

<b>Matter of Dement v Kelly</b>
2010 NY Slip Op 30207(U)
January 27, 2010
Supreme Court, New York County
Docket Number: 112762/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

PRESENT: \_\_\_\_\_

PART 35

Index Number : 112762/2009

**DEMENT, WILLIAM**

vs.

**KELLY RAYMOND**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 1/25/10

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause — \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

The instant Article 78 application is decided in accordance with the accompanying Decision. It is hereby

**ORDERED** and **ADJUDGED** that the application of Petitioner William Dement, (1) for an judgment pursuant to Article 78 of the CPLR, (a) reviewing and annulling the action of the respondents Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, The Board of Trustees of the Police Pension Fund, Article II, the New York City Police Department and the City of New York herein denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code §13-252 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and (b) upgrading petitioner's non line of duty disability pension to be line of duty disability pension; or (c) directing and ordering the respondents to reconsider the petitioner's application, in a fair and lawful manner; and (2) for an order, pursuant to §2307(a), of the CPLR, directing the respondents to serve and file upon the date hereof: (a) all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of the petitioner herein, not included herein; and (b) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the NYPD, not included herein, is denied in its entirety and the instant Petition is dismissed. And it is further

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be entered based on this judgment. Clerk's Office must appear in person at the Judgment Clerk's Desk (Room 1416) to file this judgment.

\* 2]  
**ORDERED** that the Clerk of the Court is directed to enter judgment accordingly. And it is further

**ORDERED** that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated 1/27/10

ENTER: [Signature], J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_ x  
In the Matter of the Application of

WILLIAM DEMENT,

Index No. 112762/2009

Petitioner

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

**DECISION/ORDER**

-against-

RAYMOND KELLY, as the Police Commissioner  
of the City of New York, and as Chairman of the Board  
of Trustees of the Police Pension Fund, Article II,  
THE BOARD OF TRUSTEES of the Police Pension  
Fund, Article II, NEW YORK CITY POLICE  
DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

\_\_\_\_\_ x  
EDMEAD, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1410).

**MEMORANDUM DECISION**

Petitioner William Dement (petitioner) moves (1) for an judgment pursuant to Article 78 of the CPLR, (a) reviewing and annulling the action of the respondents Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II (the Police Commissioner), The Board of Trustees of the Police Pension Fund, Article II (the Board of Trustees), the New York City Police Department (NYPD) and the City of New York (the City) (collectively, respondents) herein denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code §13-252 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and (b) upgrading petitioner's non line of duty disability pension to be line of duty disability pension; or

(c) directing and ordering the respondents to reconsider the petitioner's application, in a fair and lawful manner; and (2) for an order, pursuant to §2307(a), of the CPLR, directing the respondents to serve and file upon the date hereof: (a) all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of the petitioner herein, not included herein; and (b) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the NYPD, not included herein.

*Background*

Petitioner was born on March 3, 1962, and became a member of the Police Pension Fund (PPF) after he was appointed a police officer with the NYPD on January 3, 1983.

Petitioner was a Lieutenant with the NYPD on September 11<sup>th</sup> 2001. He first responded to the World Trade Center (WTC) terrorist attack on September 14, 2001, where he performed a twelve hour tour of duty. Later, during the months of September, October and the first week of November, 2001, he was assigned to the Staten Island Landfill in connection with 9/11 recovery and investigative work. In November of 2001, he initially experienced labored breathing, persistent heavy coughing, chest congestion, and nasal fluid and throat discharge as a result of his WTC toxic exposure injuries.

On or about December 6, 2002, petitioner submitted an application for Accident Disability Retirement (ADR) pursuant to NYC Admin. Code § 13-252, and the Police Commissioner submitted an application on petitioner's behalf for ordinary disability retirement (ODR). In his 2002 application, petitioner alleged that he was disabled due to "difficulty in breathing" allegedly caused by exposure at the WTC and land fill. On or about December 31,

2002, while his ADR application was pending, petitioner retired from the NYPD after completing 20 years of service. The Police pension fund Medical Board (the Medical Board) reviewed petitioner's 2002 application for ADR, as well as the Police Commissioner's ODR application, on February 28, 2003, and after reviewing the medical evidence submitted, and interviewing and examining petitioner, determined that petitioner "does not have a disability which would preclude him from performing the full duties of a New York City police officer." Thereafter, the Medical Board recommended to the Board of Trustees that both applications be denied. After tabling petitioner's case on June 11, 2003, the Board of Trustees, at its July 9, 2003 meeting, voted to deny petitioner's application for ADR and the Police Commissioner's application for ODR based on the Medical Board's recommendation.

On or about November 5, 2005, petitioner filed a Notice of Participation in the World Trade Center Rescue, Recovery or Clean-Up Operations (Notice of Participation), noting that he worked within the WTC site on numerous dates between September 14, 2001 to October 5, 2001 performing supervision of rescue and cleanup. On October 27, 2006, petitioner filed an application for ADR pursuant to the WTC Law, and the Police Commissioner submitted an application for ODR on petitioner's behalf. In his application, petitioner alleges that he is disabled due to "WTC cough, [reactive airway disease or dysfunction syndrome("RADS"), asthma, [gastro-esophageal reflux disorder ("GERD")], esophagitis, sinusitis, chronic rhinitis, & severe sleep apnea." Petitioner also filed an undated Application for Reclassification requesting that his service retirement pension be reclassified as an ADR pension pursuant to the WTC Law.

The Medical Board reviewed the petitioner's WTC application for ADR for the first time on August 10, 2007 and unanimously determined, *inter alia*, that petitioner was disabled "due to

his sleep deprivation secondary to his severe sleep apnea,” but that “there was no evidence of a significant pulmonary disability. At the January 9, 2008 meeting, the Board of Trustees considered petitioner’s WTC application and the Police Commissioner’s ODR application for the first time. Because the Police Commissioner’s ODR application was improperly considered, the Board of Trustees remanded petitioner’s application back to the Medical Board for further review. Once again, the Medical Board unanimously recommended to the Board of Trustees that petitioner’s application be denied. Ultimately, the Board of Trustees remanded petitioner’s application back to the Medical Board to consider new medical evidence.

The Medical Board reviewed petitioner’s WTC application for ADR for the third and final time on December 5, 2008, and once again unanimously recommended to the Board of Trustees that petitioner’s application under the WTC Law be denied because although petitioner is disabled due to sleep apnea, “there is no evidence of any etiologic connection” between sleep apnea and individuals exposed to the WTC. Furthermore, the Medical Board noted that it did not find that petitioner was disabled by any other condition that would render him eligible for ADR under the WTC Law.

At the May 13, 2009 meeting, the Board of Trustees considered petitioner’s WTC application for the last time. At the request of Lieutenant Thomas Sullivan, president of the Lieutenants Benevolent Association, the Board of Trustees voted to withdraw the Commissioner’s ODR application filed on petitioner’s behalf and “6/6” petitioner’s ADR application. Under the principles of *New York v Schoeck*, 294 NY 559 (1945), a 6/6 tie vote automatically resulted in the Board of Trustees’ disapproval of petitioner’s application for ADR and approval of the Police Commissioner’s application for ODR submitted on petitioner’s behalf.

Thereafter, on or about September 9, 2009, petitioner filed the instant Verified Petition.

*Petitioner's Contentions*

Respondents handled petitioner's case in a legally deficient manner by: ignoring evidence of the disabling nature of petitioner's 9/11 breathing and GI problems, and heavy metal poisoning; failing to realize that petitioner's sleep apnea was in fact a "condition or impairment of health caused by a qualifying condition or impairment of health" under the WTC Law; failing to properly apply the presumption of the WTC Law; failing to overcome the presumption with competent evidence, and instead basing their denial on the Medical Board's claim that "[a]lthough there are reports of individuals exposed to the World Trade Center having sleep apnea there is no evidence of any etiologic connection," and the Board of Trustees' decision that "his sleep apnea is not covered under the presumption," and failing to consider the exacerbating effect of petitioner's breathing and GI problems on his sleep apnea and sleep deprivation.

The denial herein did not meet the applicable standards of review or evidentiary standards, and in rendering the denial the respondents ignored the controlling pension law principles and intents.

*Respondents' Contentions*

At the outset, because petitioner failed to appeal the Board of Trustee's July 9, 2003 decision within the applicable statute of limitations, he therefore cannot contest the decision regarding his December 6, 2002 application in this Article 78 proceeding.

The medical evidence submitted by petitioner and reviewed by the Medical Board demonstrates that petitioner is disabled from performing the full duties of an NYPD officer as a result of sleep apnea, but fails to demonstrate that petitioner is disabled as a result of any other

\* 8]

condition alleged in his WTC application, including RADS, GERD, asthma, esophagitis, sinusitis, chronic rhinitis, or that his sleep apnea was related to or exacerbated by one of the qualifying conditions under the WTC Law. The Medical Board's interviews and physical examinations of petitioner on February 28, 2003, August 10, 2007, March 21, 2008 and December 5, 2008 fail to demonstrate that petitioner's respiratory or gastrointestinal symptoms were severe enough to render him disabled from full police duty, or that these symptoms related to or exacerbated his disabling sleep apnea.

Analysis

Before beginning this analysis, it is important to note that because petitioner failed to appeal the Board of Trustee's July 9, 2003 decision within the applicable statute of limitations, he therefore cannot contest the decision regarding his December 6, 2002 application in this Article 78 proceeding.

CPLR 7803 states that the court review of an administrative determination consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1<sup>st</sup> Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1<sup>st</sup> Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1<sup>st</sup> Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988] ). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's

function is completed on finding that a rational basis supports the administrative determination (see *Howard v Wyman*, 28 N.Y.2d 434 [1971] ). Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (see *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1<sup>st</sup> Dept.], aff'd 66 N.Y.2d 1032 [1985] ).

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 See also *Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Moreover, where, as here, the administrative determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. See *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Envtl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4<sup>th</sup> Dep't 1980). See also *Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v*

*Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4<sup>th</sup> Dep't 1978), *lv. To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

And, "Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since 'the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.'" *Wooten v Finkle*, 285 AD2D 407, 408 (1<sup>st</sup> Dept 2001) (quoting *Berenhaus v Ward*, 70 NY2d 436, 443 (1987); *Matter of Stork Rest. v Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter of Acosta Wollett*, 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006] ).

The seminal case assessing the propriety of the determination by the Medical Board is *Matter of Borenstein v New York City Employees' Retirement System*, 88 NY2d 756 (1996). In *Borenstein*, the Court of Appeals held that:

In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious (see, *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 351; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231). Ordinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence (see, *Matter of Tobin v Steisel*, 64 NY2d 254, 259; *Matter of Canfora v Board of Trustees*, *supra*). While the quantum of evidence that meets the "substantial" threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require "some credible evidence" (see, e.g., *Matter of Longo v City of New York*, 178 AD2d 253, 255, *affd* 79 NY2d 1011; *Matter of Goldman v McGuire*, 101 AD2d 768, 770, *affd* 64 NY2d 1041; *Matter of Belnavis v Board of Trustees*, 84 AD2d 244, 248; *Matter of Manza v Malcolm*, 44 AD2d 794; *Matter of Drayson v Board of Trustees*, 37 AD2d 378, 380, *affd* 32 NY2d 852). "Some credible evidence" strikes a proper balance between deference to the Medical Board and accountability to NYCERS members.

*Id.* at 791.

In *Borenstein*, the Court found that a determination by the Medical Board that respondent

was not physically disabled for the purpose of performing city-service was based on some credible evidence and was not arbitrary and capricious where the Medical Board, while considering respondent's subjective complaints of pain when determining disability, found that the medical evidence submitted by respondent was not dispositive on the issue of disability but was subject to conflicting interpretations. The Board alone had the authority to resolve such conflicts. In each of its two final reports submitted to the Board of Trustees, the Medical Board detailed what medical proof had been considered, specified the nature of respondent's complaints and outlined the results of its physical examinations of respondent, concluding that respondent's physical condition was not disabling for duty.

And, in the instant case, this court is without authority to determine, as a matter of law, that respondents' determination was faulty, since the Medical Board thoroughly evaluated all of the medical evidence, on multiple occasions, and respondents considered a full record before reaching their determination. (*Matter of Canfora v Board of Trustees*, 60 NY2d 347; *Matter of Demarco v New York City Employees' Retirement Sys.*, 211 AD2d 594; *Matter of Cammarota v Teachers' Retirement Sys.*, 205 AD2d 412; *Matter of Nemecek v Board of Trustees*, 99 AD2d 954; *Matter of Whalen v Monaghan*, 285 App Div 884, 309 NY 929; *Matter of Appleby v Herkommer*, 165 AD2d 727; *Matter of Spiro v Ward*, 159 AD2d 225; *Matter of Bevers v New York City Employees' Retirement Sys.*, 179 AD2d 489; *Matter of Drayson v Board of Trustees*, 37 AD2d 378, 32 NY2d 852; *Matter of Brown v New York City Employees' Retirement Sys.*, 99 AD2d 451.).

In the instant case, on the basis of all of the evidence before the Medical Board and its own examinations of petitioner, the Medical Board's final conclusion is supported by sufficient

credible evidence in the record, and shall not be overturned by this court. The Medical Board's consistent findings, added to the medical documentation reviewed, which led the Medical Board to conclude that petitioner had not met his burden of substantiating that he was unable to perform full police duties due to the enumerated disabling conditions , or that his disabling sleep apnea was caused by a qualifying WTC condition is - again - amply supported by the record and shall not be overturned by this court.

In this case, petitioner's doctors provide a plethora of evidence and findings contradictory to the findings of the Medical Board. However, a difference of opinion among doctors fails to establish that the Medical Board's determination was arbitrary and/or capricious. *See In re Cammarota v Teachers' Retirement Sys.*, 205 AD2d 412, 412 (1<sup>st</sup> Dept 1994) ["We agree with the IAS Court that the record contains ample credible evidence supporting the Medical Board's finding...., and that the conflicting medical evidence addressed by petitioner provides no occasion for judicial interference."]

As petitioner correctly points out, Administrative Code §13-252 establishes that if an NYPD "member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service," he is to be retired on an ADR pension. The World Trade Center Disability Law (NYC Admin. Code §13-252.1 specifically for cases involving WTC injuries/ailments establishes the legal presumption that "any condition or impairment of health *caused by* a qualifying condition or impairment of health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours shall be presumptive evidence that is was incurred in the performance and discharge of duty ... unless the contrary be proved by competent evidence.

[emphasis added]

This court finds that petitioner has failed to establish that the Medical Board arbitrarily and/or capriciously failed to find that requisite "causation" between petitioner's sleep apnea and his GI problems to the degree sufficient to warrant overturning the respondents' determination herein.

As to petitioner's argument that respondents misinterpreted and misapplied the World Trade Center Law, the court is guided by the Court of Appeals in *Howard v Wyman*, 28 N.Y.2d 434 N.Y. 1971, wherein the Court stated:

It is well settled that the construction given statutes and regulations by the agency responsible for their administration, *if not irrational or unreasonable*, should be upheld. (See, e.g., *Matter of Mounting & Finishing Co. v. McGoldrick*, 294 N. Y. 104, 108; *Matter of Colgate-Palmolive-Peet Co. v. Joseph*, 308 N. Y. 333, 338; *Udall v. Tallman*, 380 U. S. 1, 16-18; *Power Reactor Co. v. Electricians*, 367 U. S. 396, 408.) As this court wrote in the *Mounting & Finishing Co.* case (294 N. Y., at p. 108), "statutory construction is the function of the courts 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' (*Board v. Hearst Publications*, 322 U. S. 111, 131). The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (*Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 146)."

*Howard* at 434. (Emphasis added).

#### Conclusion

Based on the foregoing, it is hereby

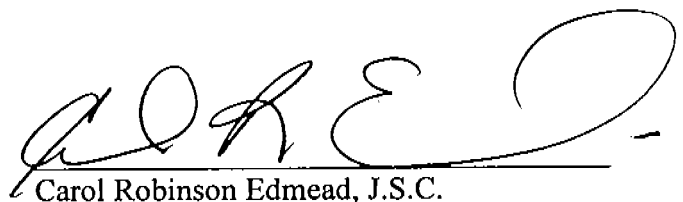
**ORDERED** and **ADJUDGED** that the application of Petitioner William Dement, (1) for an judgment pursuant to Article 78 of the CPLR, (a) reviewing and annulling the action of the respondents Raymond Kelly, as the Police Commissioner of the City of New York, and as

Chairman of the Board of Trustees of the Police Pension Fund, Article II, The Board of Trustees of the Police Pension Fund, Article II, the New York City Police Department and the City of New York herein denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code §13-252 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and (b) upgrading petitioner's non line of duty disability pension to be line of duty disability pension; or (c) directing and ordering the respondents to reconsider the petitioner's application, in a fair and lawful manner; and (2) for an order, pursuant to §2307(a), of the CPLR, directing the respondents to serve and file upon the date hereof: (a) all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of the petitioner herein, not included herein; and (b) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the NYPD, not included herein, is denied in its entirety and the instant Petition is dismissed. And it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment accordingly. And it is further

**ORDERED** that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: January 27, 2010



Carol Robinson Edmead, J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**HON. CAROL EDMED**