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COURT OF APPEALS

STATE OF NEW YORK

APPLICATION OF PATRICIA WALSH,

Appellant,

-against-

NO. 82

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

Respondents.

20 Eagle Street
Albany, New York
October 16, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Okay, the next appeal on
2 this afternoon's calendar is appeal number 82, Matter of
3 Walsh v. New York State Comptroller.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Good afternoon, Counsel.

6 MR. EDELSTEIN: Good afternoon, Your Honors. May
7 it please the court, my name is Jonathan Edelstein. I
8 represent petitioner-appellant Patricia Walsh. With the
9 Court's permission, I would like to reserve three minutes
10 for rebuttal.

11 CHIEF JUDGE DIFIORE: You may, sir.

12 MR. EDELSTEIN: Thank you. Your Honors, it is
13 the petitioner's position that the words "any act of any
14 inmate" in Section 607-c of the Retirement and Social
15 Security Law, mean any act of any inmate.

16 JUDGE STEIN: So - - -

17 MR. EDELSTEIN: The - - -

18 JUDGE STEIN: - - - so in your view, if the
19 inmate suffered a seizure and fell on the correction
20 officer, that would fall within the statute and provide
21 increased retirement benefits for the correction officers?

22 MR. EDELSTEIN: Well - - -

23 JUDGE STEIN: Is - - - is - - - just - - - is
24 that correct?

25 MR. EDELSTEIN: Your Honor, while I take no



1 position on that, that's the Laurino case - - -

2 JUDGE STEIN: Well, but that's something that we
3 - - -

4 MR. EDELSTEIN: But - - -

5 JUDGE STEIN: - - - that - - - you know, that we
6 have to - - - in - - - in interpreting the words of the
7 statute, which you agree is what our job is here today,
8 correct --

9 MR. EDELSTEIN: Yeah.

10 JUDGE STEIN: - - - we have to determine what
11 does "any" mean, what does "act" mean. And I'm focusing on
12 the word "act" for the moment.

13 MR. EDELSTEIN: Yes.

14 JUDGE STEIN: So if you think that an involuntary
15 act such as falling, when you have a seizure, does or does
16 not fall within that - - -

17 MR. EDELSTEIN: Yes.

18 JUDGE STEIN: - - - that word, then - - - for the
19 purposes of the statute, then I think that makes a
20 difference. So how - - - how - - - how do we approach
21 this, if - - - if we're not at least looking at whether
22 there's an act of volition here?

23 MR. EDELSTEIN: Well, a seizure is not an act.
24 An inmate who has a seizure does not do anything to
25 precipitate the seizure. It's an autonomic - - -



1 JUDGE STEIN: Well, how do we know? How do we
2 know that the inmate didn't, two minutes before that,
3 ingest some substance voluntarily and suffer a seizure?
4 How do we know that? Or do we have - - -

5 MR. EDELSTEIN: Well, if there's ev - - -

6 JUDGE STEIN: - - - to look at that?

7 MR. EDELSTEIN: If there's evidence of that in
8 the record, Your Honor, then I would submit that there is
9 an act of an inmate.

10 JUDGE STEIN: Well - - -

11 JUDGE WILSON: Well, how do you know the legis -
12 - - what the legislature meant by "act"? I mean forget
13 what you think it means. Is there anything in the record
14 to indicate what the legis - - - whether the legislature
15 was thinking "act" means affirmative act, volitional act,
16 accidental act, tripping on something, having a seizure,
17 anything?

18 MR. EDELSTEIN: Well, Your Honor, I would submit
19 that the legislative history bespeaks an intent to provide
20 a broad remedy to correction officers who are injured in
21 the correctional setting as a result of things that inmates
22 do and things that happen to them during an interaction
23 with inmates.

24 JUDGE FEINMAN: But before we look at legislative
25 history, we would have to first figure out whether or not



1 the term is ambiguous. And couldn't we start off by trying
2 to figure out what the plain meaning of the word "act" is -
3 - -

4 MR. EDELSTEIN: Well - - -

5 JUDGE FEINMAN: - - - by looking in dictionaries?
6 And dictionaries tell us that acts can be voluntary or
7 involuntary.

8 MR. EDELSTEIN: Well, and certainly I would
9 submit - - -

10 JUDGE FEINMAN: Looking at - - - you know, that
11 thing we all learn about called "Black's Law" in our first
12 year of law school, where an act is defined as something
13 done or performed, especially voluntarily - - - I don't
14 know what "especially" means. Does that exclude or include
15 involuntary acts?

16 MR. EDELSTEIN: Well, I would submit that where
17 the statute contains the word "any act", that is a term of
18 general import that's meant to include all acts, anything
19 that could be construed as an act.

20 JUDGE STEIN: So - - -

21 JUDGE RIVERA: But that's only begging the
22 question of what - - -

23 JUDGE FEINMAN: If that's the case - - -

24 JUDGE RIVERA: - - - is an act. And an act,
25 volitional, not volitional, affirmative, not affirmative?



1 MR. EDELSTEIN: Well, I mean, as His Honor said,
2 I - - -

3 JUDGE RIVERA: Well, look - - - let me just get
4 back. In - - - in this case, you - - - you must agree,
5 given the testimony that your client provided, that the
6 inmate was not intending to fall on top of the correction
7 officer, correct?

8 MR. EDELSTEIN: Correct.

9 JUDGE RIVERA: Right. So it's not like the
10 inmate wanted to do this, sought to do this, put anything
11 into - - - put any motion into effect with the intent that
12 she would land on top of the officer.

13 MR. EDELSTEIN: Well, the Third - - -

14 JUDGE RIVERA: And in fact, she wasn't even
15 trying to disobey the officer - - -

16 MR. EDELSTEIN: No.

17 JUDGE RIVERA: - - - correct?

18 MR. EDELSTEIN: And the Third Department has
19 already held in the DeMaio case and the Traxler case that -
20 - -

21 JUDGE RIVERA: No, no, no. But I'm - - -

22 MR. EDELSTEIN: - - - that - - -

23 JUDGE RIVERA: - - - talking about this case.

24 MR. EDELSTEIN: Okay.

25 JUDGE RIVERA: I'm talking about in this case.



1 MR. EDELSTEIN: No, I - - - I don't - - - I would
2 submit that there's no basis to limit the term "act" to
3 intentional acts.

4 JUDGE RIVERA: Okay, so then I'm - - - I'm a
5 little unclear what your argument is with respect to what
6 you do when you have basically a two-track disability
7 retirement allowance system. What would be the basis by
8 which your client, this correctional officer, falls within
9 that category of incapacitated officers entitled to a
10 heightened pay - - -

11 MR. EDELSTEIN: That there was - - -

12 JUDGE RIVERA: - - - under 607-c as opposed to
13 the ordinary disability?

14 MR. EDELSTEIN: That there was an act by an
15 inmate, namely stepping out of the van - - -

16 JUDGE RIVERA: But we're back to that - - - okay
17 - - -

18 MR. EDELSTEIN: - - - that led to an
19 unintentional result.

20 JUDGE RIVERA: I'm not being clear. So that - -
21 - that is not defined, so we have to find what's the
22 rationality; what is the legislature seeking to do?

23 MR. EDELSTEIN: Yes. Well, my opponent doesn't
24 dispute that stepping out of the van was an act. He
25 doesn't disp - - -



1 JUDGE RIVERA: But I think - - - I think - - - I
2 think the other side is very clear - - - the Comptroller's
3 Office is very clear that it's not - - - it doesn't come
4 within 607-c. I think that is very clear that that is
5 their position. It does not fall within the scope of this
6 particular type of disability benefit.

7 MR. EDELSTEIN: Well, their position, as
8 expressed in their brief, is that the fall is attenuated
9 from the step, and therefore the step may have been the act
10 but the fall is not the act.

11 JUDGE STEIN: Well, I think that might - - - we
12 can let them state their position. That may have been an
13 alternative argument.

14 But you know, because - - - because "act" is not
15 defined in the statute, I think that - - - to me, that
16 leaved at least some room to say that there's ambiguity,
17 which then causes us to look to - - - and in - - - in line
18 with Judge Riv - - - what Judge Rivera said - - - what was
19 intended to distinguish this level of benefit from an
20 ordinary disability retirement benefit.

21 And I think it's - - - it's pretty clear to me
22 that - - - that the legislature was referring to the type
23 of danger that is unique to the prison or the inmate-
24 officer relationship. And - - - and I have trouble seeing
25 how falling, stumbling - - - whether she took - - -



1 MR. EDELSTEIN: Well - - -

2 JUDGE STEIN: - - - a step or a step-and-a-half
3 or didn't, intentionally or unintentionally, how that would
4 fall within that legislative intent.

5 MR. EDELSTEIN: Well, I would first of all refer
6 to Senator Leibell's memorandum, which specifically dis - -
7 - mentions transporting inmates as one of the situations
8 that can cause these dangers that the statute is intended to
9 remedy.

10 JUDGE STEIN: But - - -

11 JUDGE GARCIA: But the problem with those - - -
12 that kind of history generally, or that type of letter is,
13 to me that means sure, as you're transporting prisoners,
14 there may be an - - - an opportunity for violence or escape
15 or some type of inherent risk in the prison system, right,
16 with having people incarcerated.

17 What I'm - - -

18 MR. EDELSTEIN: Well - - -

19 JUDGE GARCIA: - - - trying to get a handle on
20 here is how - - - going to the purpose of this, how does
21 this type of disability with this type of benefit fit
22 within the overall scheme of what would be available to
23 someone in your client's position, right, as a - - - in
24 this position?

25 So there is a disability benefit, right, that's



1 available, outside of this statute?

2 MR. EDELSTEIN: For those with a certain amount
3 of time in service - - -

4 JUDGE GARCIA: Um-hum.

5 MR. EDELSTEIN: - - - which would mean that if
6 somebody were injured this way who didn't have the time and
7 service that Ms. Walsh had, they would be out of luck.

8 JUDGE GARCIA: Right, but for her with her time
9 and service, she would qualify for another type of
10 disability benefit?

11 MR. EDELSTEIN: I believe so, although the record
12 really doesn't shed much light on that.

13 JUDGE GARCIA: And would that - - - if a person
14 were qualified for that, that would not depend on whether
15 or not it occurred even in the line of duty; is that
16 correct?

17 MR. EDELSTEIN: I believe that outside a Heart
18 Bill situation, that it does require that the disability
19 occur in the line of duty.

20 JUDGE GARCIA: Okay.

21 MR. EDELSTEIN: Again, this is not something that
22 the record really speaks to. It's something I could
23 research if the court wants me to.

24 JUDGE FEINMAN: But I want to understand if - - -
25 if - - - if what you're advocating would lead to us holding



1 that all injuries that are caused by some contact with an
2 inmate would somehow qualify for this POD benefit - - -

3 MR. EDELSTEIN: They would not - - -

4 JUDGE FEINMAN: - - - and if not, what's the
5 limiting principle?

6 MR. EDELSTEIN: Well, the limiting principle is
7 provided by the words of the statute: "natural and
8 proximate". That the - - -

9 JUDGE FEINMAN: So the - - -

10 MR. EDELSTEIN: - - - cases - - -

11 JUDGE FEINMAN: - - - so the acts are always
12 going to be, you know, satisfied - - - that part of the
13 statute is going to always be satisfied once you have the
14 inmate and the whatever happened together?

15 MR. EDELSTEIN: Once you have the inmate doing
16 something, and when the inmate doing something causes
17 injury to the officer, yes, I would - - - I would - - -

18 JUDGE STEIN: Isn't that the same as the direct
19 interaction? So it seems to me that there - - - there are
20 a couple of - - - there's the direct interaction, and then
21 there's the act. It seems to me, those are two different
22 things.

23 MR. EDELSTEIN: Well, direct interaction is not
24 part of the statute. Direct interaction is part of the
25 gloss that the Third Department has put on it to identify



1 the word "act".

2 JUDGE FAHEY: That's really the issue here - - -
3 that's really the issue here; isn't it? Because I think
4 Judge Stein's right that the proximate result of the
5 action, that's, I think, an easier thing, more measured,
6 and it's not - - - also not measured by the statute.

7 What this statute - - - what we have to decide on
8 is whether the plain language means "any act" or the plain
9 language means any particular type of act. And then
10 there's a series of cases that define those types of act.

11 MR. EDELSTEIN: Well, Your Honor, the statute
12 does include the words "natural and proximate". That's not
13 a judicial gloss.

14 JUDGE WILSON: Well - - - well, hold on.

15 MR. EDELSTEIN: That's plain language.

16 JUDGE WILSON: It - - - but it - - - it includes
17 it in one clause and not the other, right? There's an "or"
18 in between them.

19 MR. EDELSTEIN: Yes, "by or as the natural" - - -

20 JUDGE FAHEY: I - - - I understand that the
21 statute says that. And - - - and - - - and Judge Wilson's
22 right, there is an "or", but - - - I understand the statute
23 says that. My question to you, though, is in terms of
24 what's really at stake here is what "any act" means.

25 MR. EDELSTEIN: That is correct, Judge.



1 JUDGE FAHEY: Would you agree with that? Okay.
2 All right.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 JUDGE FAHEY: Thank you.

5 MR. EDELSTEIN: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel.

7 MR. PALADINO: Judge Stein, unlike my opponent, I
8 do have a position on the seizure hypothetical. And in
9 that scenario, if the inmate has a seizure and falls on the
10 officer, there has not been an act. The word "act" is the
11 critical - - -

12 JUDGE GARCIA: What if they have a - - -

13 MR. PALADINO: - - - term - - -

14 JUDGE GARCIA: - - - seizure and they can't
15 control their movements, and they hit the officer with
16 their arm; different answer?

17 MR. PALADINO: No, it would be the same answer.
18 There's a lack of a - - - a volitional act. The - - - the
19 term "act" - - -

20 JUDGE FEINMAN: So - - -

21 MR. PALADINO: - - - is ambiguous. And before we
22 - - -

23 JUDGE FEINMAN: So - - -

24 JUDGE RIVERA: So - - - so "act" means what? I
25 intend something; I intend to move my body in a particular



1 way? What - - - what is "act"?

2 MR. PALADINO: It can mean what we say it means,
3 which is something done or performed, or an occurrence
4 resulting from a person ex - - - exerting their will on the
5 external world. That's the volitional sense.

6 It admittedly can be broader and include
7 involuntary or nonvolitional acts. That's why we're here.

8 JUDGE FAHEY: Here's the problem - - -

9 JUDGE FEINMAN: So - - - so that's why we're
10 here.

11 JUDGE FAHEY: Go ahead.

12 JUDGE FEINMAN: And if the legislature wanted it
13 to limit to volitional, why couldn't they just insert the
14 word "volitional" in front of the word "act"; or the word
15 "intentional"; or whatever limiting language you can think
16 of?

17 MR. PALADINO: They could have did - - - done
18 that. We wouldn't be here if they - - - if they had. But
19 if you look to the - - - the legislative history, you see
20 the types of acts that the legislature was concerned about
21 - - -

22 JUDGE FAHEY: But in the absence - - - in the - -
23 - we - - - we don't got to legislative history - - - if I
24 understand Judge Feinman's point - - - un - - - unless the
25 - - - there's some ambiguity in the - - - in the present

1 language.

2 And when I look at this case, Mr. Paladino, what
3 I wonder is, is the ambiguity in our analysis, in the
4 analysis of this issue, engendered by the jurisprudence
5 around the case rather than the language in the statute
6 itself? And let me tell you what I mean. Let me just - -
7 - and then you can respond to it.

8 I went through all the cases and I listed the
9 various words that were used to describe the act. And I
10 came up with sev - - - eight, so far, and I'll give you a
11 listing of the words, that have described these particular
12 acts in the different cases: intentional, overt,
13 affirmative, voluntary, disobedient, unruly, antisocial - -
14 - seven. So I came up with seven so far that - - - in
15 various cases, that describe the act. And almost all the
16 words are words of limitation on - - - on the act itself.

17 And it - - - it seems to me, going back to Judge
18 Feinman's point, that if they wanted to do that, then they
19 do that. So that's usually what they do. When - - - they
20 know how to write these laws.

21 But to - - - this is an area of the law that's
22 well pored-over. It's - - - it's parsed word-by-word by
23 both the legislature and the legal profession. So it seems
24 that they would have done that if they wanted to do this.

25 So if we stick with the plain language, I think



1 we're logically almost stuck with a definition of act - - -
2 I agree with all my colleagues, that that's - - - but a
3 definition of "act" that doesn't have all these limiting
4 words that have been put on by our jurisprudence.

5 MR. PALADINO: The word "act", by itself, is
6 ambiguous.

7 JUDGE FAHEY: Um-hum.

8 MR. PALADINO: If I say that an inmate collapsed
9 and fell off the back of the van, you wouldn't say to
10 yourself, well, he committed an act. No, you would say
11 something happened to the inmate. You could also say,
12 though, the inmate did something. He collapsed. That's
13 why it is, by itself - - -

14 JUDGE FAHEY: Um-hum.

15 MR. PALADINO: - - - on its face, an ambiguous
16 term.

17 If you go - - - I have before me the - - - the
18 Black's Law Dictionary definition that Judge Feinman
19 referred to. And in it, it refers to the fact that the
20 term is - - - is of ambiguous import, being used in various
21 senses. So if you - - -

22 JUDGE WILSON: Can I - - - can I just walk you -
23 - -

24 MR. PALADINO: I'm sorry.

25 JUDGE WILSON: No, go ahead.



1 MR. PALADINO: So if the analysis is that you
2 can't get to legislative history unless there's facial
3 ambiguity, there is.

4 JUDGE WILSON: I just want to ask you about the
5 structure of the words in the statute.

6 MR. PALADINO: Um-hum.

7 JUDGE WILSON: So it looks to me that you have to
8 read it as if there's a comma there that isn't in the
9 words. And let me start with that. Then we have - - - we
10 have an "or", right? We have "by", and then "or the
11 natural and proximate result of", and I assume the "by" has
12 to pick up "any act"; is that right?

13 MR. PALADINO: That's how I would read it. In
14 other words - - -

15 JUDGE WILSON: Okay, I - - - otherwise, what can
16 the "by" attach to?

17 MR. PALADINO: Right, I mean - - -

18 THE COURT: Okay.

19 MR. PALADINO: - - - if - - - if the inmate
20 obviously punches the officer, that is - - -

21 JUDGE WILSON: So - - -

22 MR. PALADINO: - - - a disabling act by the
23 inmate.

24 JUDGE WILSON: - - - so stick - - - stick with me
25 for a minute, then.



1 MR. PALADINO: Um-hum.

2 JUDGE WILSON: So there are then two paths, it
3 seems to me, in the statute. One is an injury sustained in
4 the performance of the discharge of the duties by any act
5 of an inmate, or as the natural and proximate result of any
6 act of an inmate.

7 So how are those two different? What is the
8 legislature trying to capture in one and not the other and
9 vice versa?

10 MR. PALADINO: Well, the "by" would encompass the
11 situation where the inmate slugs the officer; that's the
12 direct act by the inmate.

13 JUDGE WILSON: Um-hum.

14 MR. PALADINO: Let's say there's a struggle going
15 on between two inmates and the officer sees the struggle,
16 starts to get involved in the struggle and throws out his
17 back; that would be not an act by an inmate but certainly
18 as the natural and proximate result of an act of an inmate.

19 But all the senses that Judge Fahey listed in the
20 case law are all types of volitional acts. I think it's
21 true, as Judge Stein noted, that there was a certain type
22 of special risk unique to the correctional environment that
23 was the justification for this statute.

24 JUDGE WILSON: There's a - - - but in the "by"
25 clause, there's an absence of a proximate cause



1 requirement.

2 MR. PALADINO: Well, if you have the "by", I
3 think you necessarily have the pro - - -

4 JUDGE WILSON: Well - - -

5 MR. PALADINO: If I pu - - - if I punch you, I
6 think that - - - and that disables you - - -

7 JUDGE WILSON: But there's a difference between
8 but-for causation and proximate, no?

9 MR. PALADINO: But I - - - I - - - I think this
10 was intended to be written such that proximate cause is
11 modifying both instances, both the "by" - - -

12 JUDGE WILSON: Well, except that it's not written
13 that way; is it?

14 MR. PALADINO: Yes, it's not an artfully drafted
15 statute. I will - - - I will gr - - - I will grant you
16 that.

17 JUDGE FEINMAN: So looking at 607 for a moment -
18 - -

19 MR. PALADINO: Um-hum.

20 JUDGE FEINMAN: - - - not just the c(a), but also
21 c(b), which is the - - - the section that deal with people
22 who get these communicable diseases, right?

23 MR. PALADINO: Um-hum.

24 JUDGE FEINMAN: So that uses the word "an act of
25 any inmate" also. And yet, you would agree that that



1 section is not requiring any volitional act, right?

2 MR. PALADINO: Well, I think it was - - -

3 JUDGE FEINMAN: I mean, it's a presumption
4 statute; I get that.

5 MR. PALADINO: Um-hum.

6 JUDGE FEINMAN: So - - - so how do - - - how do
7 we reconcile that - - - you know, these two sections?

8 MR. PALADINO: Well, I think (b) is addressing a
9 related problem. Prisons are not only violent and
10 dangerous places, they are infected with lots of diseases.

11 JUDGE FEINMAN: Um-hum.

12 MR. PALADINO: And the - - - the legislature
13 recognized that an officer, by being in a prison
14 environment, just by breathing the air, can acquire - - -

15 JUDGE FEINMAN: Tuberculosis - - -

16 MR. PALADINO: - - - tuberculosis - - -

17 JUDGE FEINMAN: - - - or whatever. Yeah, I mean
18 - - -

19 MR. PALADINO: Hepatitis, you can get that in a
20 variety of ways. HIV, actually, they do have the reference
21 back to an act - - - act of an inmate.

22 But I think the - - - the reason for the
23 different treatment there is that those are slightly
24 different problems that the legislature was confronting at
25 - - - at the same time. But under no read - - -



1 JUDGE FEINMAN: Yeah, but does the use of the
2 word "an act" help us figure out what an act means in the
3 one that we're dealing with, sub (a) - - -

4 MR. PALADINO: I'm not sure - - -

5 JUDGE FEINMAN: - - - or it's not informative?

6 MR. PALADINO: Well, I - - - I think that if you
7 - - - again, recognize that it's ambiguous on its face.
8 It's - - - it certainly does - - - is not reasonably read
9 to include nonvolitional acts. There's no way you can look
10 at what was motivating the legislature. They were
11 concerned about violence and altercations.

12 Admittedly, they draft a statute that goes beyond
13 that. I will agree with my opponent that what they wrote
14 would cover negligent acts of inmates. But all of those
15 are volitional acts. The coverage in that instance would
16 be going beyond the specific problem identified by the
17 legislature.

18 But what we're concerned about is don't take the
19 additional step - - -

20 JUDGE RIVERA: Okay, so this is why I don't
21 understand your - - - your point that this includes
22 involuntary acts. Like I don't read "act" to mean an
23 involuntary movement.

24 MR. PALADINO: Oh, I don't read it that way
25 either. What my - - - my - - -



1 JUDGE RIVERA: Sorry, then I misunderstood you.

2 MR. PALADINO: No - - -

3 JUDGE RIVERA: I thought before you said it
4 includes involuntary acts.

5 MR. PALADINO: No, what I meant to say was the -
6 - - the term "act" is ambiguous. It can mean voluntary
7 acts or it could mean voluntary or involuntary.

8 JUDGE RIVERA: Well, but that's - - -

9 JUDGE FAHEY: Here's the problem - - -

10 JUDGE RIVERA: - - - I'm sorry.

11 JUDGE FAHEY: Here's the - - -

12 JUDGE RIVERA: I just want to clarify that.

13 JUDGE FAHEY: Go ahead, Judge.

14 JUDGE RIVERA: What - - - why is it ambiguous?
15 Where does it - - - where can you track back that the word
16 "act" includes involuntariness.

17 MR. PALADINO: Well, if you go to Black's Law
18 Dictionary it - - - some of the senses - - -

19 JUDGE RIVERA: I don't - - - I don't - - - okay,
20 but then we just disagree.

21 MR. PALADINO: But again - - -

22 JUDGE RIVERA: I don't read it that way.

23 MR. PALADINO: All right.

24 JUDGE RIVERA: But let me ask you a different
25 kind of question - - - well, actually, Judge Fahey had a

1 question, then I'll - - -

2 JUDGE FAHEY: Yeah, I just want to stay on this
3 point. It's not ambiguous. What it - - - the way I see it
4 is it's all-encompassing, and it includes both voluntary
5 and involuntary acts. The - - - the phrases that - - -
6 that - - - that we - - - all of us - - - in our discussion,
7 are referring to, are phrases that limit the nature of what
8 an act is. It's - - - it's - - - it's unruly, it's
9 disruptive, it's voluntary, it's involuntary.

10 Those are all slices of what an act is. But none
11 - - - but the - - - the word - - - the phrase "any act"
12 encompasses all those phrases. So that's, I guess, where
13 I'm disagreeing. I'm not getting your argument that it's
14 ambiguous, because it seems to me that this legislation may
15 have been written too broadly. I - - - I can understand
16 that. But that's not the same as saying it's ambiguous.

17 MR. PALADINO: The argument - - - I think that's
18 petitioner's argument - - - kind of begs the question.

19 JUDGE FAHEY: Um-hum.

20 MR. PALADINO: If "act" was intended to embrace
21 simply volitional acts, which I think is the ordinary
22 understanding of the term when you say someone acted - - -
23 someone did something as opposed to someone hap - - -
24 something happened to them, adding the word "any" simply
25 says - - - means any volitional act is - - - is what it

1 means.

2 And it's clear from the legislative history that
3 this statute was intended to confer the same coverage as
4 the statute that governs state correctional officers, which
5 simply uses the term "an act of an inmate" as opposed to
6 "any act of any inmate".

7 And I think when you consider that, "any" and
8 "and" are really synonymous in that context and are not sub
9 - - - intended to expand "act" beyond the volitional sense.
10 It's simply saying any volitional act. So if the inmate in
11 a work crew intentionally, you know, lifts his arm and
12 strikes an officer, even though he did not intend to
13 strike the officer, that was a volitional act, and that
14 will suffice to satisfy the "act of an inmate" requirement.

15 JUDGE STEIN: But let me ask you about all of
16 these other terms that Judge Fahey mentioned.

17 MR. PALADINO: Um-hum.

18 JUDGE STEIN: Are they all included within
19 "volitional"?

20 MR. PALADINO: Yes. As - - - unless I heard him
21 incorrectly.

22 JUDGE STEIN: So it's not - - - it's not - - -
23 it's - - - in your view, the Third Department isn't saying
24 that these are - - - each and every one of them are
25 different types of acts or different limitations on what an



1 act is? It's one limitation. It's volunlar - - -
2 volitional. That - - - that's what you're saying:
3 affirmative or volitional, same thing. Right?

4 MR. PALADINO: Correct. We are not saying,
5 despite what the petitioner is arguing, that there has to
6 be a disobedient act; it just has to be volitional, and
7 then it has to be the proximate cause. So here, even if
8 you view this involuntary colla - - -

9 JUDGE STEIN: And it doesn't have to be
10 antisocial?

11 MR. PALADINO: Correct.

12 JUDGE STEIN: And it doesn't have to, you know,
13 be intentional.

14 MR. PALADINO: Correct. But even if somehow
15 collapsing and falling off the back of a van somehow
16 qualifies as an act, where the petitioner fails is on the
17 proximate cause end, because the hearing officer found that
18 the injury - - -

19 JUDGE RIVERA: I - - -

20 MR. PALADINO: - - - was attributable - - -

21 JUDGE RIVERA: No, I think - - - in an effort - - -
22 - now I'm losing the limiting principle, because now - - -
23 now you've really kind of said it is almost anything that
24 an inmate does, and I didn't think that's really where you
25 started.



1 So but I wanted to ask a different kind of
2 question, which is going back to some of the questions that
3 - - - that were asked of Walsh's counsel.

4 If - - - if you could please help me understand
5 this two-track disability process and where someone like
6 Walsh, if she doesn't have ten years in, would she be
7 eligible for ordinary disability benefits, under the - - -
8 this event; would it fall under b(3), is it an accident?
9 What - - - what - - - where does this fall?

10 MR. PALADINO: No, and - - -

11 JUDGE RIVERA: Or end up. I shouldn't say
12 "fall".

13 MR. PALADINO: - - - it - - - it is true that - -
14 - that what are available to corrections officers other
15 than the sort of service retirement - - -

16 JUDGE RIVERA: Yes.

17 MR. PALADINO: - - - are ordinary disability - -
18 -

19 JUDGE RIVERA: Yes.

20 MR. PALADINO: - - - which you at least have to
21 have ten years. If you do, it doesn't matter whether you
22 are disabled on the job or - - -

23 JUDGE RIVERA: Off the job, right.

24 MR. PALADINO: - - - off the job.

25 JUDGE RIVERA: Yeah, yeah.



1 MR. PALADINO: And they have this performance-of-
 2 duty disability retirement, that gets the most generous
 3 possible benefit. The - - - the - - - the alleged inequity
 4 was between correction officers and police officers and
 5 firemen. And they have ordinary. They have performance-
 6 of-duty. But if they - - - if it's a performance-of-duty,
 7 they only get fifty percent of their final average salary.
 8 And they have accidental, which is a very technical term of
 9 - - - of art, that has caused a lot of controversy.

10 What they gave to the correction officers was a
 11 performance-of-duty, limited by an act of an inmate, which
 12 we - - - which we say has to be volitional.

13 JUDGE RIVERA: I see.

14 MR. PALADINO: But if they get it, they get the
 15 highest possible retirement benefit of seventy-five
 16 percent.

17 But someone in the situation that Your Honor
 18 identified who unfortunately doesn't have the ten years - -
 19 -

20 JUDGE RIVERA: Um-hum.

21 MR. PALADINO: - - - is out of luck. That is an
 22 - - - that is an unfortunate consequence. This petitioner
 23 is getting ordinary - - -

24 JUDGE RIVERA: I see.

25 MR. PALADINO: - - - disability re - - -



1 retirement - - -

2 JUDGE RIVERA: Okay, so - - -

3 MR. PALADINO: - - - benefits.

4 JUDGE RIVERA: - - - so then 605(b)(3), that
5 speaks to accidents, would not - - - unless you have ten
6 years - - - well, actually, it doesn't apply to the ten
7 years - - - wouldn't apply to an inmate's misstep?

8 MR. PALADINO: I'm sorry accidental - - - the - -
9 - the correction officers do not have accidental disability
10 retirement benefits.

11 JUDGE RIVERA: Okay.

12 MR. PALADINO: They have this benefit - - -

13 JUDGE RIVERA: Okay.

14 MR. PALADINO: - - - which if - - - if they
15 qualify for it, they get an amount equal to the accidental
16 benefits - - -

17 JUDGE RIVERA: I see.

18 MR. PALADINO: - - - which is seventy-five
19 percent. And that's one of the reasons why there has to be
20 some limiting principle that you're giving the most
21 generous possible benefit. And under the statutory scheme,
22 the higher the benefit, the harder it is to get.

23 JUDGE GARCIA: But under that - - - under that
24 accidental disability benefit, which she does not qualify
25 for, what's the percentage you get for that?



1 MR. PALADINO: Seventy-five percent of your final
2 - - -

3 JUDGE GARCIA: So why would it be more limiting
4 than that, if it's the same percentage? I'm saying why
5 would need a - - - is the limiting percentage in the
6 accidental disability benefit - - - not this one, the other
7 statute - - - is that limited in some way?

8 MR. PALADINO: Well, an accidental benefit - - -
9 if this was a police officer; if this happened to a police
10 officer - - -

11 JUDGE GARCIA: All right - - -

12 MR. PALADINO: - - - he - - - that person
13 presumably would not qualify, because this type of incident
14 is a foreseeable risk of their - - - of their job duties.

15 JUDGE GARCIA: But they still get some type of
16 accident - - - you know, line-of-duty - - -

17 MR. PALADINO: They - - - they get - - -

18 JUDGE GARCIA: - - - or they get accidental
19 benefits, or there's some type of thing. But I thought you
20 were saying that this statute makes up for the fact, in
21 some way, that these types of employees don't qualify for
22 this accidental benefit statute. And therefore, we need a
23 limiting principle?

24 MR. PALADINO: What I - - - what I was trying to
25 say was before this statute existed, all the correction



1 officers had - - -

2 JUDGE FEINMAN: Was the ordinary disability.

3 MR. PALADINO: - - - unlike the police officers,
4 was ordinary. But what they wound up giving them - - -
5 they didn't wind up giving them exactly what the police and
6 firemen get, which is disability fifty percent, accidental
7 seventy-five percent. Instead they gave them this
8 performance-of-duty, so long as there is an act of an
9 inmate. And if you meet that requirement, you get the
10 seventy-five percent.

11 JUDGE RIVERA: Okay.

12 MR. PALADINO: And it's because it's so generous
13 that we're saying there has to be a limiting principle.

14 JUDGE RIVERA: I'm sorry, so who does - - - to
15 whom does 605(b)(3) apply? It doesn't apply to corrections
16 officers? Just to be clear.

17 MR. PALADINO: 605(b) - - - 605(b)(3). I think
18 you're talking about the ordinary - - - 605 - - -

19 JUDGE RIVERA: Yes, it is ordinary.

20 MR. PALADINO: - - - is ordinary for - - - for -
21 - -

22 JUDGE RIVERA: Accident, as long as you're not
23 negligent, the officer themselves.

24 MR. PALADINO: The ordinary is just you get
25 disabled - - -



1 JUDGE RIVERA: Right. Less than ten years as a
2 result of an accident, no?

3 MR. PALADINO: You - - - you have to be - - -
4 have at least ten years of service.

5 JUDGE RIVERA: For the ordinary.

6 MR. PALADINO: For the ordinary. And then you
7 get disabled, and it doesn't matter how or where that
8 occurs. You're - - - you're off-duty and - - -

9 JUDGE RIVERA: But I thought 605(b)(3) said if
10 you don't have ten years in, you could still get that
11 ordinary disability for an accident. Did I misread
12 605(b)(3)?

13 MR. PALADINO: I don't have 605 - - - I don't
14 have that section in front of me, Your Honor, and I - - - I
15 confess, I don't know - - -

16 JUDGE RIVERA: Well, it's - - - it's - - -

17 MR. PALADINO: - - - what you're - - - what
18 you're referring to.

19 JUDGE RIVERA: - - - it's mentioned in footnote 1
20 on page 3 of the corrected brief for - - - for the
21 respondents. It says, if the member was incapacitated as
22 the result of an accident sustained in service, the ten-
23 year service requirement does not apply.

24 MR. PALADINO: Yes, so that would be an - - - I
25 guess that would be an - - - an alternative in - - -



1 instance in which you can get the ordinary.

2 JUDGE RIVERA: Okay.

3 MR. PALADINO: Okay.

4 JUDGE RIVERA: But - - - but Walsh would not fit
5 in - - - under this? Put aside the ten years' service, for
6 the moment - - - because this would be not be considered an
7 accident? That's what I'm trying to clarify.

8 MR. PALADINO: I don't think this would
9 constitute an accident, because it's a - - - it's a risk -
10 - - a foreseeable risk of doing your job.

11 JUDGE RIVERA: Of - - - of doing the job.

12 MR. PALADINO: Right.

13 JUDGE RIVERA: Because it's not an unforeseeable
14 event.

15 MR. PALADINO: Right. Correct.

16 JUDGE RIVERA: It's foreseeable that during
17 transport, you might get injured - - -

18 MR. PALADINO: I think that would be - - -

19 JUDGE RIVERA: - - - not - - - not by a
20 volitional act, in the sense of - - -

21 MR. PALADINO: Right.

22 JUDGE RIVERA: - - - they're trying to escape, as
23 Judge Garcia mentioned, or actually get into a fight, but
24 they slip and fall - - - the misstep?

25 MR. PALADINO: Yes, Your Honor.



1 JUDGE RIVERA: Okay.

2 CHIEF JUDGE DIFIORE: Thank you, Mr. Paladino.

3 MR. PALADINO: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MR. EDELSTEIN: Briefly, Your Honor, I would like
6 to pick up on the distinction between vi - - - "by" and
7 "natural and proximate result". And I would submit that's
8 very relevant here; that the "by" is where there's nothing
9 between the act and the injury. The off - - - the inmate
10 slugs the officer, the officer goes down.

11 JUDGE RIVERA: Well, look, it's poorly drafted -
12 - -

13 MR. EDELSTEIN: And - - -

14 JUDGE RIVERA: - - - and one could say poorly
15 drafted includes using "by" to mean "by the natural and
16 proximate result". The "by" or "as" is referring still to
17 the natural result, because otherwise you're going to have
18 to have a comma after the "natural result". So it's - - -
19 you've got poor drafting - - -

20 MR. EDELSTEIN: But - - -

21 JUDGE RIVERA: - - - or potentially challenging
22 drafting.

23 MR. EDELSTEIN: - - - poor - - - poor drafting or
24 no, a natural and proximate result doesn't have to be a
25 one-step result. It could be where, as my opponent says,



1 an inmate is exerting their will on the external world, but
2 their - - - doesn't end the way they willed it.

3 There is an accident. There is a slip between
4 the cup and the lip, or as here, between the van and the -
5 - - and the yard.

6 The inmate here was exerting her will in the
7 external world. She was - - - got up and she made one-and-
8 a-half steps. The natural and proximate result of trying
9 to take one-and-a-half steps off a steep, highly placed
10 van, while you're drunk or high, is that you might fall.

11 So I would submit that there is no attenuation
12 here between the act, which my opponent agrees is an act,
13 of taking these steps and of the fall, that - - - you know,
14 that's like saying that there's an - - -

15 JUDGE RIVERA: But when there's movement, the
16 question is whether or not it means "act" within - - - what
17 - - - what - - - what the legislature wanted covered under
18 607-c. That's the question.

19 MR. EDELSTEIN: I don't - - - that is the
20 question. But I don't think my opponent disputes, and in
21 fact I think in front of this court he just said, that he
22 didn't dispute that taking a step would be a volitional
23 act.

24 In his brief he certainly agrees that taking a
25 step is a volitional act. So where a step is taken, where



1 there's this volitional act, but as a natural and pr - - -

2 JUDGE STEIN: So if we disagree with you about
3 the step, does that change the analysis here - - - about
4 the step before the stumble or the fall?

5 MR. EDELSTEIN: You mean if the court were to
6 find that the step was not volitional?

7 JUDGE STEIN: If - - - if the constellation of
8 what happened here did not con - - - constitute a
9 volitional act, yes, of the - - - of the inmate? Well,
10 that - - - that - - - I guess that's answering the
11 question. That wasn't really what I was asking.

12 You seem to be relying on the fact that this one
13 or one-and-a-half steps was volitional. Does your argument
14 depend on that - - - on those one-and-a-half steps? Or
15 what if she stood up? Is that enough?

16 MR. EDELSTEIN: Yes.

17 JUDGE STEIN: Is that a volitional - - - that's a
18 volitional act? And then just keeled right over?

19 MR. EDELSTEIN: Standing up is a volitional act,
20 Your Honor.

21 JUDGE STEIN: Okay.

22 MR. EDELSTEIN: And there was - - -

23 JUDGE FAHEY: How about - - -

24 MR. EDELSTEIN: - - - a volitional act - - -

25 JUDGE FAHEY: - - - this.



1 JUDGE STEIN: What - - - what - - - what if she -
2 - -5

3 JUDGE FAHEY: How about - - - how about this? I
4 go out. I go to a neighborhood bar. I drink for two
5 hours. I get in my car. I'm drunk. I drive for three
6 blocks. I'm still intoxicated. I swerve, hit another car
7 coming in the other direction. Is that - - - was my
8 drinking that led to the DWI charge and the accident a
9 volitional act?

10 MR. EDELSTEIN: It was absolutely a volitional
11 act - - -

12 JUDGE FAHEY: Okay.

13 MR. EDELSTEIN: - - - Your Honor.

14 JUDGE STEIN: And what if somebody put - - -

15 JUDGE FAHEY: Just wanted to make sure.

16 JUDGE STEIN: - - - a pill in my iced tea - - -

17 JUDGE FAHEY: Okay.

18 JUDGE STEIN: - - - and I had no idea, and I was
19 apparently intoxicated or drugged. Is that a volitional
20 act?

21 MR. EDELSTEIN: Well, it depends on - - - I mean,
22 if somebody puts a pill in your tea and you feel woozy, but
23 you nevertheless go out and drive, yes, that's a volitional
24 act.

25 JUDGE STEIN: Well, what if - - - what if this



1 particular person had something slipped in her drink? So
2 she didn't get in a car and drive. She was brought to
3 court, or she was - - - she was being moved. She didn't
4 ask to be moved. She didn't ask to be put in that van.
5 She was put in that van.

6 So how - - - I guess my point is, is that there's
7 nothing in this record as to how she got to be in that
8 state that she was in. So how - - - how do we say that
9 that, in and of itself, was volitional?

10 MR. EDELSTEIN: Well, Judge, because the
11 involuntary intoxication is very much the exception. When
12 somebody is intoxicated, 9- - - - 999 times out of 1,000
13 it's the result of volitional - - - voluntary intoxication.

14 JUDGE FEINMAN: But - - -

15 MR. EDELSTEIN: And if there was evidence in this
16 record that something was put in her drink, then maybe it's
17 a different story. But there certainly is nothing from
18 which it could be inferred that her intoxication was
19 anything other than what intoxication ordinarily is.

20 JUDGE FEINMAN: But does it matter whether she is
21 dragged into the van or dragged out of the van by the
22 police officers - - - the corrections officers, sorry - - -
23 versus the correction officer tells her stand up, you know,
24 we've arrived back at the jail?

25 MR. EDELSTEIN: Well, it depends on why she was



1 being dragged out, Your Honor. For instance, if she was
2 being dragged out because she refused to get up and leave,
3 then there would be the volitional act of her refusing to
4 get up and leave.

5 Here we have the volitional act of getting up and
6 leaving. Either way, the - - - either way, there has been
7 an act that has been performed. And there is a natural and
8 proximate result to that act, which is - - - you know, and
9 I would point out also that the correctional setting
10 accentuates the risk, because you have here someone who was
11 handcuffed, not - - - not - - - not leg-shackled, but
12 handcuffed, which is going to impair movement. Sometimes
13 the inmates are shackled.

14 You have this van that is specially designed for
15 the correctional setting, and it's a very steep step off of
16 it - - - two steps off of it. And I think the risk is
17 accentuated by the fact that in this record, three other
18 officers got hurt in the exact same van in the exact same
19 way, that one of the things that happens when inmates
20 perform the volitional act of stepping out of this van, is
21 that they may fall. It's happened three other times.

22 Two of those officers, by the way, got active an
23 inmate benefits.

24 And I would finally just - - -

25 JUDGE RIVERA: So the - - - the question is



1 whether or not the legislature, having two different
2 disability retirement allowances available, would have
3 provided what - - - what they call the generous - - -
4 right, the generous allowance under the circumstances were
5 the inmate missteps - - -

6 MR. EDELSTEIN: Well - - -

7 JUDGE RIVERA: - - - and as I think - - - I think
8 Ms. Walsh described it, takes a header - - -

9 MR. EDELSTEIN: Yes.

10 JUDGE RIVERA: - - - and falls on top of her?

11 MR. EDELSTEIN: Well, look at the - - -

12 JUDGE RIVERA: Versus where she's fighting with
13 her and trying to either escape or is violent - - -

14 MR. EDELSTEIN: Well - - -

15 JUDGE RIVERA: - - - directly, right, at - - -
16 towards the inmate (sic).

17 MR. EDELSTEIN: But taking the header is a result
18 of her antisocial nature in and of itself, for getting
19 drunk and high while a prisoner.

20 And I would - - - in the - - - there's
21 legislative history other than the part that the Kaler
22 court focused on. I mean, the very same governor's memo
23 talks about a member of the service sustaining a
24 debilitating injury while executing his or her duties. We
25 must provide them with the means to take care of themselves

1 and family.

2 Senator Leibell is not only talking about
3 violence. It says "violence, assault, transmissible
4 disease, and other life-threatening situations."

5 JUDGE GARCIA: Counsel - - - Counsel, it seems to
6 me, the - - - the problem where we seem to be struggling
7 with this case is there - - - there must be some
8 commonsense definition of "act" that would exclude the case
9 - - - and I think this is near a real case in the Third - -
10 - where you're carrying an inmate on a stretcher, they drop
11 one end of it, it lands on an - - - on a guard, and the
12 guard is injured; versus what I think would be a seizure,
13 where in the course of that seizure, an inmate strikes a
14 guard, versus an inmate faints, they go to catch the
15 inmate, and there's an injury.

16 And this, to me, seems kind of arguably somewhere
17 in between, if you can find that commonsense definition.
18 And then it would become an issue of standard of review.

19 So what would the commonsense definition of "act"
20 be that would divide the universe of these cases that way?

21 MR. EDELSTEIN: Well - - -

22 JUDGE GARCIA: Because you know, mopping the
23 floor - - - and that we can say is a causation issue - - -
24 but mopping, it's been determined to be sometimes an act
25 problem - - - mopping the floor and someone slips an hour



1 later, versus you know, striking a guard.

2 So what is the commonsense definition of "act"
3 that you could give me that would satisfy that problem?

4 MR. EDELSTEIN: Well, I would say that an act is
5 a bodily movement by an inmate that is not an autonomic
6 body process; that the inmate moves a muscle, says a word,
7 does something.

8 JUDGE GARCIA: So a bodily injury caused - - -
9 bodily movement caused by an inmate?

10 MR. EDELSTEIN: Bodily movement caused by an
11 inmate, yes, Your Honor, that's what I would submit - - -

12 JUDGE GARCIA: Okay.

13 MR. EDELSTEIN: - - - is an act.

14 JUDGE FAHEY: Although just a moment ago, you
15 said someone refusing to make a bodily movement would be an
16 act.

17 MR. EDELSTEIN: Okay, actually, then I would
18 amend my answer. I would include words - - - words spoken
19 by an inmate that result in some sort of action being taken
20 by the correction officers.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 MR. EDELSTEIN: Yes.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Application of Patricia Walsh v. New York State Comptroller and the New York State and Local Employees' Retirement System, No. 82 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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