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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4559-19**

JEREMY NIRENBERG,

Petitioner-Appellant,

v.

**BOARD OF TRUSTEES,
POLICE AND FIREMEN'S
RETIREMENT SYSTEM,**

Respondent-Respondent.

Argued April 4, 2022 – Decided May 25, 2022

Before Judges Rothstadt, Mayer and Bishop-Thompson.

On appeal from the Board of Trustees of the Police and Firemen's Retirement System, Department of the Treasury, PFRS No. xx-5048.

Arthur J. Murray argued the cause for appellant (Alterman & Associates, LLC, attorneys; Arthur J. Murray, on the briefs).

Robert Seymour Garrison, Jr., Director of Legal Affairs, PFRSNJ, argued the cause for respondent

(Robert Seymour Garrison, Jr., attorney; Juliana C. DeAngelis, Legal Counsel, on the brief).

PER CURIAM

Petitioner Jeremy Nirenberg appeals from a final agency decision by the Board of Trustees (Board), Police and Firemen's Retirement System (PFRS), finding he is not entitled to accidental disability retirement (ADR) benefits under N.J.S.A. 43:16A-7. We affirm.

I.

A.

We summarize the relevant facts from the record. Nirenberg began working for the Atlantic City Police Department (ACPD) in August 2006. Nirenberg held various assignments within the ACPD, as a patrol officer, special investigations VICE unit, tactical patrol unit, detective, and with the Division of Criminal Justice Violent Crimes Task Force, referred to as the Atlantic City Task Force. (ACTF)¹.

¹ In the tactical patrol unit, Nirenberg was assigned to a two-officer patrol car responsible for high priority calls. As a detective, he had completed undercover assignments, executed search warrants, and assisted other municipalities and state agencies with their investigations. Nirenberg was selected for the ACTF, which focused mainly on long-term narcotics and weapons investigations. As part of the ACTF, he spent ninety percent of his time on the streets and ten percent completing administrative tasks.

The ACTF was conducting surveillance on Donald Capriotti, recently released from prison after serving nearly twenty years for aggravated manslaughter and known to Nirenberg from prior cases². Capriotti was suspected of selling controlled dangerous substances (CDS) at various motels in and around Atlantic City.

On November 1, 2013, Egg Harbor Township Police Department (EHTPD) issued a BOLO³ bulletin regarding Capriotti titled "OFFICER SAFETY – THREATS OF VIOLENCE," which read in relevant part, "Capriotti has stated that he intends to shoot someone before his upcoming sentencing date and would shoot police too." The bulletin further provided "[a]ny police officer having contact with him should use extreme caution."

On November 7, 2013, while on surveillance on an unrelated narcotics investigation, Nirenberg was called to the station to complete paperwork. At the station, Nirenberg heard police radio transmissions regarding a silver vehicle

² In January 2013, Nirenberg executed a search warrant on Capriotti's home in Egg Harbor Township, wherein guns and narcotics were recovered. In June 2013, Capriotti was arrested for aggravated assault with a machete. While out on bail, Capriotti was arrested for possession of CDS.

³ BOLO is the acronym of "be on the lookout" used by law enforcement for an electronic all-points bulletin for individuals primarily classified as dangerous and for high-priority crimes.

owned by Capriotti eluding the police in Atlantic City, and shortly thereafter the vehicle was "spotted abandoned in the marsh area" off the Black Horse Pike. An officer transmitted Capriotti was "not wanted for a homicide, although he had a prior homicide, known weapons." An officer also transmitted that the "bulletin that was referenced was an officer safety that the male was possibly in possession of a gun and face[d] a lengthy jail sentence coming up, and threat[ed] to shoot officers."

Nirenberg chose to leave the station, equipped with a bulletproof vest and his service weapon, to voluntarily join the pursuit. When Nirenberg arrived at the marsh area, ACPD, New Jersey State Police (State Police), and EHTPD had created a perimeter, and the SWAT teams were called. Approximately fifteen minutes after Nirenberg's arrival, officers stationed at the top of a building radioed that a figure was spotted in the water. Nirenberg followed EHTPD Sergeant Steven Swankoski, Lieutenant Michael Bordonaro and his K-9 partner⁴ toward the figure. The group waded through the water and came up on a hill, where Nirenberg immediately recognized Capriotti submerged up to his neck in the water, looking sideways directly at him. Capriotti was ordered to show his

⁴ Apparently Swankoski and Bordonaro were not part of the task force.

hands as the officers advanced with their weapons drawn. Nirenberg had his weapon at the "low-ready" position as he was approaching. When Capriotti failed to comply, the K-9 was released.

As the K-9 approached and "grabbed Capriotti on the right side," he emerged from the water, raised what appeared to be shotgun and pointed it directly at Swankoski.⁵ A shot rang out, which Nirenberg thought came from Capriotti, and all three officers discharged their weapons. Nirenberg was unsure as to how many rounds he fired. The K-9 was hit and went down in the water. Nirenberg saw the K-9 laying in the bloodied water making a "low moaning," "blood curdling groan." Swankoski and Bordonaro retrieved the K-9 and left the scene to seek medical attention.

According to Nirenberg, he felt "isolated and abandoned" with the two officers no longer at the scene. Nirenberg saw Capriotti "motionless" and "floating on his back in bloody water." Nirenberg pointed his gun directly at Capriotti's temple and realized he was alive. Capriotti suddenly gasped and Nirenberg "felt as if his heart was beating out of his chest." Nirenberg and another sergeant pulled Capriotti out of the water and checked for weapons, after

⁵ After Capriotti was apprehended, officers realized that the suspected gun was a metal pipe.

Capriotti's hands were seen. Nirenberg was taken to the hospital for observation and treatment and was released approximately three hours later.

Nirenberg returned to the ACTF in mid-January 2014 and continued to work overtime assignments and long-term investigations that kept him off the street. When Nirenberg worked the streets, he experienced "feelings of confusion and not making the right decisions." Nirenberg's "reaction was slower than it ought to be," he "felt jittery" and "pulled his duty weapon prematurely" when he was on patrol.

Specifically, in February 2014, Nirenberg claimed he was slow to react in approaching two suspects, later discovered to have a concealed semiautomatic assault weapon in a backpack. Several months later, Nirenberg questioned his response time and the ability to grasp an important aspect of the job in connection with a motor vehicle stop involving four males in a high drug area in which a semiautomatic assault weapon was also recovered. Both times, he felt as if his "heart [was] beating out of his chest."

Nirenberg further claimed his personal and home life were affected. Following the November 7, 2013 incident, Nirenberg claimed he awakened four to five times each night, however, he could not recall if he had nightmares. At home, Nirenberg was "extremely agitated" and short tempered with his wife and

children. He claimed that his relationship with his wife "deteriorated." He also avoided crowds and public places because he preferred being alone. Nirenberg was "troubled" when he watched news stories involving police officers being ambushed or killed for no reason.

B.

Over three years later, in January 2017, Nirenberg filed an application for ADR benefits, alleging that "during the course of his duties on November 7, 2013, [he] was involved in an officer involved shooting of a suspect." Nirenberg further alleged that "[he] fired [his] weapon at the suspect approximately seven times as [he] was in fear of his safety as well as [his] other fellow officers." Nirenberg claimed that "[he] suffer[ed] from post-traumatic stress disorder [PTSD] as a result of the incident," and could no longer perform his duties.

In a January 12, 2018 letter, PFRS denied Nirenberg's application for ADR benefits, finding the incident was not undesigned and unexpected. PFRS also found the incident was not a terrifying or horror-inducing event that would be objectively capable of causing permanent mental disability to a reasonable person. Consequently, Nirenberg was granted ordinary disability retirement benefits.

Nirenberg requested PFRS reconsider the denial of ADR benefits. PFRS declined and reaffirmed its initial decision. Nirenberg appealed PFRS's initial decision, and the matter was transferred to the Office of Administrative Law (OAL) as a contested case.

An administrative law judge (ALJ) conducted hearings on December 5, 2019 and December 31, 2019. During the hearings, Nirenberg provided a brief description of his employment with ACPD. Nirenberg testified that prior to November 2013, he had "hundreds of physical involvements with suspects," however, he never had to discharge his weapon until November 7, 2013.

Nirenberg's testimony regarding the November 7, 2013 incident was consistent with the State Police response team report. Nirenberg briefly described the effect of the November 7, 2013 incident on him the following night. Nirenberg testified that he was intoxicated and involved in physical altercations, which was not typical behavior for him. Nirenberg also recounted how the incident affected his work performance for nearly two years.

Nirenberg sought help after two years. He testified that ACPD sent him to Dr. Garry M. Glass, a psychiatrist, for treatment. During his treatment period, he felt "anxious and irritated." After thirteen months, he stopped treatment and engaged in yoga, surfing or gym exercises to "calm his mind and increase his

well-being." Nirenberg offered the testimony of Dr. Glass, who addressed Nirenberg's psychological condition. In an April 16, 2017 report to PFRS, Dr. Glass affirmed his initial diagnosis of an adjustment disorder with anxiety and depression.⁶ Dr. Glass noted Nirenberg did not meet all the criteria for PTSD but showed most of the signs and symptoms.

In a second report to PFRS dated April 5, 2018, Dr. Glass disagreed with PFRS's explanation that Nirenberg had a pre-existing disease based on a "comprehensive" pre-hire evaluation and psychological testing, which provided "valid results and revealed no indication of mental disease." Dr. Glass opined that Nirenberg functioned as a "highly effective" police officer for eight years. Dr. Glass also disagreed with PFRS that the November 2013 incident was "non-life threatening."

Dr. Glass later determined that in Nirenberg's case the PTSD was delayed since the symptoms manifested as time passed. Dr. Glass did not dispute Dr. Bizarro's⁷ diagnosis of PTSD, however, he considered his own diagnosis to be "more precise and accurate."

⁶ Adjustment disorder and major depressive disorder is a disability which prevents someone from working and is not just based on a diagnosis.

⁷ We discern from the record that Nirenberg received treatment from Dr. Bizzarro.

Lastly, Dr. Glass disagreed with Dr. Daniel B. LoPreto's opinion regarding the cause of Nirenberg's disability. Dr. Glass explained that the November 13, 2013 incident in its entirety caused the disability. Dr. Glass opined that when Nirenberg returned to work in January 2016, he could not continue to work as a police officer.

PFRS offered the testimony of Dr. LoPreto, who opined that Nirenberg was permanently disabled due to a psychological condition that was multi-caused and not related to a single incident. Dr. LoPreto explained that he interpreted Dr. Bizarro's records and Dr. Glass's reports as "Nirenberg was subjectively afraid because he perceived a threat." Dr. LoPreto agreed that the November 7, 2013 incident was a critical incident, which he understood as any incident where there is a potential loss of life or serious injury. However, Dr. LoPreto believed Nirenberg was involved in other critical incidents prior to the November 2013 incident. Dr. LoPreto also noted that Dr. Glass did not treat Nirenberg for PTSD. Accordingly, Dr. LoPreto opined that Nirenberg did not have PTSD.

In the June 15, 2020 initial decision, the ALJ concluded Nirenberg was not entitled to ADR benefits. The ALJ found the November 7, 2013 incident "[rose] to the level of a terrifying or horror-inducing event that involved actual

death," which would cause a reasonable person in a similar situation to suffer a disabling mental injury under Patterson v. Board of Trustees, State Police Retirement System, 194 N.J. 29 (2007). However, the ALJ determined that the November 7, 2013 incident was not "undesigned and unexpected" under Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189 (2007).

The ALJ concluded that Nirenberg did not sustain his application for ADR benefits based upon a preponderance of the evidence presented after considering "the totality of the circumstances, including Nirenberg's job responsibilities, his training and experience as a member of the ACTF who were actively investigating the suspect, and the circumstances of the incident." The ALJ reasoned:

The difficulty herein is that unlike the [cases Nirenberg cited to support his position⁸], Nirenberg did not find himself in an unusual situation without the tools to do his job. Before responding, Nirenberg knew that Capriotti was considered armed and dangerous. Capriotti had been under surveillance by the [Task Force]. The earlier bulletin alerted Nirenberg, that Capriotti may try to shoot it out with police, rather than return to prison. Nirenberg also knew that Capriotti abandoned his car and fled into the marshes seeking cover. At the scene, Nirenberg was alerted that a figure

⁸ The ALJ described Mount v. Trs. of Pub. Emps. Ret. Sys., 133 N.J. Super. 72 (App. Div. 1975), Moran v. Bd. of Trs., Police & Firemen's Ret. Sys., 438 N.J. Super. 346 (App. Div. 2014), and the Initial Decision in Finneman v. Bd. of Trs., Police & Firemen's Ret. Sys., OAL TYP 02790-10, Initial Decision, (2012).

was spotted in the water. Hearing that information, Nirenberg participated in the pursuit to apprehend Capriotti. Nirenberg was armed with his weapon and wearing a bullet proof vest, in anticipation of gunfire. While the ensuing scene was horrific, it was not unexpected or unusual under the circumstances presented.

Before PFRS made its final determination, exceptions and a reply were filed to the ALJ's initial decision. Nirenberg asserted PFRS was estopped or otherwise barred under the doctrine of res judicata from adopting the ALJ's initial decision because Bordonaro and Swankoski were granted ADR benefits related to the November 7, 2013 incident.

On July 14, 2020, PFRS adopted the ALJ's initial decision and issued a final agency decision, and thus denying Nirenberg's petition for ADR benefits. This appeal followed.

II.

On appeal, Nirenberg argues the ALJ erred in determining the incident on November 7, 2013 was undesignated and unexpected. He also challenges PFRS's final agency decision as a misapplication of Richardson in the context of undesignated and unexpected. He further argues that this matter should be remanded to PFRS because he should be awarded ADR benefits like the two other officers involved in the shooting. We disagree.

"Our review of administrative agency action is limited." Russo v. Bd. of Trs., Police & Fireman's Ret. Sys., 206 N.J. 14, 27 (2011) (citing In re Herrmann, 192 N.J. 19, 27 (2007)). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Ibid. The party who challenges the validity of the administrative decision must demonstrate it was arbitrary, unreasonable, or capricious. Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980).

We accord deference to the Board's interpretation of a statute it is charged with enforcing. Thompson v. Bd. of Trs., Teachers' Pension & Annuity Fund, 449 N.J. Super. 478, 483 (App. Div. 2017), aff'd o.b., 233 N.J. 232 (2018). "Such deference has been specifically extended to state agencies that administer pension statutes,' because 'a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise.'" Ibid. (quoting Piatt v. Bd. of Trs., Police and Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015)).

Additionally, we will affirm an agency's findings of fact if "supported by adequate, substantial and credible evidence." In re Taylor, 158 N.J. 644, 656-57 (1999) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J.

474, 484 (1974)). "The choice of accepting or rejecting testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal." Oceanside Charter Sch. v. Dep't of Educ., 418 N.J. Super. 1, 9 (App. Div. 2011).

ADR benefits require an employee demonstrate he or she "is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his [or her] regular or assigned duties." N.J.S.A. 43:16A-7(a)(1). "[A]n accidental disability retirement entitles a member to receive a higher level of benefits than those provided under an ordinary disability retirement." Patterson, 194 N.J. at 43.

In Richardson, our Supreme Court held a claimant seeking ADR benefits must prove the following:

1. that he [or she] 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;
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.

[Richardson, 192 N.J. at 212-13.]

A claimant who has suffered a "permanent mental injury caused by a mental stressor without any physical impact can satisfy the Richardson standard." Patterson, 194 N.J. at 48. The Patterson Court held:

The disability must result from direct personal experience of a terrifying or horror-inducing event that involves actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person. By that addition, we achieve the important assurance that the traumatic event posited as the basis for an accidental disability pension is not inconsequential but is objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury.

[Id. at 34.]

Subsequently, the Court identified a two-part analysis to be applied in cases asserting a permanent mental incapacity resulting from "an exclusively psychological trauma." Mount, 233 N.J. at 426 (2018). "The court first determines whether the member directly experienced a 'terrifying or horror-inducing event that involves actual or threatened death or serious injury, or a

similarly serious threat to the physical integrity of the member or another person." Ibid. (quoting Patterson, 194 N.J. at 50). If the event meets the Patterson test, the court then applies the Richardson factors to the member's application. Ibid.

As the Court noted in Russo, "an employee who experiences a horrific event which falls within his [or her] job description and for which he [or she] has been trained will be unlikely to pass the 'undesigned and unexpected' test." 206 N.J. at 33. However, "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.

We first address whether PFRS erred in modifying the ALJ's initial decision finding that the events of November 7, 2013 satisfied the terror or horror-inducing requirement under Patterson. Having reviewed the record, we agree with the ALJ's finding that Nirenberg suffered a terrifying and horror-inducing event on November 7, 2013. Nirenberg's participation in Capriotti's apprehension, anticipation and exchange of gunfire, injury to the K-9, and Capriotti's body in the bloody water was, indeed, a direct cause of Nirenberg's initial anxiety and depression, and subsequent PTSD. Such a personal threat,

perceived or actual, to Nirenberg's safety is the type of traumatic event experienced on November 7, 2013 that was "objectively capable of causing a reasonable person in similar circumstances to suffer a disabling mental injury." Patterson, 194 N.J. at 34. As a result of the horrific event, Nirenberg doubted his abilities as a police officer, questioned his reaction time, disengaged from his family and, ultimately, was unable to continue working as a police officer. Based on the undisputed medical testimony, Nirenberg suffers a disabling mental injury stemming from the horrific events of November 7, 2013.


Because Nirenberg met the Patterson test, we next examine whether he satisfied the "undesigned and unexpected" prong under Richardson. On this record, we agree Nirenberg failed to satisfy the undesigned and unexpected requirement necessary to warrant ADR benefits.

In Richardson, satisfaction of the "undesigned and unexpected" prong requires an event "extraordinary or unusual in common experience" and not "injury by ordinary work effort." Richardson, 192 N.J. at 201 (quoting Russo, 62 N.J. at 154). "The polestar of the inquiry is whether, during the regular performance of [the member's] job, an unexpected happening . . . occurred and directly resulted in the permanent and total disability of the member." Id. at 214.

Here, Nirenberg failed to satisfy the undesignated and unexpected required under Richardson. Nirenberg's job duties as of November 7, 2013, included long-term narcotics and weapons investigations. In particular, Nirenberg, as a part of the ACTF, was investigating Capriotti, a known dangerous felon who would not return to prison without the exchange of gunfire based on the BOLO and radio transmissions. Despite Nirenberg's assertions, he received training, both at the police academy and through the course of his career in law enforcement, in the apprehension of suspects. Nirenberg was not a rookie officer, and during his career in law enforcement, with the exception of November 7, 2013, he had no occasion to fire his weapon at any suspects.

Moreover, as part of the ACTF, Nirenberg stopped work on an unrelated investigation and volunteered in the pursuit of Capriotti on November 7, 2013. On this record, nothing about the events of November 7, 2013 fell outside the scope of Nirenberg's general duties as a police officer and assignment to the ACTF. We conclude there is ample credible evidence supporting the denial of Nirenberg's application for ADR benefits and PFRS's final agency decision was not arbitrary, capricious, or unreasonable .

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPEALS DIVISION