Law Office of Steven J. Kossup, PC
18 Church Street
Suite 114
Newton, New Jersey 07860
Phone: (973) 940-1167 Fax: (973) 940-1169
E-mail: sjk@kossup.com
Attorney ID: 017471993
By: Steven J. Kossup, Esq., for Appellant Michael Carbone

Michael Carbone	)Superior Court of New Jersey
	)APPELLATE DIVISION
Appellant	)Docket No.: A-003222-24
	)
v.	) ON APPEAL FROM
	)
Police and Firemen's Retirement System of New Jersey	)Final Administrative Decision
	)Decision by the Board of Trustees,
	)Police and Firemen's
Respondent	) Retirement System
	)
	)SAT BELOW:
	)The Hon. Danielle Pasquale, ALJ

APPELLANT'S BRIEF

Steven J. Kossup, Esq.
on the Brief and Appendix on
Behalf of Appellant Michael
Carbone

Dated: August 14, 2025

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PRELIMINARY STATEMENT

Appellant Michael Carbone was disabled on September 22, 2020 while working as a Morris County Sheriff's Department K-9 Handler due to the negligence of a NJ State Trooper. By this point the Panel has reviewed the ALJ's opinion and understands that Appellant and his K-9 partner were to conduct a search for (presumed to be) armed suspects in a 20' x25' garage. Appellant made repeated warnings, found on this record, to have been **designed** to notify others that a K-9 will be released into the area and anyone in that area will get bitten. The K-9, once fully deployed, next indicated to Appellant that he had visually identified what Appellant reasonably believed at that point to be a suspect hiding in the garage. Appellant followed the K-9 into the garage and saw that his powerful K-9 was in full drive to viciously attack and subdue a State Trooper who **unexpectedly** wandered into the search field contrary to all announcement warnings given. The K-9 was not trained to stop with any verbal command in this confined space– Appellant, in this emergency, "heroically" (on this record) restrained the charging animal to prevent serious bodily harm to the Trooper – if not, the Trooper would have been mauled and likely disabled for further service as an officer. Appellant was disabled as the direct result of this intervention which would not have been necessary but for the Trooper's negligence. Consequently, Appellant's injury was the direct result of an

undesigned and unexpected situation that arose during his regular or assigned duties for which he should have been granted Accidental Disability.

PROCEDURAL HISTORY

On May 10, 2022, Appellant filed an application for Accidental Disability benefits as a result of the injuries sustained on September 22, 2020 pursuant to N.J.S.A. 43:16A-7 (Pa84-Pa86). On January 9, 2023, the Board of Trustees, Police and Firemen's' Retirement System of New Jersey (hereinafter Respondent) determined that Appellant qualified for Ordinary Disability retirement benefits under N.J.S.A 43:16A-6 (Pa36-Pa38) but denied Appellant's application for Accidental Disability pension benefits in its determination that the event was not "**undesigned and unexpected**" (Pa36). Appellant filed a timely appeal and requested a hearing before an Administrative Law Judge. On March 15, 2023, the matter was transmitted to the Office of Administrative Law as a contested case (Pa144). A hearing was held on November 14, 2024[1].

The ALJ issued the initial decision on April 14, 2025 (Pa8-Pa26). Exceptions were noted (Pa173-Pa199). Respondent issued its final determination on May 15, 2025 (Pa7). Appellant filed the within appeal – the Agency's adoption of the ALJ's decision and the ALJ's Decision itself to the Appellate Division are appealed in this proceeding (Pa1-Pa6). Hereinafter,

[1] Transcript designation: T – Hearing date of November 14, 2024.

reference to Respondent, ALJ, or the Agency shall be understood to encompass the ALJ's initial decision and the Agency's adoption thereof.

STANDARD OF REVIEW

This fact pattern presents a qualifying case under the Accidental Disability Statute, N.J.S.A. 43:16A-7. The only issue on appeal is whether the incident was "**undesigned and unexpected**" [Richardson Factor (2b)]. Respondent conceded all other criteria (Pa36-Pa38).

The Supreme Court established the criteria in Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189 (hereinafter Richardson Factors) as to what is needed in order to satisfy the traumatic event standard of N.J.S.A. 43:16A-7 – to do so, a member must prove:

1. that he is permanently and totally disabled; *(Resolved in Appellant's favor at Pa36).*

2. as a direct result of a traumatic event that is *(Resolved in Appellant's favor at Pa36).*

    a. identifiable as to time and place;*(Resolved in Appellant's favor at Pa36).*

    b. **undesigned and unexpected; (In Dispute)**

    c. caused by a circumstance external to the member, not the result of pre-existing disease that is aggravated or accelerated by the work; *(Resolved in Appellant's favor at Pa36).*

3. that the traumatic event occurred during and as a result of the member's regular or assigned duties; *(Resolved in Appellant's favor at Pa36).*

4. that the disability was not the result of the member's willful negligence; *(Resolved in Appellant's favor at Pa36).*

5. that the member is mentally or physically incapacitated from performing his usual or any other duty. Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189, 212-13, 927 A.2d 543 (2007) *(Resolved in Appellant's favor at Pa36).*

The Richardson decision "underscores that what is required is a force or cause external to the worker that directly results in injury and identifies ordinary mishaps, including lacerations, trips, and falls, as traumatic events[2]. Appellant meets this standard.

The Richardson Court noted that, under prior statutes, the Court's long "defined 'accident' in accordance with its ordinary meaning — *as 'an unlooked for mishap or untoward event which is not expected or designed.'*" *Id.* at 197, 927 A.2d 543 (citations omitted)[3]. Here, Appellant followed all proper procedures, but the State Trooper unexpectedly entered into his search field causing injury. Respondent's denial in this area deemed anything that happens

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[2] Richardson v. Bd. of Trustees, Police & Firemen's Ret. Sys., 192 N.J. 189, 211,927 A.2d 543, 557 (2007)

[3] Definitions: Mishap: "an unfortunate accident." Untoward: "unfavorable or unfortunate." Dictionary.com

at work is to be expected and is therefore not 'undesigned and unexpected'. That is error of law.

The Supreme Court provided guidance: "That is a misreading of the statute, which *requires* that the traumatic event occur 'during and as a result of the performance of [the member's] *regular or assigned* duties.'" *Ibid.* The Court ruled that under the current statutes "a traumatic event is essentially the same as what we historically understood an accident to be - an **unexpected** external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort." *Id.* at 212, 927 A.2d 543; *see id.* at 214, 927 A.2d 543. Appellant has met the standard and reversal by the Appellate Division is appropriate.

There is no adverse credibility issue in this case. The Panel's review will focus on [ALJ]'s decision and the Agency's adoption, as Appellant has demonstrated that ultimate determination was not "supported by substantial credible evidence in the record as a whole" and consequently remains as "arbitrary, capricious and unreasonable." These determinations should be reversed. Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980).

The Fairweather Court recognized that the Appellate Division holds ultimate authority for statutory interpretation where the Agency's decision is manifestly (clearly) mistaken:

> "... although we respect the agency's expertise, ultimately, interpretation of statutes is a judicial, not an administrative, function and we are in no way bound by the agency's interpretation." Fairweather v. Public Employees' Retirement System, 373 N.J. Super. 288, 295 (2004)

STATEMENT OF FACTS

Appellant Michael Carbone, Witness Detective Mark Slinger, and Expert Michael McMahon testified at the November 14, 2024 trial.

1. Testimony of Appellant Michael Carbone

Appellant Michael Carbone was a Morris County Sheriff's Officer Detective Assigned to Emergency Services Unit - K-9 Division. He had served 8.7 years with almost 7 of those years in the K-9 unit. His last day of work was August 1, 2022 (T23:1-23, Pa9) with good performance in his job. He was a certified handler and trainer (Pa12, Pa97, Pa110) with no disciplinary problems during his tenure (T:27 to T:28) (Pa166). His assigned K-9 was Loco, a Dutch shepherd weighing 92 lbs. (T:37, T:40, Pa12) These animals ***are not pets***. (T37:24 -T38:25). Appellant and K-9 Loco were both certified for fieldwork, with over 200 searches (T165: 6-23) and K-9 Loco being dually certified "in apprehension of criminals as well as narcotics" (T43:13-20). K-9 Loco was trained to bite and hold for apprehension purposes.[4]

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[4] The ALJ correctly states the policy (Pa12) but it describes different working dogs – here, K-9 Loco's role was solely narcotics detection and apprehension (T43:13-15, also T193:21-T194:1, Pa145-Pa149) (meaning to search, bite and

The ALJ agreed that Appellant's training comported with the AG Guidelines and the even more stringent MCSO Standard Operating Procedures (SOPs)[5] (Pa51-Pa79, Pa98-Pa109, Pa110-Pa124, Pa125-Pa143).[6] That training required Carbone, and K9 Loco (his K-9 Unit) to demonstrate knowledge of the major phases of criminal apprehension, including false start, recall, straight apprehension and pat-down for both standing and a moving crowd. It also included off-leash and on-leash apprehensions.[7]

All of the testimony and the corroborating documents bolster the fact that K-9 Loco specifically was exceptionally strong and both bred and trained to be potentially deadly when deployed upon suspects.[8] Loco's lineage was of large and muscular Dutch Shepherd male dogs known for their "extreme power and

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hold for apprehension purposes). Also, ALJ confirming apprehension concept at T311:1- T312:5. These animals are not generally cross trained - T307:8-T308:8.

[5] The ALJ at Pa12 found that "on September 22, 2020, Carbone and his K-9 Unit acted in accordance with AG Guidelines and his Department's SOPs, and thus I so FIND." (Pa12) The ALJ's subsequent discussion of the guidelines in the opinion cite these provisions, including the pre-deployment announcements/warnings and found these as observed on the subject date.

[6] Regarding announcements with the explicit policy verbiage (T102:8-T105:25, Pa15, Pa87-Pa94). No scent indication." (T104:3-T105:6). Deployment as per policy (T104:3-T105:5). Adherence to policies/Trooper negligently present in search area accident post warnings (T325:6-T326:2)

[7] Violent and abusive pulling on animal's throat is *never* done in training (T199:2 -T200:7).

[8] The animal was strong and deadly - Appellant was subsequently injured when he took the necessary action to stop K-9 Loco from biting the trooper (T117:4-9, T112:11-T114:11, T116:18-T117:3).

drive" (Pa13, Pa156-Pa157).[9] Considered as a weapon,[10] K-9 Locos role was to cause severe injury to a perpetrator,[11] especially when Loco was in pursuit of suspects (*also found as fact by ALJ* at Pa13-Pa14).

The Morris County Sheriff runs the use of K-9s for the 39 municipalities and performed in service training to "anyone who's going to be requesting our services" [*the field officers from municipalities*] how to work at scenes with the K-9s (T74:18-T75:21). It is established on this record that K-9s don't recognize other officers as friends: "...it knows me and that's it. Everyone else is essentially a target." Therefore, police present at searches are advised to keep away from a working K-9 so that they are safe (T74:7-T76:18, Pa12).

INCIDENT OF SEPTEMBER 22, 2020

Appellant testified that on September 22, 2020, he was called to service at approximately 2:35 AM to assist with apprehension of (presumed to be) armed suspects who had abandoned and run from a stolen auto (Pa15, Pa48-Pa49, Pa87-Pa94, Pa95-Pa96, T69:10-19, T193:11-12)[12]. Four departments were at the scene - Parsippany-Troy Hills Police Department, Hanover Police Department, Morris County Sheriff's Office, and the New Jersey State Police

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[9] Again, T278:12-T279:2 and generally on this record including T347:1-5 (questions by Court).
[10] The term "weapon" appears at T203:6.
[11] K-9 dogs ***are not pets*** (T37:24 -T38:25).
[12] "We're looking for multiple suspects potentially with guns." (T193:11-12)

(T86:3-7). Upon arrival, Appellant and his partner Mark Slinger found that the Hanover Police Department Unit Commander had already established a perimeter before they called for a K-9 unit. This procedure followed Appellant's prior instruction and training of local departments (Pa87, T74:6-14). Appellant gave the appropriate procedural warnings that a K-9 was about to be deployed in the area - (Pa88-Pa89, T77:7-T78:10, 911 CAD – Notes warnings given at least three times).[13] Per Policy, "Upon arriving at a sanctioned K-9 apprehension incident, SOP 1:5.7 requires that the K-9 team issue the following voice announcement: "This is the police. We have police trained dogs. If you do not come out, you will be bit."[14] All witnesses testified that this was initially done over a loudspeaker upon arrival. The ALJ found that Appellant followed all policy concerning announcements prior to deployment.[15] Note that the ALJ also specifically found that the

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[13] All announcements were per policy and the ALJ found these were properly and repeatedly done. (T102:8-T105:25, Pa12)

[14] Announcements properly done (T102:8-T105:25, Pa88-Pa89, T326:16-T327:19) would be effective in 25-foot garage/trooper failed to comply (T326:16-T327:19).

[15] Discussed at length on this record with reference to 911 CAD record and policy Pa-87-Pa94, Pa98-Pa109, Pa 110-Pa124, Pa125-Pa143. References to "Announcement" warnings in the transcript is found at: T77-T78, T80-T81, T83 (noting Pa87-Pa94), T84, T87-T90, T94-T97 (Announcements at the garage Pa87-Pa88), T100, T102-T105, T108, T133-T134, T136-T137, T174, T185, T189-T191, T195-T197, T210, T212, T222-T233 T287, purpose discussed at T288.

"announcements" provision found in the policy "is designed, of course, to allow individuals to either identify themselves or exit the area. (Pa13)[16] (*Emphasis added on term "designed"*).

The armed suspects had fled, or bailed, from the stolen auto, then under police chase (T108:15-16, T193:11-12).[17] After giving his announcements over the PA system of his police vehicle. Appellant and his back up officer Det. Slinger, along with a Parsippany officer, conducted the search in the dark, in a residential neighborhood with several structures. Appellant and K-9 Loco then approached a structure and again gave required announcements – upon entry, the team found State Troopers were coming in the rear area of the same building. They had not observed the warnings for some reason – Appellant immediately, and in accord with his training, gathered those officers together and cautioned them of the potential danger of "getting ahead' of the search team. He reminded them that K-9 Loco could not tell who was a suspect and who was an officer, so the K-9 will apprehend his target in a vicious manner (T85:1-T86:7). Going forward, he told them to follow behind him for their own safety.[18] This contact

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[16] The ALJ found that this was designed so that the trooper would leave the area or alert that he was in the area. The situation did not evolve as the policy was designed. It was undesigned and unexpected.

[17] Notified at Pa88, T74:6-14. The suspects were armed. Pa95-Pa96, T69:10-19, Pa48-Pa49, Pa 87-Pa94. Four departments were at the scene noted at (T86:3-7).

[18] This situation known as a *'Blue on Blue'* (described in detail at T84:6-T 86:21) approximately 20 minutes before he was injured and disabled. A 'Blue on Blue'

is known the field of K-9 work as a *'Blue on Blue'* (described in detail at T84:6-T86:21). A 'Blue on Blue' incident is not a "*training event*" and does not appear in the AG Guidelines, nor in the Morris County policy and procedures – the ALJ incorrectly deemed it to be part of training at (Pa16). This is error - instead, "Blue on Blue" is professional shorthand for a situation that occurs when an officer comes too close to the K-9 team. It is important to note that the K-9 is not *trained* to decline "blue on blue" contact – in fact the K-9 is not taught, and therefore unable, to distinguish between officers and suspects at all. Appellant explained to the then present (8-10 officers) again how to operate safely when Appellant and his backup deploy K-9 Loco during the impending search to avoid this safety error moving forward (Pa125-Pa143, T:83-T:85, T85:25-T86:7).

Following the 'Blue-on-Blue incident, Appellant continued to search the area with K-9 Loco without further incident until he reached a Garage on site.

Garage (Locus of Injury): Appellant and K-9 Loco entered a backyard wherein a garage was located (Pa172); Appellant first checked a shed there and then continued in front of the shed to the back door area of the subject garage(Pa172) where this accident occurred.

The garage dimensions are approximately 20 feet by 25-30 feet. (T96:7-

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occurs when the K-9 comes into proximity of a police officer during a search or deployment.

T97:19). Appellant approached the garage from the [human sized] rear door of the garage (T98:19-20-T99:1-13). The rear door was partially opened (inward) and Appellant stood with his right shoulder to the wall in a tactical posture as the suspects were believed to be armed. His K-9 Loco was placed at his left foot area (T100:3-T102:5). Appellant held the leash in his right hand with his shoulder up against the wall, facing the direction of the door; K-9 Loco was either sitting or in a down position in front of him (T101:19-T102:5). Appellant could see the left side of the dual garage doors was closed (*left side looking from his position*) - at that angle he did not know, nor could he see, that the other garage door [right side] was open. Appellant was in preparation at this point to deploy the dog into the garage (T110:20-T111:6).

Appellant then made loud and repeated pre-deployment announcements with the explicit policy verbiage required before deployment of a K-9 (T102:8-T105:25, Pa15, Pa88-Pa89). No one responded to the announcements and K-9 Loco, at that point, gave no indication of scent or sight. Appellant explained "If he had a scent indication of human error odor, he would start barking to alert that there was somebody in there. Loco was not barking related to a scent indication." (T104:3-T105:6). Appellant also clarified that, up to this point, everything so far was going according to policy (T104:3-T105:5).

Appellant explained that, following the announcements;

> "no one calls back. I hear nothing; I go to open the door to send (deploy) Loco. As the door opens, I see Loco immediately posture up. I see he's fixated on something and now he's on route to engage the target he's supposed to [engage] in the garage - yeah, I mean it's like instantaneously." (T106:10-25).

Appellant testified that, even now with the post deployment sight indication, *everything is still going according to policy up to that point*. "[U]pon turning in front of me, he gave a *sight* indication (*explained as head up, ears forward*) (T107:19-24). Appellant "gave" K-9 Loco the whole leash, fully extended, (15 ft) (Pa171) keeping the loop, to allow him to freely reach the target (T114:23-T115:22, this being consistent with training video at Pa148, Pa15). Appellant at that moment believed that the K-9 had this sight indication on the actual *suspect(s)* in the garage once he turned into the doorway. Again, Appellant believed K-9 Loco had found a suspect.

Appellant broke tactical cover and stepped into the doorway to give his K-9 more leash. At that point he also sought to determine what the target was – **unexpectedly**, instead of a suspect, K-9 Loco was moving at maximum effort "25 to 30 miles an hour" toward a *State Trooper:*

> "I thought he was biting a suspect. I knew that I had to close that distance - I stepped into the garage to give him more leash and then immediately realized [...] there's a Trooper there (at the threshold of the garage bay on the right) and [began] yelling my commands to the dog and essentially simultaneously pulling, yanking him back as he's hitting the

> end of the leash to bite the Trooper." (T112:11-16, (Pa80-Pa83)

Appellant explained that the Trooper should not have been in the garage – he would have *heard* the policy K-9 deployment warnings shouted into the garage and should have gotten out of the area, but he did not (this was later confirmed by the Appellant's expert as noted below). Appellant was thus suddenly and unexpectedly confronted with a potentially deadly or certainly very dangerous situation that should not have occurred but for the State Trooper's failure to obey the Appellant's announcements. The Trooper saw the K-9 Loco in full charge coming directly at him but for the moment was frozen in place. The K-9 "doesn't know he's ... a cop." (T116:18-T117:3). The Trooper shouldn't have been there, and Appellant had to take immediate action to protect the Trooper from his own negligence (T117:4-9):

> "Knowing what these dogs are capable and knowing what the outcome of a bite could be if he would have bit that state trooper, it could have been deadly... [S]o when I see the Trooper I'm immediately like and I need to stop that dog. If that dog bites him he's essentially going to tear him up; the dog is going to bite this Trooper and I know the damage that that dog you know essentially could do. So for the trooper's sake for the sake of the dog not getting injured by the trooper or myself I yanked the dog back and stopped him from biting the trooper" (T112:11-T114:11, Pa145-Pa149)

That violent stopping action, necessary to protect the negligent Trooper from the deployed K-9 Loco, is on this record the direct result of Appellant's

disability. (Pa15). Appellant was able to stop the dog "about three, four, five feet from *(the trooper)."* (T114:9-13). K-9 Loco hit the end of the leash with great intensity and force, causing injury to Appellant. The leash was attached to his throat and K-9 Loco "violently spun around and again he was still ... trying to engage. I'm now getting him out of there." (T117:13-16).

Immediately, upon removing K-9 Loco from the garage and immediately following this incident, Appellant met with Detective Slinger and Officer Woodruff and told them what had just happened:

> "Right in that moment when it came out I was very upset because I just ... told these guys if I'm working the dog you need to stay behind me *(re-Blue on Blue incident)* ... So I came out of the garage. I was upset. Slinger was right there. Woodruff was a little bit further back but you know Slinger was confused because he didn't know why I came out either. He was getting ready to go in and I was like "man, there's you know obscenities, but I was I was upset that there was a trooper in there and I got hurt "(T119:18-T120:1)... "Slinger didn't know what happened and I'm like, there was a State Trooper in there after I deployed the dog. I don't know where he came from, why he's in there, or whatever, and I told him that I hurt my arm so I asked them to walk to the back of the yard.... so we then walked off to the side to kind of gather our thoughts and get our like put a plan in place and then continued searching (explained at T126:9-20).

Appellant searched for the Trooper at the scene: "... after I got hurt I went back to look and he was gone, but I didn't know that I was like *that* injured" (*i.e. rendered disabled for further service*) (T118:16-24) (Pa32). Appellant did not then presently realize the extent of physical damage actually caused in this

accident. Appellant, K-9 Loco, and Det. Slinger completed the call and Appellant returned back to his office. "I go to the office and now, you know, the adrenaline's coming down. I'm starting to realize that my arm is more hurt than I thought it was and when I get to the K-9 Kennels, I report my injury to my supervising officer" (T120:6-17, Pa-48).[19]

Appellant next sought medical aid and reported the incident to his physician (Pa80-Pa83, T154:20-T156:13).[20]

K-9 Dogs are not trained to stop on verbal command in such short distances upon a live target in this small area, and the full force violent pull Appellant used to stop the animal is never done in any training.

Appellant, a State Certified K-9 Trainer and Handler, explained that there is no training available where an officer would be able to verbally recall a fully deployed K-9 on a live target in the short space presented in the garage, especially in a "live" street level scenario. (T128:1-6, T132:11-18).[21]

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[19] Appellant used the term "abruptly" in that report as to the unexpected nature of his K-9's effort towards a Trooper. The common meaning is that the pull on the leash, necessary to protect the trooper from getting mauled on that date, was *unexpected.* He explained this at T122:1-9, T32:21, T117:6-9, T121, and elsewhere on this record.

[20] The medical report was made that same morning (T155:24-T156:4).

[21] The ALJ found this to be fact at Pa14, noting: "Detective McMahon's expert report spells out just how dangerous and effective this weapon (K-9 Loco) can be:

> When K-9 Loco is working in any scenario in which he is making an apprehension he is working through two innate drives; prey and defense.

Appellant's violent restraint of K-9 Loco arose only to prevent the Trooper from being mauled by K-9 Loco:

> "That whole type of pulling we would *never* do in training. It's abusive... It's not a training way. I mean that was like an instinctual thing... the policy sets it up so that we would *never* have to stop a dog from attacking someone that's not supposed to be attacked -- so1would never deploy the dog unless it was a warranted situation." (T199:2 -T200:7).So from my K-9 team and my guys we did exactly what our policy states to do and that there is no training for this type of situation (T128:1-6, T132:11-18).

The pull used to stop the K-9 was an unsafe action never done in training This constitutes an emergency response to the Trooper's error.

Training Pull and Leash technique used in training:

Appellant did, *in training* use a smooth pull technique to "set the bite" (teach a deeper bite) on a suspect, but this is a steady and slow controlled pull as shown on Video (Pa148). This pull is not used in a street level recall of a K-9. This type of smooth pull shown in the video is completely different than the abrupt tearing at K-9 Loco's throat in the subject incident. Appellant explained:

> "the pull for the regrip is--- it's--- smooth for lack of better words. It's a smooth controlled pulling back. It's not an excessive amount of pressure. It's light pressure, just enough to kind of-life and you know, the collar is in front of the dog.

Prey drive is defined as a canine's desire to chase, catch and kill prey. Defensive drive, also a survival drive, is defined by a canine's fight, flight or freeze response. When the two of these drives are properly nurtured in a police K9, the canine views an encounter with a suspect as potentially life-or-death engagement that he must win (Pa163).

> So if I'm pulling him back I'm choking him. (*The pull for the regrip*) is just enough tension to communicate the push in (*by the canine to adjust his bite*). The garage? The dog was at full deployment, you know, maximum effort - and essentially as much as I could pull back it's --not a --it's two totally different--- *we would never do that --- it's abusive*. (T198:5-T199:5)

Verbal Recall and its application:

A verbal recall, as taught, was not available under the circumstances: verbal recall is an exercise done in a large open field, not a small garage in such close proximity to the target. Training for the verbal recall does not work in the short space and distance available in the garage. Also, the ALJ erred in her analysis (Pa20, Pa22) because a leash is not used in the verbal recall described here - Appellant clarified that this is *not to pull him back* [on a leash]; instead 'it's to do a recall - meaning *tell* him to come back *(with verbal command)* (T138:9-T139:1). Appellant yelled to the K-9 Loco (verbal recall) to no avail:

> "[W]hen you're in 20 feet like by the time I'm seeing it, yelling at the door, *he probably didn't even hear what I was saying* because it's-- they are-- they're doing what they're *supposed* to do because we would never do that in training." (T138: 22-T 139:l).

At this point Appellant strenuously clarified the *way* he had to stop K-9 Loco was something he would not do in training. Appellant explained:

> "[T]hat would be abusive to the dog. Like you could literally snap his neck doing that just one time. So just simply from that point we -- we would never do that to the dog. I mean that -- that would probably be my best point to make on that.

> Like you -- you -- you - you would -- you would damage the dog one way or another mentally, physically." (T150:12-19)

Appellant testified that the emergency restraint confused and harmed K-9 Loco as his apprehension intensity dropped. He had been torn away doing exactly what he had been trained to do. He was confused. "He was not the dog you want to be searching for suspects at that moment." (T117:17-T118:15). Appellant completed his assignment and was unable to return or further serve as a law enforcement officer thereafter due to his injury.

2. Relevant Testimony of Witness Detective Mark Slinger

Detective Mark Slinger was part of Appellant's K-9 team. Witness Slinger confirmed that he was called out on the job with Appellant on September 22, 2020 and he described the nature of the stolen auto incident consistent with Appellant (T209:8-T210:7). Detective Slinger's role with Appellant on the K-9 team was backup officer "so my primary function was to provide lethal force" if confronted with such a situation (T214:18-22). He stayed within a few feet of Appellant during the searches (T214:23-25, Pa17).

Detective Slinger confirmed that the Appellant made all required announcements per policy. The Court found this at Pa12. This is of record at T210:18-24, T223:1-7 and Pa87-Pa94.

Detective Slinger was also present at the "Blue-on-Blue" incident and

testified consistent with Appellant regarding this incident (noted in the ALJ opinion at Pa17-Pa18, T212:16-24). He confirmed there were other law enforcement officers within the structure and that Appellant had made the repeated commands in a clear and loud manner before they entered the structure (T212:9-13).

Despite announcements they saw that other officers entered the building on the far side of the structure ahead of the K-9 team. This was not supposed to happen - "we backed out of the building after we finished clearing it and we got all the officers that were there with us - the search team that were with us- immediately and we got them together go over our expectations again surrounding the use of a police dog." Witness Slinger described how Appellant pointedly instructed them at that time to "let the dog do the work" (T212:18-T 213:9). The Court asked, and Detective Slinger confirmed, that Appellant gave these additional instructions to the rest of the officers that were there (T213:14-23).

Injury at the Garage (Pa172):

Detective Slinger was still with Appellant when they (as search team) got to the subject garage and was standing right off of Appellant's left shoulder. Witness Slinger confirmed the back garage door was slightly opened and he also did not have a direct view into the garage from his position (T216:5-23). He

observed that Appellant deploy the K-9, and "within I would say five seconds I hear Detective Carbone call the dog." (T217:3-8).

He testified:

> "[S]omething was not going as planned... because if there was a suspect that happened to be-- that was hiding inside that garage, [Appellant] would not be yelling at the dog to come back to him. The dog's trained to obviously find, locate, the suspect. So for Mike - for Detective Carbone to yell his name to come back to him I knew something was out of the ordinary." (T218 5-14). "We back out of the garage then at that point Carbone was pretty upset, pretty livid, and he was angry about what --- just had occurred. He said I hurt my arm and I -- we almost or K-9 Loco almost bit a trooper, along-- something along those lines.' (T218:19- T219:2)

Appellant backed out with K-9 Loco before Det. Slinger was able to enter the garage (T219:4-5). The team then moved on and completed their duties then closed the assignment.

3. Testimony on Expert Witness Michael McMahon

Expert Michael McMahon testified on behalf of Appellant and admitted by the Court as a master dog trainer in general for K-9s and also as the (Morris County Sheriff's) supervising police K-9 officer and handler and trainer (T262:5-22, Pa150-Pa154) Mr. McMahon's qualifications and report were entered into evidence (Pa150-Pa165).

Expert McMahon opined that Appellant followed the standard operating

procedures in deploying K-9 Loco with appropriate [warning] announcements given (T:286:20-24) in accord with policy for Morris County Sheriff's Office. The expert further opined within a reasonable degree of expertise that "someone confronted with K-9 deployment almost always will generally give up or surrender at that point if they're in the area, or at least - at a minimum - notify us of their presence." (T288:9-18). The Expert explained that the Trooper **unexpectedly** entered Appellant's search area and with the short distance presented, Appellant was compelled to terminate apprehension in whatever way he could (T295:20-T296:10).

The Trooper in this case did not notify Appellant to his presence, and the K-9 did not initially "alert" that anyone was in the garage - McMahon explained what the "alert" is as to the K-9:

> "posting or indicating in some manner, but it's physical change in behavior that the handler is able to identify in the dog that they have, you know, visually or through their sniffing, through their olfactory system, identified that there's a suspect or a person in that space."

In short, the K-9 saw a person in the garage upon deployment, but no one had responded to the Appellant's announcements that he was about to deploy the K-9 (T289:9-17).

The expert, at T290-T292, described the approach to the subject garage and Appellant's manner of deployment consistent with Appellant's testimony.

Appellant followed all policy in his decision on deployment (T291:25-T293:5). "At the moment that Mike identified the Trooper was K-9 Loco's target – [...] [Appellant] then used the leash as a mechanism to stop the dog from apprehending or biting the suspect - biting the target [the trooper] at this time." (T294:4- 9). This K-9 was thus hit with a violent restraint by Appellant when he's doing exactly what he's trained to - the Expert explained "for any dog that would create conflict because it's going to be against what he was taught was correct. So it's going to be perceived as punishment which is therefore going to make the dog more - less likely to perform that behavior in the future." (T307:23-T308:8), also (T331:4-16).

The Expert confirmed that a verbal recall was not available under the circumstances presented:

> "We trained for a verbal recall, but we don't train specifically for this kind of context where we have a-- a fellow officer or a civilian in a live search environment ... just because of the nature of the search. So the risk it would be posing to them, a physical injury to put somebody being in the search area, and equally if I put a "suspect" in there, a decoy out of a bite suit, inside of room and I use "operant conditioning," the "punishment" to teach a dog not to apprehend a suspect in a live picture or search picture, I could extinguish the behavior of the searching and the apprehending altogether and the dog, at this point - we don't want the dog thinking we're trying to discriminate between targets. We want dog to go in and perform the job of the apprehension." (T296:11- T297:4) also (T305:17-T306:16)

The Expert further explained that K-9 Loco, in that situation on September 22, 2020, viewed the encounter with the suspect as a potentially life or death engagement that he must win -he explained:

> "Through the -- the training and the - the training process that K-9 Loco received from the start of his training nurturing prey drive and working him through defense drive and teaching him through the scenarios that we work with that he's in a fight for his life, that he needs to go in and-- and complete that mission of apprehending whoever the suspect or the target is and he's been through a process that has taught him, one, that he enjoys that and he seeks that out and that it is serious in nature." (T324: 3-12)

The Department doesn't train for immediate recall within these short distances once a K-9 is already deployed. He opined within his scope of expertise that Appellant acted professionally and responsibly doing everything that he could to prevent K-9 Loco from causing serious bodily injury to the New Jersey State Trooper who improperly entered the search area - this was not due to any failure on the part of Appellant, nor of K-9 Loco (T324:19-T325:4).

The ALJ clarified - the policies are there to prevent errant bites because the goal from what the Court is hearing, "is to bite the suspects, not to just detain them or bark at them. It's literally really bite them - that's what I'm hearing today (T311:2-5). The Expert confirmed that was correct (T311:7).

Expert further opined that attempt at verbal recall would not have been sufficient in the context presented and that is why Appellant had to use the

physical restraint (T332:4-9). The verbal recall *is not done* with a leash and is taught over much greater distances. The Expert explained that "The recall is performed at a distance of about 75 to 100 yards and it's off leash in a field facility." (T297:7-10). His explanation of the verbal recall was consistent with Appellant's explanation at T169:2-22 and is explained at length at T297:5-T298:6.

Recall Procedure:

The Expert explained that under the circumstances Appellant did not have room to use a verbal recall. He described that "A minimum distance set forth for the AG guidelines was not the standard we practice at the Morris County Sheriff's Office (T301:1-12). The standard practice there was as follows:

> " ... [S]o we would increase the distance on that as far as the proximity from the dog to the handler or dog to the decoy for certification purposes because that's a more--- you know, in-- in this situation be more challenging in an open field to, you know, terminate a pursuit on a fleeing suspect when you're closer proximity to them than you would at 10 yards....
>
> (Q): Okay, Now *in the situation here* whether there's 75 yards or 10 yards, does Mike have 10 yards within which to (verbally) recall his dog?
>
> (A): No, he does not." (T301:6-21)

Therefore, Appellant was forced to use the leash as previously described, contrary to all training provided.

Finally, the Court clarified: "I just want to be clear -- that there's no

training with regard to the structures because then that dog would be either harmed by the pullback or yeah, kind of broken because -- because the thing that this dog in this case was in a drive state, right? Revved up at one point was trained to do?" (T347:9-15). The Expert answered: "Yes, yeah we would render them ineffective if we punish them repeatedly for performing something we're asking them to do-it would be the equivalent of telling them to do this, but then when they perform it we're, you know, using compulsion to correct them for doing it." (T347:16-21).

Expert McMahon opined that the undeclared Trooper's unexpected presence in the search area was contrary to all warnings given (T325:23-T326:2).

Based on that, Expert McMahon opined that the undeclared Trooper's unexpected presence in the search area was contrary to all warnings given (T325:23- T326:2). He further opined that in a 25-foot garage space presented, the Trooper would have heard these announcements and should have declared his presence before deployment (T326:16-T327:19).

LEGAL ARGUMENT

POINT ONE
THE ALJ'S FINDINGS OF FACT AND THIS RECORD SUPPORT THE GRANT OF AN AWARD OF ACCIDENTAL DISABILITY.

(Raised below at Pa173-Pa192)

There is no dispute that Appellant's decision to deploy the K-9 to search the garage was properly done according to policy and procedure. The ALJ

confirmed this at Pa12. The Court, in Angiola, observed that "the Supreme Court's focus has not been on the voluntariness of the defensive measures taken when confronted with a traumatic risk. Instead, it has been on whether the employee set that risk in motion (Angiola v. Board of Trustees, 359 N.J. Super. 552, 559 (2003). The ALJ, on this record (T:202) stated "Let's take judicial notice. What you did was heroic. I -- I'm not even saying you did anything wrong."[22] Heroic means "showing extreme courage; especially of actions courageously undertaken in desperation as a last resort."[23] The ALJ then capriciously ruled against Appellant. The Trooper was absolutely the cause of this mishap and would have been seriously injured but for Appellant's heroic effort to stop his fully deployed K-9 (T325:6-T326:2). "Heroic" actions are not "ordinary" actions and indicate the hero's (Appellant's) sacrifice to correct the Trooper's error – but for the Trooper's error Appellant would not be disabled.

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[22] "In this case, we are persuaded that in denying accidental disability benefits to a firefighter whose **heroic** response to an undesigned and unexpected traumatic event left him disabled, the Board has misconstrued *Richardson* and reached a result at odds with the legislative intent in adopting the "traumatic event" standard.**3**..." Moran v. Board of Trustees, Police and Firemen's Retirement System, 438 N.J. Super. 346, 352. The Court also noted "On this appeal, we defer to the agency's factual findings, but we owe no deference to its legal conclusions, "particularly when 'that interpretation is inaccurate or contrary to legislative objectives.'" Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27, 17 A.3d 801 (2011) (quoting G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs., 157 N.J. 161, 170, 723 A.2d 612 (1999)) (Ibid at 352).

[23] https://www.vocabulary.com/dictionary/heroic

Further, if the Appellant had allowed the K-9 to reach and maul the Trooper, Respondent would not have ruled, as here, that it was merely the Trooper's job to work at crime scenes and possibly get mauled.

Appellant met with an event that was undesigned and unexpected. Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT TWO
THE ALJ MADE ERROR OF FACT IN HER ANALYSIS AND RELIED ON THIS ERROR IN HER ULTIMATE DETERMINATION

(Raised below at Pa173-Pa190, T138:22-T139:l, T168:16-T169:2)

The ALJ, at Pa15, inaccurately described an incident in which a suspect was apprehended. "Apprehended" means to have the suspect bitten and subdued. The ALJ wrote that the suspect was 50 to 75 yards away from Appellant when he yelled and then he deployed the dog to bite the suspect. The ALJ further noted that the canine was attached to the suspect when Appellant verbally called him off. That is not at all accurate and contrary to Appellant's testimony at T168:16-T169:2.

The ALJ followed up on this error and used it in her arbitrary conclusion that Appellant should have been able to call off the K-9 under the circumstances presented, even after finding there is no training for the verbal recall under the

short distance presented (Pa16). This was not drawn from the whole of the record and is error. (*see* Angiola v. Board of Trustees, 359 N.J. Super. 552, 560)

The ALJ is factually incorrect - as a matter of fact, the point in the 50 to 75 yards measurement of Appellant's account was that Appellant had 50 to 75 yards to call off his K-9; the K-9 had been sent in to apprehend the suspect. The suspect turned and gave up, whereupon Appellant verbally stopped the apprehension - in the subject Garage (Pa172), Appellant explained that the animal's drive state would be so intense that "...*he probably didn't even hear what I was saying* because it's-- they are-- they're doing what they're *supposed* to do because we would never do that in training." (T138:22-T139:l).

This error impacts the analysis because the ALJ determined that Appellant would have been able to verbally call off the K-9 in the short distance provided in the 25-foot garage and that he had also previously tore at the K-9's throat in his 200 prior deployments – neither determination finds support, nor can be reasonably reached on this record.

Furthermore, the ALJ's version of the recall account at Pa15 makes no sense whatsoever - the ALJ's erroneous misconstruction of what actually occurred included that the canine actually bit the suspect (in that prior incident) before Appellant could verbally call him off because the "job was complete" (Pa15). The ALJ's analysis would be understood to meant that Appellant should

have let the K-9 actually apprehend, bite, and subdue the Trooper so his job would be complete and then Appellant could effectuate the verbal recall. This makes no sense, is capricious, unreasonable, and is also inconsistent with the whole record.

The actual testimony at T:168-T:169 contradicts this ALJ's allegation. Appellant on cross explained:

> "...a suspect fled into a wooded area. ... As K-9 Loco saw the -- the individual go to the left he had enough -- I could yell at that point. Like I could see him. He was approximately 50 to 75 yards away. I'm yelling at the suspect my commands as per policy.[24] I deploy the dog on leash. K-9 Loco *began to apprehend or began to engage into an apprehension* and the individual gave up and at that point I had to recall the dog back to me."

The ALJ then clarified –

> COURT: "...when you're saying on leash in that instance you let go of the leash?
>
> (CARBONE) "Correct, I dropped the leash and let him run to gain the distance. The suspect was -- I don't want to say a football field away, but he was quite a distance, 50 to 75 yards ahead of me.
>
> COURT: "So is there a different command or training recalling Loco whether he's -- you're not holding the leash, but the leash is attached, versus he's off leash?..
>
> (CARBONE) There would be the same commands, same -- same idea. ... Again that's a -- you know, a very long distance,

[24] "This is the police. We have police-trained dogs. If you do not come out you will be bit." (T105:15-17)

> reasonable amount of time for me to yell, the dog hears and then get the dog back, ***not similar to the garage in that capacity.*** (T169:3-22)

Wherefore, the ALJ's conclusion that Appellant had successfully conducted a verbal recall of his K-9 in the prior account so he should have been able to do it in the garage is arbitrary error not consistent with the record, especially with the ALJ's own finding (Pa14) that (a) a verbal recall was not available under the circumstances and (b) that the officers do not violently pull at their animals in training as it would be deemed as punishment and render them ineffective for service as a confident and reliable K-9 police dog.

Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT THREE
APPELLANT SUFFERED A TRAUMATIC EVENT ON DUTY AND THE DETERMINATION THAT THE EVENT WAS NOT UNDESIGNED AND UNEXPECTED WAS LEGAL ERROR

(Raised below at Pa172-Pa193)

The ALJ found that:

> "As the AG Guidelines and SOPs are **designed** (*emphasis added*) to deploy K-9 Units in high-stakes, dangerous scenarios and K-9 Loco is specifically bred to be a deadly weapon akin to a gun who will not stop until he attacks the perpetrator (and cannot discern who is a perp and who is an innocent bystander), I FIND that many dangerous outcomes

> are trained for and thus contemplated and to be expected in K-9 work." (Pa16)

The ALJ's analysis is contrary to the controlling law and authority in this area - in all policework many dangerous outcomes are trained for and thus contemplated in training. The ALJ's decision, and the Agency's adoption thereof, is contrary to the instruction from Richardson:

> "In Richardson, the New Jersey Supreme Court has clarified the meaning of the term traumatic event, stating that a traumatic event is essentially the same as what we historically understood an accident to be, an **unexpected** external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort. The Court found that in using the term traumatic event, the New Jersey Legislature did not mean generally to raise the bar for injured employees to qualify for accidental disability pensions. Rather, the Legislature intends to excise disabilities that result from pre-existing disease alone or in combination with work effort from the sweep of the accidental disability statutes and to continue to allow recovery for the kinds of **unexpected** injurious events that had long been called accidents. In making that point, the Court notes that some cases failed to recognize that critical limitation in purpose and persisted in the entirely wrong notion that the term traumatic event was intended, in itself, to more significantly narrow the meaning of accident. ..." *Moran v. Board of Trustees*, Police and Firemen's Retirement System, 438 N.J. Super. 346, 347

The Panel in Moran further instructs:

> "As previously noted, the 1964 amendments to the disability pension statute were *not* (emp. Added) intended to make it generally more difficult for injured employees to obtain an accidental disability pension. *Richardson, supra*, 192 N.J. at 210-11, 927 A.2d 543. *Moran v. Board of Trustees*, Police and Firemen's Retirement System, 438 N.J. Super. 346, 353.

In Thompson v Board, the Respondent argued that Thompson's job description:

> "which states a health and physical education teacher "[e]stablishes and maintains standards of pupil behavior needed to provide an orderly, productive learning environment." *However, there was no evidence it was a designed and expected part of Appellant's job that she be punched, slapped, pushed, shoved, restrained, or threatened with physical harm by students.* (Emphasis added). Thus, the incidents were **undesigned** and **unexpected** under the *Richardson* test. (...) Therefore, the Board erred in concluding the incidents were not **undesigned** and **unexpected**. (*Note: this case was otherwise denied on psychiatric grounds*). Thompson v. Bd. of Trustees, Teachers' Pension and Annuity Fund, 449 N.J. Super. 478, 501-504

The ALJ should have considered that the Trooper's presence was unexpected because of the safeguards in place and Appellant's injury due to the Trooper's presence was *undesigned and unexpected*. The ALJ confirmed her own the error in her language of the analysis noted below:

> "In short, given all of the testimony and the exhibits, outline that the guidelines and SOPs are designed to attempt to prevent some of the potentially-grave and innumerable eventualities of utilizing a K-9--a deadly weapon, and thus I so FIND." (Pa17)

Therefore, with this established, the design was to prevent what happened on September 22, 2020 – it was not supposed to happen. It was an accident – a mishap – instead, the ALJ takes it to conclude that the "innumerable eventualities of utilizing a K-9" are to be expected, anticipated, and assumed by

the officer as a risk of operating his K-9 dog – in short, none of this is undesigned and unexpected because everything and anything should be expected – to the contrary, it is long established that there is a difference between a potential occurrence and the expectation of an occurrence. In *Gable*, the Court explained "Although a corrections officer… may realize that there is a "potential that he or she will be called upon to subdue an inmate, an officer does not expect his or her daily routine will normally involve being struck by an aggressive or escaping inmate." *Gable, supra*, 224 *N.J. Super.* at 423. (Gable v. Board of Trustees, 115 N.J. 212, 223-224. Therefore, the K-9 team issues the warnings – the idea that anything after that is expected exceeds the decisional law. The ALJ's ruling is reversible error.

In Richardson, the Agency made a similar error in denying an application from a corrections officer injured during a scuffle with an inmate:

> "The Board contends that because subduing an inmate is part of the anticipated work of a corrections officer and was not **unexpected** or unintended, Richardson cannot satisfy the traumatic event standard. That is a misreading of the statute, which *requires* that the traumatic event occur "during and as a result of the performance of [the member's] *regular or assigned* duties." […] *The polestar of the inquiry is whether, during the regular performance of his job, an* ***unexpected*** *happening, […], has occurred and directly resulted in the permanent and total disability of the member.* [*Id.* at 213-14, 927 A.2d 543 (alteration in original) (final emphasis added).]

Appellant's testimony demonstrates that the Trooper's presence was neither known nor expected, and the overall record shows that Appellant would not have knowingly deployed his K-9 on a Trooper given its potential power and danger and deadly propensities as found by the ALJ (Pa14). This is also illustrated in the corresponding photos and video demonstrating the damage of such bites even while wearing padding during training (Pa145-Pa149). The situation was unexpected and not due to any fault on Appellant's part.

Wherefore, the incident was undesigned and unexpected; Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT FOUR
THE ALJ INCLUDED ERROR OF FACT IN HER STATEMENT THAT APPELLANT WAS CANDID IN AGREEING THAT HE DID NOT KNOW ABOUT THE ANNOUNCEMENTS AND WHO COULD HEAR THEM

(Raised below at Pa182, T105:7-25, T127-T128, T326:16-T327:19)

The ALJ incorrectly found that Appellant was candid and agreed that he did not know who heard the announcements. This error is used in her analysis to conclude that the Trooper's unannounced presence was expected. This is error of fact – At T127-T128 Appellant testified:

> "Q: Did anything -- by your view as a K-9 -- certified K-9 trainer did anything go wrong in that incident in the garage?

> A: From my K-9 team? No. The trooper wasn't supposed to be there. He should have heard the warnings and -- and listened to them and then not have entered the search area. So from -- from my K-9 team and my guys we did exactly what our policy states to do."

The record supports that Appellant did not affirm that the Trooper may not have heard the announcements and contrary to the ALJ's capricious determination, Appellant obviously knew his policies and procedures and would not have made this statement reported by the ALJ as it was inconsistent with the testimony. Appellant had actually been "screaming" the commands. (T105:7-25). Appellant's expert further opined that in a 25-foot garage space presented, the Trooper would have heard these announcements and should have declared his presence before deployment (T326:16-T327:19).

The ALJ's capricious "logic would dictate" commentary (Pa18) contradicts her finding that Appellant followed all deployment policies (Pa12). The public entity would have relied on this adherence per N.J.S.A 59:1-1 et seq., in defense of the action had the Trooper been bitten and a claim against the public entity followed.

Wherefore, Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT FIVE

THE ALJ REQUIRED APPELLANT TO MAKE SURE NO ONE WAS IN A SEARCH AREA BEFORE USING THE K-9, EVEN, AS HERE, WHERE APPELLANT WAS LOOKING FOR POTENTIALLY ARMED SUSPECTS IN THE VERY SAME SEARCH AREA

(Raised below at T77:7-T78, T:85, T102:8-T105:25,T105:7-25, T157:4-6, T158-T:159, Pa13-Pa15, Pa87-Pa94, Pa98-Pa109)

The ALJ stated (Pa18):

> "Logic dictates that there may be someone who does not hear that message, just like the Troopers who were found in the first structure moments before the incident in question."

Yet, Appellant did not put a risk into motion (Pa10, Par. 6(c), Pa36). This ALJ found Appellant followed every safety measure and acted with care at all time, including re-briefing the officers at the scene of the "blue on blue" contact and with every announcement. The ALJ's capricious "logic" dictates that the occurrence itself is, in retrospect, confirmation that it should have been expected. In accord, a fair conclusion by the ALJ's "logic" is that the Appellant should put the animal on hold and then search enclosures himself first to insure any officer isn't in there – the problem with this unreasonable approach is that police were looking for armed individuals who eluded them and fled into a neighborhood area (note at Pa95-Pa96, Pa157, T193:11-12). Appellant followed SOPs and Attorney General Opinion on use of K-9, and the ALJ's speculative mandate departs from those public policies.

Possibilities are endless and do not rise to the level of expectation. This ruling quite arbitrary as capricious and unreasonable.

This was not a *search post-warrant execution* where the premises are secured and everyone has already been arrested – in those cases the premises are already cleared and made safe before the K-9 team enters, alone, and looks for narcotics or contraband. This situation with Appellant *sub judice* was, by contrast, a live search for hidden probably armed suspects in an unsecured area. The record is clear that Appellant acted in accord with that belief as he kept a tactical posture against the garage wall near the rear door as he shouted commands outside of the garage.

Next, the ALJ determination bypasses the fact that Appellant himself properly made numerous repeated Announcement warnings[25] and further Appellant's expert, whom the ALJ found credible, had trained Appellant to make loud announcements that would have been heard in the 25-foot garage. Anyone

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[25] Discussed at (T102:8-T105:25, Pa87-Pa94, Pa13-Pa15, T:105:7-25, T:85, Pa98-Pa019). This procedure followed Appellant's prior instruction and training of local departments (Pa87, T74:6-14). Appropriate procedural warnings made on K-9 deployment - (Pa88, T77:7-T78:10, 911 CAD - Notes Warning Given at least three times). Under the Morris County Sheriff's guidelines that policy, if the dog had hidden bitten the Trooper, Appellant still acted within guidelines of policy provisions (T157:4-6, T158-T:159, Pa98-Pa109). Appellant acted within the guidelines of these provisions.

in the garage should have come out – the Appellant was shouting directly into the door of the garage. The Trooper should have responded.

This demand from the ALJ that K-9 officers should presume unintended persons are in the search was already covered in the policy of general and triple repetition of those announcement warnings before each search and the general commands given upon arrival.[26] This demand from the ALJ fails to consider that the Appellant was only called for assistance once the original agency, of East Hanover, determined that use of a K-9 was *necessary* because the suspects hid and wanted to remain *undetected* – Appellant, in following the SOP's and the Attorney General Guidelines, then had to, himself, check off a series of procedural steps even before making the decision to deploy based on the circumstances presented. Nothing more should have been expected of him. Appellant's K-9, further, acted exactly as he was trained by the Government agency involved - to engage, bite and subdue the suspect in a battle that he must win (Pa163). The ALJ capriciously required, in retrospect, that the Appellant should think beyond the terms of the SOP and Attorney General Guidelines even though she specifically found that he followed these. The Trooper was warned

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[26] Policies ensure that proper decision making is made in that context (Pa51-Pa79, Pa98-Pa143). Announcements, where no response follows, permit the officer to proceed with deployment (T288:1-23). Appellant's deployment was correct – the troopers presence caused mishap (T309:17-24).

and remained in the area. He created an unnecessary risk despite repeated warnings, and the risk created the need for immediate and physically severe and extreme action which caused injury to Appellant.

Appellant therefore respectfully demands of this Panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT SIX
THE ALJ EXCEEDED THE SCOPE OF APPEAL IN HER FINDING THAT THAT "THERE WAS NO OUTSIDE FORCE" WHERE THE RESPONDENT HAD CONCEDED AT THE AGENCY LEVEL THAT THE DISABILITY WAS CAUSED BY AN EXTERNAL EVENT

(Raised below at Pa184)

The ALJ, in clear error states, "There was no outside force; this was a search from structure-to-structure, where the announcements were designed to inform people that the weapon (the dog) is coming for them and they will get bitten if they get in the way" (Pa18). If so, the Trooper remained contrary to that directive.

The Trooper set the risk in motion, and Appellant never should have been placed in this position. Further, Respondent conceded direct result and external force (Pa36). The ALJ is factually incorrect and this determination is prejudicial, arbitrary, capricious, unreasonable and contrary to Respondent's findings which define the scope of appeal.

Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT SEVEN
THE ALJ ERRED IN THE FINDING THAT A BLUE-ON-BLUE IS A SITUATION FOR WHICH K-9 UNITS ARE TRAINED. RATHER, BLUE-ON-BLUE REFERS TO K-9 CONTACT WITH A POLICE OFFICER, NOT A TRAINING MODULE

(Raised below at T213:6-9, T334:4-20, Pa179, Pa185-Pa186, Pa197-Pa198)

The ALJ stated:

> "I agree with Appellant's counsel who himself refers to the incident as a "blue-on-blue" situation, a situation K-9 Units are trained for specifically and unfortunately that is what happened here, as such I so FIND." (Pa18)

The ALJ is not correct – "Blue on Blue" refers to error, not a training incident – it is professional shorthand to describe a situation where a K-9 comes in close proximity to officers. The Police K-9s are not 'trained' in a blue-on-blue incidents; officers are instead directed to stay out of them - to avoid any contact with a working K-9. There is instruction to the officers beyond that. The announcements are made, and the officers are to listen to them as well. Contrary to the ALJ's finding at Pa18 (Blue on Blue as training event), there is no training for the K-9 to differentiate between an officer and a suspect as found in her own opinion at Pa16. Also, Counsel's reference to the Blue on Blue term is a correct

use of the term itself but does not lend itself to the ALJ's error in misapplication of that term as a training module. Lastly, the Appellant was not injured in a *simulated training event* carried out according to plan – he did not have the expectation or prior knowledge designed and permitted in training. The K-9, as well, did not alert until after deployed and provided no pre-deployment indication that the situation was about to go very bad – in an undesigned and unexpected manner. To the contrary, an injury would not be undesigned and unexpected "where it occurred during a simulated training exercise that was being carried out to plan...." Reed v. Bd. of Trs., 2025 N.J. Super. Unpub. LEXIS 1158, *7) (Pa200-Pa204).

Wherefore, the incident was undesigned and unexpected; Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT EIGHT
THE ALJ ERRED IN HER DETERMINATION THAT NOTHING UNEXPECTED OCCURRED DURING THE SUBJECT EVENT

Raised below at T134:16-19, T137:2-23, T192:5-10, T193:3-12

The ALJ stated at Pa15:

> "The outstanding Richardson requirement is whether the accident was undesigned and unexpected. Specifically, an "unexpected happening" must occur to show that the incident that caused the injury was a traumatic event that is, among other things, undesigned and unexpected. There is no

> evidence of such an occurrence here. As outlined above, Carbone's job, an experienced K9 detective trainer and handler, is incredibly dangerous. In fact, his training is extensive specifically to try to prevent a vicious attack of an unintended target, or in this case, a "blue-on-blue" attack. Carbone has utilized and/or deployed K-9 Loco on over two hundred similar searches. **In fact, Carbone was trained to take the corrective action of recalling him on and off-leash should K-9 Loco seek to take down an unintended target**". (Pa22) (Emphasis added)

The ALJ is incorrect and this statement demands reversal. Initially, none of these situations are applicable here – on the record:

1. The Appellant and the Sheriff's officers do not ever train to recall a K-9 from deployment in the situation presented. On this record there is no training for this, nor do the K-9 officers pull a K-9 back violently on apprehension. (T137:2-23)

2. There was no scent indication that would have alerted Appellant to take or consider another course of action. (T192:5-10, T193:3-12)

3. Appellant instead has training on how to *remove* the dog off of a suspect once the K-9 has apprehended and bitten the suspect; the relevant policy section provides guidance on the actual deployment procedure for apprehension. Appellant followed these procedures.

4. Lastly, the record does not support the ALJ's finding at Pa22 that it would be reasonable to expect the search field would have unintended targets, nor did Appellant testify that in the normal course of his duties did he encounter such unintended targets "many times in the past." (Pa22) Appellant testified that the policies are in place to prevent unintended persons in the search field (T134:16-19). And the ALJ found that they were in fact "*designed*" (Pa16, Pa18) for that purpose.

The Trooper caused a major catastrophic accident in Appellant's life – further the Trooper could have possibly gotten himself very injured or killed but for Appellant's immediate action to address the trooper's exposure to danger. The situation is outside of what it was trained for, it is outside of what was anticipated, it's outside of policy procedure dictates, and it was completely unexpected by both Appellant and by K-9 Loco.[27]

Wherefore, the incident was undesigned and unexpected; Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

POINT NINE
THE ALJ INCORRECTLY FOUND AT PA15 THAT APPELLANT INJURED HIMSELF. THIS IS PREJUDICIAL, EXCEEDS THE SCOPE ON APPEAL AND IS FACTUALLY INCORRECT.

(Raised below at Pa173-Pa190, T117:6-9)

The ALJ incorrectly found at Pa15 that Appellant injured himself. This prejudicial finding exceeds the scope on appeal (undesigned and unexpected)

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[27] Moran v. Board of Trustees, Police & Firemen's Retirement System, 438 N.J. Super. 346, 348, 103 A.3d 1217 (App. Div. 2014), finding that a firefighter who suffered a disabling injury while kicking down the door of a burning building because the tools normally used by firefighters to break down doors had not yet arrived was "undesigned and unexpected", *also* Brooks v. Board of Trustees, Public Employees' Retirement System, 425 N.J. Super. 277, 279, 40 A.3d 1166 (App. Div. 2012), where a school custodian was injured when students dropped one end of a 300-pound weight bench also deemed undesigned and unexpected.

and is factually incorrect (Pa48-Pa49). Respondent, prior to trial, already determined that the event was external to the member and that it was not a result of his willful negligence, and that the disability was the direct result of this incident (Pa36). The parties so stipulated, yet the ALJ prejudicially and arbitrarily disregarded these facts in error of fact and found instead that Appellant injured himself (Pa48, T117:6-9).

Nevertheless, the Appellant did not set the risk in motion-the Trooper did, and the K-9's impact caused disability. In Angiola, the Court reviewed a similar situation and determined the ALJ's focus improperly placed on Angiola's own actions in response to the threat of the oncoming car. The ALJ in that case, as here, suggested that the employee acted voluntarily (*hurt himself*) when he jumped in reaction to an oncoming car and suffered injury in a subsequent fall. The Angiola Panel disagreed and noted that the Supreme Court's focus has not been on the voluntariness of the defensive measures taken when confronted with a traumatic risk. Instead, it has been on whether the employee set that risk in motion. (Angiola v. Board of Trustees, 359 N.J. Super. 552, 559).

It is established on this record that the Appellant followed all requirements before deployment. The ALJ so found, notwithstanding her rejection of the idea that Appellant was without deficiency or fault as to that deployment (Pa19). The

ALJ, instead, relied on select cases where the employees actually injured themselves. These are not on point with these facts.

The ALJ's application of Gambatese v. Board of Trustees, 2018 N.J. Super. Unpub. LEXIS 1133 (App. Div. May 15, 2018) (Pa205-PA209) at Pa21 is not on point because the Gambatese Court found that there was no recoil or slamming into Gambatese' s body and denied accidental disability – there was no external force or circumstance present in that case. Appellant, sub judice, met external force, especially with respect to the intensity, weight, and use of the K-9 as a deadly weapon (Pa17). To the contrary, the Respondent admitted external nature here (Pa10, par.6). By contrast, the attempt to mitigate an undesigned and unexpected risk is recognized as a traumatic event as in Muller v. Bd. of Trs., Police and Firemen's Ret. Sys., 316 N.J. Super. 94, 719 A.2d 699 (App.Div.1998) (bite by suspect, leading to struggle to extract finger caused fall deemed traumatic where suspect might have bitten the finger off anyway and otherwise disabled employee).

In another K-9 case, Strauss v Board of Trustees, PFRS, the Court determined that a K-9 jumping on his handler was unexpected because the dog was trained not to jump on Petitioner (*dominant body contact not permitted with handler*). That Court held:

> "In a similar situation, the Court has recognized that "[a]lthough a corrections officer . . . may realize that there is

> a 'potential that he or she may be called upon to subdue an inmate, an officer does not expect his or her daily routine will normally involve being struck by an aggressive or escaping inmate.'" Gable, supra, 115 N.J. 223-24 (quoting Gable v. Board of Trustees, Public Employees' Retirement System, 224 N.J. Super. 417, 423 (App. Div. 1988). That language, with minor modification, applies to Strauss' claim. While she might have recognized the potential that Nikko, despite his training, would jump on her, she would not expect her daily routine would involve such contact. We conclude that PFRS applied an incorrect standard when it analyzed the incident in terms of whether [Strauss] should have anticipated the event and was wrong as a matter of law when it concluded on these uncontested facts that petitioner's injury was sustained as part of her normal work effort. Strauss v. Board of Trs., 2007 N.J. Super. Unpub. LEXIS 1303 (Pa210-Pa212).

These cases pre-date but are consistent with Richardson. Richardson instructs that "A "traumatic event" essentially is the same as what historically was understood to be an accident: an unexpected, external happening that directly causes injury and is not the result of pre-existing disease in combination with work effort. (pp. 27-32)..." Richardson v. Board of Trs., 192 N.J. 189, 192.

The ALJ, at PA18 actually relied on bad law criticized in Richardson (Pa18) and found that Appellant's case is to be viewed in a restrictive sense:

> "Consequently, the eligibility requirements for these benefits are more restrictive. See Cattani v. Bd. of Trs., Police & Firemen's Ret. Sys., 69 N.J. 578, 584 (1976); Kane v. Bd. of Trs., Police & Firemen's Ret. Sys., 100 N.J. 651, 663 (1985)." (Pa18)

This is error of law. The Richardson Court criticized Kane and determined that application of its three-prong standard "resulted in confusion and created a

body of law with no rational core, thereby compelling this re-evaluation. ..." Richardson v. Board of Trs., 192 N.J. 189, 192.[28]

The ALJ turned her analysis from the Richardson case and, as specifically criticized in Richardson, "... turned useful guides to the Legislature's intent into an artificially-created standard of ground-level disqualification." (*citing Maynard*) 113 N.J. at 178, 549 A.2d 1213...." Dennis v. Bd. of Trs., Pub. Employees' Ret. Sys., 394 N.J. Super. 484 (App. Div. 2007)(slip op. at 11)..." (third grade student who flung himself backward onto petitioner's lap.) noted in Richardson v. Board of *Trs.*, 192 N.J. 189, 210 (Pa213-Pa217).

Wherefore, the incident was undesigned and unexpected; Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

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[28] *Cattani*, a 1976 case, isn't materially applicable to these facts because Appellant, sub judice, suffered an external event that directly caused his disability. In Cattani it was noted "The statute requires a happening external to the worker (not pre-existing disease alone or in combination with work) to warrant accidental disability benefits...." Richardson v. Board of Trs., 192 N.J. 189, 202. That requirement is met sub judice in the Respondent pre-trial stipulated concessions and board determination that Appellants disability is the direct result of an external circumstance as noted by the ALJ and included in the initial decision (Pa10, par.6).

POINT TEN
THE EXHIBITS NOTED IN THE ALJ'S OPINION DO NOT FOLLOW THE RECORD

(Raised below at Pa 188)

Joint Exhibits in the ALJ's decision are unrelated to this action and not found in the record (Pa25). The correct exhibits are noted in the transcript and at Pa29-Pa144. The ALJ copied large portions of the decision from the matter Angel Mendez v. Board of Trustees, PFRS Docket TYP 01395-19 verbatim without direct reference to the Mendez case (Pa17-Pa21, Exhibits at Pa25, Pa221-Pa225). Further, Mendez is not relevant to the case sub judice because his account lacked clarity, included speculation, and bore on his credibility. The holding in Mendez is not on point or relevant to the case sub judice.

CONCLUSION

The ALJ ruled that the law enforcement officers' job is dangerous and any possible incident involving the K-9 caused by a third party should be expected and there will never be a mishap, even if an officer should follow all policy "designed" (ALJ finding) to prevent any such incident. This arbitrary determination does not follow the decisional law.

The K-9 would have, bluntly, torn the Trooper apart and probably disabled him (Pa145-147). The Trooper's presence was unexpected. Appellant had to use an abusive emergency measure never used in sanctioned training by tearing at his K-9's throat to address a risk created by the Trooper for which on this record

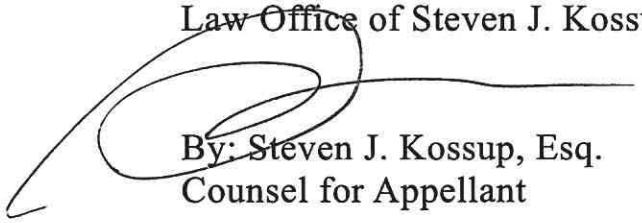
no training was available. The ALJ confirmed Appellant did nothing wrong and his actions to save the Trooper were "heroic" (T202:13-14).

Appellant has demonstrated that ultimate determination was not "supported by substantial credible evidence in the record as a whole" and consequently remains as "arbitrary, capricious, and unreasonable." These determinations should be reversed. Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980).

The undesigned and unexpected nature of the incident is established on this record - the standard is met here: " a member who is injured as a direct result of an identifiable, unanticipated mishap has satisfied the traumatic event standard". Richardson v. Board of Trs., 192 N.J. 189, 213(2007).

Appellant would not have been injured but for the Trooper's error. Appellant therefore respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

Law Office of Steven J. Kossup, PC



By: Steven J. Kossup, Esq.
Counsel for Appellant

Dated: August 14, 2025
C: Robert Papazian, Esq.
Appellant

MICHAEL CARBONE, Appellant, v. BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM OF NEW JERSEY, Appellee.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION ON APPEAL FROM A FINAL ADMINISTRATIVE DECISION DOCKET NO. **A-003222-24** Sat Below: The Hon. Danielle Pasquale, ALJ OAL Docket No. TYP 02352-2023S

BRIEF ON BEHALF OF APPELLEE - BOARD OF TRUSTEES, POLICE AND FIREMAN'S RETIREMENT SYSTEM OF NEW JERSEY

Gebhardt & Kiefer, P.C.
Robert J. Papazian, Esq.
Attorney ID 246352017
1318 Route 31 North
Annandale, New Jersey 08801
(908) 735-5161

Attorneys for Appellees, Board of Trustees, Police and Fireman's Retirement System of New Jersey

On the Brief: Robert J. Papazian, Esq.

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INTRODUCTION

Appellee, Board of Trustees of the Police and Firemen's Retirement System of New Jersey ("Board"), submits this brief in opposition to the Appeal and Brief of Appellant Michael Carbone ("Appellant" or "Carbone"), a former detective in the Morris County Sheriff's Office that was assigned to the K-9 Unit as a handler and trainer. As set forth herein, the Board rejected Carbone's application for Accidental Disability retirement benefits ("AD benefits") because he failed to carry his burden of proving that the September 20, 2020 incident, wherein his K-9 service dog pulled on the leash he was holding as a handler, was an "undesigned and unexpected" traumatic event. The Administrative Law Judge's ("ALJ") Initial Decision ("ID") affirmed the decision of the Board, concluding that Carbone was trained to take the corrective action of recalling the K-9 on and off leash if the K-9 sought to take down an unintended target. (Pa22).[1] The Board adopted the ALJ's ID in its Final Administrative Determination ("FAD") to deny AD benefits.

The only issue on appeal is whether the Board's decision, finding that Carbone failed to prove that his disability was the direct result of a traumatic event that was "undesigned and unexpected," is arbitrary, unreasonable, or

[1] As used herein, "Pa" refers to Appellant's Appendix and "Ra" refers to Appellee's Appendix.

capricious. Appellant relies on mischaracterizations distraction, while disregarding the applicable standard of review in favor of his preferred narrative. But the evidence reveals that a K-9 handler's training, experience, and job description contemplates a K-9 service dog pulling on the leash. It is not undesigned and unexpected. It is part of the job. For the reasons discussed below, the Board respectfully requests that this Court affirm the Board's FAD denying Appellant's AD benefits.

STATEMENT OF FACTS

Carbone was a detective in the Morris County Sheriff's Office and was assigned to the K-9 Unit as a handler and trainer. Tr. 23:5-10.[2] Carbone's K-9 service dog was named "Loco," a Dutch Shepard trained to, inter alia, search for and apprehend fleeing suspects. Tr. 37:23-38:6. On September 20, 2020, Carbone was called to participate in a search-and-locate for suspects that had fled from their vehicle. Tr. 32:2-6; Pa87. Conducting the search with Carbone was Loco, Officer Slinger, and Officer Woodruff on radio. Tr. 69:20-70:10. Several other law enforcement agencies were involved in the search, including New Jersey State Troopers. Tr. 85:19-86:7.

At some point during the search, Carbone began searching a house that was under construction. Tr. 83:25-84:12. Carbone heard other officers,

[2] "Tr." refers to the November 14, 2024 Office of Administrative Law hearing transcript.

including State Troopers, coming through the back of the house and mistakenly believed them to be the suspects. Tr. 84:19-25. Noting the "extremely dangerous situation" of "deploy[ing] the dog thinking it was the suspect," Carbone called off the search and "rebriefed" the other 8-10 officers on working alongside a K-9 unit, instructing them not to "get ahead of me in the search." Tr. 85:1-14.

Approximately twenty minutes later, after resuming the search, Carbone approached a rear door leading into a two-car garage, 25 feet long by 25 feet wide. Tr. 98:10-101:2. With Loco waiting beside him on a fifteen-foot leash, Carbone announced his presence into the garage, Tr. 90:12-14, and peered through the crack of the door, allowing him to "kind of make out what's kind of in there," Tr. 101:19-24. With no response coming from inside the garage, Carbone opened the door and saw "Loco immediately posture up" to indicate that he was fixated on something in the garage. Tr. 106:12-18. Believing that Loco's sight indication signaled that a suspect "was hiding and not coming out to [Carbone's] warnings," Carbone deployed Loco and "br[oke] cover" to see what Loco was running towards. Tr. 108:2-110:17. Carbone then realized that Loco was engaging a State Trooper in the open garage bay door. Tr. 110:14-111:17.

At the time, Carbone had his hand through the leash's safety loop, but had released the fifteen feet of leash to let Loco engage his target. Tr. 111:13-22. Carbone simultaneously yelled commands to call the dog back and attempted to gather the leash to yank Loco back. Tr. 112:1-9. Loco hit the end of the leash and pulled Carbone's arm of the hand in the safety loop, hyperextending his arm. Tr. 117:3-9; Pa48. Carbone "complete[d] the call" and returned to the office, where he realized that his arm was injured. Tr. 120:10-17. He was diagnosed with a right elbow partial distal tendon tear. Pa32.

PROCEDURAL HISTORY

On May 10, 2022, Carbone filed his application for AD benefits. Pa29 ¶ 4; Pa84. On January 9, 2023, the Board denied Carbone's application for AD benefits, but granted Ordinary Disability benefits. Pa36. The Board determined that he was totally and permanently disabled; that he was physically or mentally incapacitated from the performance of his usual or other duties; that the event that caused the disability is identifiable as to time and place; that the event was caused by circumstances external to the member and was not the result of a pre-existing disease; that the event occurred during and as a result of his regular and assigned duties and not the result of his willful

negligence; but that "the event that caused [his] disability is not undesigned and unexpected." Pa36.

Carbone timely filed his appeal and demanded an Administrative Hearing as a contested case. On March 13, 2023, the Board approved his request for a hearing to appeal and referred this case to the Office of Administrative Law. The ALJ heard testimony on November 14, 2024, and ordered post-trial briefing.

On April 14, 2025, the ALJ issued her Initial Decision affirming the denial of AD benefits and held that Carbone failed to meet his burden of proving that the September 22, 2020 incident was "undesigned and unexpected." Pa8. On April 24, 2025, Carbone filed eleven exceptions with up to forty subparts to each exception, and the Board timely filed responses to the exceptions. Pa173-199. On May 12, 2025, the Board voted to adopt the Initial Decision of the ALJ and issued its final administrative determination. Pa7. Appellant timely appealed.

STANDARD OF REVIEW

An administrative agency's determination is presumptively correct, and on review of the facts, this Court will not substitute its own judgment for the agency's where the agency's findings are supported by sufficient credible evidence. Gerba v. Board of Trustees, Public Employees Retirement System, 83

N.J. 174, 189 (1980); see also Campbell v. New Jersey Racing Comm'n, 169 N.J. 579, 587 (2001). If the Appellate Division is satisfied after its review that the evidence and inferences to be drawn therefrom support the agency's decision, then it must affirm even if the Court feels it would have reached a different result. Campbell, 169 N.J. at 587.

An agency's decision may only be reversed when there is a clear showing that it is arbitrary, capricious, or unreasonable, or is unsupported by sufficient credible evidence in the record. Russo v. Board of Trustees, Police & Firemen's Retirement System, 206 N.J. 14, 27 (2011); Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). The party challenging the validity of the administrative decision bears the burden of showing that it was "arbitrary, unreasonable or capricious." Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980) (internal citations omitted).

ARGUMENT

I. THE SEPTEMBER 20, 2020 INCIDENT WAS NOT UNDESIGNED AND UNEXPECTED

Carbone failed to establish that he is entitled to AD benefits under Richardson v. Board of Trustees, which requires petitioners to show each of the following five elements:

1. That he is permanently and totally disabled;

> 2. As a direct result of a traumatic event that is
>
> a. identifiable as to time and place,
>
> b. **undesigned and unexpected**, and
>
> c. caused by a circumstance external to the member (not the result of preexisting disease that is aggravated or accelerated by the work);
>
> 3. That the traumatic event occurred during and as a result of the member's regular or assigned duties;
>
> 4. That the disability was not the result of the member's willful negligence; and
>
> 5. That the member is mentally or physically incapacitated from performing his usual or any other duty.

192 N.J. 189, 212-13 (2007) (emphasis added). The applicant bears the burden of proof on each of these elements. Id. at 212. Carbone has failed to satisfy the "undesigned and unexpected" element required by Richardson.

The "undesigned and unexpected" element requires "an unexpected external happening that directly causes injury." Ibid. If an employee is injured when doing his usual work in the usual way, the undesigned and unexpected element is not satisfied. Id. at 201. In other words, the "work effort itself . . . cannot be the traumatic event." Id. at 211. Courts look to relevant factors such as a Appellant's training, job description, and experience to determine whether an event was undesigned or unexpected. Mount v. Board of Trustees, PFRS,

233 N.J. 402, 427 (2018); Russo v. Board of Trs., PFRS, 206 N.J. 14, 32-33 (2011). A member "who experiences a horrific event which falls within his job description and for which he has been trained will be unlikely to pass the 'undesigned and unexpected' test." Russo, 206 N.J. at 33. But "the Board and a reviewing court must carefully consider not only the member's job responsibilities and training, but all aspects of the event itself. No single factor governs the analysis." Mount, 233 N.J. at 427.

The sole issue here is whether it is undesigned and unexpected for a K-9 dog to pull on the leash held by his law enforcement handler when the K-9 is deployed. Despite Appellant's digressions, there is no dispute about whether he followed proper procedures or even whether he should have done anything differently. In fact, the Board explicitly found that Carbone was injured while performing his regular and assigned duties and not because he was willfully negligent. Pa36. The parties even agree that Loco functioned as he was trained to do. Carbone was using Loco to search for and apprehend fleeing suspects. He had the training, responsibilities, and experience to deploy Loco. By deploying Loco, he was doing his usual work in his usual way, which is insufficient to establish a traumatic event that is undesigned and unexpected.

In the only case discussing whether a K-9 injuring his handler could be considered undesigned and unexpected, the Appellate Division found that a K-

9 jumping on his handler and knocking her off a kennel platform was "unexpected if only because the dog was trained not to jump on [the handler]." Strauss v. Board of Trustees, PFRS, 2007 N.J. Super. Unpub. LEXIS 1303, *7 (App. Div. Mar. 12, 2007) (Pa210). In contrast here, both Carbone and Loco were doing their usual work in the usual way and for which they were trained extensively to do. As Carbone's expert testified, there are inherent risks in handling a K-9 even when following proper protocols. Tr. 349:22-25 ("Even if he did everything right there's still things that could happen in this scenario based on the type of job he's got."). The ALJ agreed, finding that "Carbone's job [as] an experienced K9 detective trainer and handler, is incredibly dangerous," Pa22, and "that many dangerous outcomes are trained for and thus contemplated and to be expected in K-9 work," Pa14.

Undersigned counsel could find no other case law discussing whether a K-9 injuring his handler can be considered undesigned and unexpected. However, as recognized by Carbone himself, the deployment of a K-9 is akin to the "pulling of a trigger of a gun." Tr. 33:4-8. Carbone repeatedly made this comparison, stating that deploying a dog is

> no different than you wouldn't shoot a gun into the crowd, right? Like your dog is essentially the gun, right? So like I can select you to shoot you with a gun, but if I got a bunch of people running back and forth now I have to use my discretion to say is this putting other people in harm? . . . So now I'm going back into

> my policy where I'm yelling stop. Hands up. Stop. Hands up or I'll send my dog. . . . It's literally like the same thing as using a gun."

Tr. 183:11-25; *see also* Tr. 185:9-11; Tr. 203:3-7.

Indeed, a trained K-9 is a dangerous weapon utilized by law enforcement, much like a firearm. Deploying K-9s and utilizing a firearm are considered uses of force that must only be used when following proper guidelines and policies. *See, e.g.*, Pa117-18; Tr. 183:11-25. Both K-9s and firearms are ways for law enforcement to intimidate and force the compliance of suspects. Pa158 at ¶ g. Both require extensive training for an officer to use effectively. Both could cause serious bodily injury or death. Utilizing either poses risks "not just for the handler," but for innocent bystanders as well. Tr. 348:2-9. An officer could shoot himself or similarly get bit by his deployed K-9. Tr. 348:21-23 (Appellant's expert testifying that "for instance if a handler was bitten in the hand while the dog was trying to apprehend"). Improper use of either could result in allegations of excessive force and disciplinary actions. And extensive training, maintenance, and care are required to ensure both function effectively and safely in high-risk situations.

Along with these similarities, the event that injured Carbone – Loco hitting the end of the leash and pulling Carbone's arm after being deployed – is no different than the recoil of a firearm after pulling the trigger. A member is

not entitled to AD benefits after being injured from the recoil of a firearm. As discussed in Mason v. Board of Trustees, PFRS, the recoil of a firearm, even if it causes disabling injuries, is not undesigned and unexpected. 2018 N.J. Super. Unpub. LEXIS 271 (App. Div. Feb. 5, 2018). In Mason, the member was injured while firing a shotgun in the course of her employment. Id. at *2. She had performed the same test involving a shotgun once a year for the previous eighteen years and was familiar with using a shotgun. Ibid. According to the Court, "[t]he potential recoil from firing a shotgun was anticipated and expected based on [the member] having qualified with a shotgun in each of the eighteen years prior to the incident." Ibid. The Appellate Division agreed with the Board and the Administrative Law Judge that there was nothing "unusual or extraordinary" in the recoil of a firearm.

Like the member in Mason, Carbone was well aware of the potential for Loco to pull on the leash he was holding once he deployed him. He was familiar with deploying Loco and was trained on how to do so. In comparison to the member in Mason's one-time-per-year shotgun test, Carbone utilized Loco approximately *200 times* in a five-year span. Tr. 165:21-24. Carbone knew of Loco's power and speed capabilities when deployed. Tr. 37:24-38:6; Pa162 ¶¶ 22-23. Loco could "run at speeds between 30-40 mph." Pa163 ¶ 36. Loco's "prey drive" and inability to suddenly stop after being deployed are the very

qualities that render him an effective weapon. Pa163 ¶¶ 31, 38. There is nothing unusual or extraordinary about a K-9 handler being pulled by the arm when he deploys his K-9. Like the recoil from a shotgun, a deployed K-9 pulling on its leash is anticipated and expected.

a. Training and Job Description

Carbone's training and job description captures every relevant circumstance and event that led to his injury.[3] Carbone received training and satisfied the training requirements of the State Attorney General and Morris County. The AG Guidelines set "the minimum [training] standards at a state level." Tr. 36:8-37:4; Pa51. On top of the AG Guidelines, the Morris County Sheriff's Office has additional training and job requirements for K-9 teams. Tr. 39:2-40:15; Pa98; Pa110; Pa125. Carbone received a K-9 training certification from the Morris County Sheriff's Office, Pa97, and spent "thousands of hours" personally training Loco, Tr. 40:12-15.

The September 20, 2020 event is covered by Carbone's training. The purportedly traumatic event was simply Loco pulling on the leash held by Carbone when Loco was deployed to apprehend what was perceived to be a suspect. It is undisputed that Carbone received training on "controlling a

[3] The New Jersey Civil Service Commission describes examples of Carbone's work to include "train[ing] and handl[ing] dogs used in . . . tracking criminal suspects, searching for missing or lost individuals, searching buildings, affecting the arrest or preventing the escape of suspected criminals." Pa43; Tr. 24:1-24.

leashed K-9 while deployed." Tr. 35:21-36:4. As the ALJ properly found, Carbone's "training is extensive specifically to try to prevent a vicious attack on an unintended target, or in this case, a 'blue-on blue' attack. . . . Carbone was trained to take the corrective action of recalling him on and off-leash should K-9 Loco seek to take down an unintended target." Pa22. These findings are amply supported by the record.

Both set of Guidelines require Carbone to know how to protect himself during searches and deployments. The AG Guidelines require Carbone to "demonstrate the ability to properly control the police specialty dog during searches." Pa79. Part of the AG's training is "Handler Protection," which requires the ability to safely terminate pursuit of a suspect. Pa73. Similarly, the Morris County Guidelines require a Patrol Canine Handler to "successfully complete[] training in . . . handler protection skills . . . [and] accepted methods of canine deployment." Handler protection training includes "physical apprehension when a 'suspect' attempts escape." Pa129.

The specific circumstances leading to the event are also captured by Carbone's training. The Morris County Guidelines provides training for when deploying a K-9 into a building to search for a suspect, when the suspect does not respond to the handler's announcements, when the dog finds a suspect before the handler sees him, and when the K-9 indicates a target. Pa106.

Carbone's training also provides for the event of a mistaken target. Morris County Guidelines place the "decision as to whether or not to deploy a canine . . . [in] the sole responsibility of the handler[, who will] bear in mind . . . the circumstances of the situation to include danger to the public, *other Officers*, and the canine versus the chances of a successful deployment." Pa104. Additionally, it makes no difference to the Court's analysis that the suspect was actually a State Trooper. The Guidelines' repeated use of the word "suspect" captures those perceived to be criminals, even if that belief is mistaken. *See* Wex LII Legal Dictionary, "suspect," ("A suspect is a person who is believed to have committed a crime . . . ."). At the time Carbone deployed Loco, the State Trooper was a *suspected* criminal. Therefore, regardless of whether Carbone and Loco were mistaken about the identity of their target, their training encompasses deployment against those they mistake as criminals.

Relatedly, handlers are trained to take corrective action if the dog attacks a nearby officer. Morris County Guidelines state that "[i]f a dog attacks . . . any other person the handler will immediately begin the previously stated corrective actions." Pa114. "The handler is responsible and will be held accountable for the protection of himself and any other person coming in contact with the dog." Pa114. Here, Carbone's act of yanking Loco's leash to prevent him from attacking a nearby officer was a corrective action. Tr. 306:19-307:7; Tr. 47:18-

24 (contrasting controlled pull when biting with a corrective jerk or yank). Carbone was trained and required to do exactly that.

Finally, Carbone received training for how a handler is to navigate a search when other law enforcement units are simultaneously searching the area and who may not be familiar with working in tandem with a K-9 unit. The AG Guidelines mandate "familiarization training for supervisors and other officers . . . employing agencies [that] do not operate K-9 units, should the agency call for K-9 assistance from a neighboring community." Pa63-64. Carbone employed such training just twenty minutes prior to the event when he was searching the house that was under construction. Carbone "stopped the search completely" and gave "a rebrief field training . . . [to] let the [officers] know that was an extremely dangerous situation because [Carbone had] deployed the dog thinking it was the suspect and . . . there's obviously the issues of like crossfire stuff or police on police [violence]." Tr. 85:1-7. That is precisely what he was trained to do in those circumstances.

b. *Experience*

As the ALJ properly found, Carbone had plenty of experience dealing with similar situations. Pa22. Carbone concedes that he "ha[s] a lot of experience in training to deploy a dog on leash, off leash, and actual experience in operations of working calls deploying a dog on and off leash." Tr. 36:1-4. Carbone and

Loco had previously participated in criminal apprehensions and building searches, and had participated in searches for a suspect approximately 200 times. Tr. 164:18-165:24. At times, Loco would pull on his lead. Tr. 165:3-5. There were also times when Carbone had to recall Loco while he was on leash to prevent him from apprehending a suspect. Tr. 167:21-25. And as demonstrated twenty minutes prior to the event, Carbone had experience conducting searches when other law enforcement officers "get ahead of him" and encroach on his K-9 team's search efforts. A law enforcement officer intruding on an active search of a building cannot be characterized as extraordinary or unusual if it happened twice within the span of twenty minutes. Rather, as the ALJ found, it can "be expected." Pa22. However frustrating it may be for a K-9 handler to have officers interfering with search efforts, it appears to be a recurring and ordinary aspect of working alongside other law enforcement teams.

Carbone thus had the training, responsibilities, and experience to deploy Loco and expect him to pull on his leash in the course of his usual work in searching for and apprehending suspects, even to prevent an unintended target from being harmed. Thus, the incident cannot be said to be undesigned and unexpected.

II. THE ALJ'S AND BOARD'S FINDINGS OF FACT ARE SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD

Appellant takes issue with a plethora of factual findings made by the ALJ, disregarding evidence that supports the ALJ's findings in favor of his preferred narrative, all while mischaracterizing the ALJ's well-articulated reasoning. See, e.g., Appellant Br. at 27 (construing ALJ's comment about Carbone's undisputed heroism to somehow mean "not 'ordinary'" and therefore undesigned and unexpected).[4]

In Point Two of Appellant's brief, he claims that the ALJ erred by pointing to another instance where Carbone had verbally recalled Loco to conclude that "Appellant should have been able to call off" Loco on the day of his injury. Appellant Br. at 28. As an initial matter, the ALJ did not pontificate in what Carbone *should* have done differently, nor would she be in a position to do so. The ALJ merely described an instance that Carbone testified to where he verbally recalled Loco while on leash, which supports the ALJ's finding that he had experience recalling a leashed and deployed dog. Pa15; Tr. 167:23-170:25.

[4] Contrary to Appellant's repeated attempts to create a false dichotomy, the Board was not faced with awarding either the State Trooper AD benefits or Carbone AD benefits. Appellant Br. at 28, 29-30, 36, 44, and 49. The award of benefits is not a zero sum game, and Appellant ignores the reality that sometimes no one receives AD benefits because an injuring event is simply not undesigned and unexpected.

Similarly, in Point Five of his brief, Appellant claims that "[t]he ALJ required Appellant to make sure no one was in a search area before using the K-9" and that "the Appellant should put the animal on hold and then search enclosures himself first to insure any officer isn't there." Appellant Br. at 37. Again, the ALJ did not, nor is she in the position to, dictate K-9 search and apprehension procedures. Appellant does not and cannot cite to the Initial Decision for these propositions, nor are they a fair reading of the ALJ's findings and conclusions.

In Point Four of his brief, Appellant claims that the ALJ misconstrued his testimony about who could hear his announcements about the K-9 team. Appellant Br. at 35. The ALJ found that Carbone "was candid in agreeing that he did not know about the announcements and who could hear them." Pa17. The ALJ accurately characterized Carbone's testimony that "it's possible that someone may not hear the announcement and be in that vicinity" Tr. 172-73, that there "are possibilities" that "somebody with earphones" and "who can't hear" his announcements, Tr. 200, and that he didn't know "whether the trooper who was at the end of the garage was in that group [of officers in the house under construction that he spoke to twenty minutes prior]," Tr. 186-87, to conclude that "[l]ogic dictates that there may be someone who does not hear that message, just like the Troopers who were found in the first structure

moments before the incident in question." Pa18; see also Tr. 136:5-14 (discussing possibility of someone with "headphones on [or] sleeping" and cannot hear announcements).

In Point Six, Appellant claims that the ALJ "exceeded the scope of appeal" by finding "there was no outside force" and that the Board had conceded the issue. Presumably, Appellant is referencing the Board's finding that "according to the medical documentation, the event is caused by a *circumstance external to the member* and is not the result of a pre-existing disease," a separate element under Richardson. Pa36 (emphasis added). The discussion in Richardson of "an external influence or cause outside the member himself" was an attempt to clarify cases involving a member's preexisting conditions and is simply not relevant here, where the sole issue is whether the event was undesigned and unexpected. See Richardson, 192 N.J. at 212-13.

In Point Seven, Appellant claims that the ALJ mischaracterized a "blue-on-blue situation." Appellant Br. at 41. Contrary to Appellant's arguments, the ALJ did not describe a blue-on-blue situation as a "training incident" or misunderstand how Appellant was injured. Appellant Br. at 41-42. The ALJ found that K-9 Units are extensively trained and specifically trained to avoid blue-on-blue situations, Pa18, wherein a police officer or the K-9 officer come

into contact with another officer and the potential threat of injury to that officer, Tr. 334:4-13. This finding is supported by the record. Pa104 (Handler must be aware of "danger to the public, other officers, and the canine"); Pa114 ("If a dog attacks . . . any other person the handler will immediately begin the previously stated corrective actions."); Pa63-64 (mandating "familiarization training for supervisors and other officers . . . employing agencies [that] do not operate K-9 units, should the agency call for K-9 assistance from a neighboring community"); Tr. 133:20-136:14 (discussing training based on policies to prevent unintended person from being bit).

In Point Nine, Appellant claims that the ALJ found "that Appellant injured himself." Appellant Br. at 44. Presumably, Appellant is referencing the finding that "[a]s a result [of Carbone recalling Loco], Carbone overextended his arm causing his permanent injury." Pa15. That finding is supported by the record. Tr. 32:23-25; Pa48. Contrary to Appellant's arguments, she did not find that it was the result of his willful negligence.[5]

CONCLUSION

For the reasons discussed above, the Appellee, Board of Trustees of the Police and Firemen's Retirement System of New Jersey, respectfully requests

[5] In Point Ten, Appellant correctly notes that the ALJ's Appendix mislabels the parties' Joint Exhibits. Pa25-26. However, the ALJ relied upon the correct Joint Exhibits, as correctly identified and discussed in the Initial Decision. Pa9-10.

that its Final Administrative Determination denying Appellant's application for AD Benefits be affirmed.

Respectfully submitted,

/S/ Robert J. Papazian

Robert J. Papazian, Esq.
Gebhardt & Kiefer, P.C.
Attorneys for Appellee, Board of Trustees of the Police and Firemen's Retirement System of New Jersey

Dated: September 22, 2025

Law Office of Steven J. Kossup, PC
18 Church Street
Suite 114
Newton, New Jersey 07860
Phone: (973) 940-1167 Fax: (973) 940-1169
E-mail: sjk@kossup.com
Attorney ID: 017471993
By: Steven J. Kossup, Esq., for Appellant Michael Carbone

Michael Carbone	)Superior Court of New Jersey
	)APPELLATE DIVISION
Appellant	)Docket No.: A-003222-24
	)
v.	) ON APPEAL FROM
	)
Police and Firemen's Retirement System of New Jersey	)Final Administrative Decision)Decision by the Board of Trustees,)Police and Firemen's
Respondent	) Retirement System
	)
	)SAT BELOW:)The Hon. Danielle Pasquale, ALJ

APPELLANT'S REPLY BRIEF

Steven J. Kossup, Esq.
on the Reply Brief on Behalf of
Appellant Michael Carbone

Dated: October 4, 2025

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

For Judicial economy, Appellant incorporates and relies upon his procedural History and Statement of Facts filed with Appellant's brief as if included herein and rejects Respondent's Statement of Facts in toto[1] - it is incomplete, misleading, superficial, and, as discussed below, leaves out relevant details because these are adverse to Respondent. Also, reference herein to the Respondent or ALJ's reasoning on appeal is understood to include in toto the ALJ's initial decision and the Respondent's adoption thereof.

LEGAL ARGUMENT

POINT ONE

Respondent's position at Db14 is factually incorrect and contradicts the testimony, training, and SOPs with respect to K-9 deployment

The record does not support this conclusion Respondent's erroneous assertion at (Db14) that Trooper was a "suspected criminal" at the time he entered the search field and Appellant and K-9 Loco were trained to stop a deployment under the circumstances in.

Initially, despite announcements made (T102:8-T105:25, Pa89) the Appellant did not know anyone had entered the search field in the garage until after the K-9 was already deployed and the K-9 himself located the target (i.e.

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[1] Objection is made to Respondent's numerous unwarranted invective statements, but no further response will be made unless required by the Panel.

Trooper). Appellant's policy announcements were loud and conducted properly (T102:8-T105:25, Pa89) shouted into the 25-foot square area. The Trooper should have made his presence known. No one responded and K-9 Loco gave no indication of scent or sight indication (T104:3-T105:6). Up to this point everything so far was according to policy at that point before Appellant released the K-9 in deployment. "It's the way it was designed." (T104-105:5)[2].

Appellant further testified that if Loco had a scent indication of human odor, he would start barking to alert that there was somebody in there. Loco did not bark related to a scent indication (T103:8-T104:2). Loco also did not give any sight indication at the time that he and Appellant stood at the door giving the announcements

It was only *after deployment* that the K-9 gave a sight indication that *anyone* was even in the garage. At this point the K-9 targeted on what Appellant believed was one or more suspects from the police chase and bailout.

Appellant then also stepped into the doorway to see what the target was;

> "I thought he was biting a suspect. I knew that I had to close that distance (he was still holding the end of the leash) - I stepped into the garage to give him more leash and then immediately realized [...] there's a Trooper there (at the threshold of the garage bay on the right) and [began] yelling my commands to the dog and essentially simultaneously pulling, yanking him back as he's hitting the end of the leash

[2] Appellant's expert testified on 'sight indication' and opined on this in his report (T329-T332, Pa159).

> to bite the Trooper." K-9 Loco was moving at maximum effort " 25 to 30 miles an hour" (T112:11-16, T113-T114)

Respondent confirmed, on cross, that "[I]f there was any belief on my end that there was somebody there (in the garage) I'm not deploying the dog. [I]'m reverting back to policy giving announcements period" (T172:21-25).

At Db9, Respondent admits "there is no dispute that he should have done anything differently… and Loco functioned as he was trained to do." Appellant's entry into the garage post deployment was to assist the K-9 to apprehend a suspect – it was the Trooper in the garage that created the mishap.

Appellant explained:

> "So again knowing what these dogs are capable and knowing what the -- the outcome of a bite could be if he would have bit that state trooper it could have been deadly. So the dog shoots -- the -- the trooper shoots the dog because he's biting him, (accidentally) shoots me (T112:18-22) (Photo Exhibits on K-9 apprehension bite at Pa 145-Pa148). "... So for the trooper's sake for the sake of the dog not getting injured by the trooper or myself I yanked the dog back and stopped him from biting the trooper."(T113:15-18).

The Trooper did see the K-9 coming at him and froze (T116:18-T117:9). Appellant was injured - "when …the dog abruptly hit the end of the leash" [3] as

[3] At Db4, Respondent incorrectly states Appellant didn't realize his arm was injured until he got to his office. That is not correct as explained at Pb15-16 – Appellant knew he had been injured. The arm hurt more by that point and he sought aid.

he pulled it back to stop the K-9 from reaching the trooper. (T117:4-9)[4]. Appellant was able to stop the dog "about three, four, five feet from (*the trooper*)." (T114:9-13).

POINT TWO

The ALJ's opinion and Respondent's adoption and defense thereof erroneously concludes that nothing unexpected or undesigned can arise in Appellant's job as a K-9 handler.

It was established on this record that no training for the K-9 was available under the circumstances presented as noted at Pb7, Pb12-18, Pb 23, Pb 41, Pb 49-50, confirmed by the Court as noted at Pb25-26. Expert McMahon opined that there was no training available to recall a fully deployed street level certified K-9 for this situation under the circumstances presented (Citations of Record noted at Pb16,17,41,43,49-50, T345:11-T347:5). There is no immediate "on" and "of" switch for these animals -this Trooper's unexpected presence arose contrary to Appellant's adherence to all policy designed to insure safe operations. It was the Trooper that caused emergency that required Appellant to take "heroic" effort to prevent injury (T202:14, Pb17-26). Appellant's expert Michael McMahon (Pa155-Pa165, T228-T351) was found to be highly credible

[4]Appellant used the term "abruptly" in that report as to the unexpected nature of his K-9's effort towards a Trooper. The common meaning is that the pull on the leash, necessary to protect the Trooper from getting mauled on that date, was *unexpected.* He explained this at T122:1-9, T32:21, T117:6-9, T121, and elsewhere on this record.

by the ALJ (Pa18). Appellant's expert testimony was also uncontroverted as Respondent produced no expert. The Expert had professional input with updates on the K-9 unit policies over the years (T305:12-16) and was responsible for setting up training scenarios for the officers (including Appellant) that they would possibly face when they were on the street with these K-9s. Expert McMahon testified that he would not have set up a training model for what happened in the garage on September 22, 2020 because it would have been adverse to safe practices and result in punishment adverse to the very the purposes for which the K-9 is used:

> "I had not - I had never designed that scenario before...first and foremost, for the safety of any ... role players or anyone that was involved in the situation. We wouldn't want them to be apprehended by the K-9 if the handler made the incorrect decision being out of protective equipment and secondarily because I wouldn't want a patrol dog who's responsible for the safety of the officer and for the general public to ***hesitate*** to apprehend a suspect because they had been punished for trying to apprehend the suspect." (T306:4-16) "...so in dog training any kind of aversive would be perceived by the dog as punishment... And punishment by nature scientifically is used to eliminate behavior. So if I were punishing a dog for trying to apprehend someone I'm then going to make him not want to apprehend suspects, right? Because he can't discriminate between innocent officer, civilian, or suspect." (T306:19-T307:7).

Nevertheless, the ALJ's decision and the Respondent's adoption and defense thereof assert that the nature of K-9 work assumes that because the job is ***dangerous***, then nothing can be considered undesigned and unexpected - this

logic does not follow into the heart of the law - In Gable v. Board of Trustees, the Court, under the Kane[5] progeny, refuted this conclusion – the Appellate Division affirmed the ALJ in *Gable* stating:

> "Firemen, policemen, correction officers and similar public servants know that they will be involved in dangerous activities and they routinely create or come voluntarily to the source of their harm. If policemen did not restrain suspects, firemen did not enter burning buildings and correction officers did not quell jailhouse disturbances, they would not get hurt. They would also not be doing their jobs. Respondent's position would not merely result in poor public policy, it is not the lesson of the *Kane* second test." Gable v. Board of Trustees of Public Employees' Retirement System, 224 N.J. Super. 417, 425

The Supreme Court agreed: "If law-enforcement officers act cautiously, they will not get injured but they will also not be doing their jobs properly, and the public will not be as well protected" (Gable v. Board of Trustees, 115 N.J. 212, 224). All work of any public servant is subject to safety policy - the ALJ found that Appellant followed all the policies – nevertheless, the Trooper walked in despite Appellant's announcements and caused this injury (Pa17). The idea that Appellant, in deployment of the K-9, should be deemed to have set that risk in motion is without merit (Pa29, Pa36).

The ALJ's position that anything could happen in the job of a K-9 handler and therefore it is all to be expected (Db9-Db10, Pa14, Pa22, Pa 29) is therefore

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[5] Kane v. Board of Trustees, PFRS, 100 N.J. 651(1985)

error of law. There is no such bar on work related injury: a police officer can train extensively on self-defense and get beaten to death or injured. A bomb technician can inadvertently detonate an explosive, causing self-injury. A healthcare worker walking a person out of a fire can be pulled off balance and suffer injury (Fairweather v. Public Employees' Retirement System, 373 N.J. Super. 288). A construction supervisor can stand on the edge of a ditch that collapses (Flores v. Board of Trustees of Public Employees Retirement System, 287 N.J. Super. 274). An office worker can be injured when the driver of her vehicle steps on the brakes (Fawcett v. Bd. of Trs., Pub. Employees' Ret. Sys., 307 N.J. Super. 378, 704 A.2d 1041 (App. Div. 1998). A broom bristle in the eye can be meet the standard for a traumatic event (Duignan v. Bd. of Trs., Pub. Employees' Ret. Sys., 223 N.J. Super. 208, 538 A.2d 432 (App. Div. 1988)). Likewise, a K-9 handler does not expect an unintended target to walk in his search field and cause injury once the K-9 has been deployed.

Respondent argues that Appellant took "corrective" action (Respondent's word at Db1); "corrective" action is to be only required where there is error – Respondent admits/confirms at Db8 that the Appellant followed all rules and made no error – this concludes that the mishap occurred elsewhere outside of Appellant's control. There was no *correction* required of the K-9, nor other option for the Appellant - the Trooper ignored announcements and created a

dangerous situation which would have proven tragic had the Appellant not taken the heroic action judicially noted to protect the Trooper from his own error (Pb17-26).

Respondent's assertion that Appellant was acting in the performance of his regular or assigned duties when injured and is thus disqualified for Accidental Disability benefits contradicts N.J.S.A. 43:16A-7 and Richardson factors because the injury must occur during and as a result of the performance of the member's assigned duties. The situation before this Court concerns an undesigned and unexpected situation [Richardson Factor 2(b)] for which no training was available; Appellant had to violently restrain his K-9 partner in a manner outside of all training because of the Trooper's disregard for the announcements that a K-9 was being deployed.

POINT THREE
Error in Understanding of Recall

Respondent and the ALJ confused the concept of recall as that relates to K-9 training and actual street capability. This constitutes a misleading departure from the testimony and is unsupported by the facts of record.[6] At Db1,

[6] Pb16-26, Pb6, Pb16-Pb17 (regarding comparison of a pull versus the violent restraint required here), T194:2-23, Pa147, Pa 148, Pb18-Pb24 (Use and purpose of Verbal recall), Pb25-26 (How Recall is trained), Error on Recall concept and K-9s capabilities by ALJ explained at Pb28-Pb31, Event was undesigned and unexpected, Pb42.

Respondent presents his erroneous assertion that Appellant "recalled" the K-9. The violent restraint in the garage was not a "recall" – it was an emergency measure required to avoid a catastrophic situation caused by the third party/trooper's negligence in non-adherence to the demands to announce himself. Uncontroverted evidence in the case contradicts Respondent's assertion that Appellant was trained to tear at his meticulously trained 95 pound fully deployed K-9's throat during apprehension on a live target. This assertion is absolution false. Appellant was not "trained to do exactly that." (Db14).

POINT FOUR
Respondent mischaracterized Appellant's mechanism of injury as the result of a normal work effort

Respondent's counsel makes an unsubstantiated argument at Db2, Db8, and Db9 that the situation in the garage was a normal work effort: "But the evidence reveals that a K-9 handler's training, experience, and job description contemplates a K-9 service dog pulling on the leash. It is not undesigned and unexpected. It's part of the job (Db2)." On this record, with use of a video at Pa148, Appellant testified as to the normal process in apprehension of a suspect:

> "So if -- for the dog's purposes the -- the leash is a -- is an -- a -- a -- a tool or equipment for communication in this purpose, nothing that's going to keep him back or prevent him from going (*while deployed for apprehension* re P-4). So because he's leashed I have to let him go and then as I come up the stairs." (T59:14-19) (Also 1T52: 9-21)

The situation in the subject garage is a complete departure from anything in training as established on this record. Consequently, Appellant and Appellant's expert established that the violent restraint was abusive and adverse to the purposes for which a K-9 is ever used and that no training was available for the circumstances prevented. Therefore, neither Appellant, nor K-9 Loco, was "trained to do exactly that." (Db14). The record is saturated with facts contrary to Respondent's assertion that this was normal work effort, and the video at Pa148 demonstrates how the leash is used as these animals are trained in apprehension.

POINT FIVE

Respondent's reliance on Mount and Russo is misplaced, as these cases concern psychological disabilities

Both Mount and Russo arose in an exclusively mental stress claim and are reviewed under Patterson v. Board of Trustees, State Police Ret. Sys., 194 N.J. 29 (2008) whereas cases involving physical injury are reviewed under the Richardson factors[7]. The case sub judice involves physical contact and physical injury - reliance on Mount and Russo is misplaced. Respondent stipulated that an external circumstance directly caused the disability sub judice (Pa29, Pa36).

[7] Mount v. Board of Trustees, PFRS, 233 N.J. 402 (2018)
Russo v. Board of Trustees, Police & Firemen's Retirement System, 206 N.J. 14 (2011)

Richardson instructs "…, [A] traumatic event is essentially the same as what we historically understood an accident to be-an unexpected external happening that directly causes injury and is not the result of pre-existing disease alone or in combination with work effort". Richardson v. Board of Trs., 192 N.J. 189, 212 There is no allegation that he had a pre-existing disease as noted in Factor 2C of Richardson.

Russo is applicable for the principal that a traumatic event will arise where there is no training available in psychological cases (Russo v. Board of Trustees, Police and Firemen's Retirement System, 206 N.J. 14, 33). On this record, it has been established that there was no training for the K-9 under the circumstance presented (Pb16-Pb18, Pb24-Pb26, Pb28-Pb29, Pb31-Pb32). Otherwise, terms gleaned from psychological cases do not readily translate to a case involving external force, physical impact, and physical disability determined by Respondent under Richardson factors alone.

POINT SIX
Respondent's analysis under the unpublished case Mason v. Board of Trustees, PFRS exceeds the scope of appeal

Respondent's analysis at Db 10 (in reliance on Mason v. Board of Trustees 2018 N.J. Super. Unpub. LEXIS 271 (App. Div. Feb. 5, 2018) focuses on Richardson Factor 2(c) which requires that the injury is to be "*caused by a circumstance external to the member (not the result of preexisting disease that*

is aggravated or accelerated by the work)[8]." Respondent determined that the disability was directly caused circumstance external to Appellant and that the injury was the *direct result* of the external force in that incident (Pa29-Pa30, Pa36). Respondent's argument is against established facts and scope on appeal.

The case sub judice, instead, concerns Richardson *Factor 2(b),* that the event is to be "undesigned and unexpected". Contrary to Respondent's argument, the subject event was not a routine or normal occurrence (as noted on the record and at Pb42-44), nor did it occur in routine training, nor did or could the K-9 unit ever train for this situation under the circumstances presented as noted above and on this record. To that end, Respondent's argument using Strauss v. Board of Trustees, PFRS, 2007 N.J. Super. Unpub. LEXIS 1303 (App. Div. Mar. 12, 2007)) is also misplaced – Strauss' case is pre-Richardson, but the K-9 was not supposed to use body contact (dominance) on his handler; and in this case the Trooper was not supposed to be in the search area. Both situations resulted in mishap and injury to the officers.

Respondent's incorrect reference to "apprehension" in this area of its argument at Db 13 is also not on point and contrary to the facts of record: An apprehended person is someone that is bitten, and no one was bitten in this case. Respondent's reference to apprehension at Pa129 is not on point with the facts–

[8] Richardson Factors are in Appellant's Standard of Review at Pb3-Pb4.

it concerns a training test where a suspect, walking several yards in front of the officer and K-9 team, then suddenly attacks the Officer with a training club - the leash is slack – the Officer then releases his K-9 on command and takes the suspect down as indicated in the Video at (Pa148). There is no violent restrain in any of these actions.

Respondent's reference, at Db13 concerning Pa106 [Sec. 1:5.7 (1)], is however relevant to show that the post-deployment K-9 only identification of a live target in the was correct even where, as here, the handler and K-9 had no pre deployment indication of a unannounced suspect – as herein, the K-9 found the suspect before anyone else was even aware of suspect's presence. Respondent thus argues contrary to the facts at this section (Db13) and against the ALJ's finding and Respondent's admission that Appellant conducted himself properly. In those situations, the handlers are not liable for injury to the suspect.

POINT SEVEN
Blue-on-Blue encounters are not commonplace

Respondent's reference at Db14 to the SOP's at Pa114 (if the K-9 attacks another officer) concerns maintaining a safe environment during training at the Morris County Training Program and is not on point with the situation presented here. New K-9 as assigned to only one handler; green, high drive K-9s have be learn to restrain and direct instincts to bite and subdue (T347:22-T349:17). In

training they may target the wrong training person – policy directs that the *K-9's handler* is the one responsible to remove a dog.

A 'blue-on-blue' is different – the term is professional shorthand for close proximity of the K-9 to other officers. Appellant did not deploy (send or let go) his K-9 at the construction area contrary to Respondent's assertion at Db15. He was about to but heard noise and stopped. He then instructed those officers on proper protocol when working with a K-9. Later, in the garage that night, there was no noise, no response to the announcements, and the K-9 was actually released, or "deployed" - Respondent's argument at Db16 is therefore not supported on the record - there was no finding on the record that police intruding into search areas was commonplace. Instead, it is contrary to record, and training marked on the record, (Pb41) and contrary to Respondent's cross examination of Appellant:

> "Q: Prior to this incident -- and I believe you testified that it actually happened twice. It happened when you went into the building that was under construction and then obviously the event where you were injured in the garage. Prior to those two times has Loco ever needed to distinguish between a suspect and either an officer or some innocent bystander? [...] [W]as there ever another time where that happened like it did in this case, the two times in this situation?
>
> A: I've never come across another instance similar to this one" (T179:16 to 180 25)

Respondent's assertion speculates that a blue-on-blue contact "appears to be a recurring and ordinary aspect of working alongside other law enforcement teams". On this record, blue-on-blue incidents are explained but are not "commonplace" (Pb41-Pb42). Further, K-9 are not taught to distinguish as explained at Pb10-11. If this were the case, the officers would be bitten all the time and use of K-9 would be a liability and unacceptable threat to public safety. Appellant, an experienced and certified handler with more than 200 call outs, *never* ran across an incident similar to this one. Therefore, the Respondent and ALJ's position that it is a "recurring and ordinary aspect of working alongside other law enforcement teams" is not supported on this record (Pb41-Pb44).

CONCLUSION

Wherefore, for the reasons stated in Appellant's brief and herein, Appellant respectfully demands of this panel that the ALJ's initial decision, and the Respondent's adoption of that opinion, be reversed and an order for entry of an award of Accidental Disability to Appellant should follow.

Law Office of Steven J. Kossup, PC

By: Steven J. Kossup, Esq. for Appellant Michael Carbone