

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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OBRIAN PASTRANA,

Petitioner,

**For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules**

Index No. 160515/2023

-against-

VERIFIED PETITION

NEW YORK CITY FIRE PENSION FUND,
BOARD OF TRUSTEES OF THE NEW YORK
CITY PENSION FUND, and THE CITY OF NEW
YORK,

**ORAL ARGUMENT
REQUESTED**

Respondent(s).

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Petitioner OBRIAN PASTRANA, by and through his attorney, CHRISTINA MARTINEZ, for his verified petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), respectfully shows as follows:

NATURE OF PROCEEDING

1. This is a proceeding pursuant to Article 78 of the CPLR, seeking inter alia to review, annul, and reverse the determination made by Respondents denying Petitioner a pension of three quarters of his salary as required by New York City Administrative Code § 13-353, and for a further Order directing payment of such pension retroactive to the date of his retirement, and for such other appropriate relief.

PARTIES

2. Petitioner OBRIAN PASTRANA is an individual who resides in Orange County, New York. PETITIONER has been employed by the RESPONDENT NEW YORK CITY FIRE DEPARTMENT ("FDNY") since 2006 and was promoted to Firefighter in 2013. He has been a member of the retirement

system and New York City Fire Pension Fund at all relevant times hereinafter mentioned, and as a member thereof, made any and all contributions thereto as required by law.

3. Respondent, CITY OF NEW YORK (“City”), is a municipality organized and existing under the laws of New York State. The CITY OF NEW YORK was and is responsible for the policy, practice, supervision, and conduct of its Officers and Agencies at all relevant times hereto. The CITY OF NEW YORK is a body within the meaning of Article 78 of the CPLR. THE CITY OF NEW YORK's principal office is located at 1 Centre Street, New York NY 10007.

4. Respondent, THE NEW YORK CITY FIRE PENSION FUND is a corporation duly organized pursuant to the laws of the State of New York, and is the pension fund for the City’s firefighter and fire officers, headquartered in New York, New York, at One Battery Park Plaza – 9th Floor, New York, New York 10004.

5. Respondent, THE NEW YORK CITY FIRE PENSION FUND (“Pension Fund”), is charged, pursuant to the Administrative Code of the City of New York, with administering the FDNY Pension Fund.

6. Respondent, THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE PENSION FUND consists of City and Union representatives, who review and vote on whether a member is entitled to a disability retirement pension.

7. Respondent, THE BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE PENSION (“Board of Trustees”), is charged, pursuant to the Administrative Code of the City of New York, with administering the New York City Fire Department Pension Fund.

8. Included in the duties of the BOARD OF TRUSTEES and PENSION FUND, is the determination of applications for line-of-duty disability pensions by firefighters and fire officers.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to CPLR 506(b) and 7804(b).

10. Venue in the County of NEW YORK is proper pursuant to CPLR 506(b) because it is the county where RESPONDENTS made the determination herein complained of.

INTRODUCTION

11. Petitioner Obrian Pastrana's journey as a firefighter is a testament to his unwavering commitment to the city he swore to protect. At the tender age of twenty, he embarked on a career with the New York City Fire Department ("FDNY") as an Emergency Medical Technician in 2006. In 2013, he ascended to the role of a firefighter, ready to face the inherent dangers of his vocation with courage and dedication. Little did he know that the ultimate test of his heroism would come during the COVID-19 pandemic, a time when New York City cried out for its brave first responders to stand tall.

12. While most of the city sought shelter from the storm, Firefighter. Pastrana and his fellow first responders bravely plunged into the maelstrom of uncertainty, providing essential services to a grateful city. They were hailed as heroes by New York's residents, the media, and the government for their selfless commitment to safety. For Firefighter Pastrana, risking his life to ensure the well-being of New Yorkers was second nature, and he never hesitated to report for duty.

13. In October 2021, when the FDNY and the City mandated that he receive the COVID-19 vaccine as a temporary condition of employment, Firefighter Pastrana did not waver in his duty. He rolled up his sleeve and received the jab, as required, because that is what heroes do – they put the welfare of others above their own. Tragically, it was in the line of this civic duty that he was injured by the COVID-19 vaccine.

14. At the young age of thirty-five, Firefighter Pastrana's lifelong dream of serving the FDNY has been cruelly torn away from him, replaced by a future plagued by permanent disability and financial instability. Despite an immediate severe anaphylactic allergic reaction to the first dose of the COVID-19 vaccine, which was documented as a service-connected injury by the FDNY doctors, the FDNY required Mr. Pastrana to receive the second dose. After the second dose, Mr. Pastrana went into heart failure and was diagnosed with myocarditis, a rare but known adverse reaction to the Pfizer COVID-19 vaccine. His heart will never be the same, and the FDNY ultimately deemed him unfit for duty, ending his career as a firefighter in the cruelest of ways. This shocking turn of events stands as a haunting testament to the price Firefighter Pastrana paid for his unwavering dedication to his duties. Everyone – from the FDNY to the Medical Board of the New York City Fire Pension Fund and even the Board of Trustees – concurs on one undeniable fact: Firefighter Pastrana is permanently disabled from the COVID-19 vaccine. However, the crux of the matter lies in the categorization of his disability benefits – a critical decision that now stands as a glaring injustice.

15. This Article 78 proceeding challenges the decision of the Board of Trustees of the New York City Fire Pension Fund to deny Firefighter Pastrana the Accidental Disability Benefits he so rightfully deserves, instead awarding him ordinary disability benefits through the outcome of a tie vote. Firefighter Pastrana, like countless other civil service workers in New York City, is a member of the municipal pension fund and retirement system, specifically, the New York City Fire Pension Fund. The pension contributions deducted from every one of his hard-earned paychecks have, over the years, built the foundation for his retirement pension, reinforcing his belief that should disability ever strike, his financial future would remain secure.

16. Now, this Court stands as the last bastion of hope, with the authority to rectify the wrongs perpetrated by the Board of Trustees. Mr. Pastrana brings this Article 78 proceeding to review the

determination by the Board of Trustees of the New York City Fire Pension Fund, denying him Accidental Disability Retirement (“ADR”) Benefits, which was affected by an error of law, was arbitrary and capricious, and an abuse of discretion pursuant to CPLR § 7803(3). It is imperative that the Court exercise its judicial authority to provide justice for this dedicated firefighter who sacrificed his health, career, and dreams to serve the people of New York City.

STATEMENT OF FACTS

17. Petitioner, O’Brian Pastrana, is a FDNY Firefighter, and has been employed by the FDNY since he was twenty years-old in 2006. On October 20, 2021, the New York City Commissioner of Health and Mental Hygiene issued the City Worker COVID-19 Vaccine Mandate.¹ A accurate copy of the Health Commissioner’s Order is attached hereto as Exhibit 1.

18. On October 29, 2021, the last day of the deadline, Petitioner received the first dose of the Pfizer COVID-19 vaccination in order to comply with the Vaccine Mandate and continue working as a Firefighter.

19. Immediately thereafter, he developed hives, swelling of his lips, sweats, chills, and body aches. An accurate copy of the Commissioner’s Application, dated March 10, 2023, is attached hereto as Exhibit 2. “He was seen in the ER and was treated with oral steroids, Benadryl and H2 blockers (his ESR was elevated at that time at 22, and his D-dimer was normal at 18). *Id.* On November 1, 2021, an FDNY Bureau of Health Services (“BHS”) Doctor, Dr. Barbara Cheung, diagnosed Firefighter Pastrana with “COVID-19 vaccine side effect”. An accurate copy of the FDNY MD-9 Summary Report generated on March 16, 2023, is attached as Exhibit 3. This caused him to miss three days of work from October 30, 2021 to November 2, 2021. *Id.* Dr. Cheung diagnosed Petitioner with “COVID-19

¹Health Commissioner’s Order, accessible at <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-city-employees.pdf>

VACCINE SIDE EFFECT” and noted that this was “SC” (Service-Connected). An accurate copy of BHS Examination Reports are attached as Exhibit 4 – *see* p. 32.

20. According to the Centers for Disease Control (“CDC”), a “severe allergic reaction” after a previous dose of the COVID-19 vaccination or an “immediate allergic reaction of any severity” to a previous dose are contraindications to any future doses of the vaccine. An accurate copy of *Contraindications and precautions*, Centers for Disease Control, last updated August 25, 2021, is attached as Exhibit 5. This was the most up-to-date guidelines published by the CDC at the time that Petitioner received the COVID-19 vaccines.

21. On November 15, 2021, Firefighter Pastrana had to be taken from the firehouse to the hospital in an ambulance while on active duty due to the worsening and severity of his allergic reaction, which included rash, hives, and swelling in the lips. He was seen in the emergency room and was given epinephrine, a drug commonly used to treat anaphylaxis, along with prednisone. An accurate copy of the After Visit Summary is attached as Exhibit 6.

22. He never returned to the firehouse again.

23. On November 21, 2021, he was again seen in the ER with “worse shortness of breath and hives”. Ex. 2. The After Visit Summary from the Garnet Health Medical Center Emergency Department shows that Petitioner was diagnosed with anaphylaxis. An accurate copy of the After Visit Summary is attached as Exhibit 7. From November 15, 2021 to November 22, 2021, the FDNY documented that he missed seven days of work. Ex. 3.

24. At every BHS doctor appointment, the Petitioner articulated the fact that he was having ongoing severe allergic reaction to the COVID-19 vaccine and that he was concerned about getting a second dose. Despite his ongoing severe allergic reaction to the first dose, the FDNY not only

recommended, but required, Firefighter Pastrana to receive the second dose of the COVID-19 vaccine. *See Pet'r's Aff.*

25. On November 23, 2021, at the FDNY's direction, despite fear and serious reservations, Firefighter Pastrana received the second dose of the COVID-19 vaccine. After his second dose, his medical condition further deteriorated, and he developed shortness of breath, chest pain, decreased oxygen levels, and a worsening of his swelling and hives. He presented to his doctor at Crystal Run Healthcare and was transferred to the emergency room. An accurate copy of Crystal Run Healthcare summary is attached as Exhibit 8. He was again seen in the ER and treated with IV steroids and a full regimen for allergic reactions. An accurate copy of After Visit Summary is attached as Exhibit 9.

26. "A note from Saint Lukes Cornwall Hospital emergency room, dated 11/30/2021, noted the member had acute urticaria² post COVID vaccine injection." An accurate copy of the New York City Fire Pension Fund's Subchapter 2 Medical Board's Recommendations, dated May 2, 2023, is attached as Exhibit 10. "The member was treated with IV methylprednisolone and IV famotidine as well as Benadryl. As of a follow-up on 11/30/2021, the member was on cyclobenzaprine, 10 mg, 3 times daily, famotidine, 40 mg, twice daily, ibuprofen, 600 mg, 3 times daily, as needed Xyzal, 5 mg, 3 times daily, and metformin, 500 mg daily. These medications were, in part, instituted for swollen lips and hives." *Id.*

27. Despite medication, his symptoms continued, leading to cardiac testing by Cardiologist Dr. Totonelly, MD/JD FACC, FSCAI, of Dutchess Medical Associate, PC. which revealed reduced Left Ventricular Ejection Fraction and fibrosis. Dr. Totonelly stated that he "definitely suffers from side effects due to the vaccine". An accurate copy of the Dutchess Medical Associates report, dated January 6, 2022, is attached as Exhibit 11.

² Urticaria, also known as hives, is a skin reaction that causes itchy welts. *Chronic hives*, MAYO CLINIC, [https://www.mayoclinic.org/diseases-conditions/chronic-hives/symptoms-causes/syc-20352719#:~:text=Hives%20—%20also%20called%20urticaria%20\(ur,chronic%20hives%20isn%27t%20clear](https://www.mayoclinic.org/diseases-conditions/chronic-hives/symptoms-causes/syc-20352719#:~:text=Hives%20—%20also%20called%20urticaria%20(ur,chronic%20hives%20isn%27t%20clear) (last visited October 20, 2023).

28. Petitioner followed up with Dr. Totonelly on January 19 and January 24, 2022. True and accurate copies of the Dutchess Medical Associates report, dated January 19, 2022, is attached as Exhibit 12, and the report dated January 24, 2022 is attached as Exhibit 13. On January 25, 2022, Firefighter Pastrana was seen by FDNY BHS Dr. Hurwitz, who diagnosed him with myocarditis and COVID-19 vaccine side effect, both of which were labelled “service connected.” Ex. 4, p. 24. Dr. Kurwitz noted that Petitioner “was “recently seen by cardiologist who feels he has active subacute myocarditis”. *Id.* Again on February 9, 2022, Petitioner was seen by another FDNY BHS doctor – Dr. Dianne Acuna, who also diagnosed Firefighter him with myocarditis and COVID-19 vaccine side effect, both of which were noted to be service connected.” Ex. 4, p. 22-23.

29. On February 22, 2022, Petitioner had a cardiac MRI at NYU Langone, referred by FDNY BHS Dr. Acuna: The findings were LV diminished systolic function (LVEF 40%), RV mildly diminished systolic function (RVEF 45%), and “There are patchy and linear areas of mid wall LGE involving the basal and mid LV septum suggestive of nonischemic myocardial fibrosis”. There is a relative hypokinesia of the mid LV septum and some dyskinesia of the distal mid and apical LV lateral wall suggestive of dyssynchrony.” An accurate copy of the MRI report is attached as Exhibit 14.

30. The CDC has declared that “evidence from multiple vaccine safety monitoring systems in the United States and around the globe supports a causal association between mRNA COVID-19 vaccines (i.e., Moderna or Pfizer-BioNTech) and myocarditis and pericarditis.” *Clinical Considerations: Myocarditis and Pericarditis after Receipt of COVID-19 Vaccines Among Adolescents and Young Adults*, Centers for Disease Control, available at <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/myocarditis.html> (last accessed October 20, 2023).

31. On March 2022, Firefighter Pastrana was diagnosed with COVID-19. Ex 2.

32. On May 12, 2022, Petitioner's EKG noted "Tachycardia" and a "hypertensive response to exercise", and indicated a patient history of "Tachycardia, CMP, Myocarditis, Chest pain, Dyspnea/SOB, Borderline DM." The Petitioner "achieved greater than 85% of maximum predicted heart rate". An accurate copy of the EKG report is attached as Exhibit 15.

33. On May 19, 2022, Petitioner underwent allergy testing which conclusively ruled out any other allergic reactions. His test results revealed no food allergies and mild allergies to dust, cockroaches, ragweed, and sagebrush. An accurate copy of the Allergy Test results is attached as Exhibit 16.

34. On May 24, 2022, Petitioner underwent a cardiac MRI ("35 year old man with history of myocarditis undergoing evaluation for follow-up."), which indicated 1) interval improvement in biventricular function with LVEF currently 53% and RVEF 55%, and 2) "persistent mild linear mid myocardial late gadolinium enhancement within the basal anterior septum." An accurate copy of the MRI report is attached as Exhibit 17.

35. On February 28, 2023, Petitioner was examined by FDNY BHS. The Examination Report, signed by Dr. Acuna, Dr. Cheng, and Dr. Ly ("the Three Physician Board"), stated:

CARDIO: this November is 2 years since was FD and does not feel he will be able to ever return to FD. Thus this is a 3PB for fitness/disability retirement...
3PB... 36 y/u FF OTJ 10 years who developed swollen lips, sweats, chills and body aches after receiving COVID vaccine on 10/29... he was seen in the ER (ESR was elevated 22, D-dimer normal 181), on 11/15 he again developed hives and swollen lips and was given Epi in the ER along with prednisone. The plan was to RTFD 11/22 however on 11/21 he against went to ER with SOB hives and more prednisone was given. He received the second vaccine on 11/23 with fatigue and aches but plan again was to RTFD 11/29 the allergic reaction worsened and he was given IV steroids... he was started on a regimen for allergic reactions but given the persistent chest pain and SOB, he underwent cardiac testing that included ECHO with reduced LVEF. He continued to have chest pain and DOE and ultimately was diagnosed with COVID in March of 2022. Persistent symptoms despite medications and obtained cardiac MRI that revealed patchy areas of fibrosis as well as decreased LVEF and RVEF thus the diagnosis was that of myocarditis... his medications were adjusted to include entresto, HCTz, ... by June 2022 MRI revealed persistent fibrosis despite improved LVEF; medications still included entresto, HCTZ, baby asa, metformin... no change in weight at this time. Reviewed most recent ECHO... still

having DOE and has brosis but improvement in the LVEF thus a stress test was performed and he was only able to achieve 10 METS due to DOE and chest pain Since that time, he contintues to experience dyspnea doing activities of daily living, (playing with his young daughter, etc.) and the chest pains come and go all the time... will have pulmonary evaluation to r/o any pulmonary etiology for his symptoms however given the persistent. DOE/CP and the diagnosis of myocarditis with persistent fibrosis evidence of MRI, he can be incapacitated suddenly thus is unfit permanently for RTFD... recommended LD/LSS.”

Ex. 4, p 3-4.

36. The diagnosis was marked as Service-Connected. Ex. 4, p 3-4.

37. The same day – on February 28, 2023, the FDNY Chief Medical Officer, Karen Hurwitz, M.D., submitted the Three Physician Board’s diagnoses and opinions to the Fire Commissioner. Firefighter Pastrana was diagnosed with: (1) allergic reaction to COVID vaccine, (2) Myocarditis, and (3) COVID disease. Dr. Hurwitz opined that Firefighter Pastrana is permanently unfit for firefighting duties. Dr. Hurwitz also found that Firefighter “is at an increased risk for sudden incapacitation” “[g]iven the findings on the MRI, the history of the COVID, the history of the allergic reaction to the vaccine, and the persistent findings of shortness of breath, chest pain, fatigue, and fibrosis on cardiac MRI. Ex. 2.

38. On March 10, 2023, Firefighter Pastrana was evaluated by FDNY BHS Dr. Anna Nolan. The “M.D.s Report” states: “referred to have pulmonary evaluation to r/o [rule out] any pulmonary etiology for his symptoms however given the persistent DOE/CP [dyspnea on exertion/chest pain] and the diagnosis of myocarditis with persistent fibrosis evidence of MRI, he can be incapacitated suddenly thus is unfit permanently to RTFD [return to full duty].” Ex 4, p1-2. The report also noted “vaccine side effect with associated myocarditis.” After the examination he was taken off full duty and put on light duty and recommended for retirement. Ex 4, p1-2. The diagnosis code was service connected. Ex 4, p1-2. Additionally, the chart on the examination report noted a service-connected diagnosis of “COVID-19 VACCINE SIDE EFFECT”. Ex 4, p1-2. The chart also noted a service-connected diagnosis of

“MYOCARDITIS”. Ex 4, p1-2. The chart also noted a service-connected diagnosis of “COVID19 CONFIRMED”. And a service-connected diagnosis of “ADJUST DISORDER W/ ANXIETY, DEP”.

Ex 4, p1-2.

39. On March 10, 2023, Fire Commissioner Laura Kavanaugh processed the Fire Commissioner’s Application based on the unanimous opinion of the Three Physician Board. Ex 2.

40. On May 2, 2023, after interviewing Petitioner, the Subchapter 2 Medical Board (“Cardiology Medical Board”), issued the following determination:

Based upon our review of all medical records and interview with the member, it is the unanimous opinion of the Subchapter 2 Medical Board that FF Pastrana is permanently disabled as a consequence of myocarditis with ongoing symptoms, status post COVID vaccinations which precludes him from firefighting duties. Therefore, we recommend that he be granted an Ordinary Disability retirement for his Fire Commissioner’s application for myocarditis with ongoing symptoms. He may engage in gainful and suitable occupation.

Ex. 10.

41. No reason was given for recommending Ordinary Disability as opposed to ADR. Ex 10.

42. On May 4, 2023, “the Subchapter 2 Medical Board focused its evaluation on [Petitioner’s] respiratory tract” and recommended that his application for disability benefits be denied based on normal pulmonary function testing and imaging studies of his lungs. An accurate copy of the Subchapter 2 Medical Board (Respiratory) (“Respiratory Medical Board”) Recommendation is attached as Exhibit 18. This only looked at Petitioner’s respiratory function and found no reason for disability benefits due to respiratory disability.

43. On June 28, 2023, the Board of Trustees had its regular meeting. Petitioner was represented by counsel at this meeting. Petitioner’s attorney submitted a letter to the Board of Trustees outlining the reasons that the Petitioner was medically and legally entitled to ADR Benefits and requesting that the Petitioner be upgraded accordingly. An accurate copy of the Counsel’s Letter is attached as Exhibit 19.

44. The Board of Trustees is comprised of twenty-four votes. The United Firefighters Association (“UFA”) and United Fire Officers Association make up twelve votes of the total votes (“Union Board Members”), and representatives from the Fire Commissioner, Department of Finance, Mayor’s Office, and Comptroller’s Office make up the other twelve votes (“City Board Members”). At the meeting, one of the UFA members made a motion to increase Petitioner’s pension from Ordinary Disability to Accidental Disability. It came down to a split-vote. An accurate copy of the Board of Trustees Meeting Minutes is attached as Exhibit 20. All of the Union Board Members voted in favor of upgrading Petitioner to ADR Benefits and all of the City Board Members voted against upgrading Petitioner. An accurate copy of the New York City Fire Pension Fund’s final determination, dated June 28, 2023, is attached as Exhibit 21.

45. This terrible tragedy has caused the Petitioner to suffer from depression and anxiety. He regularly receives ongoing mental health treatment from a specialist. He has been diagnosed with ongoing posttraumatic stress disorder, and adjustment disorder with depressed mood. He deals with frustration, intrusive thoughts, sadness, anger, grief, self-doubt, guilt, loss, regret, feels invisible, and is completely devastated by what has happened to him. An accurate copy of the Mental Health Case Reports are attached as Exhibit 22.

46. Physically, he suffers from permanent cardiovascular disability, chronic fatigue, trouble breathing, chest pain, loss of energy, shortness of breath. He cannot walk more than short distances. He must be on medication for the long-term. Personally, his family life is also suffering. He cannot play catch with his young daughter any more. He cannot help his wife around the house. He cannot afford to make mortgage payments or afford basic necessities due to the loss of income being on ordinary disability. He continues to struggle with immense loss over his career as a firefighter, his health, longevity of life, being physically able-bodied, and never having complete heart function again.

LEGAL ARGUMENT

THE PENSION BOARD'S DENIAL OF ACCIDENTAL DISABILITY RETIREMENT BENEFITS IS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF LAWFUL PROCEDURE, MADE IN ERROR OF LAW, AND AN ABUSE OF DISCRETION.

47. CPLR Article 78 exists to provide judicial review of various administrative determinations. *See* CPLR 7801 & 7802. PETITIONER seeks mandamus to review relief which permits an administrative determination to be set aside if it “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion”. CPLR 7803(3).

48. There is no rational basis for the finding that the Petitioner is not entitled to Accidental Disability Pension Benefits. The denial of Accidental Disability Pension Benefits by tie vote of the Board of Trustees is arbitrary and capricious and not supported by substantial evidence.

49. In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis or is arbitrary or capricious. (*see, Matter of Canfora v. Board of Trustees*, 60 N.Y.2d 347, 351, 469 N.Y.S.2d 635, 457 N.E.2d 740; *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 230–231, 356 N.Y.S.2d 833, 313 N.E.2d 321).

50. The New York Court of Appeals held that “[t]he arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is **without foundation in fact**. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. The proper test is **whether there is a rational basis** for the [agency’s determination].” *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974) (cleaned up, internal citations omitted, and emphasis added). *See also 512–3rd St., Inc. v. New York State Liquor Auth.*, 217 A.D.2d 1010, 629 N.Y.S.2d 932 (4th Dep’t 1995).

51. If the Agency's action is without sound reason and is not “[supported] by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination” than the decision can be vacated. *Ador Realty, LLC v. Division of Housing and Community Renewal*, 25 AD.3d 128, 139-140 (2d Dept 2005).

52. “As to [] an error of law, its meaning is rather clear cut and most often involves an allegation that the agency improperly interpreted or applied a statute or regulation.” *New York City Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994). In this regard, courts will uphold the interpretation of regulations by the agencies responsible for their administration if such an interpretation is reasonable. *See Howard v. Wyman*, 28 N.Y.2d 434, 438, 322 N.Y.S.2d 683, 271 N.E.2d 528 (1971). The “arbitrary and capricious and error of law standards are very similar.” *Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals*, 46 Misc. 3d 325, 332–33, 995 N.Y.S.2d 659, 666 (Sup. Ct. 2013), *aff'd*, 120 A.D.3d 1606, 992 N.Y.S.2d 667 (2014).

53. Firefighter Pastrana received a permanent disability as a result of a severe allergic reaction that he received from the COVID-19 vaccine which was sustained due to the City’s mandatory COVID-19 vaccine requirement for firefighters and other City Workers.

54. There is no rational basis for the Respondents’ denial of Accidental Disability Retirement Benefits.

The Applicable Law

55. "A firefighter is entitled to accidental disability retirement [benefits] when a medical examination and investigation shows that he or she is 'physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service'" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90

NY2d 139, 144 [1997], quoting Administrative Code of City of NY § 13-353). *See also.*” N.Y.C. Admin. Code § 13-304(a).³

56. Petitioner is entitled to Accidental Disability Retirement benefits pursuant to Administrative Code of City of NY § 13-353.

57. Section 363 of the New York Retirement and Social Security Law, states in pertinent part that a member is entitled to accidental disability retirement (“ADR”), if he is: “(1) Physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by his own willful negligence sustained in such service and while actually a member of the retirement system, and (2) Actually in service upon which his membership is based.” NY RETIR & SS § 63(a)(1)-(2).

58. Pastrana is physically incapacitated for performance of duty.

59. Pastrana is unfit for duty and can no longer serve as a FDNY firefighter.

60. Pastrana is and has at all relevant times been a member of the retirement system.

61. Pastrana’s physical incapacitation for performance of duty is the natural and proximate result of an accident not caused by his own negligence sustained in such service.

The ADR Process

62. A member who is awarded ADR Benefits will generally receive a pension that is three-quarters of their final average salary. In determining whether the member is entitled to ADR Benefits, the member’s application involves a two-step process. (*Giuliano v. New York Fire Dep’t Pension Fund*, 185 A.D.3d 812, 813, 127 N.Y.S.3d 572, 575 (2d Dep’t 2020)). “Following a medical examination, the three-physician member pension fund Medical Board, charged with passing upon all such required

³ “The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his or her duties.” N.Y.C. Admin. Code § 13-304(a). “In case of total permanent disability at any time caused in or induced by the actual performance of the duties of his or her position, the amount of annual pension to be allowed shall be not less than three-fourths of the annual compensation allowed such member as salary.” N.Y.C. Admin. Code § 13-304(a)(1).

medical examinations and investigating all essential information in connection with a disability retirement application (*see* Administrative Code § 13–323), determines whether the member is disabled for performance of duty and ought to be retired (*see Matter of Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1–B Pension Fund*, 90 N.Y.2d at 144, 659 N.Y.S.2d 215, 681 N.E.2d 382; Administrative Code § 13–352).” *Id.* at 813-814.

63. If the Medical Board concludes that the member is disabled, it must then determine whether the disability is “a natural and proximate result of an accidental injury received in such city-service” and certify its recommendation on this issue to the Board of Trustees, **which is ultimately responsible for retiring the city service member and determining the issue of service-related causation** (Administrative Code § 13–353; *see* Administrative Code § 13–323[b]; *Matter of Meyer v. Board of Trustees of N.Y. City Fire Dept., Art. 1–B Pension Fund*, 90 N.Y.2d at 144, 659 N.Y.S.2d 215, 681 N.E.2d 382; *Matter of Russo v. Board of Trustees of N.Y. City Fire Dept., Art. 1–B Pension Fund*, 143 A.D.2d 674, 676, 533 N.Y.S.2d 78).

64. In the second step, the Board of Trustees reviews the Medical Board’s recommendation. A pension fund’s Board of Trustees has a duty to scrutinize a Medical Board’s actions and findings, and may not simply adopt a deficient denial. (*See Brady v. City of New York*, 22 N.Y.2d 601, 605-607 [1968]; *Pamlanye v. McGuire*, 111 A.D.2d 721, 723 [1st Dep’t 1985]). The Board of Trustees has the responsibility in determining whether a petitioner’s disability is the natural and proximate result of an accidental injury received in city service. (*Russo v. Board of Trustees*, 143 A.D.2d 674, 676 [2d Dep’t 1988]).

The Board of Trustees’ denial of Accidental Disability Benefits is not based on substantial evidence.

65. The Board of Trustees’ determination must be overturned because it is not based on substantial evidence:

Ordinarily, a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence (*see, Matter of Tobin v. Steisel*, 64 N.Y.2d 254, 259, 485 N.Y.S.2d 730, 475 N.E.2d 101; *Matter of Canfora v. Board of Trustees, supra*). While the quantum of evidence that meets the “substantial” threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require “some credible evidence” (*see, e.g., Matter of Longo v. City of New York*, 178 A.D.2d 253, 255, 578 N.Y.S.2d 131, *aff’d* 79 N.Y.2d 1011, 584 N.Y.S.2d 436, 594 N.E.2d 930; *Matter of Goldman v. McGuire*, 101 A.D.2d 768, 770, 475 N.Y.S.2d 849, *aff’d* 64 N.Y.2d 1041, 489 N.Y.S.2d 467, 478 N.E.2d 983; *Matter of Belnavis v. Board of Trustees*, 84 A.D.2d 244, 248, 445 N.Y.S.2d 736; *Matter of Manza v. Malcolm*, 44 A.D.2d 794, 355 N.Y.S.2d 110; *Matter of Drayson v. Board of Trustees*, 37 A.D.2d 378, 380, 326 N.Y.S.2d 328, *aff’d* 32 N.Y.2d 852, 346 N.Y.S.2d 273, 299 N.E.2d 684). “Some credible evidence” strikes a proper balance between deference to the Medical Board and accountability to [New York City Fire Pension Fund] members.

Borenstein v. New York City Employees' Ret. Sys., 88 N.Y.2d 756, 760–61, 673 N.E.2d 899, 901 (1996)

66. “It is well settled that substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically.” (*Kelly v. DiNapoli*, 30 N.Y.3d 674, 684, 94 N.E.3d 444, 450 [2018] (internal quotations and citations omitted)). “[I]t has been said that credible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered, and further that it must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion “ (*Meyer v. Bd. of Trustees of the New York City Fire Dep't, Article I-B Pension Fund by Safir*, 90 N.Y.2d 139, 147, 681 N.E.2d 382, 387 [1997] (internal citations omitted))

67. There is absolutely no evidence to support the Board of Trustees’ denial of Accidental Disability benefits, let alone evidence from a credible source that would generate any level of conviction in a finding of no causation. All of the evidence supports an award of Accidental Disability Benefits.

68. The question of whether the Petitioner is disabled is not in dispute. In a case like this one, where a disability is found to exist by a medical board, and the denial of accidental Disability Benefits is predicated on a tie vote of the Board, the Court has the power to determine the cause of the disability and award a disability pension. (*see, Matter of Bridgwood v. The Board of Trustees of N.Y. City Fire*

Dept., Art. 1-B Pension Fund, 204 A.D.2d 629, 612 N.Y.S.2d 621; *Matter of Fitzpatrick v. The Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 203 A.D.2d 460, 610 N.Y.S.2d 857; *Matter of Causarano v. Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 178 A.D.2d 474, 577 N.Y.S.2d 134; *Matter of Jones v. Board of Trustees of N.Y. Fire Dept., Art. 1-B Pension Fund*, 123 A.D.2d 628, 506 N.Y.S.2d 896). This Court can set aside a pension denial and award the pension sought and conclude as “a matter of law” that a disability was the “natural and proximate result of a service-related accident.” (See *Hodges v. Bd. of Trustees of New York City Fire Dep't, Article 1-B Pension Fund*, 203 A.D.2d 365, 366, 609 N.Y.S.2d 942, 943 [2d Dep’t 1994]).

69. Here, Petitioner was interviewed by two Medical Boards. The first evaluated cardiovascular disability and the second evaluated respiratory disability. The Respiratory Medical Board found no respiratory disability. The Cardiology Medical Board determined that Petitioner “is permanently disabled as a consequence of myocarditis with ongoing symptoms, status post COVID vaccinations which precludes him from firefighting duties.” Ex. 10. With no reason provided, the Cardiovascular Medical Board recommended Ordinary Disability Retirement Benefits. *Id.* The Medical Board did not base its recommendation for ordinary disability benefits on any evidence in the record. The Medical Board did not articulate any basis for its recommendation, let alone a factually grounded medical basis which can possibly constitute credible evidence on the issue of causation.

70. Moreover, it is *the Board of Trustees* that has the duty to determine from all the available evidence whether the disability was sustained as the result of an accident. “The board could not so delegate its independent responsibility for the determination of the issue upon which depended the granting or denial of the petitioner's application.” (*Brady v. City of New York*, 22 N.Y.2d 601, 606, 241 N.E.2d 236, 238 (1968)). It is well “settled that the Board of Trustees, while bound by the Medical Board's determination of disability, is entitled to make its own determination regarding causation.”

(*Calzerano v. Bd. of Trustees of New York City Police Pension Fund, Article II*, 245 A.D.2d 84, 84, 664 N.Y.S.2d 451, 451–52 [1st Dep’t 1997] (citing *Matter of Borenstein v. New York City Employees’ Retirement Sys.*, 88 N.Y.2d 756, 760, 650 N.Y.S.2d 614, 673 N.E.2d 899; *Matter of Canfora v. Board of Trustees*, 60 N.Y.2d 347, 351, 469 N.Y.S.2d 635, 457 N.E.2d 740)). Thus, it is the Board of Trustees that is responsible for determining the issue of service-related causation, and making the determination for ADR Benefits.

71. **The decision was not warranted by any evidence before the Board, which all makes out causation as a matter of law.** At the June 28th meeting, all of the Union Board Members voted to upgrade to Accidental Disability and all of the City Board Members voted to award only Ordinary Disability, resulting in a tie. Ex. 20, 121:12-16. The City Board Members gave two reasons on the record for refusing to upgrade Petitioner:

72. Mr. Lauger: “... there was not one, but two medical boards, two days apart, one on May 2nd, one on May 4th. They contradict each other. The May 2nd Medical Board says he is permanently disabled – this is ODR – for consequence of myocarditis. The May 4th Medical Board says “there is insufficient objective medical evidence for permanent disability related to his allergic reaction to COVID vaccine and COVID disease. The member has normal pulmonary functions and imaging studies for his lungs.” Ex. 20, 105:23-25, 106:1-15.

73. Mr. Sforza, a Union Board Member, explains that there were two different Boards with different doctors who were evaluating the Petitioner, and the Respiratory Board was “evaluating him to see whether or not the COVID had anything to do with his lungs and whether he was disabled as a result of his lungs. That board found him not disabled for his lungs, and they stated it. They denied him the disability because it wasn’t a lung issue.” Ex. 20, 106:16-25; 107:1-12.

74. There is clearly no rational basis for refusing to award Accidental Disability Benefits based upon the Respiratory Board's determination. It was Petitioner's heart condition that was the basis of his disability retirement, and the Cardiology Board found him disabled.

75. The only other reason given by the Board was by John Dorsa for the Comptroller's Office, who stated "I don't feel that there was enough of an argument to support that this is ADR, so we will be voting no." Ex 20, 120:1-11.

76. "It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* There is no evidence which reasonably supports the proposition that the Petitioner is not entitled to ADR. The statement by Mr. Dorsa was nothing more than a bald conclusion and certainly does not reach the level of substantial evidence. Mr. Laughler's proffered reason – that the Respiratory Board did not find disability – was explained by Mr. Sforza and does not amount to any credible evidence that ADR should have been denied for Petitioner's cardiovascular disability.

77. There is "an absence of substantial evidence when the denial was premised only on a summary conclusion of no causation and lacked any factual basis." (*McDonough v. City of Oneonta*, 237 A.D.2d 692, 694, 654 N.Y.S.2d 213, 214 [3d dep't 1997] [finding sufficient evidence supporting Supreme Court's determination that petitioner is permanently disabled as a result of his heart disease and that his condition was causally related to the stress incurred by petitioner as a result of his physical exertion in the performance of his duties as a firefighter based upon the testimony of petitioner's treating cardiologist, as well as doctor, board-certified in internal medicine, cardiology and critical care, who conducted three separate independent medical examinations of petitioner at the request of the City's

workers' compensation carrier]; *see also* *Matter of Bennett v. Board of Trustees*, 20 A.D.2d 522, 522–523, 244 N.Y.S.2d 735, *supra* [holding that “mere acceptance of the *bald* finding of the medical board” on issue of whether injury was incurred in line of duty was insufficient (emphasis supplied)], *affd.* 16 N.Y.2d 562, 260 N.Y.S.2d 837, 208 N.E.2d 782; *see also*, *Matter of Liston v. City of New York*, 161 A.D.2d 491, 492, 555 N.Y.S.2d 757 [medical board's conclusory finding lacking a factual basis did not constitute “competent evidence” required to rebut statutory presumption of causation], *lv. denied* 76 N.Y.2d 709, 561 N.Y.S.2d 913, 563 N.E.2d 284).

78. Thus, this Court should award him ADR benefits. (*Mescall v. Bd. of Trustees of New York City Fire Dep't, Article 1-B Pension Fund*, 204 A.D.2d 643, 644, 612 N.Y.S.2d 624, 625 [2d dep't 1994]) (held that there was no objective medical evidence that the petitioner's knee condition was the result of anything other than a line-of-duty injury and awarded accident disability retirement benefits).

79. The severe allergic reaction Firefighter Pastrana suffered was unforeseen, unexpected, and not a risk inherent in his ordinary job duties as a firefighter. All of the medical documentation in the record shows that this was the cause of his permanent disability, myocarditis. It resulted directly from the mandated COVID-19 vaccination, making it a unique and unforeseen circumstance. This assertion aligns with the Court of Appeals' definition of an accident, as articulated in *Matter of Kelly v. DiNapoli*. And Firefighter Pastrana's accident was brought about by the mandated COVID-19 vaccination and his severe allergic reaction and subsequent permanent cardiovascular disability, is a clear example of a sudden, unexpected, and injurious event that was not an inherent risk in his ordinary job duties as a firefighter. The unique circumstances surrounding his case, compounded by the contravention of CDC guidance, make it an extraordinary and compelling case for the granting of ADR benefits. And there is no rational basis for a finding that this accident was not service-connected. The strongest evidence of that is the FDNY's own records of Firefighter Pastrana's vaccine reaction and resulting disability which

all are explicitly denoted as service-connected in the records. Ex. 3. Firefighter Pastrana's vaccination was a direct result of his service as a firefighter. The Vaccine Mandate, legally deemed a "term of employment," imposed upon him the occupational requirement to receive the COVID-19 vaccine in the line of duty. His decision to receive the vaccine was not a personal choice but an obligation mandated by his superiors for the safety of the community he served. Moreover, the FDNY instructed him to continue with the second dose, despite clear contraindication by the CDC.

80. Several Union Board Members made impassioned pleas to the Board of Trustees on Firefighter Pastrana's behalf, explaining how very clearly the facts of his case call for ADR:

81. Mr. Eustace said on the record:

I just want to put on the record, we have upgraded a case in the past from COVID-related illness, and it was highly contested, so we tend to see where this is going, but once again, the issue is because it's the word COVID is involved here, and we are just – it's all pretty much semantics between here.

But he went to work, as Eddie Brown said earlier, and if you are sick, it's line-of-duty related. If you pass away, it's going to be a line-of-duty related, but if you are permanently disabled, you are just out of luck.

We even had meetings about this, and we have been told in good faith it will be taken care of, and we're here again and it has not been taken care of.

We didn't fight one fire or do CPR via Zoom. We just came to work and did what we are supposed to do. That's what this guy did. He came to work and did what he's supposed to do. He wanted to support his family, so he took the shot.

He got sick, and they told him to take the next one.

It was a line-of-duty injury, and at work. If he died, he would be taking care of his family. But he didn't die. Now he is just permanently disabled, and here we are not doing the right thing. That's all I have to say.

Ex. 20. 107:13-108:20.

82. Mr Brosi stated:

Now this individual gets his shot, has a known side effect, is actually seen by a medical officer and diagnosed and counted as service connected.

There are protocols in the medical field at that time despite not knowing detailed evidence about the vaccine. That specific protocol isn't to take an additional vaccine.

That person was ordered and I say "ordered" for this specific reason: In the absence of following that order, you were terminated. You lost your gainful employment.

So at this point this person is already medical compromised, seen by somebody in BHS, and the people that know better, the people that have the medical efficacy to do better, in order to follow a policy and fail to look into the details, further exasperated this person's condition.

Yes, as Bobby stated, because the word COVID is in there, there is this giant fear that we will open a Pandora's Box, that everybody will be looking for a COVID disability.

I believe exactly what the lawyer stated is we are well beyond that window. There are very few cases because this is a very rare outcome to have side effects that lead to a level of disability this person is experiencing.

The fact that the city could so boldened to either terminate or force people to retire in every agency in the city, make this individual take it, have a side effect, get documented, placed on service-connected medical leave, and then ask him to take it again and then hide behind "We don't know if its accidental in nature."

Well, it certainly wasn't inherent in the risks. I don't think anybody came on the fire department not knowing they might get burnt, they might get killed, r they might get broken, or they might get cancer. They didn't think they would be forced into a vaccine, and given to them after the height of the pandemic, usually after they had a natural immunity.

If they city doesn't take responsibility for forcing us for that action, who does?

And this young individual, who did not necessarily even reply to the vaccine because he did not fall in the high risk categories that did, not been forced to do this, then would this person still not be an employee?

And if not, whose responsibility is it? Who should compensate this individual? It was a condition of employment, regardless of what the city wants to tell you. If it wasn't, somebody needs to explain to me how he terminated or forced these other people on to leave without pay or into retirement or just separated from service.

Who takes that responsibility? Who gave that order?

It started at the Mayor's Office, so you can't say you are not involved. It passed through two mayors, so you can't say it's not involved. It was continued by the commissioner who also said at the time we have more than enough time.

I will get to you, Dorsa. I don't know who the comptroller was at this time.

But at the end of the day from the top down, from the mayor to the commissioner to the doctors at BHS, this was the protocol, this was the policy, and this was the order.

And despite him having one shot, even if you said we have no way of knowing he would have a side effect because it was rare, and we took that into consideration against the greater good, you could say that; not twice.

Second shot, you have liability. Second shot, you are outside of medical protocol. The second shot, you took at compromised individual who has already shown side effects, which has been diagnosed by a doctor, and you made him go twice, and you threatened his employment in the process.

If you don't see that as accidental, if you don't see that as line of duty – realistically, I'm not even sure what accidental is anymore. I don't know how you connect those two dots.

Without this mandate, without this order, these two never interconnect, and this is certainly not inherent to your job.

Ex. 20. 108:21-114:14

83. “[T]he proof incontrovertibly established a causal connection between the petitioner's line-of-duty injuries and his disability (*Perrotta v. Bd. of Trustees of New York Fire Dep't Article 1-B Pension Fund*, 232 A.D.2d 493, 493, 648 N.Y.S.2d 931 [1996] (citing *Matter of Tobin v. Steisel*, 64 N.Y.2d 254, 485 N.Y.S.2d 730, 475 N.E.2d 101; *Matter of Canfora v. Board of Trustees*, 60 N.Y.2d 347, 469 N.Y.S.2d 635, 457 N.E.2d 740; *Matter of Causarano v. Board of Trustees*, 178 A.D.2d 474, 577 N.Y.S.2d 134; *Matter of Shedd v. Board of Trustees*, 177 A.D.2d 632, 576 N.Y.S.2d 336)).

84. “In particular, the record is bereft of any objective medical evidence indicating that the petitioner's disabling [cardiovascular] condition was the result of anything other than his line-of-duty injuries”. *Perrotta*, 232 A.D.2d at 494 (citing *Matter of Mescall v. Board of Trustees*, 204 A.D.2d 643, 645, 612 N.Y.S.2d 624; *cf.*, *Matter of Drayson v. Board of Trustees*, 37 A.D.2d 378, 326 N.Y.S.2d 328, *affd.* 32 N.Y.2d 852, 346 N.Y.S.2d 273, 299 N.E.2d 684).

85. “Under these circumstances, the petitioner's disability was the natural and proximate result of his service-related accidents.” (*Perrotta*, 232 A.D.2d at 494 (citing *Matter of Mescall, supra*, at 645, 612 N.Y.S.2d 624; *see also*, *Matter of Bridgwood v. Board of Trustees*, 204 A.D.2d 629, 630, 612 N.Y.S.2d 621; *compare*, *Matter of Regan v. Board of Trustees*, 226 A.D.2d 731, 641 N.Y.S.2d 863; *Matter of Callahan v. Board of Trustees*, 226 A.D.2d 628, 641 N.Y.S.2d 389; *Matter of Coleman*, 224 A.D.2d 522, 638 N.Y.S.2d 165)).

86. The record contains uncontroverted medical evidence that the Petitioner’s cardiovascular disability was caused by the COVID-19 vaccination, which constitutes a line-of-duty injury.

87. *Stack v. Bd. of Trustees of New York City Fire Dep't Article 1-B Pension Fund*, 235 A.D.2d 483, 652 N.Y.S.2d 992 (2d Dep’t 1997) (“the record contains uncontroverted medical evidence that the petitioner's arthroscopic knee surgery was necessitated by his line-of-duty injuries, and that the subsequent disability was the result of that surgery. Accordingly, since there was no medical evidence

that the petitioner's knee condition was the result of anything other than his line-of-duty injuries, the Supreme Court properly determined that he was entitled to an accident disability pension”). There is no credible evidence of lack of causation before the Board of Trustees. Therefore, its determination must be reversed. (*Cf. Christian v. New York City Employees' Ret. Sys.*, 56 N.Y.2d 841, 843, 438 N.E.2d 872, 873 [1982] (“medical board was not arbitrary or capricious in its unanimous conclusion that appellant had failed to sustain his burden of establishing a causal connection between the incident of July 10, 1975 and his disabling cataracts. The board explicated the rationale behind its decision, that decision was warranted by the evidence before the board, and, the issue of causation being one for medical judgment, the board of trustees was entitled to rely on the opinion of the medical board.”))

88. In reviewing alleged arbitrary and capricious administrative determinations, a reviewing court's function is limited to “whether the record contains sufficient evidence to support the rationality of the ... determination.” *Atlas Henrietta*, 46 Misc. 3d at 332 (quoting *Coco v. Zoning Bd. of Appeals*, 236 A.D.2d 826, 828, 653 N.Y.S.2d 769 (4th Dep't 1997)). The Respondents’ reasons for denying Petitioner are not supported by sufficient evidence and must be overturned. *Koch v. Sheehan*, 21 N.Y.3d 697, 704, 998 N.E.2d 804 (2013) (annulling determination by the Office of Medicaid Inspector General on the ground that the decision was arbitrary and capricious because of the “inadequate record support for the decision.”).

Firefighter Pastrana qualifies for Accidental Disability Retirement benefits as a matter of law.

89. "A firefighter is entitled to accidental disability retirement [benefits] when a medical examination and investigation shows that he or she is 'physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service." Administrative Code of City of NY § 13-353

90. The Court of Appeals has declared that a remedial statute enacted for the benefit of a civil servant, such as the disability pension laws applicable here, “should be liberally construed in their favor.” (*Mashnouk v. Miles*, 55 N.Y.2d 80, 88 [1982]). Disability pension laws are in place to assure the availability of such benefits to a municipal employee who is permanently incapacitated for duty. (*O'Marah v. Levitt*, 35 N.Y.2d 593, 596 [1974]).

Firefighter Pastrana’s permanent disability is the result of a service-connected accident.

91. Firefighter Pastrana’s disabilities were proximately caused by and induced by the actual performance of the duties of his position. From October 20, 2021 through February 12, 2023, COVID-19 vaccination was a temporary condition of employment for firefighters. Firefighter Pastrana received the COVID-19 vaccination on October 29, 2021, the deadline for receiving the first dose pursuant to the City’s Vaccine Mandate. His position as a firefighter required him to receive the COVID-19 vaccination.

92. On October 29, 2021, his immediate allergic reaction to the COVID-19 vaccine started the nightmare that would end his career as a firefighter. On November 15, 2021, while on active duty at the firehouse, Firefighter Pastrana experienced a severe allergic reaction to the COVID-19 vaccine, which he received due to the City’s Vaccine Mandate. This reaction resulted in his urgent hospitalization and subsequent inability to continue his duties as a firefighter. This incident constitutes an accident within the meaning of the New York City Administrative Code.

93. Firefighter Pastrana's vaccination was a direct result of his service as a firefighter. The Vaccine Mandate, deemed a "condition of employment," *Garland v. City of New York*, No. 21-CV-6586(KAM)(CLP), 2023 WL 2682406, at *9 n. 8 (E.D.N.Y. Mar. 29, 2023), legally obligated him to receive the COVID-19 vaccine, ensuring the safety of both himself and the community he served. His

decision to receive the vaccine was not a personal choice but an occupational requirement imposed upon him in the line of duty.

94. Moreover, after he suffered from a severe allergic reaction from the first dose, Firefighter Pastrana was seen by FDNY BHS doctors who directed him that he must receive the second dose. *See* Pet'r's Aff. Firefighter Pastrana was following orders. His superiors ordered him to receive a vaccine as a condition of employment. That vaccine caused him to be permanently disabled and unfit for duty as a firefighter. To foreclose him from accidental disability benefits on the basis that Firefighter Pastrana's disabilities are not service connected would be a miscarriage of justice.

95. Notably, the BHS Examination Reports demonstrate that the FDNY used the "SC" diagnostic code indicating that Firefighter Pastrana's vaccine injury and resulting myocarditis were service connected. Ex. 4, p 1-2.

96. Firefighter Pastrana's case is unique and should not be disregarded merely because it deviates from the typical line-of-duty accident. It is crucial to interpret the law with fairness and adaptability, considering the dynamic nature of firefighters' profession and the evolving challenges firefighters face, particularly during a state of emergency and public health crisis. The intent of the law is to safeguard the well-being and livelihoods of firefighters who suffer incapacitation due to accidents sustained while in service, and this intent should be upheld by granting Firefighter Pastrana with ADR benefits.

Firefighter Pastrana's disabilities were caused by an "accident".

97. Firefighter Pastrana's vaccine injury constitutes an accident under the New York City Administrative Code. The Court of Appeals has defined an accident as "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Matter of Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 N.Y.2d 1010, 1012, 457 N.Y.S.2d 472, 443 N.E.2d 946 [1982]) (internal quotation marks and citation omitted). In 2018, the Court of Appeals

reaffirmed that standard, stating that, to establish their entitlement to ADR benefits, petitioners must “demonstrate that their injuries were caused by sudden, unexpected events that were not risks inherent in their ordinary job duties” (*Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 678, 70 N.Y.S.3d 881, 94 N.E.3d 444 [2018]).

98. The severe allergic reaction Firefighter Pastrana experienced is an unforeseen consequence of the vaccine, which was administered as directed and required by the FDNY. His multiple emergency room visits and resulting permanent cardiovascular disability, confirmed by both the FDNY Medical Committee and the New York City Pension Fund’s Subchapter II Medical Board, validate the gravity and legitimacy of his condition. It is important to note that the FDNY’s own doctor, Dr. Barbara Cheung, diagnosed Firefighter Pastrana with a "COVID-19 vaccine side effect." Ex. 3, p. 4 of 4. This diagnosis confirms that the adverse reaction was a direct consequence of the vaccination. Additionally, the FDNY’s Chief Medical Officer of the Bureau of Health Services, Dr. Karen Hurwitz, diagnosed Petitioner with “allergic reaction to the COVID vaccine”, myocarditis, and COVID disease. Ex. 2. And the Subchapter II Medical Board also found the Petitioner to be “permanently disabled as a consequence of myocarditis with ongoing symptoms, status post COVID vaccinations which precludes him from full firefighting duties.” Ex. 10. The physical incapacitation he now endures is indisputably a direct and natural result of the accident, thus fulfilling the criteria outlined in the New York City Administrative Code.

99. It is evident that Firefighter Pastrana's vaccine injury meets the criteria of an accident. Firefighter Pastrana's severe allergic reaction to the COVID-19 vaccine was a sudden and unexpected event. This reaction was not a risk inherent in his ordinary job duties as a firefighter, as it occurred due to the temporarily mandated COVID-19 vaccination, which he received in compliance with the Vaccine

Mandate issued by the New York City Commissioner of Health and Mental Hygiene and required by the FDNY.

100. Firefighter Pastrana's permanent disabilities did not result from activities undertaken in the "ordinary course of job duties". (*Kelly v. DiNapoli*, 30 N.Y.3d 674, 686 [2018]). His severe allergic reaction to the COVID-19 vaccine was not a risk of the work ordinarily performed by a firefighter. The reaction was an unforeseen consequence of the vaccination, which he underwent as a requirement of his employment. Analogously, we can draw parallels to the *Matter of Sica*, in which the court found that injuries suffered by a firefighter responding to a call involving toxic fumes were not accidents, as exposure to toxic chemicals was a risk inherent in the ordinary duties of a firefighter (*Matter of Sica v. New York State Comptroller*, 77 N.Y.2d 968, 969 [1991]). The Court of Appeals held: "The precipitating causes of petitioners' injuries were not accidents because they did not consist of sudden, unexpected events that were not risks inherent in... Sica's job as a firefighter requiring him to provide emergency medical services." (*Kelly v DiNapoli*, 30 NY3d 674, 685 [2018]). In Firefighter Pastrana's case, severe allergic reactions from the COVID-19 vaccine were not a risk inherent in his ordinary firefighting duties. The mandate for vaccination and subsequent allergic reaction created a unique and unforeseen circumstance. And receiving vaccinations have never been mandatory for firefighters before. Moreover, even the COVID-19 vaccination requirement was a temporary measure.

101. Furthermore, when analyzing Firefighter Pastrana's vaccine injury considering the global pandemic of COVID-19 virus, New York City's Mayor Bill de Blasio's declaration of a state of emergency, and the New York City Health Commissioner's declaration of a public health emergency, it becomes evident that his situation falls squarely within the Court of Appeals' definition of an accident. The unprecedented nature of the pandemic, coupled with first-time-ever vaccination mandates for firefighters, highlights the unexpected and extraordinary circumstances surrounding Firefighter

Pastrana’s accident. His adverse reactions were not anticipated or inherent risks in the ordinary job duties of a firefighter, making them unexpected and injurious in impact.

102. In addition, the Centers for Disease Control and Prevention (CDC) clearly states that a severe allergic reaction after a previous dose of the COVID-19 vaccine is a contraindication to any future doses of the vaccine. Ex. 5. Despite this contraindication, the FDNY recommended and required Firefighter Pastrana to receive the second dose. This was without scientific foundation and contravenes the CDC’s guidance. The subsequent administration of the second dose resulted in further deterioration of Firefighter Pastrana's medical condition and permanent disability.

There is a presumption that heart disabilities are caused by service-related accidents.

103. General Municipal Law § 207–k, often called the “Heart Bill” establishes “a presumption that a disabling or fatal heart condition suffered by a New York City police officer or fireman was accidentally sustained as a result of his employment if not rebutted by contrary proof”. (*Uniformed Firefighters Assoc. v. Beekman*, 52 N.Y.2d 463, 472–73, 438 N.Y.S.2d 746, 420 N.E.2d 938 [1981]). Thus, entitling the employee to accidental line-of-duty benefits.

104. Here, Petitioner is permanently disabled due to myocarditis. GML § 207–k creates a presumption that this disabling heart condition was accidentally sustained as a result of Petitioner’s employment. The Respondents never rebutted this presumption. Therefore, the Petitioner is entitled to Accidental Disability Benefits as a matter of law.

105. Another firefighter – who we will call “Firefighter #1” to respect his privacy and the confidential nature of his medical diagnoses– was granted Accidental Disability benefits on recommendation of the Medical Board based on a diagnosis of “reactive airway disease with COVID.” The Medical Board relied upon the “Lung Bill” to grant the ADR benefits to Firefighter #1. The Medical Board Recommendation is attached as **Exhibit 23**. The Lung Bill operates in the same manner as the

Heart Bill, except that it pertains to disabling lung conditions. Pursuant to the “Lung Bill,” “any condition of impairment of health caused by diseases of the lung, resulting in total or partial disability or death” to a firefighter, “shall be presumptive evidence that it was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence.” (See Administrative Code § 13–354; see also *Matter of Battista v. Board of Trustees of N.Y. State Fire Dept. Pension Fund*, 188 A.D.2d 598, 598–99, 591 N.Y.S.2d 492 [2d Dept.1992].) The Medical Board clearly acknowledges that Firefighter #1’s reactive airway disease was from COVID-19.

106. The Board of Trustees also upgraded another firefighter – Firefighter #2 – to Accidental Disability benefits from a COVID-related illness. One of the members of the Board of Trustees, Robert Eustace, stated at the Petitioner’s hearing:

I just want to put on the record, we have upgraded a case in the past from COVID-related illness, and it was highly contested, so we tend to see where this is going, but once again, the issue is because it’s the word COVID is involved here, and we are just – it’s all pretty much semantics between here.

Ex. 20: 107:13-20.

107. It is lacking in any rational basis, and therefore arbitrary and capricious, to find COVID-related illness to be a service-related accident and not an injury from the COVID-19 vaccination which was required by the FDNY. It is arbitrary and capricious to grant Firefighter #1 Accidental Disability Benefits based upon the Lung Bill but to fail to do the same for Petitioner based upon the Heart Bill. Petitioner’s heart condition from the COVID-19 vaccination is no less a service-related accident than Firefighter #1’s lung disability from COVID-19. Additionally, the Chief Medical Officer also diagnosed Petitioner with COVID disease. Ex. 2.

Respondents violated the New York State Constitution.

108. The New York State Constitution Article V § 7, establishes that “membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship,

the benefits of which shall not be diminished or impaired.” By failing to provide the appropriate ADR benefits, the Respondents have violated Petitioner’s New York State constitutional rights

CLAIMS

FIRST CAUSE OF ACTION

(Violation of CPLR §7803(3))

109. Petitioner repeats and realleges paragraphs 1 through 108 hereof, as if fully set forth herein.

110. The Respondents’ denial of Accidental Disability Retirement Benefits is tainted by an error of law and made in violation of lawful procedure in violation of CPLR 7803(3).

111. The Respondents’ denial of Accidental Disability Retirement Benefits is without a sound basis in reason, and made without proper regard to the facts.

112. The Respondents’ denial of Accidental Disability Retirement Benefits is without substantial evidence.

113. The Respondents’ denial of Accidental Disability Retirement Benefits is arbitrary and capricious and an abuse of discretion in violation of CPLR 7803(3).

114. By reason of the foregoing, Respondents’ denial of Accidental Disability Retirement Benefits should be annulled and reversed.

PRAYER FOR RELIEF

WHEREFORE, PETITIONER respectfully requests that a judgment and order be entered herein as follows:

- A. Reviewing and annulling the action of Respondents herein in denying Petitioner Accidental Disability Retirement Benefits, and holding said action to be arbitrary and capricious pursuant to Article 78 of the CPLR;
- B. Directing and ordering Respondents to retire Petitioner with Accidental Disability Retirement pursuant to New York City Administrative Code § 13–353, retroactive to the date of his retirement plus interests, costs, and fees;
- C. If Respondents fail to act in accordance with CPLR §7804(e) in answering the Petition, for an Order pursuant thereto, directing Respondents herein to serve and file upon the date hereof:
 - 1. All reports, recommendations, certificates, and all other documents submitted to the New York City Fire Pension Fund in connection with Petitioner’s disability retirement pension application herein; and
 - 2. Copies of any and all records, reports, or notes relating to Petitioner which are on file with the New York City Fire Pension Fund.
- D. Granting such other and further relief as the Court deems just and proper.

Dated: October 25, 2023

Staten Island, NY

Respectfully submitted,



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To: **NEW YORK CITY FIRE PENSION FUND**

One Battery Park Plaza, 9th floor

New York NY 10004

**BOARD OF TRUSTEES OF THE
NEW YORK CITY FIRE PENSION FUND**

One Battery Park Plaza, 9th floor

New York NY 10004

CITY OF NEW YORK

1 Centre Street

New York NY 10007

c/o New York City Law Department

100 Church Street

New York NY 10007

VERIFICATION

STATE OF NEW YORK)
) ss.
COUNTY OF ORANGE)

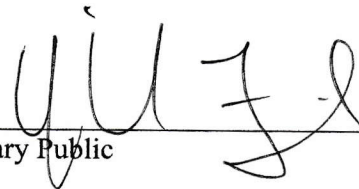
I, O'BRIAN PASTRANA, being duly sworn, deposes and says:

1. I am the Petitioner in the within action.
2. I have reviewed the contents of this Petition and verify that the statements contained herein are true to the best of my knowledge, except as to matters alleged on information and belief, and as to those matters, I believe them to be true.
3. I am aware that if any of the statements contained in the Petition are willfully false, I am subject to punishment.



O'BRIAN PASTRANA

Sworn to before me this
25th day of October, 2023



Notary Public

YAMILLE FRAILE
Notary Public, State of New York
No. 01FR6171992
Qualified in Orange County
Commission Expires Aug. 6, 2027