer if they “did a physical assessment of the . . . employee’s work environment . . . [and] did you put in in writing?” Caines testified that if the employer tells PESH that such a document exists, PESH asks for it. In this matter, according to Caines, the NYPD provided the active shooter training course description and outline. Caines testified that PESH looked for “what exactly is the hazard that the employer found in New York City for the New York City Police Department,” and determined if the training they provided was consistent with what other police departments are doing. Caines testified that PESH conducted field interviews with employees and asked employees whether they felt the training that was given provides a safe work environment. To determine whether the training provided was compliant with the standards, Caines said, “[w]e do make a determination if the training was not – not so much – okay. I would say the quality of it.” The training, according to Caines, should be based on “the hazards and what you should do about those hazards and where the hazards are located.”

Caines testified that during the inspection, the PBA voiced concerns to PESH that the ballistic vest selected by the NYPD for the ASPK did not prevent certain bullets from penetrating the vests and that some officers had access to different levels of PPE in terms of tactical gear, including that foot patrol officers did not have access to the same PPE as radio patrol car officers. He testified that the PBA’s complaint also raised a concern that the firearm carried by patrol officers was inadequate to address an active shooter situation but PESH’s determination in this matter did not address the firearm concern because, according to Caines, the complaint was regarding PPE and PESH does not consider a firearm to be PPE. Caines could not recall if the training material and PPE equipment descriptions were provided to the PBA prior to the May 24, 2017 closing conference. Caines also acknowledged that the PBA submitted written objections to the abatement finding but could not recall if they were submitted before respondent’s final investigative narrative was issued in July 2018. When asked if the concerns voiced by the PBA caused PESH to reconsider its determination that the violations were abated, Caines stated that it did not, “[b]ecause we looked at what the standard required and we believed that the employer was compliant to the citations that we issued.”

Caines agreed that according to the NYPD’s certification of the hazard assessment for active shooter incidences, the ASPK was to be used in all active shooter encounters but Caines acknowledged that he did not know how a police officer on foot patrol has access to an ASPK when responding to an active shooter. Caines stated that he generally believed one “would be available” to foot patrol officers. Caines further stated that he did know whether the PPE selection was made before or after the May 19, 2017 hazard assessment was done, or if the ASPK was selected as PPE based on the hazard assessment.

Testimony of Ana Simon

Ana Simon (hereinafter “Simon) testified that she has been a police officer for the NYPD for more than 21 years and she currently works as a training officer in the 73rd precinct in Brooklyn. Simon stated that she took the NYPD’s active shooter training, “a few years ago or whatever,” when the training was done over two days. Simon testified that she had not yet taken the revised one-day training. Simon described the two-day training as being hands-on and classroom-based the first day and the second day was a roleplay including equipment and something akin to paintball guns. Simons testified that she found the two-day training helpful and that she did not know how it had been condensed into a one-day training. Simon stated that she was responsible for scheduling officers in her command for the active shooter training, but the training did not take place very often. Simon testified that of the approximately 200 officers in her command, only 55-60 had taken active shooter training because of how frequently the training was offered and because of the demand on the officers in her precinct.

STANDARD OF REVIEW AND RELEVANT LAW

When a petition is filed, the Board reviews whether an order issued by the Commissioner is “valid and reasonable” (Labor Law § 101 [1]). A petition must state “in what respects [the order on review] is claimed to be invalid or unreasonable,” and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). Petitioner has the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Industrial Board of Appeals Rules of Procedure and Practice (hereinafter “Board Rules”) [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v National Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

The PESH Statutory Scheme

The federal Occupational Safety and Health Act, 29 USC §§ 651 – 678, was enacted “to assure so far as possible [to] every working man and woman in the Nation safe and healthful working conditions” (29 USC § 651 [b]). OSHA “was not enacted for the principal purpose of punishing employers . . . ; rather, ‘[i]t authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring’” *People v Pymm*, 76 NY2d 511, 518 [1990] quoting *Whirlpool Corp. v Marshall*, 445 US 1, 12 [1980]). OSHA permits states to seek federal approval for plans to develop and enforce safety and health standards for public employees (29 USC § 667 [b]). A state’s plan will be approved if it contains “satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards” promulgated under OSHA (29 USC § 667 [c] [2] and [6]).

Pursuant to this federal mandate the New York Legislature enacted PESH (Labor Law § 27-a) in 1980 to provide individuals working in the public sector with the same or greater workplace protections as are provided to employees in the private sector under OSHA (*Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 442 [1995]; *Matter of Goldstein v New York State Indus. Bd. of Appeals*, 292 AD2d 706, 706 [3d Dept 2002]). As required under the PESH Act, Labor Law

§ 27-a (4) (a), DOL adopted the federal OSHA standards, including the General Industry Standards found in Part 1910 (29 CFR 1910). Every public employer in New York has the duty to comply with the safety and health standards promulgated under PESH (Labor Law § 27-a [3] [a] [2]). Additionally, Labor Law § 27-a (3) (a) (1) requires employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm,” “reasonable and adequate protection to ... lives, safety or health,” and compliance with safety and health standards by both public employers and public employees. PESH enforcement procedures are detailed in Labor Law § 27-a (6) and provide that “[i]f the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provisions of this section, standard, regulation or order alleged to have been violated”

OSHA General Duty Clause

OSHA requires the employer to conduct a hazard assessment pursuant to 29 CFR 1910.132 (d), which states:

“(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

- (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
- (ii) Communicate selection decisions to each affected employee; and,
- (iii) Select PPE that properly fits each affected employee.

Note: Non-mandatory Appendix B contains an example of procedures that would comply with the requirement for a hazard assessment.

(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.”

PESH Act Requirements of Part 800.6, Workplace Violence Prevention Program

In 2006, the Legislature enacted Labor Law § 27-b, recognizing that workplace violence to public employees is a health and safety “hazard” and requiring public employers to conduct activities to reduce and/or prevent it (*Matter of City of New York Department of Juvenile Justice*, PES 07-014 at 11 [April 21, 2010], *affd sub nom Matter of City of New York v Commissioner of Labor*, 100 AD3d 519 [1st Dept 2014]). In 2009, the Commissioner of Labor adopted workplace violence regulations to implement the statute and carry out the mandate required by PESH that the Commissioner promulgate specific “standards” to protect employees from recognized hazards

(Labor Law § 27-a [4] [b]; 12 NYCRR Part 800.6). These regulations permit the DOL to inspect workplaces and to enforce the regulations, with an employer subject to notice of violation and penalties under PESHSA for any violations found (Labor § 27-a [6]; 12 NYCRR 800.6 [j] [5]).

The workplace violence regulations require public employers to develop and “implement” Workplace Violence Protection Programs to prevent and minimize the hazards of workplace violence to public employees (12 NYCRR 800.6 [a]). The employer must first develop and post a written policy statement about the program’s goals and objectives, conduct a risk evaluation for potential hazards related to workplace violence, and develop a workplace violence protection program (hereinafter “WVPP”) that explains how the policy is going to be implemented (12 NYCRR 800.6 [e], [f], and [g]). The WVPP must include details about the “risks that were identified” in the evaluation, describe the “methods and means” by which the employer will address each specific hazard identified, and the “methods” it will use to prevent the incidence of workplace violence, and also include a hierarchy of “controls” it will adhere to in doing so, including engineering controls and “work practice controls” (12 NYCRR 800.6 [g]). Finally, it must provide information and annual training to employees about the WVPP, establish and implement reporting systems for incidents of workplace violence, and provide for an annual review of those reports with the authorized employee representative to identify trends in the types of incidents reported and the “effectiveness of the mitigating actions taken” (12 NYCRR 800.6 [h], [i], and [j]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rules (12 NYCRR) § 65.39.

Respondent’s Investigation was Insufficient to Support its Determination that the Employer Abated Citation 1 Item 1

The certification of hazard assessment in the record, which was certified by Rasheed, does not meet the regulatory requirements of a hazard assessment, thus, respondent incorrectly determined that the citation regarding the lack of a hazard assessment was abated by the NYPD (29 CFR 1910.132 [d]). OSHA requires a written certification of a hazard assessment that identifies the workplace that was evaluated, the person who is certifying that the evaluation occurred, and the date of the hazard assessment (29 CFR 1910.132 [d][2]).

Respondent’s reliance on the document submitted by the NYPD as a purported certification of hazard assessment was unreasonable. The certification of hazard assessment entered in the record is insufficient because it does not identify the workplace evaluated or the date the hazard assessment took place, both of which are plainly required by 29 CFR 1910.132 (d) (2). Under the heading “WORKPLACE EVALUATED,” in the certification, the paragraph begins by explaining that a review of weapons used by active shooters “from San Bernadino to Orlando” was conducted and a particular vest and helmet selection was based on it. However, there is nothing under that heading that identifies what workplace was evaluated. There was extensive testimony about the uniqueness of the NYPD, but the certification of the hazard assessment itself does not reference what workplace was assessed. Rasheed did not identify in his testimony what workplace was assessed in the hazard assessment nor do we believe that would substitute for the absence of that required information in the certification of the hazard assessment.

Further, the certification does not contain the date the hazard assessment took place (29 CFR 1910.132 [d] [2]). The certification contains a date that the certification itself was certified, but not a date on which the hazard assessment was done. The certification also states that a hazard assessment was conducted “for procurement of Active Shooter Patrol Kit,” and lists information about vests and helmets, indicating that the hazard assessment was likely performed after the ASPKs were selected and purchased. A hazard assessment is necessary to assess hazards and then to determine what PPE will protect employees from those hazards, not to identify PPE which has already been procured. There is no evidence in the record that respondent otherwise established when the hazard assessment was performed because neither Lam nor Caines testified that they either reviewed the hazard assessment or had any knowledge of what hazards had been identified in the assessment. Regardless of respondent’s lack of knowledge of when the hazard assessment took place, under the OSHA regulation there is a requirement that the date the hazard assessment was done be included in the certification and that is not the case here (29 CFR 1910.132 [d] [2]). Rasheed did not testify as to the date the assessment took place, rather, Rasheed only testified that he conducted the assessment for the certification he signed by reviewing the PPE already selected by the NYPD and comparing it to NIJ standards.

These are not merely technical regulatory deficiencies. Respondent’s failure to obtain a complete and accurate certification of hazard assessment makes it impossible for the Board to make a finding on whether respondent’s determination that the NYPD took sufficient actions to abate the violations was reasonable and valid. Respondent already found that the NYPD failed to conduct a hazard assessment and failed to select PPE which would protect employees from the hazards identified in an assessment; and violations were issued by respondent based on those findings. Respondent failed to explain how affirmative findings could have been made that the violation regarding PPE selection was abated without seeing a complete and accurate certification of hazard assessment, and without ever seeing what hazards were identified in the hazard assessment. Simply put, there is insufficient information in the record as to how respondent could determine that the PPE selected addressed the hazards found if respondent failed to obtain information on what hazards were found in the hazard assessment. The certification of hazard assessment in this case also states on its face that it is limited to an assessment of PPE already selected and is dated after the PPE had already been selected. Without any other date as to when the assessment was done, the record does not evidence that the NYPD did in fact do a hazard assessment since the ASPK was already selected and procured before the certification was signed by Rasheed. Additionally, Rasheed acknowledged that the certification of hazard assessment is incorrect on its face because it requires each uniformed officer to use the ASPK but the ASPK is not made available by the NYPD to foot patrol officers. Lam similarly conceded the certification’s inaccuracy.

Even more perplexing, perhaps, is that respondent made actual substantive findings in the final investigation in which the violations were found abated despite both Lam and Caines testifying that PESH does not assess the sufficiency of the PPE selected by the employer because PESH lacks the expertise necessary to do so and must rely on the employer’s expertise in making these choices. The May 24, 2017 final investigation narrative contains affirmative findings by respondent that the ASPK was sufficient to protect the affected employees from an active shooter situation. No determination need be made herein regarding the accuracy of Lam and Caines’ statements on the ability of PESH to assess PPE, but the Board does find that neither respondent’s records nor testimony contain a satisfactory explanation of how these substantive determinations could have been made without a complete and accurate certification of a hazard assessment being

provided by the NYPD and without knowing what hazards were identified by the NYPD (*see e.g. Matter of Civil Service Employees Association, Inc. [Niagara Falls State Park]*, Docket No. PR 18-003, at pp. 13-14 [Feb. 24, 2021]).

We find that it was unreasonable for respondent to determine that Citation 1 Item 1 was abated based on the record evidence. The Board herein is not making findings of the sufficiency of any substantive determination made by the NYPD regarding its PPE selection, weapon selection, or training. The record does not contain sufficient information to permit the Board to make such substantive determinations. The Board is cognizant of the holding in *Williams v City of New York*, 2 NY3d 352, 368 (2004), and makes no finding herein that respondent should or can “second-guess the decision of police supervisors on matters like these.” This is not a finding that respondent is required or even permitted to substitute judgment, in place of the employer’s, in circumstances where reasonable minds could differ on which generally acceptable PPE should be used. The Board only finds that respondent’s failure to obtain a complete and accurate certification of hazard assessment or explain how the substantive determinations upon which the abatement finding regarding the ASPK was based could be made without knowing the hazards, renders the abatement findings unreasonable and invalid.

The Determination that Citation 1 Item 2 Was Abated was Unreasonable

The Workplace Violence regulations under PESHSA require the employer to develop a written WVPP which must, among other things, evaluate the workplace for risks of violence and to include details about the “risks that were identified” in the evaluation, describe the “methods and means” by which the employer will address each specific hazard identified, and describe the “methods” it will use to prevent the incidence of workplace violence (12 NYCRR 800.6 [g]). Respondent determined that citation was abated based on an updated WVPP provided by the NYPD. The WVPP entered in the record states that an ASPK is provided to all uniformed officers by the NYPD but Rasheed admitted that is not true. Based on the admitted inaccuracy in the WVPP, we find it was unreasonable for respondent to determine that Citation 1 Item 2 was abated.

The Determination that Citation 1 Item 3 Was Abated Was Unreasonable

As stated above, the WVPP risk assessment provided by the NYPD to respondent was admittedly inaccurate. Respondent relied on that inaccurate risk assessment to determine that the NYPD was sufficiently providing training on active shooters to patrol officers when the determination was made that citation 1 item 3 was abated. That determination states, in relevant part, that the NYPD “have been providing . . . training on the hazards identified prior to the hazard assessment as well as when the new hazard assessment was conducted and certified on May 19, 2017.” First, the May 19, 2017 certification of hazard assessment is distinct from the WVPP that is the subject of this citation. Secondly, Rasheed admitted that the WVPP was inaccurate. Thus, respondent’s investigation was insufficient to establish that the NYPD was providing training as per the WVPP’s risk assessment for active shooters.

Based on a review of the evidence entered into the record at the hearing in this matter, we find that it was unreasonable for respondent to have determined that the employer abated the violation and citation, items 1, 2 and 3. Respondent’s determination is hereby revoked.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition is granted and denied in part; and
2. Respondent's determination is revoked.

Dated and signed by the Members
of the Industrial Board of Appeals
on August 9, 2023.



Michael A. Arcuri, Member



Patricia Kakalec, Member



Molly Doherty, Chairperson



Najah Farley, Member



Sandra Abeles, Member