

To: New Jersey Law Revision Commission
From: Arshiya M. Fyazi, Counsel
Re: Definition of Traumatic Event (N.J.S. 43:16A-7(1))
Date: July 06, 2021

MEMORANDUM

At the March 18, 2021, Commission meeting (held via Zoom), a number of commenters appeared to provide their insights regarding the Commission’s work on the clarification of the term “traumatic event” in N.J.S. 43:16A-7. In attendance that day were: Craig S. Gumpel, Esq., of Craig Gumpel, LLC; and Paul L. Kleinbaum, Esq., of Zazzali, Fagella, Nowak, Kleinbaum & Friedman; Timothy J. Prol, Esq., of Alterman & Associates, L.L.C.; and M. Scott Tashjy, Esq., The Tashjy Law Firm, LLC. During the meeting, Chairman Gagliardi invited the commenters to provide proposed language and to communicate with Staff regarding draft modifications to clarify the accidental disability pension statute, N.J.S. 43:16A-7.¹

Craig S. Gumpel, Esq., of Craig Gumpel, L.L.C., and Paul L. Kleinbaum, Esq., of Zazzali, Fagella, Nowak, Kleinbaum & Friedman subsequently reaffirmed their previously-stated position on behalf of both the New Jersey State PBA and the New Jersey FMBA.² Their joint letter did not submit proposed language, but said that it was not “appropriate for the Commission to consider amendments to the statute.”³ The letter reiterated that “the Legislature vested the PFRS Board of Trustees with the authority to modify the standards for accidental disability retirement benefits” and requested that “the Commission refrain from issuing any report concerning the traumatic event standard.”⁴

M. Scott Tashjy, Esq., principal at The Tashjy Law Firm, LLC, provided proposed modifications to the accidental disability statute.⁵ His suggestions appear in the Appendix that follows this Memorandum.

This Memorandum includes modifications to the proposed statutory language made in response to the commenter’s proposals and additional limited modifications to clarify some of the draft language as a result of issues identified during ongoing Staff review. The language included below is from the Memorandum prepared for the Commission’s March meeting. The comments received are shown after each section to which they apply, followed by any proposed Staff drafting in response. Staff anticipates updating its drafting in response to any guidance provided by the Commission and preparing a Revised Draft Tentative Report for Commission consideration at an upcoming meeting.

¹ See N.J. Law. Rev. Comm’n, Meeting Minutes (Mar. 18, 2021). (On file with the NJLRC.)

² See letter from Craig S. Gumpel and Paul L. Kleinbaum to Arshiya M. Fyazi and Jennifer D. Weitz, Counsels, N.J. Law Rev. Comm’n, *1-2 (Apr. 15, 2021) (On file with NJLRC.)

³ *Id.*

⁴ *Id.*

⁵ See E-mail from Scott M. Tashjy, principal at the Tashjy Law Firm LLC., to Arshiya M. Fyazi, Counsel, N.J. Law Rev. Comm’n (Apr. 20, 2021). (On file with the NJLRC.)

Appendix

The proposed modifications to N.J.S. 43:16A-7, **Retirement for accidental disability; allowance; death benefits; definitions; participation in World Trade Center rescue, recovery, or cleanup operations**, are reflected as follows:

- ~~strikethrough~~ signals the proposed elimination of text;
- underlining indicates the proposed addition of text;
- underlining plus italics,⁶ notes the proposed addition of language since the March 08, 2021, Memorandum; and,
- [*italicized brackets*]⁷ signifies modifications proposed by commenters.

Original Staff Draft⁸

a. (4) Upon the written application by a member in service, by one acting in his behalf or by his employer, any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that the member is permanently and totally disabled as a direct result of a traumatic event, ~~occurring during and as a result of the performance of his 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.

Commenters Submission

No comments have been received regarding this proposed modification.

Revised Staff Draft

a. (4) Upon the written application by a member in service, by one acting ~~in his~~ on the member's behalf or by ~~his~~ the member's employer, any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that the member is permanently and totally disabled as a direct result of a traumatic event, ~~occurring during and as a result of the performance of his regular or assigned duties and that such disability was not the result of the member's willful negligence and that such~~

⁶ The language in italics has been added since the issuance of the Update Memo on this subject matter. See Updated Memo from Arshiya M. Fyazi and Jennifer D. Weitz, Counsels, Definition of Traumatic Event (N.J.S. 43:16A-7(1)) (Mar. 08, 2021) (on file with the NJLRC).

⁷ The language in italicized brackets was proposed by commenters.

⁸ The language contained in this proposed modification appear in the Updated Memorandum dated March 8, 2021.

~~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.~~

Comments - Subsection a.

The language contained in subsection a. consisted of one large block paragraph. The paragraph has been subdivided into subsections a. through g. to improve accessibility and for ease of reference. The language of this subsection has been rendered gender-neutral in the revised draft.

Original Staff Draft⁹

b. For purposes of this section, the term “traumatic event” shall mean an event that is:

(1) identifiable as to time and place;

(2) undesigned and unexpected, and

(3) caused by external circumstances, not the result of a pre-existing disease or condition known to the member that is aggravated or accelerated by the work.

Commenter Submission

[b. For purposes of this section, the term “traumatic event” shall mean an event that is:

(1) identifiable as to time and place;

(2) undesigned , unexpected and/or unanticipated;

(3) the result of a specific duty related event, not the result of a pre-existing disease or condition alone, known to the member that is aggravated or accelerated by work.]

Revised Staff Draft

b. For purposes of this section, the term “traumatic event” shall mean an event that is:

(1) identifiable as to time and place;

(2) undesigned and unexpected, and¹⁰

(3) caused by external circumstances *that are [the result of a specific duty related event], and not solely* the result of a pre-existing disease or condition that is known to the member, *and* that is aggravated or accelerated by the work.¹¹

⁹ The language contained in this proposed modification appear in the “Revised Staff Draft” portion of the Updated Memorandum dated March 8, 2021. In the March memo, subsection b.(3) was subdivided into b.(3) and b.(4). Based on commenters recommendation and the language in *Richardson* case, the Commission authorized consolidation of b.(3) as a single factor.

¹⁰ This subsection contains language used by the New Jersey Supreme Court in the opinion issued in *Richardson v. Bd. of Trustees, Police and Firemen’s Retirement Sys.*, 192 N.J. 189, 213 (2007) and was suggested by a commenter. See e-mail from Scott M. Tashjy, Esq., The Tashjy Law Firm, LLC, to Arshiya M. Fyazi, Counsel, N.J. Law. Rev. Comm’n (Apr. 20, 2021, 9:06 AM EST) (on file with the NJLRC). See also Comments *infra* regarding subsection b.(2).

¹¹ E-mail from Scott M. Tashjy, Esq., The Tashjy Law Firm, LLC, to Arshiya M. Fyazi, Counsel, N.J. Law. Rev. Comm’n (Apr. 20, 2021, 9:06 AM EST) (on file with the NJLRC). See Comments *infra* regarding subsection b.(3).

Comments - Subsection b.

The definition of traumatic event contained in newly created subsection b. is based on language provided by the Supreme Court in *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 192 N.J. 189 (2007). The definition follows the term “traumatic event” as stated in subsection a. to aid the reader.

The terms “undesigned” and “unexpected” in subsection b.(2) are terms of art that have evolved with caselaw and are clearly prescribed by the *Richardson* Court. The additional term “unanticipated” was proposed by the commenter and appears in the *Richardson* opinion, although it is not part of the test announced by the Court. Staff considered this option and is concerned that the term “unanticipated” is synonymous with “unexpected.” Staff requests comment from stakeholders on this issue.

Subsection b.(3) now comprises the language from previously created section b.(4). Staff consolidated the two subsections based on the comments received by the commenters who indicated that *Richardson* discusses these elements as a single factor.¹²

The proposed language in subsection b.(3), “the result of a specific duty related event,” may not be necessary. This language appears in subsection (a) of the original statute and was moved to subsection (d)(1) in the Appendix to make the statute more accessible. Staff requests comment from commenters on this issue.

The additional phrase in subsection b.(3), “solely” was suggested to capture the series of cases where the applicant’s permanent disability may be due to the combined effect of a pre-existing condition and a traumatic event.

¹² See letter from Craig S. Gumpel, Esq., New Jersey Firefighters Mutual Benevolent Association attorney at Law Offices of Craig S. Gumpel LLC., to Arshiya M. Fyazi and Jennifer D. Weitz, Counsels, N.J. Law Rev. Comm’n, *2 (Sep. 25, 2020) (on file with the NJLRC); letter from Paul L. Kleinbaum, Esq., New Jersey Policemen’s Benevolent Association network attorney at Zazzali, Fagella, Nowak, Kleinbaum & Friedman, to Arshiya M. Fyazi and Jennifer D. Weitz, Counsels, N.J. Law Rev. Comm’n, *2 (Nov. 4, 2020) (on file with the NJLRC) and emails from Tim Prol, Esq., Alterman & Associates, LLC to Jennifer D. Weitz, Counsel, N.J. Law Rev. Comm’n (Oct. 29, 2020 and Jan. 19, 2021). (On file with the NJLRC). See also, N.J. Law. Rev. Comm’n, Meeting Minutes *1-3 (Mar. 18, 2021). (On file with the NJLRC.)

Original Staff Draft¹³

c. A member claiming either mental or physical disability as a result of a traumatic event must show:

(1) the traumatic event occurred ~~occurring~~ during and as a result of the performance of the member's regular or assigned duties;

(2) ~~and that such~~ the disability was not the result of the member's willful ~~negligence~~ misconduct, and;

(3) such member is mentally or physically incapacitated for the performance of ~~his~~ their usual duty and of any other available duty in the department which ~~his~~ their employer is willing to assign to ~~him~~ them.

Commenter Submission

No comments have been received regarding this proposed modification.

Revised Staff Draft

c. A member claiming mental disability as a result of a traumatic event must show that:

(1) ~~they experienced an~~ the event that involved actual or threatened death or serious injury, or a ~~similarly~~ similarly serious threat to the physical integrity of the member or another person; and

(2) the event is was objectively capable of causing a reasonable person in the member's circumstances, with a similar background and training, to suffer a disabling mental injury.¹⁴

A member who satisfies the requirements of this subsection must also satisfy the requirements of subsection d. of this section.

Comments - Subsection c.

The proposed language in this subsection, is based on language provided by the New Jersey Supreme Court in *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29, 34 (2008) (“The disability must result from direct personal experience of a terrifying horror inducing event that involves actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person). The *Patterson* Court stated that “[b]y the addition of the latter requirements to the Richardson template, we assure that the traumatic event is objectively capable of causing a permanent, disabling mental injury to a reasonable person under similar circumstances.”¹⁵

¹³ The language contained in this proposed modification appear in the Updated Memorandum dated March 8, 2021.

¹⁴ The language that appears in subsection c.(2) “in the member’s circumstances, with similar background and training” was provided by the Commission. See N.J. Law. Rev. Comm’n Meeting Minutes *4 (Sep. 16, 2020). (On file with the NJLRC.) See also Comments *infra* discussing subsection c.

¹⁵ *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29, 50 (2008).

This provision was recommended by the New Jersey Supreme Court in *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 233 N.J. 402 (2018). The Court in *Mount* expressed that “[t]he Legislature has the authority to refine the statutory language to clarify its intent regarding the term “traumatic event” as it applies in future cases. It may consider a statutory provision governing claims for accidental disability benefits based on physical injuries sustained by first responders. It may also decide to enact a provision separately addressing cases arising from mental disabilities attributed exclusively to mental stressors. Additional guidance from the Legislature would assist retirement system members, boards, and counsel as they consider applications for benefits, and our courts as they review these important determinations.”¹⁶

This subsection addresses cases arising from *mental* disabilities attributed exclusively to mental stressors, and as suggested by the Commission, clarifies the reasonable person standard to be applied.

Staff did not receive written comments or proposed modifications pertaining to subsection c. of the Appendix; however, concerns were raised by a commenter regarding this subsection at the Commission meeting held on March 18, 2021. The commenter noted that the term “in similar circumstances” as discussed by the *Patterson* Court was intended to be an example and not a limitation. The additional language proposed by the Commission “...with similar background and training” acts as a limitation. The commenter added that cases are supposed to involve fact-sensitive inquiry that takes into account all of the member’s circumstances, including background and training, in cases arising from mental disabilities attributed exclusively to mental stressors.¹⁷

Since the phrase “with similar background and training” was considered before any comments were received, the Staff requests Commission’s guidance on whether they were still of the opinion to include the limiting language or whether the statute would be better served by removing the language.

Subsections c. and d. appeared in the reverse order in the Update Memo but were reordered in this Appendix in response to commenter comments that an applicant claiming a mental-mental injury must satisfy the test articulated in *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29 (2008) before the *Richardson* test can apply.¹⁸

¹⁶ *Mount v. Bd. of Trs., Police & Firemen's Ret. Sys.*, 233 N.J. 431-432 (2018).

¹⁷ See N.J. Law. Rev. Comm’n Meeting Minutes *3 (Mar. 18, 2021). (On file with NJLRC.)

¹⁸ *Id.*

Original Staff Draft¹⁹

d. In addition to the requirements in subsection c., a member claiming mental disability as a result of a traumatic event must first show:

(1) they experienced an event that involved actual or threatened death or serious injury, or a similarly serious threat to the physical integrity of the member or another person, and;

(2) the event is objectively capable of causing a reasonable person in the member's circumstances, with similar background and training, to suffer a disabling mental injury.

Commenter Submission

No comments have been received regarding this proposed modification.

Revised Staff Draft

d. A member claiming either mental or physical disability as a result of a traumatic event must show *that*:

(1) the traumatic event occurred ~~occurring~~ during and as a result of the performance of the member's regular or assigned duties;

(2) ~~and that such~~ the disability was not the result of the member's willful ~~negligence~~ misconduct; and

(3) such member is mentally or physically incapacitated for the performance of ~~his~~ their usual duty and of any other available duty in the department which ~~his~~ their employer is willing to assign to ~~him~~ them.

Comments - Subsection d.

Subsections c. and d. appeared in the reverse order in the Update Memo but were reordered in this Appendix in response to commenter comments that an applicant claiming a mental-mental injury must satisfy the test articulated in *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29 (2008) before the *Richardson* test can apply.²⁰

Newly created subsection d. consists of language originally contained in subsection a. (shown in strikethrough above its new location) that was subdivided into two different sections for ease of reference.

The term "willful negligence" has been stricken from subsections d.(2) as the provision relates to a member's actions, and "willful misconduct" has been substituted pursuant to the Commission's request.²¹

¹⁹ The language contained in this proposed modification appear in the Updated Memorandum dated March 8, 2021.

²⁰ See N.J. Law. Rev. Comm'n Meeting Minutes *3 (Mar. 18, 2021). (On file with NJLRC.)

²¹ See N.J. Law. Rev. Comm'n Meeting Minutes *4 (Sep. 16, 2020). (On file with NJLRC.)

Original Staff Draft²²

e. Permanent and total disability resulting from a cardiovascular, pulmonary or musculoskeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability.²³

Commenter Submission

*[e. Where a traumatic event occurs, resulting in Total and Permanent disability of the member, and where the basis alleged for such disability is the aggravation of a pre-existing cardiovascular, pulmonary or musculoskeletal condition, the traumatic event must be the direct cause of the disability (i.e. the essential significant or substantial contributing cause). If the member was working full unrestricted duty immediately prior to the traumatic event, and if it was foreseeable that such duty would have continued “but for” the occurrence of the traumatic event, then the traumatic event shall be determined the “direct cause” of the disability and deemed sufficient for an award of Accidental Disability pension benefits. If the member is totally and permanently disabled, yet the member does not meet the direct cause standard as hereinabove set forth, then the member shall be granted an ordinary disability.]*²⁴

Revised Staff Draft

e. When a [traumatic event occurs, resulting in] permanent and total disability [of the member, and the traumatic event aggravates a member’s pre-existing] cardiovascular, pulmonary or musculoskeletal condition, in order to qualify for an award of accidental disability retirement, the member must show [that the] traumatic event [was the direct cause of the disability.]²⁵

1. For purposes of this section, [direct cause] means either [the essential significant cause or a substantial contributing cause].

2. [If the member is totally and permanently disabled] but [does not meet the direct cause standard] set forth in this subsection, [then the] disability [shall be] deemed an ordinary disability.²⁶

²² The language contained in this proposed modification appear in the Updated Memorandum dated March 8, 2021.

²³ The language is in the current statute and was previously designated as a.(4). It has been moved to make the statute more accessible.

²⁴ Language suggested by the commenter regarding “full unrestricted duty prior to the traumatic event” in subsection e. is an argument raised by appellants but is not a standard employed by courts and should not be codified.

²⁵ This subsection contains language used by the New Jersey Supreme Court in the opinion issued in *Gerba v. Bd. of Trs., PERS.*, 83 N.J. 174, 187 (1980) and was suggested by a commenter. See e-mail from Scott M. Tashjy, Esq., The Tashjy Law Firm, LLC, to Arshiya M. Fyazi, Counsel, N.J. Law. Rev. Comm’n (Apr. 20, 2021, 9:06 AM EST) (on file with the NJLRC). See also Comments *infra* discussing subsection e.

²⁶ Modification proposed by a commenter. See e-mail from Scott M. Tashjy, Esq., The Tashjy Law Firm, LLC, to Arshiya M. Fyazi, Counsel, N.J. Law. Rev. Comm’n (Apr. 20, 2021, 9:06 AM EST) (on file with the NJLRC). This may not fully reflect the category of mental-mental injuries the court has recognized in *Patterson*.

Comments - Subsection e.

The language contained in newly created subsection e. consists of an existing paragraph of the statute (shown in strikethrough below its new location) that was moved to make it more cohesive with subsection a. of the statute as it relates to specific disabilities not directly arising from the “traumatic event.”

Gerba v. Bd. of Trs. PERS provides that “the traumatic event must be the direct cause, that is, the essential significant or substantial contributing cause of the disability”. In that case, the New Jersey Supreme Court addressed the issues of medical causation and whether the appellant’s permanent disability was the direct result of the traumatic event.²⁷ Staff recommends including this language to capture the essence of *Gerba* in the proposed modifications since this language is cited and/or quoted in many subsequent cases involving pre-existing conditions.²⁸

Revised staff draft of subsection e. encompasses language of the original statute as well as the standards enumerated by the *Gerba* court. It also recognizes the commenters’ recommendation to codify this language. Staff requests comment from commenters on this issue.

²⁷ *Gerba v. Bd. of Trs., PERS.*, 83 N.J. 174, 187 (1980). The Court states that “[a]s long as the traumatic event is the direct cause, i.e., the essential significant or substantial contributing cause of the disability, it is sufficient to satisfy the statutory standard of an accidental disability even though it acts in combination with an underlying physical disease.” See *Crowder v. PFRS supra*.

²⁸ See *Petrucelli v. Bd. of Trs., PERS.*, 211 N.J. Super. 280, 287 (App. Div. 1986), quoting *Gerba*, 83 N.J. 174, 187 (“what is now required by N.J.S.A. 43:15A–43 is a traumatic event that constitutes the essential significant or the substantial contributing cause of the resultant disability.”); *Crowder v. Bd. of Trs., PFRS.*, 2019 WL 2067886, at *3 (App. Div. May 10, 2019), discussing *Gerba*, 83 N.J. 174, 186 ([A] traumatic event that acts in combination with an underlying preexisting condition may satisfy the “direct result” requirement “[a]s long as the traumatic event is the direct cause ... of the disability[.]”); *Straub v. Bd. of Trs.*, 2019 WL 3729667, at *3 (App. Div. Aug. 8, 2019) citing *Gerba* at 187 (“[O]ur Supreme Court held that for a member of the Public Employees’ Retirement System to qualify for accidental disability benefits, it need not show that the traumatic event is the “sole or exclusive cause of the disability,” but that the alleged traumatic event is “the direct cause, i.e., the essential significant or substantial contributing cause of the disability[.]”); *Harak v. Bd. of Trs.*, 2020 WL 6285325, at *3 (App. Div. Oct. 27, 2020); *Ramos v. Bd. of Trs. PFRS.*, 2020 WL 7647377, at *3 (App. Div. Dec. 23, 2020); and *Davis v. Bd. of Trs., PFRS.*, 2021 WL 2011570, at *6 (App. Div. May 20, 2021).

*Original Staff Draft*²⁹

f. 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.

~~(2)~~ g. Upon retirement for accidental disability, a member shall receive an accidental disability retirement allowance which shall consist of:

~~(a)~~(1) An annuity which shall be the actuarial equivalent of his aggregate contributions and

~~(b)~~(2) A pension in the amount which, when added to the member's annuity, will provide a total retirement allowance of 2/3 of the member's actual annual compensation for which contributions were being made at the time of the occurrence of the accident or at the time of the member's retirement, whichever provides the largest possible benefit to the member.

~~(3)~~ h. Upon receipt of proper proofs of the death of a member who has retired on accidental disability retirement allowance, there shall be paid to such member's beneficiary, an amount equal to 3 1/2 times the compensation upon which contributions by the member to the annuity savings fund were based in the last year of creditable service; provided, however, that if such death shall occur after the member shall have attained 55 years of age the amount payable shall equal 1/2 of such compensation instead of 3 1/2 times such compensation.

~~(4) Permanent and total disability resulting from a cardiovascular, pulmonary or musculoskeletal condition which was not a direct result of a traumatic event occurring in the performance of duty shall be deemed an ordinary disability.~~

~~b. i.~~ (1) For purposes of this subsection,

(1) "Qualifying condition or impairment of health" includes:

(A) diseases of the upper respiratory tract and mucosae, including conditions such as conjunctivitis, rhinitis, sinusitis, pharyngitis, laryngitis, vocal cord disease, upper airway hyper-reactivity and tracheo-bronchitis, or a combination of such conditions;

²⁹ The language contained in this proposed modification appear in the Updated Memorandum dated March 8, 2021.

(B) diseases of the lower respiratory tract, including but not limited to bronchitis, asthma, reactive airway dysfunction syndrome, and different types of pneumonitis, such as hypersensitivity, granulomatous, or eosinophilic;

(C) diseases of the gastroesophageal tract, including esophagitis and reflux disease, either acute or chronic, caused by exposure or aggravated by exposure;

(D) diseases of the psychological axis, including post-traumatic stress disorder, anxiety, depression, or any combination of such conditions;

(E) diseases of the skin such as contact dermatitis or burns, either acute or chronic in nature, infectious, irritant, allergic, idiopathic or non-specific reactive in nature, caused by exposure or aggravated by exposure; and

(F) new onset diseases resulting from exposure as such diseases occurring in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease, and chronic psychological disease.

(2) “World Trade Center rescue, recovery, or cleanup operations” means the rescue, recovery, or cleanup operations at the World Trade Center site between September 11, 2001 and October 11, 2001.

(3) “World Trade Center site” means any location below a line starting from the Hudson River and Canal Street, east on Canal Street to Pike Street, south on Pike Street to the East River, and extending to the lower tip of Manhattan.

Commenter Submission

No comments have been received regarding these proposed modifications.

Comments – Subsections f. – i.

The provisions in subsections f. through i. have not been altered; the existing language has been divided into sections and subsections to make the statute more accessible.

*Original Staff Draft*³⁰

~~j.~~ (1) Notwithstanding any provision of subsection a. through d. of this section or any other law to the contrary, for a member who participated, whether or not under orders or instruction by an employer to so participate, in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours, permanent and total disability resulting from a qualifying condition or impairment of health shall be presumed to have occurred during and as a result of the performance of the member's regular or assigned duties and not the result of the member's willful negligence, unless the contrary can be proved by competent evidence.

A. A member who did not participate in such operations for a minimum of eight hours shall be eligible for the presumption provided that:

(i) the member participated in the rescue, recovery, or cleanup operations at the World Trade Center site between September 11, 2001 and September 12, 2001;

(ii) the member sustained a documented physical injury at the World Trade Center site between September 11, 2001 and September 12, 2001 that is a qualifying condition or impairment of health resulting in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours; and

(iii) the documented physical injury that resulted in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours is the qualifying condition or impairment of health for which the member seeks a presumption under this subsection.

B. In order to be eligible for the presumption provided under this subsection, a member shall have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the permanent and total disability.

~~(3)~~ (2) A member who participated in the World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours and subsequently retired on a service retirement or an ordinary disability retirement and thereafter incurred a disability caused by a qualifying condition or impairment of health which the medical board determines to be caused by participation in World Trade Center rescue, recovery, or cleanup operations shall be eligible to apply to the board of trustees to have the retiree's retirement allowance recalculated as an accidental disability retirement allowance for benefit payments on or after the date of the application, provided the retiree filed an application for such recalculation within 30 days of the date that the retiree knew or should have known of the existence of such disability and its relation to the rescue, recovery, or cleanup

³⁰ The language contained in this proposed modification appear in the Updated Memorandum dated March 8, 2021.

operations. In order to be eligible for such recalculation, the retiree shall have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the disability.

~~(4)~~ (3) The board of trustees shall promulgate rules and regulations necessary to implement the provisions of this subsection and shall notify members and retirants in the retirement system of the enactment of this act, P.L.2019, c. 157, within 30 days of enactment.

(4) A member or retiree shall not be eligible for the presumption or recalculation under this subsection unless within two years of the effective date of this act, P.L.2019, c. 157,1 the member or retiree files a written and sworn statement with the retirement system on a form provided by the board of trustees thereof indicating the dates and locations of service.

(5) This subsection shall apply regardless of whether the member or retiree, who is otherwise eligible, was enrolled in the retirement system at the time of participation in World Trade Center rescue, recovery, or cleanup operations as specified herein.

Commenter Submission

No comments have been received regarding this proposed modification.

Revised Staff Draft

~~j.~~ ~~(2)~~ (1) Notwithstanding any provision of subsection a. through d. of this section or any other law to the contrary, for a member who participated, whether or not under orders or instruction by an employer to so participate, in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours, permanent and total disability resulting from a qualifying condition or impairment of health shall be presumed to have occurred during and as a result of the performance of the member's regular or assigned duties and not the result of the member's willful ~~negligence~~ misconduct, unless the contrary can be proved by competent evidence.

(A) A member who did not participate in such operations for a minimum of eight hours shall be eligible for the presumption provided that:

(i) the member participated in the rescue, recovery, or cleanup operations at the World Trade Center site between September 11, 2001 and September 12, 2001;

(ii) the member sustained a documented physical injury at the World Trade Center site between September 11, 2001 and September 12, 2001 that is a qualifying condition or impairment of health resulting in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours; and

(iii) the documented physical injury that resulted in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours is the qualifying condition or impairment of health for which the member seeks a presumption under this subsection.

(B) In order to be eligible for the presumption provided under this subsection, a member shall have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the permanent and total disability.

~~(3)~~ (2) A member who participated in the World Trade Center rescue, recovery, or cleanup operations for a minimum of eight hours and subsequently retired on a service retirement or an ordinary disability retirement and thereafter incurred a disability caused by a qualifying condition or impairment of health which the medical board determines to be caused by participation in World Trade Center rescue, recovery, or cleanup operations shall be eligible to apply to the board of trustees to have the retiree's retirement allowance recalculated as an accidental disability retirement allowance for benefit payments on or after the date of the application, provided the retiree filed an application for such recalculation within 30 days of the date that the retiree knew or should have known of the existence of such disability and its relation to the rescue, recovery, or cleanup operations. In order to be eligible for such recalculation, the retiree shall have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the disability.

~~(4)~~ (3) The board of trustees shall promulgate rules and regulations necessary to implement the provisions of this subsection and shall notify members and retirants in the retirement system of the enactment of this act, P.L.2019, c. 157, within 30 days of enactment.

(4) A member or retiree shall not be eligible for the presumption or recalculation under this subsection unless within two years of the effective date of this act, P.L.2019, c. 157, the member or retiree files a written and sworn statement with the retirement system on a form provided by the board of trustees thereof indicating the dates and locations of service.

(5) This subsection shall apply regardless of whether the member or retiree, who is otherwise eligible, was enrolled in the retirement system at the time of participation in World Trade Center rescue, recovery, or cleanup operations as specified herein.

Comments - Subsection j.

Reference in subsection j.(1) has been amended to reflect newly created applicable sections. Additionally, the term “willful negligence” has been stricken from subsection j.(1) as the provision relates to a member’s actions, and “willful misconduct” has been substituted.³¹

³¹ See N.J. Law. Rev. Comm’n Meeting Minutes *4 (Sep. 16, 2020). (On file with NJLRC.)