

**Court of Appeals
of the State of New York**

IN THE MATTER OF THE APPLICATION OF
PATRICIA WALSH,

Appellant,

-AGAINST-

THE NEW YORK STATE COMPTROLLER AND THE NEW YORK
STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM, ET AL.,

Respondents.

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO
MOTION FOR LEAVE TO APPEAL**

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Dated: July 30, 2018

STATEMENT

Petitioner seeks leave to appeal from the memorandum and judgment of the Appellate Division, Third Department, entered May 31, 2018. The Third Department unanimously confirmed the Comptroller's determination denying petitioner's application for performance of duty disability retirement benefits. The Third Department upheld the Comptroller's determination that petitioner was not injured as the natural and proximate result of an act of an inmate within the meaning of Retirement and Social Security Law § 607-c, observing that petitioner was injured when an inmate, who could barely walk or stand unassisted, simply lost her footing and fell. Memorandum and Judgment, pp. 2-3. Because the proposed appeal does not meet the Court's leave-grant criteria, should be denied.

ARGUMENT

PETITIONER HAS FAILED TO PRESENT A LEAVE WORTHY ISSUE

Petitioner presents no leaveworthy issue. 22 N.Y.C.R.R. § 500.22(b)(4). Applying settled principles governing the review of administrative determinations, the Third Department correctly upheld respondents' determination. This holding is based on clear statutory language and well-established precedent and does not warrant review by this Court.

Attempting to show that the Appellate Division erred, petitioner maintains (Edelstein Affirmation at pp. 8-11) that when the incident in question

occurred, the inmate was being disobedient or acted affirmatively by virtue of being drunk or high. But in making this argument, petitioner improperly relies on matters outside of the administrative record. While the record indicates that the inmate was “possibly intoxicated or high on drugs” (70), neither the administrative law judge nor the Comptroller made a factual finding that the inmate was actually intoxicated or on drugs. Nor was it established that, if the inmate was high or intoxicated, this had been a deliberate or voluntary act. Thus, petitioner’s contention that the inmate’s condition was an affirmative act within the meaning of the statute is speculative. The Appellate Division correctly focused on the matters actually established by the record – that the inmate had not committed an affirmative act within the meaning of R.S.S.L. 607-c where, unable to stand or walk, she simply lost her balance and fell. In any event, whether the inmate was intoxicated or on drugs is a case-specific factual question that does not present a leave-worthy issue.

Petitioner simply raises the same objections to the determination argued to and rejected by the Third Department. She does not identify any issue of statewide importance or any conflict with decisions of other Appellate Divisions.

Accordingly, leave to appeal is not appropriate and petitioner’s motion for leave to appeal should be denied.

CONCLUSION

The motion for leave to appeal should be denied.

Dated: Albany, New York
July 30, 2018

Respectfully submitted,

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