SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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KEITH MCGURK,

Plaintiff,

- v -

BOARD OF TRUSTEES OF NEW YORK CITY POLICE PENSION FUND, ARTICLE II, JAMES O'NEILL AS CHAIR OF NEW YORK CITY POLICE PENSION FUND

Defendant.

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INDEX NO. 101561/2019

MOTION DATE 12/06/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Mr. Keith McGurk (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Keith McGurk (McGurk) seeks an order to vacate a determination of the respondent Board of Trustees of the Police Pension Fund, Article II (the PPF), and its chairman, Police Commissioner James O'Neill (the Commissioner; together, respondents) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied.

FACTS

McGurk was appointed as an officer of the New York Police Department (NYPD) on July 10, 2006, and also became a member of the PPF at that time. *See* verified answer, ¶ 17; exhibit A. On May 30, 2015, McGurk sustained a "line of duty" (LOD) injury to his right leg when his firearm inadvertently discharged. *Id.*, ¶¶ 18, 22; exhibits B, D. McGurk maintains that his LOD injury was the result of an "accident," as that term is defined in the controlling case law. *Id.*, ¶ 23 (paragraph misnumbered); exhibit E. On May 12, 2016, McGurk filed an application for an "accident disability retirement" (ADR) pension with the PPF. *Id.*, ¶ 23 (paragraph misnumbered); exhibit F. On July 12, 2016, the Commissioner also filed an application for an "ordinary disability retirement" (ODR) pension on McGurk's behalf, pursuant to standard NYPD administrative procedure. *Id.*, ¶ 24; exhibit G. On August 5, 2016, the PPF's Medical Board issued a report that found that McGurk was "disabled," and recommended that his application for ADR be granted and the Commissioner's application for ODR be denied. *Id.*, ¶ 26; exhibit H. At a hearing on September 18, 2017, the PPF's Board nevertheless issued a decision that rejected the Medical Board's recommendations, granted the Commissioner's application for ODR and denied McGurk's application for ADR. *Id.*, ¶ 43; exhibit P.

This is not McGurk's first application for relief pursuant to CPLR Article 78. On December 13, 2017, he filed a petition to challenge the PPF's September 18, 2017 decision (Index Number 101783/17). *See* verified answer, ¶ 45. At a hearing on September 18, 2018, this court (St. George, J.) vacated the PPF's decision as arbitrary and capricious, and remanded McGurk's ADR application to the PPF for reconsideration. *Id.*, ¶ 45; exhibit Q. Judge St. George particularly found that the PPF should have considered additional evidence before reaching a determination on McGurk's ADR application; including: 1) the transcript of McGurk's "50 (h) hearing" from late 2016; 2) the effect of any ruling in the purported 2015 products liability case that involved the gun and holster that McGurk used at the time of his LOD injury; and 3) any "additional information . . . regarding a potential defect in the manufacture of the gun belt and/or the gun or the combination thereof." *Id.*; exhibit Q at 13-16. The PPF's Board held additional hearings on January 9, 2019, February 13, 2019, March 13, 2019, April 10, 2019, May 8, 2019, and June 12, 2019, during which it received the aforementioned evidence, as well as other submissions from McGurk's counsel. *Id.*, verified answer, ¶¶ 47-66; exhibits S – CC, EE. Nevertheless, at the final meeting on June 12, 2019, the PPF's Board issued a final determination that again denied McGurk's application for ADR, and granted the Commissioner's application for ODR. *Id.*, ¶¶ 67-68; exhibit DD. The PPF Board's June 12, 2019 decision recited that it had received and considered all of the evidence that Judge St. George specified (along with other submissions from McGurk's counsel), but nevertheless found as follows:

> "After a review of all of the evidence provided, we maintain our previous conclusion that the member has not proven that the incident was an accident. In an ADR proceeding the burden of proof is on the member to show this was an accident within the meaning of the law. He has not.
>
> "He has provided no evidence that the gun was defective, no evidence that the holster is defective and has provided nothing other than his speculation that the two together create a potentially dangerous condition.

"The burden does not shift from the member to the city when a member puts forward an unsubstantiated theory, it shifts when evidence of some sort has been provided. That was not the case here. Other than his own expert, there has not been a scintilla of evidence provided to substantiate any of his claims.

"The City side, in its review, looked at the totality of the facts presented, and to the conclusions and determinations of the Comprehensive Firearms Discharge Review Board report dated November 10, 2016.

"The Firearms Discharge Review board concluded that Police Officer McGurk's actions caused the discharge of the firearm while he quickly was getting out of his personal vehicle.

"They further found that the discharge was a violation of the Department's firearms policy, with a Schedule B command discipline, and required McGurk to undergo retraining in the proper handling of firearms.

"More importantly, they rebutted McGurk's expert, who theorized that the only way the cartridge could remain in the holster was with a preposterous theory that he would have had to pick it up and put it back in the holster.

"The Firearms Review Board found that damage to the thumb strap was likely caused by the gun racking back, which would have also kept the shell casing from ejecting from the chamber.

"The Firearms Review Board also pointed out that the trigger on this weapon must be pulled twice to fire and that there is no hair trigger on New York City issued Sig 226's because all weapons are equipped with a firing pin safety lever that requires the trigger to be depressed to fire with a force of approximately 12 pounds.

"The burden was on the member to show either that happened and other than his theory, he did not. When his representatives before the Board of Trustees tried to posit that maybe his keys are what got between the holster and trigger causing the discharge at the board meeting, they took multiple tries to even get the keys into the trigger guard.

"Other than allegations of a defective product, the petitioner has failed to provide any objective evidence in support of his theory that the gun and holster were defective nor provided any evidence that either products or products in combination were defective.

"Accordingly, based on the foregoing and our exhaustive review, and weighing all the available evidence, court filings, deposition testimony, consideration of the Firearms Review Board's determination, the petitioner's expert witness report, consideration of the petitioner's theory of the case, testimony and discussions during the Board of Trustees meeting and a re-review of the underlying file, and other supplemental materìa1s, the City side finds that McGurk failed to prove that the incident in question was an accident.

"The evidence reviewed shows a perfectly working Sig Sauer P226, a holster and an independent firearms review finding that the only way the gun fired was by user error or something pulling the trigger.

"The member has not put forward any evidence of something causing the gun to fire. Just the theory that it must have.

"Lastly, the member was unable to substantiate any claims of defect or negligence with any evidence whatsoever in the use of the two or in having provided separately." *Id*., exhibit DD.

Aggrieved, McGurk thereafter commenced this Article 78 proceeding on October 3, 2019, and respondents filed an answer on February 21, 2020. *See* verified petition; verified answer. The Covid-19 national pandemic caused the courts to suspend operations indefinitely in March of 2020, which interrupted the parties' submission schedule. After sufficient court functions had been restored, the parties consented to convert this case to an e-filed matter on September 16, 2020, and later made their final submissions on October 6, 2020. The matter is now ready for disposition (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Here, McGurk raises three arguments as to why the PPF Board's June 12, 2019 decision was an arbitrary and capricious ruling.

First, McGurk argues that the PPF Board wrongly concluded that his LOD injury and disability did not result from an "accident," as the law defines that term. *See* petitioner's mem of law, ¶¶ 56-66. The PPF responds that the Board applied the law correctly in the June 12, 2019 decision. *See* respondents' mem of law at 4-14. After reviewing the controlling law, the court finds for respondents.

In *Matter of Kelly v DiNapoli* (30 NY3d 674 [2018]), the Court of Appeals recently restated its holdings that the term "accident" refers to "a 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact,'" and that "'an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury.'" 30 NY3d at 681 (internal citations omitted). The Court also reiterated that "it is 'error ... [to] focus[ ] on the petitioner's job assignment, not on the precipitating cause of injury,'" and that that the correct inquiry is whether "the injury was caused by 'a precipitating accidental event ... which was not a risk of the work performed.'" 30 NY3d at 682 (internal citations omitted). At least two decisions by the Appellate Division, First Department, hold that injuries which occur when an NYPD officer's gun belt becomes caught or entangled while the officer is exiting from a car are "not . . . sudden unexpected event[s]," but are rather merely "incident[s] of [the officer's] routine duties." *See Matter of Dalton v Kelly*, 16 AD3d 200, 201 (1st Dept 2005), citing *Matter of Starnella v Bratton*, 92 NY2d 836 (1998), *Matter of McCambridge v McGuire*, 62 NY2d 563 (1984); *see also Matter of Galluccio v O'Neill*, 186 AD3d 1153 (1st Dept 2020). McGurk's argument that "a misfire from a securely holstered firearm is not an inherent risk in the task of exiting a vehicle" fails to address any of this case law, let alone provide a rationale as to why it shouldn't control. *See* petitioner's mem of law, ¶

66. Therefore, the court concludes that McGurk's argument that his LOD injury was caused by an "accident," as the law defines that term, is unsupported, and rejects it for that reason.

Next, McGurk argues that the PPF Board wrongly concluded, as a matter of law, that his own "willful negligence" was the cause of his LOD injury and disability. *See* petitioner's mem of law, ¶¶ 67-84. The PPF again responds that the Board applied the law correctly in the June 12, 2019 decision. *See* respondents' mem of law at 4-14. After reviewing the controlling law, the court again finds for respondents.

The term "willful negligence" has been held to apply to situations where an employee "acted in conscious disregard of the consequences of his actions." *Matter of Robinson v New York State & Local Police & Fire Retirement Sys.*, 192 AD2d 951, 952 (3d Dept 1993), citing *Matter of Ramsden v Regan*, 91 AD2d 773, 773 (3d Dept 1982); Retirement and Social Security Law § 363 (a)(1); § 363-c (b)(1). The First Department holds that an NYPD officer is presumed to be "aware that special safety precautions were required when handling a firearm," and that failing to observe those precautions – with the result that the firearm discharges and injures the officer – constitutes an act of willful negligence. *Matter of Brown v Kelly*, 100 AD3d 480, 481 (1st Dept 2012). McGurk does not address the legal definition of the term "willful negligence." Instead, he appears to conflate that term with the term "accident," and argues that his handgun's alleged misfire fell within the legal definition of the term "accident" that was set forth in the Third Department's holding in *Matter of Stancarone v DiNapoli* (161 AD3d 144 [3d Dept 2018]). *See* petitioner's mem of law, ¶¶ 69-84. Indeed, apart from initially mentioning the term "willful negligence," McGurk's papers do not discuss the concept at all. *Id*. As a result, the court concludes that McGurk's argument is inapposite, and that he has failed to demonstrate that

his own "willful negligence" did not lead to his accident. Therefore, the court rejects McGurk's second argument.

The court also notes that the PPF Board's June 12, 2019 decision (a) stated that the PPF Board had reviewed both the November 10, 2016 report of the Comprehensive Firearms Discharge Review Board and the testimony and evidence presented by McGurk's expert witness; and (b) that the PPF Board found that the former was persuasive because it was supported by physical evidence, while the latter was not because it consisted solely of "speculation" and "theory." *See* verified answer, exhibit DD. The court further notes that the PPF Board complied with Judge St. George's September 18, 2018 decision requiring it to review additional evidentiary submissions from McGurk that bore on the possible causes of his LOD injury. However, the PPF Board found that there was no evidence that there had ever been a products liability lawsuit involving an identical gun and gun belt to McGurk's, contrary to what his counsel had stated to Judge St. George. From the foregoing, the PPF Board concluded that its initial finding that there was substantial evidence to justify denial of McGurk's ADR application was correct. The First Department has long recognized that, when conducting reviews pursuant to CPLR Article 78, "the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]," and that "[t]he courts may not weigh the evidence or reject the choice made by the [agency] where the evidence is conflicting and room for choice exists." *Matter of Leone v Kelly*, 27 AD3d 294, 295 (1st Dept 2006). In any case, the court finds that there was substantial evidence in the administrative record before the PPF Board - including the additional material that Judge St. George's earlier decision provided for - to support its decision to deny McGurk's ADR application.

Finally, McGurk asserts that the PPF Board "did not meet its burden of supporting its factual findings with substantial evidence and therefore its final determination remains arbitrary and capricious." *See* petitioner's mem of law, ¶¶ 85-100. However, McGurk bore the burden of proof with respect to his ADR application, *not* the PPF Board. *See e.g., Matter of Pastalove v Kelly*, 120 AD3d 419 (1st Dept 2014). Therefore, McGurk's final argument is flawed as it was based on a misreading of the law.

In light of the foregoing, the court concludes that McGurk's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Mr. Keith McGurk (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

10/23/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	x	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	☐	GRANTED	x	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE