

LUIS FERMIN,

Petitioner-Appellant,

v.

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

Respondent.

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

App. Div. No. A-001270-22

**APPEAL OF ADMINISTRATIVE  
FINAL DECISION**

On Appeal From:  
**FINAL ORDER  
AGENCY DECISION**

Agency No. 3-102576

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**BRIEF OF PETITIONER-APPELLANT LUIS FERMIN**

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## INTRODUCTION

Luis Fermin, the Petitioner-Appellant in this matter, valiantly and selflessly served as a Paterson police officer for 12 years in what we all know is a high crime area where, without fail, he always acted bravely and heroically to defend and protect the citizenry and his brother police officers. Officer Fermin was one of the unspoken heroes and foot soldiers that tirelessly and quietly preserved and enforced the laws of New Jersey, and he respected and defended the rule of law and the U.S. and New Jersey Constitutions. They say heroes are made when nobody's looking. Fermin never asked for accolades and applause and recognition, but his commendations and awards for bravery are impressive. As a member of the Police And Fireman's Retirement System ["PFRS"], hereinafter referred to as "Respondents" or as the "Board," Fermin deserved and is still entitled to the protection of the PFRS and to be treated fairly when and if the unfortunate prospect ever occurred where he became injured and disabled.

Unfortunately, that day came when Fermin while off duty discharged his service weapon three times in order ward-off a deadly attack by an unknown perpetrator who appeared to have a gun and was moving rapidly in a menacing manner towards his vehicle. When this near-death encounter occurred Fermin's life flashed before his eyes and the driver of the vehicle escaped. Fermin's use of lethal force was never questioned by the Paterson Police Department ["PPD"]. However,

the PPD did charge Fermin with technical internal charges for leaving the scene, although he returned when the scene was safe to report the incident to the PPD and was fully cooperative. Fermin pled not guilty to the charges and was suspended under his SOA contract pending the outcome of the internal affairs [IA] process. Fermin and the PPD both agreed that Fermin suffered from severe post traumatic syndrome and flashbacks after the shooting incident. The PPD believed Fermin was unfit for duty as did Appellant. An agreement which was reached amicably between Appellant and the PPD occurred in late 2019 and its only purposes and design was to secure for the Appellant a settling of monies owed him under his SOA contract since he was totally disabled and could no longer work in the high crime area of Paterson. The PPD in recognizing that the IA process would not be necessary unilaterally in the agreement did not pursue the IA charges.

There was no *quid pro quo* agreement entered designed to avoid a minor technical administrative charge. However, despite an avalanche of evidence and support in the factual and legal record made before the Board of Trustees for the PFRS, the Board ruled that it would not even allow Fermin to file his application for retirement disability with the PFRS. The Board referred the matter to the ALJ. The ALJ reversed the Board's findings and directed the Board to accept and hear on the merits Fermin's application for retirement disability with the PFRS. The Board rejected this Decision and Order of the ALJ in a manner that is arbitrary and

capricious and without factual support. When the ALJ on an issue of both fact and law and statutory interpretation reverses an agency made up of mainly laymen this should intensify this Court's scrutinization of this appeal and the reasons given for reversal of the agency's decision. This case as the ALJ indicates the Board failed to marshal facts in the record correctly and compounded their errors by misinterpreting case law and the statutes that are remedial which it governs over.

Appellant now seeks appellate review before this Court seeking basic fairness, justice, and protection as a member of the PFRS, and requests permission to file his meritorious application for retirement disability so it can be decided upon the merits.



## **STATEMENT OF FACTS & PROCEDURAL HISTORY**<sup>1</sup>

The Petitioner-Appellant Luis Fermin was a courageous highly decorated veteran police officer of the Paterson Police Department [“PPD”] who was hired in 2005 and was a member of the PFRS. (Pa47-48, Pa56-56). Twelve years later on 12/31/17 he was almost gunned down by what appeared to be an armed assailant while Officer Fermin was off duty. (Pa1-11, Pa43). Officer Fermin was stopped at a traffic light in a vehicle. (Id.; Pa78-79). Fermin’s girlfriend was the driver. (Id.). Fermin was in a particularly high crime area of Paterson late on New Year’s Eve. (Pa1-11). As a result of the emotional and mental trauma resulting from an incident Fermin was and is no longer fit to be a police officer due to psychological trauma and PTSD directly caused by being involved in a shooting a near death experience.(Pa56, Pa62).

Fermin repelled what appeared to be a carjacking or armed robbery or attempted murder when an unknown assailant reached for what appeared to be a gun as he approached the vehicle the petitioner was a passenger in. (Pa1-11, Pa43, Pa78-79). Fermin in self-defense of his own life and his girlfriend’s life used reasonable lethal force to repel a potentially deadly attack by discharging his firearm at the perpetrator. (Id.). Fermin, not knowing if he was under further attack

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<sup>1</sup> The relevant facts and procedural history are entwined. Accordingly, they are presented together in this Brief.

left the scene and later returned to the scene and provided a report or summary of the incident to the supervisor at the crime scene. The perpetrator was never found. (Pa1-23).

Fermin received internal affairs charges from the Paterson Police Department alleging mostly technical violations, solely related to the shooting incident. (Pa24-28). Fermin immediately pled not guilty to the administrative charges which were minor in nature given the nature of the incident being a case where Fermin was the victim of a deadly attack and acted heroically to protect his female companion from serious bodily injury or death. Fermin reported to the PPD that he was unable to function any longer as a police officer. (Pa1-11, Pa43, Pa56-69, Pa78-79).

The powers of the PPD agreed that Fermin could no longer carry a weapon due to his PTSD and psychological trauma, and that Fermin would never regain the ability to be a police officer again. (Pa1-11, Pa43, Pa56-69, Pa78-79).

The PPD in good faith worked out an agreement referred to as a “MOU” for the following purposes **only**: a) to agree on a separation of employment payout based on a complex set of contractual factors, to have the PPD for pay back for any unpaid suspension time, to pay Fermin continued temporary leave/effective disability pay until a date certain to allow for the disability application with PFRS to occur, sum certain set as to payouts of any accrued compensation time, unpaid

income, and other payments agreed to in the spirit of the existing SOA contract; b) to contract with Fermin that in light of Fermin being fully and permanently disabled the PPD promised and agreed to fully cooperate and support Fermin's application in terms of providing the Board with the necessary paperwork to help Fermin process his PFRS disability claim; and c) to contract with Fermin that the PPD would not support his disability application; d) to contract with Fermin that based on his disability that the Fermin was medically unable to be a Paterson Police Officer again; e) to dismiss the IA charges without prejudice solely because Fermin was disabled and as a matter of fact could not ever regain fitness to be a police officer making a hearing on the charges moot; f) to contract clear language that there was **no** *quid pro quo* re: the MOU. The MOU was agreed to because Fermin was disabled and the agreement was needed to set specific payment amounts for service time and income which were complicated and disputed. (Pa29-41). It is undisputed that the IA charges were collateral as to the reason for the MOU. (Pa1-11, Pa29-41, Pa56-69, Pa72-81, 78-79, Pa86-96, Pa124-130, Pa137-145). There was no *quid pro quo* whatsoever concerning the MOU and any IA charge being dismissed. (Id.).

At the time of the Board's decision to not consider or allow Fermin to even file his disability claims to the PFRS it was virtually five (5) years after the shooting incident. (Pa147-151). In those five years, Fermin had never been deemed

fit to be a police officer again. (Id.). At no time had the Board ordered an IME to determine if Fermin regained fitness or could regain fitness. (Id.; Pa86-96, Pa124-130, Pa137-145). The failure to take such action is indicative that the Board does not dispute Fermin's therapist's findings that Fermin was and is fully disabled as a result of the shooting incident and remains as such today. (Pa56-69, Pa86-96, Pa124-130, Pa137-145).

It is undisputed that Fermin was not terminated. (Pa1-151). It is also undisputed that no pending IA charges exist or existed at the time he filed for disability pension. (Pa1-11, Pa29-41, Pa56-69, Pa72-81, 78-79, Pa86-96, Pa124-130, Pa137-145). The charges emanated from the 12/31/17 shooting incident where Fermin was the victim acting in self-defense and in defense of another occupant in the vehicle he was a passenger in. (Id.). The IA allegations/charges were issued after the 12/31/17 shooting incident corroborating that there was no pending IA charge against Fermin prior to the shooting incident. (Id.). It is undisputed from the litigation at the ALJ that Fermin retired from the PPD solely because of necessity, in that he was fully disabled and unable to ever be an armed police officer in the PPD. Fermin's psychological analysis remains unrebutted and is completely corroborative of Fermin's and the PPD's assessment at the time the agreement was reached. (Pa1-11, Pa29-41, Pa56-69, Pa72-81, 78-79, Pa86-96, Pa124-130, Pa137-145). The agreement also included a compensation package for

Fermin covering several complex financial fringe benefits under the SOA contract. (Pa29-41).

As of 2018, Fermin was permanently disabled from PTSF and emotional distress as a result of his life being threatened and him being in imminent fear of serious bodily injury or death and discharging his firearm in self-defense and in defense of others, and he remains permanently disabled to this day. (Pa56-69, Pa76-81). It is now seven years after the incident, and at no time has the Board or Respondents ever contested the fact that Fermin is permanently disabled. (Pa1-11, Pa29-41, Pa56-69, Pa72-81, 78-79, Pa86-96, Pa124-130, Pa137-145). This is exemplified by the fact that neither the Board nor Respondents ever sought any IME to determine the permanency issue as to the PTSD and emotional distress disability. (Pa1-151).

On 1/4/19, Fermin received a Notice of Disciplinary Charges and was suspended without pay as per his SOA contract. (Pa24-28). After Fermin pled not guilty and a Hearing was requested, the PPD representatives and Fermin through counsel determined that Fermin's PTSD and emotional trauma made him unfit and disabled to act as a police officer permanently. (Pa29-41, Ps56-69). On 11/26/19, the MOU was worked out between the PPD and Fermin strictly for the purpose of aiding Fermin in his claim for permanent 2/3 accidental or alternatively permanent 40% disability. (Pa29-41). As a collateral result of the agreement and Fermin's

permanent disability it was recognized that the minor and contested technical non-criminal IA charges lodged were moot and they were abandoned. (Id.). There was no *quid pro quo* to the agreement. PPD in the agreement covenanted to assist Fermin in his disability process. (Ibid). Fermin agreed as a result of his illness and disability that he would not be a law enforcement officers in Paterson again, but he was free to work in law enforcement anywhere else if he ever regained fitness for duty. (Pa29-41).

On 11/26/19, the application for disability was filed after the MOU was finalized. (Pa42-45). A letter of retirement by Fermin was issued making 12/31/19 his last day as a PPD police officer. (Pa49-51). On 10/15/20, Fermin's mental health therapist issued an extensive and full evaluation and psychological report rendering Fermin permanently disabled due to PTSD being causally related to the 12/31/17 shooting incident. (Pa56-69). That report remains unchallenged and is unrebutted in this case. (Pa1-151).

On 10/21/20, the Supervisor for the Bureau of New Jersey Pensions outright refused to even allow Fermin to docket and file his application for accidental disability, or, alternatively, for 40% disability. (Pa70-71). The Supervisor stated:

N.J.A.C. 17:1-6.41: requires disability applicants to prove that the retirement is due to a total or permanent disability and that the disability is the reason the member left employment. Members who have involuntarily or voluntarily terminated service for any of the reasons listed

below will not be permitted to apply for a disability retirement:

1. Removal for cause or total forfeiture of public service;
2. Settlement agreements reached due to pending administrative or criminal charges unless the underlying charges relate to the disability;
3. Loss of licensure or certification required for the performance of the member's specific job duties;
4. Voluntary separation from service for reasons other than a disability; and
5. Job abolishment or reduction in force.

N.J.A.C. 17:1-6.41.

The Supervisor quoted the law accurately and then stated nothing further as to what portion of the statute would apply to bar Fermin from applying for early retirement disability. (Id.). The Supervisor did state that the MOU would not permit Fermin to return as a Paterson police officer, citing N.J.A.C. 43:16A-8(2) as the Supervisor's alleged, albeit erroneous, authority for this position. (Pa72-96). However, the statute cited does not expressly state that an application for retirement disability cannot be filed and considered on its merits. (Id.).

On 11/10/20, Fermin issued a formal appeal to the Board appealing the Supervisor's Decision. (Pa72-75). Note that the Board and Respondents are used interchangeably in this brief. That appeal clearly established that the Supervisor's decision was a clear misinterpretation of applicable law and facts of the underlying

matter. (Id.). On 12/23/20, Fermin issued his certification as a supplemental submission for consideration by the Board. (Pa76-81).

On 1/13/21, the Board denied Fermin the right to file his disability application for multiple reasons that had no application to this case. (Pa82-85). The Board cited to the IA charges being included in the Fermin MOA but made no interpretable coherent link to support refusing to allow Fermin to have his application filed and docketed. (Id.). The Board ignored the clear undisputed fact that the MOPU was not motivated by or driven by the IA charge, and the IA charge could not as a matter of law deny a member from applying for disability since the IA arose out of the same incident that caused the disability. (Ibid.). In support of this alleged reason to bar Fermin's application for disability the Board cited generally to N.J.A.C. 17:1-6.4. (Id.). However, N.J.A.C. 17:1-6.4(b)(2) states that **there is no bar** to an application being processed and considered when "settlement agreements..." involve administrative charges where the "...underlying charges relate to the disability." N.J.A.C. 17:1-6.4(b)(2).

The Board also miscomprehended the case of M.R. v. Board of Trustees, Public Employees Retirement System, A-6015-17T4. (4/6/20), which was not applicable to our case because it is factually distinguishable and was not retroactive in effect. M.R. also occurred after the MOU occurred in our case and was not approved for publication. (Pa118-123).



Lastly, the Board ignored that Fermin was permanently disabled. It had been three years since the shooting as of 2021 and no one disputed the therapist's report that Fermin was permanently disabled, and ignored that Fermin would be eligible for law enforcement work in New Jersey except for the PPD if he were ever to regain fitness. (Pa29-41, Pa124-130). The Board also misinterpreted N.J.A.C. 43:16A-8(2). (Pa82-96). However, the Board on 4/13/21 did allow for the administrative law judge to consider these issues and render a decision as to whether Fermin's application should be allowed to filed and heard on the merits. (Pa97-98).

On 4/29/22, Respondents and Petitioner-Appellant filed Summary Motions to the administrative law judge ["ALJ"] simultaneously seeking relief. (Pa124-130). Respondents sought to convince the ALJ to agree with the Board's decision to accept Fermin's filing of a disability claim. (Id.). Fermin's motion sought a decision rejecting the Board's decision to not accept Fermin's application for disability. (Ibid.; Pa137-145). On or about 5/25/22 reply briefs were filed with the ALJ by both parties. (Pa160-161). Oral argument did not take place. (Id.).

On 8/2/22, the ALJ issued a well-crafted and thorough written Decision wherein the ALJ rejected the Board's refusal to accept the application for disability from Fermin. (Pa124-130). The ALJ pointed out the Board's erroneous interpretation of N.J.S.A. 43:16A-8(2), stating:

Any beneficiary under the age of 55 years who has been retired on a disability retirement allowance under this act, on his request shall, or upon the request of the retirement system may, be given a medical examination and he shall submit to regular or assigned duties and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him. The application to accomplish such retirement must be filed within five years of the original traumatic event, but the board of trustees may consider an application filed after the five-year period if it can be factually demonstrated to the satisfaction of the board of trustees that the disability is due to the accident and the filing was not accomplished within the five-year period due to a delayed manifestation of the disability or to other circumstances beyond the control of the member.

N.J.S.A. 43:16A-7(a)(1).

The ALJ indicated further that the Board had also erred in every respect in interpreting the remedial aspects of the statutes including but not limited to N.J.S.A. 43:16A-8(2) that governed over its authority, stating:

[T]he Board is attempting to use this language as a means by which to block a member's accidental disability application from being processed. In its denial letter, the Board does not address any of the statutorily provided determinative factors regarding accidental disability retirement benefits. See Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189 (2007). Instead, the Board relies on a hypothetical situation wherein Fermin is granted benefits, subsequently recovers from his disability, applies to become re-employed by his former employer, and is ultimately denied employment by said employer due to the language of the previously entered into settlement agreement. Thus, the Board is attempting

to use the language of N.J.S.A. 43:16A-8(2) as a means by which to bar a member from applying for benefits.

The ALJ further rejected the Board's other reasonings by stating:

I **CONCLUDE** that the plain language of N.J.S.A. 43:16A-8(2) does not contemplate barring a member from applying for benefits, and any such interpretation or use of N.J.S.A. 43:16A-8(2) would conflict with the plain language of N.J.S.A. 43:16A-7(a)(1) as cited above. In addition, the very settlement agreement that the Board points to as a means by which to preclude Fermin's application from being processed contemplates and specifically provides that Fermin will apply for accidental disability benefits. It seems somewhat contradictory to reference a document that specifically states Fermin is to apply for accidental disability benefits as a reason to bar Fermin from applying for said benefits. It should further be noted that, in the less-than-likely hypothetical situation relied on by the Board, wherein Fermin receives benefits, recovers, and is then denied re-employment, the Board, upon determining that Fermin is fully recovered from his disability, could simply discontinue benefits and Fermin could seek employment elsewhere.

The ALJ Ordered:

[R]espondent's determination to deny processing Fermin's application for accidental disability retirement benefits is **REVERSED**. It is further **ORDERED** that Fermin's application for accidental disability retirement benefits be reviewed, processed, and either granted or denied based on its merits and on the factors outlined in N.J.S.A. 43:16A-7(a)(1).

On 9/6/22, Respondent submitted a letter of exceptions and on 9/14/22, after being granted a slight extension of time, Fermin issued his response to any exceptions. (Pa131-145). On 10/18/22, the Board issued a letter indicating there

would be a Board hearing on 11/14/22 to decide the matter. (Pa146). On 11/16/22 the Board rejected the ALJ Decision and affirmed its previous determination to deny Fermin the right to file his application for retirement disability. (Pa147-151).

The Board ignored the ALJ's well-reasoned opinion and Richardson, and simply doubled down on N.J.S.A. 43:16A-8(2) without further explanation. The Board ignored the fact that Fermin had been disabled for five years at the time of 11/16/22 making this issue moot. The Board by implication and inference, now in 2022, grasped for any imagined reason to deny Fermin from filing by now adding a new argument that Fermin had an MOU that was a *quid pro quo* designed to avoid discipline. The Board omitted from analysis: 1) the ALJs rejection of this frivolous argument; 2) the MOU was based on disability expressly; 3) the PPD agreed to the MOU solely because of the disability; 4) the Board without any analysis or synthesis blindly cited to case law that was wholly distinguishable and inapplicable factually and legally to the issues before it as to the Fermin application for retirement disability; and 5) the PPD was cooperating with the disability process strictly concerned with Fermin's right to disability not any technical disciplinary charge of a minor nature; 6) as a result of the Fermin disability, the MOU dismisses the disciplinary matters as a collateral moot process that was no longer needed due to the permanent disability of Fermin; and 7) there was no acceptance to interpret this remedial law and statute to effectuate its purpose which is to

protect seriously injured police officers and firemen as is required in precedent and super precedent as articulated in the Richardson case. (Id.; Pa124-130, Pa137-145).

The Board's 11/16/22 rejection of the ALJ's Decision provides no analysis as to why it departs from the ALJ and is internally inconsistent in part with the reasons that were previous provided by the Board and the Supervisor of NJ Pension back in 2020 before the ALJ hearing was approved. (Id.).

An appeal was filed by Fermin as to the Board's ruling, and an Amended Notice of Appeal and Amended Case Information Sheet were filed on 1/9/23. (Pa152-159). Respondent's Case Information Sheet and Statements comprising most of the Record submissions as filed with the Court on 5/8/23. (Pa160-161).

### **LEGAL ARGUMENT**

#### **POINT I: THE BOARD FAILED TO FOLLOW THE LEGAL STANDARD FOR APPEAL OF AN AGENCY DECISION.**

(Raised below at Pa74, Pa124-130, Pa137-145).

The Court reviews the Board's decision with a due degree of deference, recognizing its role as an administrative agency acting within the scope of its responsibilities, recognizing that the agency lacks the legal training and sophistication of a lower court judge in the overall analysis of any appeal. The Court on appeal will sustain the Board's ruling "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the

record." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). "We are not, however, 'bound by an agency's interpretation of a statute or its determination of a strictly legal issue,' particularly when 'that interpretation is inaccurate or contrary to legislative objectives.'" Mount v. Bd. of Trs., Police & Firemen's Ret. Sys., 233 N.J. 402, 418-19 (2018) (citing Russo, 206 N.J. at 27). Instead, as the Mount case pointed out "we review de novo the Board's interpretation of N.J.S.A. 43:16A7(1) and our case law." Id. at 419.

In determining whether an agency's decision is arbitrary, capricious, or unreasonable, this Court shall scrutinize: (1) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether in applying the law to the facts, the "agency clearly erred in reaching [its] conclusion." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 482-83 (2007)). The agency's findings of fact must be "supported by adequate, substantial and credible evidence." In re Taylor, 158 N.J. 644, 656-57 (1999) (quoting Rova Farms Resort, Inc. v. Inv's. Ins. Co., 65 N.J. 474, 484 (1974)). Arbitrary and capriciousness is more than this Court merely stating it would have "reached a different result." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988). However, since no testimony was given this Court owes no deference to the

agency as to credibility issues or as to any interpretations of the law made by the agency..." In re Taylor, 158 N.J. 644, 656-57 (1999) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). An appellate court is not bound by an agency's statutory interpretation or other legal determinations, which it reviews de novo. Mount, 233 N.J. at 418-419; and see Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affs. of Dep't of L. & Pub. Safety, 64 N.J. 85, 93 (1973). The appellant does have the burden to show that the administrative determination is arbitrary, capricious or unreasonable." In re Renewal TEAM Acad. Charter Sch., 247 N.J. 46, 73-74 (2021).

The Board and this Court **must** interpret its laws liberally to effectuate its remedial purpose. See Geller v. N.J. Dep't of Treasury, Div. of Pensions & Annuity Fund, 53 N.J. 591, 597-98 (1969)); Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 34 (2009). The appeal relies on the holding of Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189 (2007). In Richardson, the Court clarified the meaning of the term "traumatic event," and set forth a five-pronged [3A-1611-16T1] standard mandating that a pension system member seeking accidental disability benefits must prove. Richardsson, at 212-13.]; and Dennis v. Bd. of Trs., Pub. Employees' Ret. Sys., 394 N.J. Super. 484, 492 (App. Div. 2007).

The Board is not to disturb an ALJ recommendation that is sound and in depth and logical. Rather, it is **the rare case** that the agency fails to follow the recommendations of the ALJ. St. Vincent's Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977). The rare case where the agency does not follow the ALJ's recommendations is one where the ALJ's decision contained abject failures that the agency cannot subscribe to. In the Matter of Rastatter, City of Passaic., No. A-3323-16T4 (Unpub.) (App Div. 2020). That is not our case whatsoever. One must look with a jaundiced eye at the Board's reluctance to rely on the ALJ's reasoning especially as to interpretations of law. This is so because the Board does not have the legal acumen of the very body [ALJ] that it relies on for guidance in resolving legal and factual determinations that go beyond the ken of an agency made up almost exclusively of layman lawyers. We know that courts have made distinctions in matters as to the weight it gives certain bodies and persons on the basis of their training and experience See, generally, Regan v. City of New Brunswick, 305 N.J. Super. 342, 345-356 (App. Div. 1997).

In our case, the Board did not adhere to any of the above legal axioms that apply to this case and misapplied case law and mis-marshaled and tortured the factual record to the point that its ruling was not only arbitrary and capricious; it was also unsupported by virtually the entire factual record. Unfortunately, this



Board has a sorry history in its continuing failures to liberally interpret these remedial statutes that it governs over. The Board has been criticized severely before regarding its restrictive and onerous interpretations of the law as to what standards our proud warrior men and women in uniform must first vault when they are totally and permanently disabled within the meaning of the law while working on the job or as in this case warding off an armed deadly attack by discharging a service weapon. See Moran v. Board of Trustees, Police and Firemen's Retirement System, 438 N.J. Super. 346, 354 (App. Div. 2014). In Richardson, the Court explained 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." Richardson, 192 N.J. at 212. See also Moran v. Board of Trustees, Police and Firemen's Retirement System, 438 N.J. Super. 346, 354 (App. Div. 2014) and Brooks v. Board of Trustees Public Employees Retirement System, 425 N.J. Super. 277 (2012). More recently, this Board was reversed for failing to adhere to established law in Diaz v. Board of Trustees, Police and Firemen's Retirement System, A-3619-21, Unpub. (App. Div. 11/2/23).

**POINT II: THE BOARD'S REFUSAL TO ALLOW FERMIN TO APPLY FOR ACCIDENTAL PERMANENT DISABILITY WAS ARBITRARY AND CAPRICIOUS AND WAS NOT SUPPORTED BY THE FACTUAL RECORD.**

(Raised below at Pa1-151).

The ALJ in its Decision generally directed the Board to stay true to the fact that it is governing over a remedial statute that must be liberally interpreted to effectuate purpose; which is to protect the disabled police officer or firefighter; not exalt faulty and twisted tortured logic to achieve a result where the Board can in blanket fashion deny even the taking of a retirement disability application as to anyone that is permanently disabled who signs a good faith amicable agreement with the employer. This Court like the ALJ is anticipated to have no difficulty finding that the Board took a series of fatal missteps in failing to marshal the undisputed facts regarding that the MOU's purpose which was to facilitate the disability retirement application of an officer that was no longer for duty due to a traumatic event where the discharged his weapon to ward off a potentially deadly attack.

Despite the fact that the only evidence in the case which was presented corroborated Fermin's and the PPD's account that the MOU involved an amicable agreement between Fermin and the PPD which was done strictly to facilitate a complicated retirement/disability process and complex reconciliation of financial payments to Fermin in accordance with the SOA contract, the Board disgorged

itself of true facts and simply chose to inject its indefensible and wholly unsupported judgment that the MOU was a *quid pro quo* to avoid a disciplinary process. The Board's denial letters blocking Fermin's application do not cite one scintilla of factual evidence to support this erroneous and misguided theory.

The Board as the ALJ pointed out ignored the fact that the PPD supported Fermin's application for disability retirement recognizing that Fermin was totally disabled as a result of the near death experience emotional trauma caused from the shooting incident. The Board never disputed Fermin's claim to permanent disability. The Board never sent Fermin for an IME. Despite this fact the Board in ruling against Fermin claimed in an imaginary endeavor to speculate and suppose that Fermin might regain fitness for duty one day in the five-year statutory period whereby he would if he regained fitness need to report for work. The Board claimed that this fact made processing Fermin's disability application impossible since the MOU would not allow for his return to the PPD when the five-year period had run its course almost entirely. The Board disregarded the fact that Fermin would never regain fitness as the mental health therapist's lengthy in-depth October of 2020 report on this point was unequivocally clear and undisputed. The Board in late 2022 when it issued its final ruling against Fermin still relied on this imaginary view that he might regain fitness in five-year period and could not return to PPD making him in the Board's view ineligible to receive benefits from the

New Jersey Division of Pensions. This is incredulous given that five years had already passed when the Board made its final decision, and that Fermin could seek work in any other police department in New Jersey if the impossible happened and he regained fitness to serve magically, which is an impossibility by any rational analysis. (Pa124-130).

Moreover, the ALJ threw cold water on the Board's clearly faulty view that Fermin could not come back to the PPD even when it was already at the five-year ending point when it ruled Fermin could in the natural world theoretically of this imaginary speculative process. The ALJ recognized as any objective observer would find, namely, that Fermin was disabled forever and needed to go on disability retirement and to work out some complex financial compensation contractual elements in a binding MOU agreement which is what occurred. The ALJ correctly chastised the Board's erroneous views that Fermin somehow can regain fitness in a five-year period when it stated after conducting a thorough review of the statutes involved, and correctly stated as follows:

**I CONCLUDE that the plain language of N.J.S.A. 43:16A-8(2) does not contemplate barring a member from applying for benefits, and any such interpretation or use of N.J.S.A. 43:16A-8(2) would conflict with the plain language of N.J.S.A. 43:16A-7(a)(1) as cited above.**

**In addition, the very settlement agreement that the Board points to as a means by which to preclude Fermin's application from being processed contemplates and specifically provides that Fermin**

**will apply for accidental disability benefits. It seems somewhat contradictory to reference a document that specifically states Fermin is to apply for accidental disability benefits as a reason to bar Fermin from applying for said benefits. It should further be noted that, in the less-than-likely hypothetical situation relied on by the Board, wherein Fermin receives benefits, recovers, and is then denied re-employment, the Board, upon determining that Fermin is fully recovered from his disability, could simply discontinue benefits and Fermin could seek employment elsewhere. The Board's refusal to accept the ALJ's correct version was not just a situation where differing minds could objectively disagree on the result; it was a capricious and arbitrary erroneous finding by the Board that cannot stand.**

The Board consistently based all its findings without any support in the factual record. Moreover, the Board did not provide any analyses as to how the ALJ's rulings were mistaken and offered no support for its own erroneous views as to the denial of allowing the filing of disability retirement application form. The Board's refusal to follow the law as indicated by the ALJ is clearly evident in that the Board strictly interpreted the remedial statutes N.J.S.A. 43:16A-8(2) and N.J.S.A. 43:16A-7(a)(1) when it was sworn to interpret these statutes liberally for the protection of police officers and firefighters. The Board's failure to offer any rebuttal of the ALJ's correct interpretations of fact and law acts as an effective admission that it has no rational argument to posit to support its findings and identify where the ALJ's opinion and interpretations are incorrect.

The Board had been repeatedly informed by Fermin throughout the process in writing that its apparent reliance on N.J.A.C. 17:1-6.41(2) to also deny the application is wholly plain error since subsection 2 of that statute as was aforementioned in the preceding section expressly states applications for disability retirement will be accepted, heard and decided on the merits when the settlement agreements signed involve a disposition of administrative charge related to the actual disability that is the subject of the application. The Board's written decision/s repeatedly cite to this administrative provision supporting its decision to block Fermin from having his claim filed.

Just as the Board had no actual response to rebut the soundness of the ALJ finding that there was an agreement made that had no *quid pro quo* in existence, the Board remained silent on the undisputed fact that the underlying administrative charges specifically related to the disability which is the subject of the application in question in this appeal. The Board offers no analysis at all nor can it as to how this provision does not apply to Fermin. Additionally, given this aforementioned subsection in the NJAC, the Board's insistence that the settlement agreement involving language of a minor technical dismissed internal affairs ("IA") charge disqualified Fermin's application and refused to accept its filing was not only factually unsupportable in the record; it was not even applicable to our case since the IA charge arose from the incident where the disability arose from. The Board

clearly erred and its decision resulted in an arbitrary and capricious ruling that must be reversed by this Court, respectfully.

There is an internal inconsistency to the Board's written decisions over two years as to the reasons given in denying the filing of Fermin's application both before the ALJ ruling and in the aftermath of ALJ's ruling on 11/16/22. Moreover, the Board's misinterpretations of the administrative code and the statutes coupled with its failure to rely on the actual factual record using imaginary inferences, created a recipe for disaster that is illustrated clearly when comparing the sound well-reasoned ALJ decision versus the Board's cumulative factual and legal missteps. The Board's errors were intensified in that they were cumulative and were not cognizable under the law. Additionally, the Board's multiple errors as pointed about above are even seen in the case law it cites to allegedly support its position and also in the omission of case law that forbids the Board from denying the application of Fermin.

The Board during the entire process both before the ALJ ruled and afterward had a total and unadulterated complete lack of understanding as to the method of determining if case law that existed was supportive or not supportive of its decision to bar Fermin from filing his application. This is clearly evident in the Board's misplaced reliance on the cases of Cardinale v. Bd. Trs., Police & Firemen Ret. Sys., 458 N.J. Super. 260 (App. Div. 2019), and M.R. v. Bd. of Trs., PFRS, 2020,

Super. Unpub. LEXIS 615 (App. Div. Apr. 6, 2020). As opposed to our case, where Fermin became immediately permanently disabled after repelling with the attempted use of deadly force a life-threatening attack, and where Mr. Fermin thwarted a gunman by discharging his service weapon, M.R. was suspended because he was testing positive for CDS in contravention of his responsibilities as a judiciary employee in Union County. The Agreement that M.R. signed specifically was a resignation from employment and being barred from ever returning to work as a judiciary employee statewide, and in return the consideration he received was that the positive CDS drug test charges were dismissed. It was a *quid pro quo* agreement wholly different from our case facts, and of equal importance is that M.R.'s disciplinary charges arose from misconduct which was not pertaining to his alleged disability application. Fermin's IA charges related to the disability. That is not even disputed by the Board or by its appellate counsel. Thus, M.R. is completely factually and legally distinguishable from our case.

Furthermore, in M.R., the decision occurred on 4/6/20, which was after our MOU in Fermin was executed. M.R. had no retroactive effect. The Board failed to recognize this fact also along with the fact that the decision was unpublished making it non-binding on the Board. The Board's failure to discuss these aspects of



the M.R. case reveal its lack of knowledge about the aforementioned facts that render M.R. as unusable in our case in any way.

Similarly, the Board's errors with respect to its reliance on M.R., reemerged when it determined that the Cardinale case holding barred Fermin's application from being filed. Cardinale, like M.R., involves a claimant that was attempting to get disability from the PFRS for reasons other than the administrative charge that was pending. Cardinale was a drug addict police officer that signed an irrevocable termination agreement expressly as a *quid pro quo* for the dismissal of administrative charges and he permanently forfeited his right to be a police officer ever in in New Jersey. Cardinale also testified that he was no longer disabled and is able to return to work. Our Agreement [Ex. 4]. Cardinale, like M.R., had charges that were independent of the alleged disability that he put forward to support benefits being afforded. Moreover, it should be noted that in both M.R. and Cardinale, the ALJ agreed with the Board's analysis as to those two cases cited; but not in our case.

Given the foregoing, there is absolutely no legal or factual reason that would justify the NJDOP Board's Decision to deny a hearing this claim on the merits, much less not even permit the PFRS member to have his disability claim filed and processed. Also, given the inability of the Board to marshal our facts and apply those supported facts to the law in Cardinale and M.R., correctly, requires the ALJ

to protect the petitioner and decide that the petitioner should be permitted to have his claim processed and filed, and to have a hearing on the merits of his claim. See In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 394 (App. Div. 2018), and its progeny.

With respect to the aforementioned M.R. case, this Board totally misreads the core holding of the case and its use and application to fact patterns that are distinguishable from what was present in the M.R. case. As opposed to our case, where Mr. Fermin became immediately permanently disabled after repelling with the attempted use of deadly force a life-threatening attack, wherein Mr. Fermin thwarted a gunman by discharging his service weapon, M.R. was suspended because he was testing positive for CDS in contravention of his responsibilities as a judiciary employee in Union County. The Agreement that M.R. signed specifically was a Termination from ever returning to work as a judiciary employee statewide. It was a *quid pro quo* agreement wholly different from our case facts.

The M.R. case is not only factually distinguishable from our case rendering it as unusable in our case for enabling a non-arbitrary and non-capricious decision from being rendered, it is legal holding is also being misused misapplied by the Board. M.R. relies on Cardinale v. Bd. Trs., Police & Firemen Ret. Sys., 458 N.J. Super. 260 (App. Div. 2019). Cardinale, like M.R., involves a claimant that was

attempting to get disability from the PFRS for reasons other than the allegations raised in the administrative charge that was pending. Cardinale was a drug addict police officer that signed an irrevocable termination agreement to avoid administrative charges and permanently forfeited his right to be a police officer. Cardinale also testified that he was no longer disabled and is able to return to work. Our Agreement is wholly different. Our Agreement is revocable and discusses resurrection of administrative charges should Fermin return to the PPD to fight the case. Fermin, unlike Cardinale, is permanently disabled now for over five (5) years making him ineligible to return to police work as a matter of law.

Given the foregoing, it is clear that the court decisions in M.R. and Cardinale are completely factually dissimilar from our case. The distinction is ultimately fatal to the Board's misplaced reliance on these two cases to deny Fermin from filing his application. Cardinale and M.R. both regained physical fitness or would in the five-year period. Fermin we know did not and could not, based on the therapist's report which is un rebutted, ever regain fitness. Most importantly, in Cardinale and M.R. the exception provision in subsection (2) of N.J.A.C. 17:1-6.41 was not available to these litigants. That exception provision as we know from the aforementioned arguments above allows for an application for retirement permanent disability to be made even if an irrevocable settlement agreement occurs as long as the dismissed IA charges are related to the disability.

Fermin enjoys having that right. M.R. and Cardinale as litigants did not have that right and neither unlike Fermin alleged any more than temporary disability. M.R. and Cardinale intended to return to work, whereas Fermin is seeking permanent 2/3 accidental disability.

As the ALJ clearly recognized, the statutes involved in our matter before Board must be considered only after the decider liberally interprets that statutes that are pertinent matter, and that did not occur in this matter. See Francois v. Bd. of Trs. Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 349 (App. Div. 2010). This Court should weigh heavily against the Board its inability to or refusal to rebut in its decision the findings of the ALJ. This Court should reverse arbitrary and capricious decisions that foreclose all applicants for permanent disability when they're settlement agreement is protected by N.J.A.C. 17:1-6.41(2) and the disability sought involves an undisputed permanent injury.

Public policy does not support the blanket preclusion noted in Cardinale to our specific facts. Public policy and law enforcement resources would be adversely affected if permanently disabled police officers were forced to litigate administrative matters related to their disability where the employer and the officer charged both agree that the officer is permanently disabled never to regain fitness. The Appellant asks this Court to consider scenarios that involve other members with permanent disabilities such as blindness, cancer, loss of a limb, etc., and apply

those scenarios to our facts where what was lost permanently was a mental disability referred to as PTSD caused by the near-death shooting experience that Fermin has endured as a victim.

Fermin has strong legal support for having the Board's decision reversed. The ALJ astutely renounced the Board's misapplication of the consideration that Fermin in an imaginary scenario could regain fitness and be unable to return to the PPD. The ALJ indicated expressly that in the unlikely hypothetical dreamt up by the Board, that Fermin somehow magically could regain fitness in the five-year window, the Board "could simply discontinue benefits and Fermin could seek employment elsewhere." (Pa128).

Fermin's injuries and disability date back seven (7) years now. Good faith settlement agreements recognizing the permanent disability and cessation of internal charges coupled with the employer's full-throated promise to assist in the disability retirement application process all signify that public policy, the need to avoid unnecessary waste of resources, and in furtherance of interpreting the retirement disability statutes which are remedial in nature liberally to effectuate the statutes purposes. If the Board was correct, in Fermin's situation he would have had to go through an unnecessary an entire disciplinary process on technical charges related to his disability claim, and remain out on leave until that determination occurred, and then and only then after his appeals were exhausted

could he apply for disability retirement, assuming the passage of time did not cause him another defeat when the Board exalts another trapping to deny the member of his benefits that he paid into for over 12 years. This would also injure Fermin in that his settlement agreement financially remunerated him expeditiously based on his SOA contract, whereas in the other scenario apparently embraced by the Board, he would not see financial remuneration for many years. Moreover, Fermin remaining on the force to satisfy the Board's draconian and unworkable interpretations of law would hold up the police force from hiring for years an able-bodied officer to replace him, and this would all be for what purpose? The answer is that there is no purpose except to deny Petitioner-Appellant his right to have his application heard and decided on the merits.

**CONCLUSION**

For all the foregoing reasons, Petitioner-Appellant Luis Fermin, by and through his undersigned attorney, respectfully requests entry of an Order: (1) Reversing the Board's ruling; and (2) Directing the Board to accept Fermin's application for permanent disability and determine its *bona fides* on the merits.

Respectfully submitted,

By:



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*Attorney for Petitioner-Appellant,  
Luis Fermin*

Dated: February 19, 2024

LUIS FERMIN,

Appellant,

V.

BOARD OF TRUSTEES, POLICE AND  
FIREMEN'S RETIREMENT SYSTEM  
OF NEW JERSEY,

Respondent.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

APPEAL OF ADMINISTRATIVE  
FINAL DECISION

Docket No. **A-001270-22**

ON APPEAL FROM:  
FINAL ORDER  
AGENCY DECISION  
Agency No. 3-102576

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**BRIEF OF RESPONDENT - BOARD OF TRUSTEES, POLICE AND  
FIREMEN'S RETIREMENT SYSTEM OF NEW JERSEY**

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## INTRODUCTION

Petitioner-Appellant Luis Fermin, a former police officer with the City of Paterson Police Department (“Paterson”), appeals from the Final Administrative Decision of Respondent the Board of Trustees, Police and Firemen’s Retirement System (“the Board”), which denied his request to apply for accidental disability retirement benefits (“AD”) (PA152-PA155).<sup>1</sup>

At the outset, it must be noted that the Brief and Appendix submitted by Petitioner-Appellant to this Court are highly improper. Significantly, counsel for the Board, Juliana DeAngelis, Esq., filed with this Court a Statement of Items Comprising the Record on Appeal. Counsel for Mr. Fermin annexed that Statement to the end of the Appendix (PA160-PA161). However, the Appendix omits nearly all the documents which Ms. DeAngelis advised are part of the Record. The documents which Petitioner has egregiously omitted are: Respondent’s Motion for Summary Decision with exhibits A-J, 4/27/22; Petitioner’s Motion for Summary Decision with exhibits 1-12; Respondent’s Opposition/Reply Brief, 6/9/22; and Petitioner’s Opposition/Reply Brief, 5/31/22.

Counsel for Petitioner-Appellant has violated N.J. Court Rules, R2:6-1(a)(1) which mandates that that the Appellant must include in the Appendix “(i) such other

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<sup>1</sup> References to pages of the Appendix submitted by Petitioner-Appellant are preceded by the letters “PA.”

parts of the record...as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised.” Petitioner’s failure to abide by this Court’s Rule has necessitated the Board’s filing of its own Appendix which includes the improperly omitted documents.<sup>2</sup>

Yet another glaring defect in the Appendix submitted by Petitioner is that pages PA1 through PA 107 consist of a hodgepodge of various documents, none of which are accompanied by any certification, affidavit, affirmation, motion papers or other vehicle, such that this Court and counsel for the Board would be able to identify where, how or even if the documents were submitted to the Administrative Law Judge (ALJ) and/or the Board. There is no way of knowing, from the Appendix submitted by Petitioner, whether the ALJ or the Board ever saw any of these documents, which consist of loose police reports, mental health reports, letters and other assorted documents. These documents are not organized, labelled or presented in a coherent way such that this Court may be able to ascertain how or even whether they were submitted to the ALJ and/or Board. As but one example, Petitioner includes cover sheets for several exhibits (PA 29, PA42, PA46, PA70, PA82, PA97,

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<sup>2</sup> References to pages of the Respondent’s Appendix are preceded by the letters “RA.”

PA99), without providing any indication of what document the exhibits are purportedly taken from.

The Appendix submitted by Petitioner makes it extremely difficult for this Court to understand the factual and procedural history of this case and to review the evidence that was actually presented to the ALJ and Board. For these reasons, it is respectfully submitted that this Court should ignore the documents reproduced at pages 1 through 107 of the Petitioner's Appendix and the arguments in the Petitioner's Brief that rely upon those documents, as there is no demonstration whatsoever in the Appendix that those documents were ever seen by the ALJ or the Board.

It should be further noted that the entire Introduction to the Petitioner's Brief is devoid of any reference to the record. The Introduction is therefore completely unsupported by any facts or evidence of record, and should be ignored by the Court.

In any event, even if this Court should for some reason determine to consider Petitioner's improper Appendix and Brief, nothing presented by Petitioner merits reversal of the Board's Final Administrative Decision, which held that Petitioner is ineligible to receive AD. That decision was solidly based upon statutes and established case law. As discussed in Points I and II *infra*, Petitioner is barred by statute (N.J.S.A. 43:16A-8[2] and N.J.A.C. 17:1-6.4[b]) from receiving AD because he entered into a settlement agreement with his former employer Paterson which was

reached due to pending disciplinary charges, and because he is forever barred from returning to work for his former employer. All of Petitioner's arguments were properly rejected by the Board in light of the complete statutory bar to Petitioner receiving AD. The Board's Final Administrative Decision should be affirmed.

**COUNTERSTATEMENT OF FACTS  
AND PROCEDURAL HISTORY**<sup>3</sup>

As set forth in the Introduction to this Brief, pages 1 to 107 of the Petitioner's Brief contain documents which are unattached to any Certification, Affidavit, Affirmation, motion papers or other vehicle which would demonstrate that they were submitted to the ALJ and/or the Board. Those documents should accordingly be given no consideration by this Court. Thus, Petitioner's purported "Statement of Facts & Procedural History" at pages 8-20 of his Brief should be disregarded by this Court insofar as it relies on references to pages 1 to 107 of the Appendix.<sup>4</sup>

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<sup>3</sup> Because the Procedural History and Counterstatement of Facts are closely related, they are combined to avoid repetition and for the Court's convenience.

<sup>4</sup> Through these improperly submitted documents, Petitioner appears to be attempting to argue the merits of his disability application (i.e., the alleged diagnosis of psych disability, medical/psychiatric documents, etc.). The alleged merits of the disability application are NOT at issue in this appeal – the only issue before this Court is Petitioner's eligibility (or rather, non-eligibility) for AD.

The pertinent facts of this case are clearly and precisely set forth in the Final Administrative Determination of the Board issued on November 16, 2022 and filed December 27, 2022 (PA146-PA151).

Fermin began employment as a Police Officer with Paterson in January 2005 (PA147). In the early morning of January 1, 2018, Fermin was involved in an off-duty shooting incident in which he discharged his service weapon at an individual he allegedly believed was armed and dangerous (PA147). On January 2, 2019, Paterson served Fermin with a Preliminary Notice of Disciplinary Action (“PNDA”) stemming from the January 2018 shooting incident (PA147; RA27-RA29). According to the PNDA, Fermin “left the scene [of the shooting] without reporting the incident to police headquarters...left the scene without attempting to identify or contain [the alleged assailant]...left the scene without reporting he fired the shots from his service weapon...[and] returned to the scene in a different vehicle to the one involved in the incident, thereby contaminating the scene” (PA147-PA148; RA29). The PNDA recommended that Fermin’s employment be terminated, but suspended Fermin without pay pending a disciplinary hearing (PA147-148; RA29).

As further set forth in the Final Administrative Determination, on or about November 26, 2019 and March 12, 2020, Fermin entered into a Memorandum of Agreement (“Settlement Agreement”) with Paterson (PA148; RA31-RA41). Paterson agreed to withdraw the disciplinary charges in exchange for Fermin



withdrawing “any requests for a hearing on any and all outstanding employment issues” between Paterson and Fermin (PA148; RA38). The Settlement Agreement explicitly stated that “Fermin hereby understands and agrees that from February 1, 2020 forward he is forever barred from future employment with [Paterson]...[and] he is barred from taking any actions as a law enforcement officer for the Paterson Police Department” (PA148; RA38).

On the same day as the November 26, 2019 Settlement Agreement, Fermin submitted an application for AD benefits (PA148; RA43-RA45). Fermin asserted that he is totally and permanently disabled from the January 2018 shooting incident (PA148). On January 11, 2021, the Board reviewed the Settlement Agreement and AD application, among other documents (PA148; RA11-RA13). It determined that Fermin is not eligible to apply for AD, citing N.J.S.A. 43:16A-8(2), because Fermin has no job to return to should his alleged disability diminish in future (PA148; RA11-RA13).

Fermin’s appeal was assigned to Administrative Law Judge (ALJ) Jude-Anthony Tiscornia (PA124-PA130; PA148; RA49). The ALJ permitted the parties to file motions for summary decision, with the Board filing its motion on April 27, 2022 and Fermin filing his motion on April 29, 2022 (PA133; PA148; RA1-RA145). In his Initial Decision on August 2, 2022, Judge Tiscornia denied the Board’s Motion for Summary Judgment, reversed the Board’s finding that Fermin is ineligible to

apply for AD, and ordered the Board to process Fermin's AD application on the merits (PA124-PA130; PA148). The Board filed its exceptions (PA131-PA136), and Petitioner filed a Reply and Objection to the Board's exceptions (PA137-PA145).

The Board rejected Judge Tiscornia's Initial Decision and affirmed its prior decision that Fermin is ineligible for AD (PA150). Fermin's inability to return to work for Paterson is fatal to his AD application under N.J.S.A. 43:16A-8(2) (PA148-PA149). Under the statute, the Board may require any disability retiree to undergo a medical examination to determine whether the disability which existed at the time of retirement has materially diminished or ceased. If the medical report indicates that the beneficiary is able to perform any available duty, the beneficiary must report for duty (PA148-PA149, citing the statute).

The Board noted that Fermin is unable to comply with N.J.S.A. 43:16A-8(2) because he is forever barred from future employment with Paterson under the Settlement Agreement (PA148). The Board cited among other case law Cardinale v. Board of Trustees, Police and Firemen's Retirement System, 458 N.J. Super. 260 (App. Div. 2019), in which the Court stated that a member's inability to return to work renders a member ineligible to apply for disability benefits (PA148).

The Board observed that permitting Fermin to proceed with his AD application would contravene important public policy underlying disability retirement benefits, because it would prevent the Board from statutorily terminating

his benefits should he be determined fit to return to duty but refuse to do so (PA149). The Board has a fiduciary responsibility to protect the fund and it would not serve statutory policy to pay out moneys to those who are not entitled to them (PA149).

The Board also noted N.J.A.C. 17:1-6.4 which requires that a disability retirement applicant must prove that his or her retirement is due to a total and permanent disability; the disability must be the reason the member left employment (PA149). Members who have involuntarily or voluntarily terminated service because of removal for cause or total forfeiture of public service, and/or settlement agreements reached due to pending administrative or criminal charges, will not be permitted to apply for disability retirement (PA149-PA150). The Board noted that “Fermin’s Settlement Agreement, whereby he avoided disciplinary charges and termination in exchange for his promise to retire, was clearly the impetus for his retirement application” (PA150).

The Board rejected Fermin’s arguments that Fermin separated from his employment due to disability and that the Board’s refusal to process his AD application deprived Fermin of due process (PA150). Fermin entered into the Settlement Agreement with his former employer by which he agreed not to seek reemployment with Paterson in exchange for Paterson dropping pending disciplinary charges (PA150). Citing Cardinale, *supra* and M.R. v. Board of Trustees, PFRS, 2020 N.J. Super. Unpub. LEXIS 615 (App Div. April 6, 2020), the Board stated that

the alleged existence of a disability is irrelevant because Fermin's irrevocable resignation made him ineligible for benefits in the first place (PA150). Fermin has no job to return to and cannot comply with the return to work statute, N.J.S.A. 43:16A-8(2) (PA150). Fermin's permanent inability to return to work in the Paterson police force is "fatal to his disability application because it renders him ineligible to participate in the disability pension scheme" (PA150).

In the Board's view, Judge Tiscornia's Initial Decision ignored binding and/or persuasive case law and "would violate public policy, contravene the rehabilitation statute, and encourage abuse of the disability retirement system" (A150). Accordingly, the Board rejected Judge Tiscornia's Initial Decision and affirmed the Board's prior decision that Fermin is ineligible to apply for AD (A150). This appeal followed.

## **LEGAL ARGUMENT**

### **I. THE BOARD REASONABLY DETERMINED THAT FERMIN IS NOT ELIGIBLE TO APPLY FOR AD BENEFITS.**

On judicial review of an administrative agency determination, courts have a limited role to perform. Gerba v. Bd. Of Trs., PERS, 83 N.J. 174, 189 (1980) (citations omitted). 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. Ibid.; see also Campbell v. New Jersey Racing Comm'n, 169 N.J. 579,

587 (2001); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). “If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head’s decision, then it must affirm even if the court feels that it would have reached a different result.” Gerba, 83 N.J. at 189 (quotation omitted).

Thus, the Board’s “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.” Russo v. Bd. Of Trs., Police & Firemen’s Ret. Sys., 206 N.J. 14, 27 (2011) (quotation omitted).

While Petitioner repeatedly argues that a person eligible for benefits is entitled to a liberal interpretation of a pension statute, “eligibility [itself] is not to be liberally permitted.” Smith v. Dep’t of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209, 213 (App. Div. 2007). A liberal construction of eligibility would expand the class of persons eligible for the significantly greater monetary benefits permitted for accidental disability pensions, and would place a greater strain on the financial integrity of the fund and its future availability for those persons who are truly eligible for such benefits. Smith, 390 N.J. Super. 209, 215; Mount v. Bd. of Trs., P.E.R.S., 133 N.J. Super. 72, 86 (App.Div.1975) (recognizing that the members of “[t]he board of trustees are fiduciaries and therefore have a duty to protect the fund and the

interests of all beneficiaries thereof,” which duty must be exercised “with due care, diligence and skill in administering the trust”).

Petitioner’s counsel disparages the Board’s decision by, among other things, depicting the Board as “mainly laymen” who purportedly lack legal training and sophistication, in contrast to the ALJ (Petitioner’s Br., pp. 7, 20, 23-24). Counsel’s attempts to prejudice this Court by personal attacks on the Board are both improper and unsupported. Equally unsupported is counsel’s assertion that the Court in St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977) held that it is “the rare case” when the agency fails to follow the recommendation of the ALJ (Pet. Br., p. 23). The Court in that case said no such thing.

In fact, the Court in St. Vincent’s quoted with approval Greater Boston Television Corp. v. F.C.C., 143 U.S. App. D.C. 383, 393, 395, 444 F. 2d 841, 851, 853 (D.C. Cir. 1971), cert. den. 403 U.S. 923, 91 S. Ct. 2229, 2233, 29 L. Ed. 2d 701 (1971), reh. den. 404 U.S. 877, 92 S. Ct. 30, 30 L. Ed. 2d 125 (1971), in which Judge Leventhal emphasized that “[I]n the last analysis it is the agency’s function, not the Examiner’s, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency’s choice that governs” (St. Vincent’s, 154 N.J. Super. 24, 32-33). As discussed *infra*, the Board’s Final Administrative Decision here was amply supported by substantial evidence, and the Board faultlessly applied binding and established legal precedent

in reaching its decision, including Cardinale and M.R. Its decision should be affirmed.

**A. Inability to Comply with N.J.S.A. 43:16A-8(2)**

Under N.J.S.A. 43:16A-8(2), a disability retiree may be required to undergo a medical examination “to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished.” Ibid. Additionally, “[i]f the report of the medical board shall show that such beneficiary is able to perform either his former duty or any other available duty in the department which his employer is willing to assign to him, the beneficiary shall report for duty.” Ibid. Under this “governing legislative framework, the inability to return to duty...prevents the Board from statutorily terminating any granted benefits, a result which would contravene important public policy underlying disability retirement benefits.” Cardinale, 458 N.J. Super. at 263.

The Appellate Division’s holding in Cardinale, cited by the Board in its Final Administrative Determination, fully supports the Board’s denial of Fermin’s request to apply for AD here. Similar to Fermin, the petitioner in Cardinale applied for a disability retirement benefit and entered into an agreement to “irrevocably resign from” employment with the understanding that such a “separation from employment is not revocable.” Id. at 265.

The pension board “declined to process Cardinale’s [disability] application” pursuant to the return to work statute, N.J.S.A. 43:16A-8(2), because “the only obstacle to his [returning to work] was not the purported disability, but rather, his irrevocable resignation.” Ibid. Cardinale appealed, arguing that the Board misapplied the return to work statute when it found that the terms of his settlement agreement rendered him ineligible for disability retirement benefits. Id. at 263. The Appellate Division “flatly reject[ed]” this argument, holding that “when a PFRS member separates from employment by deliberately and irrevocably resigning from active duty...that person is ineligible for...[a] disability retirement benefit[] because he or she can never return to work.” Id. at 273-74.

Similar to Fermin here, Cardinale also argued on appeal that the Board’s decision “deprived him of the opportunity to show he suffered from a disability.” Id. at 267. The Court rejected this argument, finding that even if the Court assumed Cardinale’s disability existed, the existence of a disability “is irrelevant to our holding that his irrevocable resignation made him ineligible for benefits in the first place” and that “even if he was disabled – as a matter of law – the consequence of his irrevocable resignation is determinative”; his “permanent inability to return to duty is fatal.” Id. at 268-69.

Similarly, the petitioner in M.R. applied for a disability benefit and entered into a settlement agreement with his employer (the New Jersey judiciary) in which



he resigned and agreed to “not seek reemployment with the Judiciary in the future” in exchange for the Judiciary to drop pending disciplinary charges. 2020 N.J. Super. Unpub. LEXIS 615, at \*\*1-2. The Board found that petitioner’s settlement “disallowed the processing of his disability claim” because he had no job to return to and could not comply with the return to work statute, N.J.S.A. 42:16A-8(2). *Ibid.*

The Appellate Division affirmed the Board’s decision to not process M.R.’s disability application, finding that the issue of eligibility was a “critical threshold issue” and that M.R.’s inability to return to the Judiciary rendered him “ineligible for participation in the disability pension scheme.” *Id.* at 5. The Appellate Division noted that its decision in M.R. was controlled by its prior decision in Cardinale. *Ibid.* The reasoning in Cardinale and M.R. apply with equal force here.<sup>5</sup>

Indeed, Fermin – like the petitioners in Cardinale and M.R.– has an additional/impermissible obstacle (i.e., the terms of the Settlement Agreement) precluding him from ever returning to work for Paterson; further, his alleged

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<sup>5</sup> Petitioner’s attempt to distinguish M.R. on the grounds that the employee there was suspended for drug charges (Pet. Br., pp. 31, 33) is unavailing. Not only is that a distinction without a difference as to Fermin’s ineligibility for AD, M.R. mentions nothing about drug charges. Further, Petitioner’s argument that M.R. was decided on 4/6/20, after Fermin’s Settlement Agreement was executed, and had no retroactive effect is to no avail because the Board’s Final Administrative Decision was issued on November 16, 2022 and properly applied existing case law. In any event, Petitioner does not dispute that Cardinale was decided prior to the execution of the Settlement Agreement.

disability “is irrelevant” in determining his eligibility to apply for a disability retirement pursuant to the return to work statute.

It is noteworthy that ALJ Tiscornia did not even mention Cardinale or M.R., let alone distinguish those cases, in his decision (PA124-PA130), although those cases were briefed below (RA6-RA7). Judge Tiscornia’s assertion that N.J.S.A. 43:16A-8(2) cannot provide grounds for barring an individual from applying for AD (PA128) flies in the face of Cardinale and M.R., and his decision was properly rejected by the Board.

Although Petitioner’s argument is not easy to understand, Petitioner appears to be arguing that at the time the Board issued its November 16, 2022 Final Administrative Decision, Petitioner had been disabled for five years and therefore the examinations set forth in N.J.S.A. 43:16A-8(2) were purportedly a “moot issue” (Pet. Br., pp. 19, 26-27). Petitioner argues that the Board has not ordered an IME to determine whether Petitioner regained fitness or could regain fitness (Pet. Br., p. 11), and notes the ALJ’s observation that Fermin can seek employment with another employer should he believe he is fit for duty, and disability benefits can then be discontinued (Pet. Br., pp. 13, 18, 27, 36).

As an initial matter, the alleged shooting incident occurred on January 1, 2018, four years before the November 16, 2022 Settlement Agreement (PA147). The Board had no reason to order an IME because Petitioner was barred from re-

employment with Paterson due to the Settlement Agreement. Nor had he been retired on a disability retirement allowance as contemplated by N.J.S.A. 43:16A-8(2). Petitioner's argument that Fermin can seek employment with another employer was rejected by the Court in M.R., which noted that our courts have consistently ruled that employees who are no longer disabled must return to either their prior positions or any available duty that their employers are willing to assign to them. M.R., 2020 N.J. Super. Unpub. LEXIS 615, at \*\*9-10.

In short, Fermin's inability to return to work for Paterson "is fatal" to his AD application.

**B. Ineligible Under N.J.A.C. 17:1-6.4(b)**

In its Final Administrative Determination, the Board noted an additional, entirely independent reason why Fermin cannot receive AD – he is ineligible to receive such benefits under N.J.A.C. 17:1-6.4(b). A member of the Police and Firemen's Retirement System of New Jersey is eligible for AD if that individual has been "mentally or physically incapacitated for the performance of his usual duty or of any other available duty in the department which his employer is willing to assign to him." N.J.S.A. 43:16A-6. However, in order to be eligible to even apply for AD, applicants must prove "that their asserted disability is 'the reason the member left employment.'" In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 397 (App. Div. 2018) (affirming N.J.A.C. 17:1-6.4 – i.e., separation from service rule – and

holding that “disability retirees must have left service because of the disability in the first instance”).

N.J.A.C. 17:1-6.4 provides in pertinent part:

“(a) Each disability retirement applicant must prove that his or her retirement is due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment; the disability must be the reason the member left employment.

“(b) Members who have involuntarily or voluntarily terminated service for any of the reasons listed below will not be permitted to apply for a disability retirement:

“1. Removal for cause or total forfeiture of public service;

“2. Settlement agreements reached due to pending administrative or criminal charges, unless the underlying charges relate to the disability;....”

Fermin cannot deny that he left employment with Paterson pursuant to a Settlement Agreement that settled pending administrative/disciplinary charges. Fermin’s repeated argument that the only purpose of the Settlement Agreement was to secure a settling of monies due to Petitioner under his contract, and that there was no *quid pro quo* agreement designed to avoid disciplinary charges (Pet. Br., pp. 6, 9-10, 12-13, 25-26, 29) is meritless. The Settlement Agreement makes very clear that in exchange for Petitioner’s resignation and debarment from further employment with Paterson, the disciplinary proceedings against him would be withdrawn (RA38). Although Petitioner argues that the Board had no evidence of a *quid pro quo* arrangement, the Board specifically noted that through the Settlement

Agreement, Fermin avoided disciplinary charges and termination in exchange for his promise to retire (PA150).

Petitioner's separation from employment was not solely due to his alleged disability and the underlying charges against him were not all related to his alleged disability. This is evidenced by the fact that if for some reason his alleged disability vanished and he sought reemployment with Paterson, all disciplinary charges seeking his removal would be immediately reinstated (RA38). Stated another way, even in the absence of his asserted disability, Paterson would still seek to separate Petitioner from employment for reasons other than his underlying disability. The terms of the Settlement Agreement make clear that Petitioner's return to the job would not be permitted even if the conditions of his disability abated ("Fermin hereby understands and agrees that from February 1, 2020 forward he is forever barred from future employment with [Paterson]...[and] he is barred from taking any actions as a law enforcement officer for the Paterson Police Department" [RA38]). Thus, the Board properly deemed Petitioner ineligible to apply for AD benefits on statutory grounds.

Petitioner points to the assertion in ALJ Tiscornia's Initial Decision that "the very settlement agreement that the Board points to as a means by which to preclude Fermin's application from being processed contemplates and specifically provides that Fermin will apply for accidental disability benefits. It seems somewhat

contradictory to reference a document that specifically states Fermin is to apply for accidental disability benefits as a reason to bar Fermin from applying for said benefits” (PA128). But this ignores that the provisions in the Settlement Agreement between Paterson and Petitioner (which Petitioner does not claim were drafted by the Board), simply cannot override the statutory prohibitions in N.J.S.A. 43:16A-8(2) and N.J.A.C. 17:1-6.4(b). Petitioner cites to no case law to support the proposition that the Settlement Agreement can override two statutes.

Further, the Court in Cardinale recognized that the Board is not bound by settlement agreements entered into by police departments and their officers. Cardinale, 458 N.J. Super. 260, 274.

It is noteworthy that Petitioner admits that the Settlement Agreement “included a compensation package for Fermin covering several complex financial fringe benefits under the SOA contract” (Pet. Br., pp. 11-12). Indeed, Petitioner states that the “settlement agreement financially remunerated him expeditiously” (Pet. Br., p. 37). Thus, Petitioner is not left bereft of resources.

Petitioner asserts that the Board’s Final Administrative Decision is “internally inconsistent in part” with its prior communications (Pet. Br., p. 20). Petitioner does not provide any references to his Appendix demonstrating any alleged inconsistencies, and therefore the argument should be disregarded. In any event, it

is respectfully submitted that there are no inconsistencies that are of any significance to the result here.

The majority of the cases cited by Petitioner in his Brief are not on point, as they deal with the issue of whether the officers in those cases sustained a disability due to a traumatic event. See for example Richardson v. Board of Trustees, Police and Firemen's Retirement System, 192 N.J. 189 (2007); Moran v. Board of Trustees, Police and Firemen's Retirement System, 438 N.J. Super 346 (App. Div. 2014); and Diaz v. Board of Trustees, Police and Firemen's Retirement System, A-3619-21, Unpub. (App. Div. 11/2/23). The alleged merits of Petitioner's disability claim are not properly before this Court, as Petitioner is ineligible for AD under N.J.S.A. 43:16A-8(2) and N.J.A.C. 17:1-6.4(b) and cannot even get out of the starting gate. For that reason, Petitioner's claims regarding the permanency and extent of his alleged disability, based upon documents which are not properly included in the Petitioner's Appendix, are irrelevant to the threshold issue of eligibility under the pertinent statutes.

**CONCLUSION**

For the foregoing reasons, the Board's denial of Fermin's request to apply for AD should be affirmed.

Respectfully submitted,

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Dated: June 20, 2024



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July 25, 2024

**Via eCourts Appellate**

Superior Court of New Jersey  
Appellate Division  
Hughes Justice Complex  
P.O. Box 006  
Trenton, New Jersey 08625

**Re: LUIS FERMIN (Appellant) v. BOARD OF TRUSTEES, POLICE  
AND FIREMEN'S RETIREMENT SYSTEM OF NEW JERSEY  
(Respondent)**

**App. Div. No. A-001270-22**

**On Appeal From:**  
**FINAL ORDER AGENCY DECISION**

**Agency No. 3-102576**

**APPELLANT'S LETTER BRIEF IN REPLY**

Honorable Judges of the Appellate Division:

Pursuant to R. 2:6-2(b) and R. 2:6-5, please accept this Letter Brief in Reply on behalf of the Petitioner-Appellant, Luis Fermin, in lieu of a more formal

instrument in response to the Brief submitted on behalf of the Respondent, Police and Fireman’s Retirement System (hereinafter, "PFRS" or the “Board”).

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## LEGAL ARGUMENT

**Point I. THE BOARD ERRED IN ITS APPLICATION OF THE "SEPARATION OF SERVICE" RULE BECAUSE FERMIN RESIGNED AS A RESULT OF A DISABILITY ARISING FROM THE SAME SHOOTING INCIDENT AS THE ADMINISTRATIVE CHARGES.**

Under New Jersey law, the "separation of service" rule requires disability retirement applicants to prove that their asserted disability is "the reason the member left employment." N.J.A.C. 17:1-6.4(a). Voluntary or involuntary termination of employment for non-disability reasons deems a PFRS member ineligible for disability benefits. See In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J.Super. 386, 394 (App. Div. 2018). In this regard, the "separation of service" statute plainly states that "[s]ettlement agreements reached due to pending administrative or criminal charges," preclude processing of an accidental disability application "***unless the underlying charges relate to the disability...***" N.J.A.C. 17:1-6.4 (emphasis added); see also Rooth v. Bd. of Trs., Pub. Emps.' Ret. Sys., 472 N.J.Super. 357, 367 (App. Div. 2022).

Here, the underlying charges relate to the disability. Fermin resigned as a result of the PTSD disability for which he seeks accidental disability benefits and the administrative charges arose from the same shooting incident that caused said disability. This constitutes a well-recognized exception to the rule denying

disability under the separation of service rule. See In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J.Super. at 397-398. Accordingly, the bar does not apply.

As stated by the Department of the Treasury, Division of Pension and Benefits during its rulemaking session, the separation from service rule "is intended to prevent members from applying for a disability retirement benefit when their service has voluntarily or involuntarily terminated for reasons unrelated to a disability." 48 N.J.R. 1306(a) (June 20, 2016). The Division explained that such former members do not qualify for disability retirement benefits, as they were not totally and permanently disabled from performing their job duties when their service ended; their public service ended for a reason completely unrelated to a physical or mental disability that keeps them from continuing to perform their job duties. Id. (emphasis added). The Board seemingly forgets that Fermin became disabled as a result of PTSD from responding to a dangerous shooting.

In its Brief, the Board misleadingly creates the false impression that Fermin resigned in exchange for the Department dropping administrative charges. But Fermin did not resign to avoid charges; he resigned because he could no longer work due to the disability arising from the same incident as the underlying charges. The charges were dropped because Fermin is disabled. There was no quid quo pro arrangement and the charges were not dropped with prejudice and could be reinstated if Fermin's disability were ever to abate.

Unlike in Cardinale, Fermin pleaded not guilty and requested a hearing. Notably, Fermin is not guilty of the disciplinary charges and he was willing and able to fight them if not for being permanently disabled as a result of the shooting. Further, Fermin, unlike the petitioner in Cardinale, never submitted a separate, irrevocable resignation letter attached to the settlement agreement. Similarly, the petitioner in Rooth, supra, submitted an irrevocable resignation letter, which was attached to her settlement agreement. 472 N.J. Super. at 357, 368. Also, unlike in Cardinale, Fermin's settlement agreement made clear the PPD was to assist him in pursuing accidental disability benefits. The fact that the administrative charges were tabled was merely a collateral, un-bargained for byproduct of the settlement agreement.

**Point II. THE SETTLEMENT AGREEMENT SPECIFICALLY STATES THAT FERMIN RETIRED DUE TO DISABILITY AND FERMIN DETRIMENTALLY RELIED UPON THIS LANGUAGE.**

The settlement agreement, which the Board argues preclude Fermin's application for disability retirement benefits, specifically contemplates and provides for Fermin to apply for accidental disability benefits. As the ALJ determined in her Initial Decision, the Board cannot fairly rely upon a settlement

agreement that specially states Fermin is to apply for accidental disability as a reason to bar him from applying. As aptly stated by the ALJ:

[T]he very settlement agreement that the Board points to as a means by which to preclude Fermin's application from being processed contemplates and specifically provides that Fermin will apply for accidental disability benefits. It seems somewhat contradictory to reference a document that specifically states Fermin is to apply for accidental disability benefits as a reason to bar Fermin from applying for said benefits. It should further be noted that, in the less-than-likely hypothetical situation relied on by the Board, wherein Fermin receives benefits, recovers, and is then denied reemployment, the Board, upon determining that Fermin is fully recovered from his disability, could simply discontinue benefits and Fermin could seek employment elsewhere.

Pa128.

The language used in the settlement agreement reasonably led Fermin to believe that the government would not fight his accidental disability reinterment application. "When dealing with the public," including PFRS members, "government must 'turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens." Cardinale v. Bd. of Trs., Police & Firemen's Ret. Sys., 458 N.J. Super. 260, 273 (App. Div. 2019) (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 378 (1992). "The government must act fairly and 'with compunction and integrity.'" Id. at 379 (internal citations omitted). The government is "always subject to the

guiding principles of fundamental fairness." Milligan v. Dir., Div. of Taxation, 29 N.J. Tax 381, 399 (Tax 2016).

Here, unlike in Cardinale, the settlement agreement includes statements on which Fermin reasonably relied to his detriment. See 458 N.J. at 273-274. In our case, the settlement agreement drafted by the PPD's lawyers repeatedly refers to "disability retirement" as Fermin's reason for leaving. Moreover, the PPD promised not to dispute but rather to facilitate Fermin's accidental disability claim. To the extent the government engaged in subterfuge or otherwise wrongfully induced Fermin to sign the agreement believing he would receive disability benefits, the agreement itself is unenforceable as a matter of equity.

**Point III. THE BOARD ERRED IN DENYING THE TRANSFER OF THIS MATTER TO THE OAL TO HOLD AN EVIDENTIARY HEARING TO RESOLVE A MATERIAL DISPUTED FACT.**

Under the Administrative Procedure Act, the Commissioner has the right to make the discretionary decision whether there are contested material issues of fact requiring an evidentiary hearing. See In re Farmer's Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607, 618 (App. Div. 1992). A hearing is "mandated only when the proposed administrative action is based on disputed adjudicatory facts." Id.; see also N.J.A.C. 17:4-1.7(e) (permitting the Board to retain the matter and

issue an administrative determination where an appeal "involves solely a question of law.").

Here, it remains true that Fermin voluntarily retired but not as avoidance as to disciplinary charges. Fermin retired as a result of his PTSD disability. As explained in Point I, *supra*, if this Court finds that the administrative charges relate to the disability because both arise from the same shooting incident, then the separation of service rule barring the processing of Fermin's disability application simply does not apply as a matter of law, and the application must be considered on its merits by the pension board. See *In re Adoption of N.J.A.C. 17:1-6.4*, 454 N.J.Super. 386, 397-398 (App. Div. 2018).

However, in the event this Court somehow finds that the underlying charges do not relate to the claimed disability, then Fermin respectfully requests a hearing to further develop the record with respect to the circumstances of his signing the settlement agreement to determine whether and to what extent the agreement is binding and/or to what extent the Board is estopped from relying upon said agreement. As set forth in Point II, *supra*, language used in the settlement agreement strongly suggests that Fermin retired because of his PTSD disability, yet the Board persists in its contention that Fermin retired to avoid disciplinary charges. To the extent this is a genuinely disputed issue of fact, a hearing may be necessary to resolve the matter, or this Court can take jurisdiction and decide



certain undisputed facts. Also, the Board's concern that plaintiff could never return to the Paterson police department was a moot point since it had been five years since the PTSD disability was determined at the time the Board refused to accept the disability application from Fermin after the ALJ rules, and at no time did the Board order a fitness evaluation to determine if Fermin's PTSD had dissipated; which it did not according to the exhibits and submissions in the lower forum.

### **CONCLUSION**

For the foregoing reasons, Petitioner-Appellant Luis Fermin, by and through his undersigned attorney, Eric V. Kleiner, Esq., respectfully requests entry of an Order reversing the Board's ruling and directing it to accept Fermin's application for permanent disability and determine its *bona fides* on the merits. Alternatively, a remand is requested to conduct an evidentiary hearing as to the enforceability of the settlement agreement.

Respectfully submitted,

by: /s Eric V. Kleiner  
ERIC V. KLEINER, ESQ.  
Attorney for Petitioner-Appellant,

Dated: July 17, 2024