To be argued by
JONATHAN I. EDELSTEIN
Time Requested: 15 Minutes

Docket No. APL-2018-00172

NEW YORK STATE COURT OF APPEALS

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In the Matter of the Application of PATRICIA WALSH,

Petitioner-Appellant,

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

- against -

THE NEW YORK STATE COMPTROLLER and THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM,

Respondents.

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

Petitioner-Appellant PATRICIA WALSH, by and through the undersigned counsel, respectfully submits this Reply Brief in response to the Brief for Respondents dated February 1, 2019 ("Res. Brf.") and in further support of her appeal from an order of the Appellate Division, Third Department, dated May 31, 2018, which confirmed respondents' administrative determination denying Section 607-c Disability Retirement Benefits to petitioner.

POINT I

THE APPELLATE DIVISION'S JUDGE-MADE LIMITATION OF R&SSL § 607-C TO "VOLITIONAL OR DISOBEDIENT" ACTS WAS ERROR

As discussed in the main brief, petitioner Walsh was denied disability retirement benefits under Section 607-c of the Retirement and Social Security Law, which applies to county correction officers who suffer disabling injuries "as the natural and proximate result of any act of any inmate." The Third Department, asserting for the first time a judge-made restriction of the term "any act of any inmate" to "volitional or disobedient" acts (R4-5), found that Ms. Walsh was not entitled to benefits when an intoxicated inmate, attempting to exit an elevated "high risk van" at her orders, fell on her.[1] There is no basis in law for the Third

[1] Respondents contend that the term "high risk van" was used only in the companion case of Martin v. Comptroller, 161 A.D.3d 1418 (3d Dept. 2018), and

Department's statutory construction, and any arguments to the contrary in respondents' brief are unpersuasive.

Respondent first contends that this Court's primary consideration is to ascertain and give effect to the intention of the Legislature and that this Court may consult the legislative history even if the statutory language appears clear. See Res. Brf. at 17. Petitioner certainly has no quarrel with this as a general proposition; as this Court has stated, "all available interpretive tools" are on the table and may be used for what they are worth. Riley v. County of Broome, 95 N.Y.2d 455, 464 (2000). But "[v]arying concerns may bear on the *weight* to be given legislative history," see id. (emphasis added), and as stated in the other case cited by respondents in support of this contention, "[t]he clearest indicator of legislative intent is the statutory text and unambiguous language should be construed pursuant to its plain meaning." Lemma v. Nassau County Police Officer Indem. Bd., 31 N.Y.3d 523, 528 (2018).

In Riley, this Court, after first concluding that the plain language of the statute at issue provided broad protection to vehicles engaged in road work, stated that the legislative history "confirm[ed] this plain language reading." Riley, 95 N.Y.2d at 464. In other words, the Riley court relied upon the "clearest indicator

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not in this case. See Res. Brf. at 9 n.3. It is undisputed, however, that both the accident in Martin and the accident in the instant case involved the same van.

of legislative intent" – the statutory language – as the primary ground for its holding, and then cited legislative history as corroboration. Here, in contrast, the respondents do not seek to use legislative history to corroborate the plain language of R&SSL § 607-c; instead, they argue that the legislative history should *negate* that plain language. Such a use of legislative history, which undermines rather than reinforces the well-settled proposition that the plain and unambiguous statutory text is the clearest indicator of the Legislature's intent, must be treated far more skeptically than the citation of legislative history in cases such as Riley. This Court should not override the plain language of Section 607-c unless some compelling principle or rule of statutory construction demands such result.

Respondents cite no such principle or rule. For instance, respondents make a perfunctory reference to the rule that courts may disregard statutory language where a "wooden or overly literal interpretation would produce absurd or unreasonable results," see Res. Brf. at 17-18, but do not explain why it would be "absurd" or "unreasonable" to consider it an act of an inmate when an inmate, stepping out of a specially designed prison van, falls on an officer and injures her. Such a situation falls within a core function of prisons and jails – secure transportation of inmates – and it is not absurd in the least to characterize an act routinely done by inmates within the prison system as an "act of an inmate."

Indeed, it is the Appellate Division's construction that will inevitably lead to

absurdities. Consider, for instance, the recent case of Garcia v. DiNapoli, 165 A.D.3d 1331, 1332 (3d Dept. 2018), decided a few months after this case, in which a correction officer "tripped and fell while descending stairs within [a correctional] facility while preparing to move inmates outside to the recreation yard." The precipitating cause of the injury was that, while descending the stairs, the officer saw an inmate running down the stairs about two steps behind him, causing him to miss a step and fall to the ground. Id. at 1333. The inmate was not supposed to be on the stairs and was required to wait for a command before descending to the recreation yard. Id.

The Third Department held, on these facts, that the injury resulted from "the inmate's *disobedient and affirmative* act of descending down the stairs... prior to receiving permission to do so" and that it "flowed directly, naturally and proximately from the inmate's act *of being out of place without permission* and startling petitioner while running down the stairs." Id. (emphasis added). But if the inmate had been on the stairs *with* permission, then the statutory construction adopted by the Third Department in this case would mean that Officer Garcia's benefit application would be denied. The inmate's conduct, the cause of the injury, and its unexpected nature would be the same, but because the inmate's act would not have been disobedient, then the holdings in this case and in Martin, supra, would require that the officer losing his step "would not constitute an affirmative

act." See Garcia, 165 A.D.3d at 1333, quoting Martin. Surely the Legislature did not intend for the exact same acts of inmates, causing the exact same injuries in the exact same manner, to fall either within or outside the statute depending on whether those acts were "volitional or disobedient."

Respondents also argue that the Appellate Division's statutory construction "furthers the Legislature's purpose" because "[a]fter all, performance-of-duty disability retirement benefits are intended to be the exception to the general rule." See Res. Brf. at 18. But respondents do not support this argument with any legislative history indicating that the Legislature intended to make "act of an inmate" benefits difficult for correction officers to get, and indeed, the extensive legislative history discussed at pages 24 through 27 of the main brief shows that the Legislature was acting out of concern for the dangerous conditions faced by correction officers and wanted to make retirement benefits broadly available to those who suffer disabling injuries as a result of inmates' acts. As the Governor stated, "[w]hen an officer sustains a debilitating injury while executing his or her duties we must provide them with the means to take care of themselves and family" (Addendum to Main Brief at 5), and as Senator Leibell and Member of Assembly Vitaliano observed, the correctional setting "necessitates a strong disability protection in the event of a career indicating injury" (Id. at 20, 21). These statements do not evince a legislative intent to read the statute in a crabbed

and narrow manner to restrict the availability of benefits; in fact, they show quite the opposite. Remedial laws, such as this plainly is, should be construed broadly, not narrowly. See Scanlan v. Buffalo Pub. Sch. Sys., 90 N.Y.2d 662, 676 (1997).

Further, to the extent that respondents argue that the Legislature intended to address the "specific problem" of inmate-on-officer violence, see Res. Brf. at 18-19, this argument falls afoul of the settled principle – which respondents do not dispute – that a broadly worded statute may not be limited to a narrower group of cases simply because it "originate[d] in some particular case or class of cases which is in the mind of the legislature at the time." Jensen v. General Elec. Co., 82 N.Y.2d 77, 86 (1993). At most, the materials cited in respondents' brief demonstrate only that the Legislature had certain types of injury foremost in mind, but given that the Legislature did not build an express limitation into the statutory language, those materials do not provide a basis to restrict the statutory application to such cases. See id.; see also Hahn v. Hagar, 153 A.D.3d 105 (2d Dept. 2017) ("Ordinarily, where the Legislature in enacting a statute utilized general terms, and did not, either expressly or by implication, limit their operation, the court will not impose any limitation").

Moreover, as respondents have no choice but to acknowledge, the Legislature noted that "transport[ing]" inmates in a correctional setting was one of the dangerous situations that "necessitat[ed] a strong disability protection." (Add.

20). Respondents argue that "this does not mean... that all incapacitating injuries occurring during inmate transports necessarily fall within the scope of the statute," see Res. Brf. at 20-21, but the only limitation that respondents suggest is that such transportation injuries must proximately result from an inmate's act, see id. at 21. There is certainly nothing in this part of the legislative history – or any other part – to suggest that the Legislature intended the further requirement that such acts be "volitional or disobedient."

Hence, there is no reason for this Court to deviate from the general rule that a statute containing the word "any," or a word of similar import, encompasses all cases falling within such language and does not permit judge-made limitations. See Jensen, supra; Hahn, supra; see also Bath & Hammondsport R.R. Co. v. N.Y.S Dep't of Env. Cons., 73 N.Y.2d 434, 437-38 (1989); Hospital Ass'n of New York State v. Axelrod, 165 A.D.2d 152, 155 (3d Dept. 1991). "Any act of any inmate" means precisely what it says – any act of any inmate, regardless of whether the inmate is defying orders or attempting to obey them.

Respondents attempt to dilute the import of the word "any" by arguing that the first two of the four "act of an inmate" statutes contain the language "*an* act of any inmate" rather than "*any* act of any inmate." See Res. Brf. at 4-6, 20 (emphasis added). But "an" is just as general a word as "any," and as respondents themselves concede, the two words are "materially the same," see id. at 5, meaning

that the word "an" does not permit judge-made limitations any more than "any" does. And even if this Court were to find, contrary to the concession respondents themselves have made, that "an" and "any" are *not* materially the same, the fact remains that a change in statutory language is significant and must be given effect even if there "was no [legislative] intent to make major substantive changes in existing law." People v. Bac Tran, 80 N.Y.2d 170, 175-76 (1992). "Any" means "any," and the plain and unambiguous language of Section 607-c must be given effect without judge-made restrictions.

Further, as discussed at length in the main brief, neither Laurino v. DiNapoli, 132 A.D.3d 1057 (3d Dept. 2015) nor Esposito v. Hevesi, 30 A.D.3d 667, 668 (3d Dept. 2006) upon which respondents rely, see Res. Brf. at 20-21, supports a different conclusion. In Laurino, the inmate sustained an involuntary seizure which was not precipitated by any act he performed, and in Esposito, the officer was injured while lifting an inmate who "was deadweight" and who did not engage in any act prior to or during being lifted. In other words, neither the inmate in Laurino nor the one in Esposito performed any act at all. Here, in contrast, Ms. Trettien was in the process of performing an act – attempting to step out of the high risk van – when she fell. Even assuming that Laurino and Esposito were rightly decided, there is no need for a strained "volitional or disobedient" formulation to distinguish them from this case.

Petitioner notes that the construction of "any act" to mean "any act" would not result in an unlimited flow of disability pensions, because the words "natural and proximate" remain in the statute. The cases holding that officers may not recover for injuries sustained from slipping on a floor that inmates mopped hours earlier, see, e.g., Kaler v. DiNapoli, 86 A.D.3d 898 (3d Dept. 2011), will remain untouched. This limitation – that the injury must flow naturally and proximately from the inmate's act rather than being the culmination of a Rube Goldberg chain of events – is more than sufficient to ensure that the Legislature's intent is complied with, and given that such limitation is built into the statutory language, this Court need not resort to extra-statutory limitations on the words "an" or "any."

Finally, this Court should reject respondents' last contention that the Appellate Division's construction of the "act of any inmate" language "has been on the books for well over a decade", but the Legislature has taken no action to overrule or modify such construction. See Res. Brf. at 22. To begin with, the "volitional or disobedient" construction at issue in this case has been "on the books," not for a decade, but only since May of last year. And just as importantly, the sole case relied upon by respondents in making this argument – Desrosiers v. Perry Ellis Menswear, 30 N.Y.3d 488 (2017) – involves a very different situation. In Desrosiers, this Court held that "when the Legislature... *forgoes specific invitations and requests to amend [a statute's] provisions* to effect a different

result" from that reached by the courts, then its inaction will constitute "some manifestation of legislative approbation of the judicial interpretation." Id. at 497 (emphasis added). Moreover, the Desrosiers court cited a laundry list of instances in which prominent interest groups and bar associations had unsuccessfully petitioned the Legislature to amend the statute, meaning that the Legislature left the judicial interpretation untouched despite its "awareness of this issue." Id. at 498.

In the instant case, there is no suggestion whatsoever that the Legislature has ever been asked to overrule the Appellate Division's construction of "any act of any inmate," and thus, there can be no presumption that the Legislature was "aware[] of the issue" but deliberately declined to take action. This case is thus not like Desrosiers, but instead is one of the ordinary run of cases in which the courts *do not* "ascribe persuasive significance to legislative inaction." Id. at 497, citing Boreali v. Axelrod, 71 N.Y.2d 1, 13 (1987); see also Garcia v. New York City Dep't of Health & Mental Hygiene, 31 N.Y.3d 601, 615 (2018) (declining to ascribe significance to legislative inaction where there had been no public debate and lobbying, and noting that "legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences"); People v. Thomas, ___ N.Y.3d ___, 2019 WL 659377, *5 n.9 (Feb. 19, 2019) ("[l]egislative inaction... is a weak reed upon which to lean in determining

legislative intent").

In sum, the plain language of R&SSL § 607-c should control. Neither the statutory text – which is phrased in broadly general terms – nor anything in the legislative history supports a judge-made limitation of "any act of any inmate" to only "volitional or disobedient" acts. The Third Department's statutory construction was in error, the term "act of an inmate" must be interpreted broadly to include injuries caused directly and proximately by inmates falling while performing the act of exiting a prison van, and the order appealed from must therefore be reversed.

POINT II

EVEN IF THE APPELLATE DIVISION'S CONSTRUCTION WAS PROPER, PETITIONER'S INJURY DID RESULT FROM INMATE TRETTIEN'S VOLITIONAL ACTS

Alternatively, even if this Court accepts the Appellate Division's judge-made restriction of the term "any act of any inmate," it should find that, on these facts, petitioner's injury did result from inmate Trettien's volitional acts of (a) attempting to exit the high-risk van at petitioner's orders, and (b) becoming voluntarily drunk or high.[2]

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[2] Petitioner emphasizes, in this regard, that the Third Department used the formulation "volitional *or* disobedient" rather than "volitional *and* disobedient," and therefore, did not purport to hold that a correction officer must prove both of these conditions.

As to the first of these, the respondents admit that the acts immediately preceding the fall – Ms. Trettien standing up and taking one and a half steps – were "affirmative acts." See Res. Brf. at 24. Respondents nevertheless contend that Ms. Trettien's steps "were too attenuated from petitioner's injuries to constitute the requisite acts of an inmate that proximately caused petitioner's injury," and therefore, it was her "involuntary collapse" that was the sole injury-causing event. Id. at 24-25. This argument does not pass the laugh test. There was no attenuation whatsoever between Ms. Trettien's steps and her fall. The steps and the fall immediately followed each other in time, and in fact, Ms. Trettien fell when attempting to take another step. There was no break or interruption between the steps and the fall. It is indisputable that the steps and the fall were part of a continuous sequence of events. The respondents might as well argue that a motor vehicle crash is attenuated from the act of driving a car.

Respondents' citation of Palmateer v. DiNapoli, 117 A.D.3d 1228 (3d Dept. 2014) for this proposition is inapposite. As explained in the main brief, Palmateer hinged on the issue of whether the petitioner in that case – who was responding to a "commotion" that he "believed" was an altercation between inmates, but was not in the presence of inmates when he was injured – had direct interaction with an inmate. See id. at 1229-30. Here, in contrast, there is no dispute that Ms. Walsh and inmate Trettien were directly interacting at the time of the fall. Thus,

Palmateer provides no support for the respondents' contention that Ms. Trettien's steps and resulting fall, *which constituted a continuous sequence of events*, were somehow "attenuated" from one another. Certainly, the connection between the inmate's act and the resulting injury in this case is, if anything, *more* direct than that in Garcia, supra, where Officer Garcia observed the inmate running down the stairs and only then became startled, missed a step, and fell. See Garcia, 165 A.D.3d at 1333.[3]

Therefore, the respondents' belated concession that Ms. Trettien's fall was immediately preceded by, and part of a continuous sequence of events with, a series of "affirmative acts" is alone sufficient to require reversal of the Appellate Division's order.

But there is more, because respondents are also wrong about the *other* injury-causing volitional act on Ms. Trettien's part, namely becoming drunk or high. To begin with, the respondents' contention that the hearing officer did not "affirmatively find" that Ms. Trettien was intoxicated, see Res. Brf. at 25, founders on the fact that both eyewitnesses who testified at the hearing confirmed her intoxication and that the hearing officer did not discredit either witness' testimony.

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[3] While research does not reveal any other decision by this Court or by the Appellate Division interpreting the term "attenuation" in conjunction with a continuous sequence of events involving an inmate, this Court has certainly held in other contexts that events that proceed without interruption are not attenuated from each other. See, e.g., People v. English, 73 N.Y.2d 20 (1989) (finding no attenuation in police interrogation that was uninterrupted).

And to the extent that respondents' characterize the eyewitnesses' testimony as "speculat[ion] from experience," see id. at 25 n.4, petitioner notes (a) that an opinion based on experience is the very antithesis of speculation; and (b) that in any event, it is well settled that intoxication, based on observation of conduct and speech as occurred here, is a permissible topic of lay opinion, see People v. Casco, 77 A.D.3d 848, 849 (2d Dept. 2010) (lay opinion as to intoxication based on observation of intoxicated person is admissible); Rivera v. City of New York, 253 A.D.2d 597, 600-01 (1st Dept. 1998) ("a lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech); Burke v. Tower East Restaurant, 37 A.D.2d 836 (2d Dept. 1971), citing Felska v. New York Cent. & Hudson R.R. Co., 152 N.Y. 339 (1897) ("lay witnesses who have sufficiently observed the actions of a person may testify categorically that the latter was sober or intoxicated"); see generally Richardson, Evidence § 363 (Prince 10th ed.). Thus, whether or not the hearing officer made an "affirmative finding" that Ms. Trettien was intoxicated, her condition was unrefuted in the record, and there is certainly no evidence from which a contrary finding might be made.

The respondents also argue, in a footnote, that voluntary intoxication "arguably was not the type of act that the Legislature contemplated" as a compensable act of an inmate because it does not involve violence or an

altercation. See Res. Brf. at 25-26 n.5. But the Appellate Division has already rejected any limitation of the statute to violent or intentional acts, see DeMaio v. DiNapoli, 137 A.D.3d 1545 (3d Dept. 2016) – a holding which respondents do not contend was incorrect – and respondents do not dispute either that becoming intoxicated in jail is an unruly act or that it is one of the ways in which inmates' "dangerous and profoundly antisocial" tendencies manifest themselves.

Thus, even if this Court were to give controlling weight to "dangerous and antisocial" to the exclusion of the statutory text and the rest of the legislative history, injuries caused by intoxicated inmates result precisely from inmates' dangerous proclivities, and in fact, intoxication makes inmates *more* dangerous to themselves and others. Indeed, as discussed in the main brief, any contrary holding would treat an inmate's intoxication as a mitigating rather than an aggravating factor and thus unjustly deny benefits to officers who risk their lives by confronting such inmates.

Finally, respondents' contention that the injury was caused, not by Ms. Trettien's drunkenness, but by petitioner's alleged "failure to carefully execute her duties," see Res. Brf. at 26, is both callous and legally incorrect. As a threshold matter, there was no evidence at the hearing from which it could be concluded that alternative measures for unloading Ms. Trettien from the van were even available. Respondents suggest that Ms. Walsh could have "summon[ed] a stretcher or

carr[ied] the inmate from the van," see id., but there was no proof in the record that stretchers were available to be summoned or that it was practical to carry Ms. Trettien, who weighed about 200 pounds (R73), down from a van entrance elevated several feet off the ground. Indeed, such measures would likely have posed at least as great a risk of injury to Ms. Walsh as the measures she took – for instance, the risks inherent in attempting to lift a 200-pound inmate from a starting point several feet high are obvious – and had Ms. Walsh done one of these things and been hurt, respondents would no doubt be now contending that she should have let Ms. Trettien step down on her own.

Moreover, if this Court were to accept respondents' contention, it would essentially import a contributory negligence standard into the Retirement and Social Security Law, which would deprive correction officers of benefits any time the Retirement System could conclude that they contributed even slightly to what happened. There is no legal support for such a standard,[4] nor is there any evidence

[4] Ritsi v. Hevesi, 15 A.D.3d 832, 832-33 (3d Dept. 2005), the sole case cited by respondents, certainly does not support such a standard. In Ritsi, an inmate threw a battery onto a catwalk, and some time later, Officer Ritsi, who was supposed to sweep the catwalk, slipped and fell on the battery. On these facts, the Third Department was at pains to emphasize that its decision *did not* hinge on "common-law principles of negligence or willfulness" but was instead guided by the fact that the petitioner's fall was not the proximate result of the inmate's act of throwing the battery. See id. at 833. Where, as in Ritsi, the inmate's act and the injury are attenuated in time, and where an officer's neglect of a clear duty established in the record occurred in the interim, then such a lack of proximate cause might logically be found. But here, Ms. Trettien was still intoxicated when

that the Legislature intended such harsh results for officers who are injured in what are often – including this case – split-second situations. To the contrary, as held in Cantone v. McCall, 289 A.D.2d 863, 864 (3d Dept. 2001), both the System and the courts are *forbidden* from second-guessing officers' responses to emergency situations where, as here, the petitioner is confronted with a "sudden and unexpected" situation and there is no record evidence to support a conclusion that an alternative course of action would be more fruitful. "Respondent's unwarranted and speculative attempt to second guess the manner in which petitioner responded to the emergency cannot, in these circumstances, be determinative of the issue" of whether Ms. Walsh was injured as a result of an inmate's act. Id.

Moreover, there may of course be more than one proximate cause of an accident, see generally Hain v. Jamison, 28 N.Y.3d 524, 529 (2016), and a contributing cause will only be considered superseding or intervening where it is so attenuated as to be unforeseeable, see Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315 (1980). Here, it is clearly foreseeable that an inmate who gets drunk or high may fall and injure a correction officer while attempting to exit an elevated van entrance. Thus, even if this Court were to find (despite the lack of

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she fell – thus no attenuation in time – and unlike Ritsi, there is no evidence in the record that Ms. Walsh had a black-letter duty to act other than as she did. Given the dissimilarity of facts between this case and Ritsi, and given the Ritsi court's explicit disclaimer of a contributory fault standard, this Court should find that Ritsi is not instructive as to the circumstances at bar.

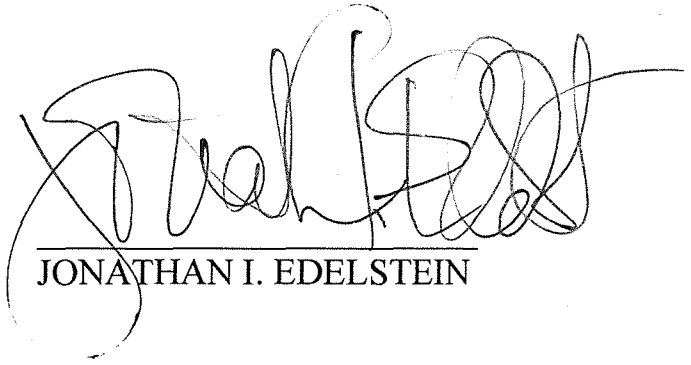
record support) that Ms. Walsh might have handled the incident some other way, that does not prevent Ms. Trettien's actions from also being a natural and proximate cause of her injury.

In sum, Ms. Trettien committed two voluntary acts – attempting to step out of the van, and becoming drunk or high – and both of those acts led, directly and without attenuation, to her falling from the van and injuring Ms. Walsh. This compels a conclusion that, even if the Appellate Division's "volitional or disobedient" construction of R&SSL § 607-c was correct, which it was not, the facts of this case fall well within that category. This Court should thus find that petitioner Walsh's injury resulted from an "act of [an] inmate" under *any* of the competing constructions of the statute at issue, and that she is accordingly entitled to the disability retirement benefits she seeks.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should reverse the Third Department's order, vacate and annul respondents' administrative determination, direct that petitioner-appellant Walsh be granted Section 607-c Disability Retirement Benefits, and grant such other and further relief to petitioner-appellant as it may deem just and proper.

Dated: New York, NY
February 27, 2019



JONATHAN I. EDELSTEIN

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 510.13(c)(i) that the foregoing reply brief was prepared on a computer.

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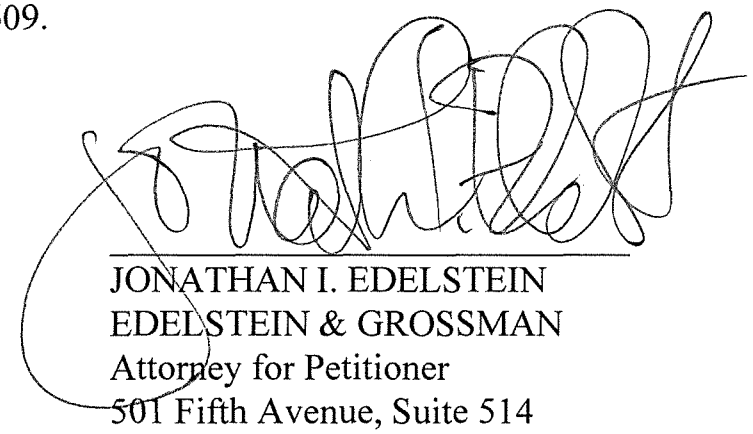
Dated: New York, NY
February 27, 2019



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