

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on March 5, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

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**In the Matter of the Application of
RAJA RATHOUR,**

Petitioner,

Index No.: 002267/2018

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

- against -

DECISION AND ORDER

**NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM.**

Respondent.

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Petitioner Raja Rathour's ("Petitioner" or "Rathour") Notice of Petition with Exhibits, dated September 6, 2018 for a Judgment pursuant to *CPLR Article 78*:

a) For an Order, to Review and Annul the Action of the Respondent New York City Employees' Retirement System ("NYCERS") in its Denial of Petitioner's Performance of Duty Disability Retirement pursuant to *Retirement and Social Security Law Section 507-c ("RSSL Section 507-c")* and to Declare Said Action to be Arbitrary, Capricious, Unreasonable and Unlawful;

b) to Direct and Order Respondent NYCERS to Retire Petitioner with a Performance of Duty Disability Retirement Allowance pursuant to *RSSL Section 507-c* Retroactive to his Retirement,
or, in the Alternative;

c) to Remand the Matter to Respondent NYCERS for an Appropriate Review, and;

d) for an Order, pursuant to *CPLR Section 2307(a)*, Directing Respondent NYCERS to Serve and File:

i) All Reports, Recommendations, Certificates and All Other Documents Submitted to the NYCERS Board of Trustees by the Department of Correction Health Management Division Regarding Any Retirement Application of Petitioner;

ii) Copies of the Minutes of Each Meeting of the Board of Trustees in its Consideration, Discussion or Actions Relating to Any of Petitioner's Retirement Applications; and

iii) Copies of Any and All Medical Records, Reports or Notes on File with the NYCERS Pension Fund and/or the Department of Correction Health Management Division Regarding Petitioner;

e) for Such Other Just and Proper Relief as Deemed by the Court;

2) Respondent New York City Employees' Retirement System ("NYCERS") Verified Answer with Exhibits and Memorandum of Law, dated April 12, 2019;

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	Petitioner 1 [Exh. A-Z]
Notice of Cross-Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits.....	
Verified Answer.....	Respondent 2 [Exh. A-DD]
Replying Affidavit.....	
Supplemental Affidavits.....	
Exhibits.....	
Other [Memoranda of Law]	Respondent 3 Petitioner 4

Upon the foregoing cited papers, the Decision/Order on Petitioner Raja Rathour's ("Rathour") Petition for a Judgment pursuant to *CPLR Article 78* regarding Respondent NYCERS' denial of Petitioner's Performance of Duty Disability Retirement from the New York City Employees' Retirement System pursuant to *RSSL Section 507-c* is as follows: Petitioner's request is granted only to the extent of remanding the matter to Respondent NYCERS for an appropriate review to reconsider his *RSSL Section 507-c* Performance of Duty Disability Retirement because this Court finds Respondent's actions and determinations are arbitrary, capricious, unreasonable and unlawful. Respondent NYCERS' prior March 20, 2017 and May 10, 2018 decisions, denying Petitioner's application for a *RSSL Section 507-c* Performance of Duty Disability Retirement are annulled. The matter is remanded, and Respondent NYCERS is to reconsider his application for a *RSSL Section 507-c* Performance of Duty Disability Retirement application in a fair and lawful manner by not disregarding this Court's rulings [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

**BACKGROUND,
PROCEDURAL HISTORY
AND
ARGUMENTS**

Petitioner Raja Rathour ("Petitioner" or "Rathour") was appointed as a Corrections Officer to the uniformed task force of the New York City Department of Correction ("DOC") on August 12, 2004, subsequently becoming a Captain. He duly became a member of the New York City Employees' Retirement System ("NYCERS") pursuant to *the New York City Administrative Code Section 13-104*. He continued to serve until his retirement. His service with DOC was satisfactory at all times [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

As Captain for the DOC, his job duties called for the care, custody and control of inmates. As a result, Petitioner suffered numerous injuries during his tenure with DOC directly from three (3) inmate-related assaults and/or altercations on April 12, 2012; August 29, 2013; and November 25, 2013. The first occurred on April 12, 2012 when Petitioner experienced injuries to his lumbar spine, hips, legs, knees, ankles, arms, elbows and wrists because of his intervention in an inmate-related altercation. He was the Area Supervisor when a 6 foot 6 inches

400-pound¹ inmate was assaulting other officers. He “grabbed one of the inmates” who slammed him into the edge of the table, causing him to hit his left lower leg and the areas of his hip and knee. While he was able to get up, the inmate proceeded to assault him. It required four or five other officers to subdue the inmate. As a result, he experienced pain in both knees and his left hip. He was taken to Booth Memorial Hospital Emergency Room. When he was examined by Jamil M. Abraham, M.D. (“Abraham”) on April 13, 2012, the doctor noted that Petitioner was assaulted by an inmate on April 9, 2012, sustaining multiple body injuries. He was able to return to work approximately three to four days later at full duty. Thereafter, Petitioner began treating with Kenneth McCulloch, M.D., (“McCulloch” or “Surgeon”) a Fellow of the American Academy of Orthopedic Surgeons on April 23, 2012. Surgeon McCulloch, M.D. found that Petitioner had sustained injuries to his bilateral knees, bilateral hips, lumbar spine, left elbow and left wrist as a result of an assault. Over the course of treatment, Petitioner was prescribed hinged knee braces for bilateral knees as well as a standard cane to assist in ambulation [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

The next incident was on August 29, 2013 when Petitioner suffered injuries to his shoulders, wrists, forearms and hands as a result of his intervention in another inmate-related altercation. Because his supervisor was held hostage, he grabbed an inmate who had previously thrown liquid (“slop”) on the floor. While he was restraining the inmate, he slipped, hitting his head and right shoulder. As a result, he injured his head, neck, shoulders and hands. Consequently, he went to the Emergency Room at Mt. Sinai Hospital. He did not recall if he lost any time from work due to the incident. When Surgeon McCulloch, M.D. reviewed Petitioner’s September 18, 2013 MRI of his *right wrist (emphasis added)*, it demonstrated a *tear of the triangular fibrocartilage complex (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Approximately three (3) months after the second inmate-related incident, Petitioner suffered injuries to his left knee, right arm, shoulder, eye and back on November 25, 2013 when he intervened in yet another inmate-related altercation. While he was escorting two inmates, they began to fight. When he attempted to stop the altercation, he was punched in the eye. Although he succeeded in bringing one of the inmates down, the other grabbed his right arm, pulling it and continuing to kick and punch him. When twelve officers responded to the situation, they proceeded to jump on top of him as well as the inmate. As a result, he slammed his left knee into the floor, injuring his right shoulder. Consequently, he went to the Emergency Room at NY Presbyterian/Queens. He was able to return to full duty but does not recall if he took any time off [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Approximately two (2) weeks later, Petitioner had an MRI of the right shoulder on December 13, 2013. It showed *acromioclavicular joint hypertrophy impinging upon the supraspinatus muscle tendon complex (emphasis added)*. There was moderate tendinosis of the rotator cuff tendon with *partial undersurface tear of the distal supraspinatus tendon (emphasis added)* along with fluid in the subacromial/subdeltoid bursa. There were degenerative subchondral cystic changes in the humeral head but no acute fractures [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

When Petitioner treated with Sami Nathan, M.D. (“Nathan”) on December 21, 2013, the doctor observed that he had injuries to his right eye, right shoulder, mid and lower back and left knee as a result of his restraining two “violent” inmates. He diagnosed him with tendinitis of the right shoulder, lower back derangement in addition to internal derangement of the left knee [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3;

¹ The inmate was also described as 6’5”, weighing 350 pounds [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Petitioner 4].

Petitioner had an MRI of the left knee on February 24, 2014, approximately three (3) months after the November 25, 2013 inmate-related incident. It found *posterior horn medial meniscal tear (emphasis added)*; suprapatellar joint effusion; and mild tricompartmental joint space narrowing in addition to marginal osteophytosis [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Surgeon McCulloch, M.D. performed multiple arthroscopic procedures to Petitioner's *left knee (emphasis added)* on August 6, 2015, including a *partial medial meniscectomy (emphasis added)* and *partial lateral meniscectomy (emphasis added)*. Pre-operative and post operative diagnoses were "*left knee medial meniscus tear (emphasis added)*, *lateral meniscus tear (emphasis added)*, synovitis and loose body" [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Petitioner continued under the care of Surgeon McCulloch, M.D. The Surgeon found on November 2, 2015 that Petitioner's *left knee failed during normal usage (emphasis added)*, resulting in a misstep shortly before his office visit. It exacerbated his left knee symptoms, causing a re-opening to his left knee meniscus. Following a postoperative evaluation on November 2, 2015, the Surgeon scheduled arthroscopic surgery. He performed a *right hip bursectomy with debridement (emphasis added)* on December 17, 2015. Preoperative and postoperative diagnoses were "*right hip trochanteric bursitis ilioltibial band syndrome (emphasis added)*" [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

One month later Surgeon McCulloch, M.D. performed a *left hip arthroscopic bursectomy (emphasis added)* on Petitioner on January 14, 2016. His preoperative and postoperative diagnoses were "*left hip bursitis (emphasis added)*" [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Following his evaluation on January 25, 2016, Surgeon McCulloch, M.D. scheduled Petitioner for *right shoulder arthroscopic subacromial decompression and possible repair of the rotator cuff surgery (emphasis added)* on March 3, 2016. He noted that Petitioner's right shoulder MRI of December 13, 2013 revealed *AC joint hypertrophy impinging on the supraspinatus muscle tendon complex with partial tearing of the rotator cuff tendon (emphasis added)*. He found that it was a *medically necessary procedure because of the positive findings on his history, exam and MRI (emphasis added)*. There was also a lack of response to conservative measures over an extended period of time and *acute change in function associated with the accident or injury of August 29, 2013 (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Petitioner's MRI of the *left knee (emphasis added)* on February 9, 2016 revealed: small to moderate size joint effusion; patella as mildly laterally positioned in relation to the troclear groove; focal osteochondral lesion of the lateral facet of the trochlear surface of the distal femur; tricompartmental arthrosis most prominent at the medial joint compartment; and mild extrusion of the body of the *medial meniscus with a tear involving its inferior articular surface (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Surgeon McCulloch, M.D. performed multiple surgical procedures to Petitioner's *right shoulder (emphasis added)* on March 3, 2016, including open subpectoral biceps tenodesis, arthroscopic subacromial decompression, *arthroscopic SLAP, labial and rotator cuff debridement and arthroscopic synovectomy (emphasis added)*. Preoperative and postoperative diagnoses were "*right shoulder rotator cuff tear, biceps tear and impingement (emphasis added)*" [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Based upon complaints of *radicular pain in his legs as a result of his November 25, 2013 back injury (emphasis added)*, Surgeon McCulloch, M.D. prescribed physical therapy for Petitioner on June 6, 2016. Surgeon McCulloch, M.D. found that Petitioner had *injury to his lumbar spine from a use of force (emphasis added)* when he was *working for the DOC on November 25, 2013 (emphasis added)*. *That force caused the onset of his low back*

pain (emphasis added). Surgeon McCulloch, M.D. recommended an MRI for Petitioner's right shoulder on July 18, 2016 because he still had ongoing pain and weakness in the right shoulder. *Although he had right shoulder arthroscopic subacromial decompression, SLAP, labial and rotator cuff debridements, he had not substantially improved (emphasis added)*. He has had biceps tenodesis. Because of the persistence of his symptoms, Surgeon McCulloch, M.D. preferred a high quality 3-Tesla MRI to evaluate for *possible residual rotator cuff tear (emphasis added) or evidence of a tear (emphasis added)*. He recommended that Petitioner *return to work only on light duty (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Petitioner attended physical therapy with Adam Cohen, DPT ("Cohen") from April 11, 2016 through July 5, 2016, then continuing from July 23, 2016 through August 6, 2016. Accelerated DME Recovery, Inc. prescribed numerous orthotic devices based upon Petitioner's *left knee condition (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Based upon his three inmate-related injuries from his work, Petitioner filed an application with NYCERS for Performance of Duty Disability Retirement on September 1, 2016 pursuant to *New York State Retirement and Social Security Law Section 507-c ("RSSL Section 507-c")*. Petitioner stated that he was incapacitated from further service as a DOC Captain because of his right shoulder, right arm, left knee, left hip, right hip and right knee. *He listed Surgeon McCulloch, M.D. as his treating physician (emphasis added)*. He stated that he had physical therapy, surgery and pain medication. His surgery dates were: August 6, 2015 for his left knee; December 17, 2015 for his right hip; January 14, 2016 for his left hip; and March 3, 2016 for his right shoulder. He stated that his job requires him to lift, work outdoors, walk, climb as well as other duties. He stated that he was totally and permanently disabled from performing the usual duties of his job title but he can do other work. He was working presently. He listed the dates of his injuries as April 9, 2012; August 29, 2013; and November 25, 2013 when he was on full duty tour. *He cited trauma as the nature of his injuries which were the result of his restraining violent inmates on the dates of the incidents (emphasis added)*. *In particular, he injured his left knee, right arm and shoulder along with his back on November 25, 2013 when he was restraining another violent inmate (emphasis added)*. *He also injured both his shoulders, wrists and hands on August 29, 2013 when he was restraining a violent inmate (emphasis added)*. He has proof of the occurrences. He was initially treated for the injuries at the facility clinic on the dates of their occurrences on April 9, 2012; August 29, 2013; and November 25, 2013. While he stopped work on the dates of the incidents of April 9, 2012; August 29, 2013; and November 25, 2013, *he only returned to light duty after the injuries (emphasis added) because he was unable to return to full duty (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

According to his report, dated December 19, 2016, three years after his inmate-related injuries, Scott L. Russinoff, M.D. ("Russinoff") remarked that *Petitioner remained on light duty (emphasis added)*. He opined that Petitioner would be a good candidate for *right knee surgery (emphasis added)* because his right knee continues to disturb him. He recommended follow up examinations every two (2) to three (3) months [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Approximately six (6) weeks later, Surgeon McCulloch, M.D. reported on January 27, 2017 that Petitioner had ongoing *left knee pain after a meniscal tear from a work-related event (emphasis added)*. As a result, it required arthroscopic debridement on August 6, 2015. While Surgeon McCulloch, M.D. observed some improvement to his left knee, Petitioner faced ongoing pain with his daily activities because of the *loss of a substantial portion of his meniscus due to a very large meniscal tear of the medial meniscus (emphasis added)*. He found Petitioner had ongoing medial joint line tenderness to palpation. He recommended conservative rehabilitative efforts along with therapy, anti-inflammatories, activity modification as well as continuing regular

basis follow ups with him [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

The NYCERS Medical Board (“Medical Board”) interviewed in addition to examining Petitioner on January 5, 2017. However, it deferred its decision about Petitioner’s causality after its review of the documentary evidence. It did take notice that *the line of duty incidents of April 9, 2012, August 29, 2013 and November 25, 2013 do qualify (emphasis added)* pursuant to *RSSL Section 507-c*. The Medical Board found Petitioner to be disabled from performing the duties of a DOC Correction Captain because of his right shoulder status post surgery with residuals and his left knee status post surgery with residuals. It claimed that it was unable to establish causality from any of the specific incidents. It focused on an alleged lack of clinical documentation as well as a significant time lapse from the dates of incidents until the surgical procedures. It called attention to Petitioner’s faithfully reporting to full duty work after each incident. It noted that Petitioner was 5'9"[sic], weighing 310 pounds [sic]. Consequently, it deferred its decision about causality. It issued a request for: 1) all clinical records pertaining to Petitioner’s right shoulder and left knee from November 25, 2013 to the present; 2) quantified examinations of the left knee prior to and subsequent to Petitioner’s reported alleged misstep in November 2015; 3) Petitioner’s time and leave records for his dates of service from April 9, 2012 to his left knee surgery on August 6, 2015; and 4) Emergency Department records along with the corresponding DOC Clinic notes on the dates of each incident, April 9, 2012; August 29, 2013; and November 25, 2013 [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Three months later when it reconvened on March 20, 2017, the Medical Board denied Petitioner’s application for Disability Retirement pursuant to *RSSL Section 507-c*. It noted that Petitioner was 5'8" [sic], weighing 291 pounds [sic], observing that osteoarthritis is a progressive degenerative process over time. It dwelled on Petitioner’s own statements about losing little or no time from full duty because of the three (3) incidents. It noted that the surgery to his left knee on “February 9, 2016”² and the right shoulder on March 3, 2016 were several years removed from any of the incidents. It stated that Petitioner claimed to be doing well regarding his left knee until the non-line of duty slip in November 2015 when he reported feeling a sensation of the medial aspect of his left knee opening up. Although there may have been temporary exacerbations of his pre-existing osteoarthritic conditions due to the incidents, the Medical Board was unable to establish causation or evidence of aggravation of pre-existing conditions to the point of disability [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Because Petitioner wished to establish his entitlement to inmate-related disability benefits, his attorney wrote a letter, dated August 7, 2017, to NYCERS, requesting the opportunity for him to testify in person at NYCERS Board of Trustees meeting about the progression of his injuries [Petitioner 1, Exhs. A-Z; Respondent

² This Court notes that February 9, 2016 was the date of his left knee MRI, showing the *medial meniscus with a tear involving its inferior articular surface (emphasis added)*. Surgeon McCulloch, M.D. performed multiple arthroscopic procedures to Petitioner’s left knee on August 6, 2015, including a *partial medial meniscectomy and partial lateral meniscectomy (emphasis added)*. Pre-operative and post operative diagnoses were “*left knee medial meniscus tear, lateral meniscus tear (emphasis added)*, synovitis and loose body [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

2, Exhs. A-DD; Respondent 3; Petitioner 4].

As a result, Petitioner testified before the Board of Trustees on May 10, 2018. *Petitioner disclosed that he returned to work while suffering from these injuries out of a sense of obligation to the department and his family (emphasis added). He informed the Board of Trustees that his coworkers accommodated him so that he would not have contact with inmates (emphasis added).* When he promptly returned to work, he handled only *administrative duties (emphasis added)*. Petitioner's attorney corrected the record over the confusion about Petitioner's allegedly stepping into a ditch in a non-work related incident. She clarified that Petitioner never claimed to have stepped into a ditch at some point prior to his knee surgery in 2015. Petitioner's attorney emphasized that it was *Petitioner's instability of the knee which caused his misstep (emphasis added)*. She disclosed that it was not a ditch but the injury occurred on a sidewalk on Rikers Island. However, after the Board of Trustees dismissed Petitioner from the meeting, it voted to deny his application. Consequently, the actions of the Medical Board and Board of Trustees resulted in Petitioner's receiving substantially less retirement benefits than the Performance of Duty Disability Retirement benefits when Respondent elected to retire him as a Corrections Captain from active service pursuant to *RSSL Section 507-a of Article 14 of RSSL* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

In his Notice of Petition for a Judgment pursuant to *CPLR Article 78*, dated September 6, 2018, Petitioner challenges Defendant NYCERS' decision to deny his *RSSL Section 507-c* Performance of Duty Disability Retirement as arbitrary, capricious and unlawful. He included medical reports from his doctors regarding his injuries, surgeries, physical therapy and treatment. Once the Medical Board has found a Performance of Duty Disability Retirement applicant disabled, he argues that either the Board of Trustees or the Courts can make the final decision on the issue of service-connected causation despite the Medical Board's recommendation. See *Matter of Tobin v. Steisel*, 64 NY2d 254 (1985). He contends that Respondent NYCERS' denial of Petitioner's disability application is unlawful and contrary to the provisions of the *State of New York Constitution, statutes, laws, ordinances, rules and regulations* as well as Court of Appeals and Appellate Division rulings. He points out that the Medical Board failed, neglected and/or refused to use the proper legal test for entitlement to a Performance of Duty Disability pension applicable in the circumstances. He underscores that the Medical Board's actions were contrary to the competent evidence which clearly establishes his entitlement to Performance of Duty Disability Retirement [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Respondent NYCERS filed its Verified Answer along with a Memorandum of Law, dated April 12, 2019. It alleges that the Board of Trustees' conclusion to deny Petitioner's application for Performance of Duty Disability Retirement is neither arbitrary nor capricious because there is credible evidence to support it. See *RSSL Section 507-c; Pell v. Bd. of Educ.*, 34 NY2d 222 (1974); *Connelly v. Bd. of Trs. Of the New York City Fire Dept., Art. 1-B Pension Fund*, 237 AD2d 602 (2nd Dept., 1997); *Wolyniec v. Bd. of Trs. Of the New York City Fire Dept., Art. 1-B Pension Fund*, 232 AD2d 495 (2nd Dept., 1996); *Archul v. Bd. of Trs. Of the New York City Fire Dept., Art. 1-B Pension Fund*, 93 AD2d 716 (1st Dept., 1983), *aff'd* 60 NY2d 567 (1983); *Christian v. New York City Employees' Ret. Sys.*, 83 AD2d 507 (1st Dept., 1981), *aff'd* 56 NY2d 841 (1982). It points out that the Medical Board's determination about an applicant's disability is binding on the Board of Trustees. See *Borenstein v. New York City Employees' Ret. Sys.*, 88 NY2d 756 (1996); *Zamelsky v. New York City Employees' Ret. Sys.*, 55 AD3d 844 (2nd Dept., 2008); *Meyer v. Bd. of Trs. Of the New York City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 (1997); *Suppan v. New York City Employees' Ret. Sys.*, 37 AD3d 474 (2nd Dept., 2007); *Canfora v. Bd. of Trustees*, 60 NY2d 347 (1983); *Kuczinski v. Board of Trs. Of the New York City Fire Dept., Article 1-B Pension Fund*, 8 AD3d 283 (2nd Dept., 2004); *Inguanta v. Board of Trs. Of the New York City Fire Dept., Article 1-B Pension Fund*, 302 AD2d 527 (2nd Dept., 2003); *Manza v. Malcolm*, 44 AD2d 794 (1st Dept., 1974); *Califano v. DiNapoli*, 147 AD3d 1177 (3rd Dept., 2017); *Nemecek v. Bd. of Trus. Of the NYC Fire Dept., Article 1-B Pension Fund*, 99 AD2d 954

(1st Dept., 1984); *Christian v. NYC Emps. Ret. Sys.*, *supra*; *Belton v. Herkommer*, 84 AD2d 713 (1st Dept., 1981); *Muffoletto v. NYC Emps. Ret. Sys.*, 603 NYS2d 144 (1st Dept., 1993); *Cassidy v. Ward*, 169 AD2d 482 (1st Dept., 1991); *Bevens v. NYC Employees Ret. Sys.*, 179 AD2d 489 (1st Dept., 1992); *Baudille v. Kelly*, 95 AD3d 415 (1st Dept., 2012); *Calzerano v. Bd. of Trs. Of the NYC Police Pension Fund*, 245 AD2d 84 (1st Dept., 1997); *Duggan v. Ward*, 160 AD2d 532 (1st Dept., 1990) [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Since the entire NYCERS administrative record regarding Petitioner's application is attached to its Verified Answer, Respondent NYCERS contends that Petitioner's request for an Order, directing NYCERS to serve and file documents regarding his application, each Board of Trustees' meeting minutes in its consideration of his application as well as medical records, pursuant to *CPLR Section 2307(a)* is unnecessary. It claims that it should be denied because Petitioner already possesses: 1) all reports, recommendations, certificates and other documents submitted with his application to NYCERS; 2) copies of each Board of Trustees meeting minutes during its consideration; and 3) copies of all medical records relating to Petitioner [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

In his Reply Memorandum of Law, dated August 2, 2019, Petitioner disputes Respondent NYCERS' decision pertaining to his disability retirement application. While courts are understandably reluctant to substitute their judgment for administrative boards, he contends that there is clear judicial authority to direct a disability retirement award upon a finding of an applicant's entitlement as a matter of law. Petitioner stresses that it is especially so when credible evidence shows that a petitioner's disability was related to a verified line of duty injury. See *RSSL Section 507-c*; *Nastasuk v. Board of Trustees of New York Fire Dept. Article 1-B Pension Fund*, 289 AD2d 335, 734 NYS2d 571 (2nd Dept., 2001); *Matter of Meyer v. Board of Trustees*, *supra*; *Matter of Nicolosi v. Board of Trustees*, 198 AD2d 282, 603 NYS2d 532 (2nd Dept., 1993); *Matter of Jones v. Board of Trustees*, 123 AD2d 628 (2nd Dept., 1986); *Matter of McCambridge v. McGuire*, 62 NY2d 563, 468 NE2d 9, 479 NYS2d 171 (1984); *Matter of Canfora v. Board of Trustees*, *supra*; *Matter of Bridgewood v. The Board of Trustees of NY City Fire Dept., Art. 1-B Pension Fund*, 204 AD2d 629, 612 NYS2d 621 (2nd Dept., 1994); *Matter of Rodriguez v. Bd. of Trustees of NYC Fire Dept.*, 3 AD3d 501 (2nd Dept., 2004); *Cusick v. Kerik*, 305 AD2d 247 (1st Dept., 2003); *Matter of Borenstein v. New York City Employees' Ret. Sys.*, *supra*; *Matter of Costello v. Board of Trustees*, 63 AD2d 894 (1st Dept., 1978); *Matter of Calzerano v. Board of Trustees of NYC Police Pension Fund Art. II*, *supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Petitioner underscores the Medical Board's failure to advance credible evidence in support of its lack of causation finding. See *Matter of Tobin v. Steisel*, *supra*; *Matter of McCambridge v. McGuire*, *supra*; *Baranowski v. Kelly*, 95 AD3d 746, 945 NYS2d 664 (1st Dept., 2012); *Matter of Gaudio v. Board*, 40 AD3d 638 (2nd Dept., 2007), lv. to appeal denied 9 NY3d 815 (December 13, 2007); *Matter of Mescall v. Board*, 204 AD2d 643 (2nd Dept., 1994). He emphasizes Respondent NYCERS' inability to repudiate any of his supporting evidence or testimony. He challenges Respondent's premise that the Medical Board is entitled to deference on all medical issues. See *Matter of Borenstein v. New York City Employees' Ret. Sys.*, *supra*; *Matter of Tobin v. Steisel*, *supra*. He argues that the evidence clearly establishes his entitlement to the approval of his disability retirement application. See *Matter of Tobin v. Steisel*, *supra*; *Boyd v. New York City Employees' Ret. Sys.*, 60 Misc.3d 608, 72 NYS3d 792 (NY Sup. Ct., 2018) [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Petitioner reiterates that the denial of his disability retirement application was arbitrary, capricious and an abuse of discretion. Because of Respondent's failure to adequately conduct the required type of thorough, independent investigation, he underscores that judicial intervention is warranted. See *Matter of Borenstein v. New*

York City Employees' Ret. Sys., *supra*; *Matter of Meyer v. Board of Trustees*, *supra*; *Roddy v. Valentine*, 268 NY 228, 197 NE 260; *New York Constitution Article IV., Section 7*; *Day v. Mruk*, 307 NY 349, 121 NE2d 362 (1954); *Birnbaum v. New York State Teachers Retirement System*, 5 NY2d 1, 176 NYS2d 984 (1958); *New York City Administrative Code Section 13-203*; *O'Marah v. Levitt*, 35 NY2d 595 (1974); *Pell v. Bd. Of Ed.*, *supra*; *Matter of Kiess v. Kelly*, 75 AD3d 416 (1st Dept., 2010); *Meyer v. Bd. of Trustees of the NYC Fire Dept., Article 1-B Fund by Safir*, 90 NY2d 139, 681 NE2d 382 (1997); *Montauk Improvement, Inc., v. Proccacino*, 41 NY2d 913, 363 NE2d 344 (1977); *Matter of Samadjopoulos v. NYCERS*, 104 AD3d 551, 961 NYS2d 410 (1st Dept., 2013); *Matter of Mescall v. Board*, *supra*; *Matter of Gaudio v. Board*, *supra*; *Matter of Canfora v. Board of Trustees*, *supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

COURT RULINGS

This Court's function in a *CPLR Article 78* proceeding is to determine whether the action of an administrative agency had a rational basis or was arbitrary and capricious. See *Matter of Borenstein v. New York City Employees' Retirement System*, *supra*; *Pell v. Board of Education*, *supra*. "Arbitrary action is without sound basis in reason and is generally taken without regard to the fact." See *Pell v. Board of Education* at 231, 356 NYS2d 833, 313 NE2d 321. Administrative agencies must act "lawfully with regard to the essential evidence and in a nonarbitrary fashion." See *VR Equities v. New York City Conciliation & Appeals Board*, 118 AD2d 459, 461 (1st Dept., 1986). "Moreover, when an administrative agency has not observed its own standards or has violated procedure by denying an applicant his or her statutory rights, its determination cannot be sustained." See *CPLR Section 7803[3]*; *In the Matter of Lidakis v. New York City Employees Retirement System*, 27 Misc.3d 1150, Kings County (2010) [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

A rational basis exists where the determination is "[supported] by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination." See *Ador Realty, LLC v. Division of Housing and Community Renewal*, 25 AD3d 128, 139-140, 802 NYS2d 190 (2nd Dept., 2005), quoting *Pell v. Board of Education* at 231, 356 NYS2d 833, 313 NE2d 321. See *Consolation Nursing Home, Inc., v. Commissioner of New York State Dept. Of Health*, 85 NY2d 326, 331, 624 NYS2d 563, 648 NE2d 1326 (1995); *300 Gramatan Ave. Associates v. State Div. Of Human Rights*, 45 NY2d 176, 180, 408 NYS2d 54, 379 NE2d 603 (1971); *Sewell v. City of New York*, 182 AD2d 469, 583 NYS2d 255 (1st Dept., 1992), lv. denied 80 NY2d 756, 588 NYS2d 824, 602 NE2d 232 (1992). If the reviewing court finds that the agency determination has a rational basis, supported by substantial evidence, such determination must be sustained, and the reviewing court is prohibited from substituting its own judgment for that of the agency. See *Navaretta v. Town of Oyster Bay*, 72 AD3d 823, 898 NYS2d 237 (2nd Dept., 2010); *Halperin v. City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 (2nd Dept., 2005); *Dawson v. Zoning Board of Appeals of Town of Southold*, 12 AD3d 444, 785 NYS2d 84 (2nd Dept., 2004); *Morley v. Arricale*, 66 NY2d 665, 495 NYS2d 966, 486 NE2d 824 (1985); *Purdy v. Kreisberg*, 47 NY2d 354, 418 NYS2d 329, 391 NE2d 1307; *Pell v. Board of Education*, at 230-232, 356 NYS2d 833, 313 NE2d 321; *Procaacino v. Stewart*, 25 NY2d 301 (1969) [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

As the Court of Appeals succinctly summarized, "[B]ecause of the severe limitations on the availability of judicial review of determinations made by bodies such as the pension board that such bodies must make a careful and painstaking assessment of all the available evidence and should defer final determination until they are satisfied that all the evidence has been fully and fairly considered." See *Brady v. City of New York*, 22 NY2d 601 (1968), quoting *Matter of Kilgus v. Board of Estimate of City of New York*, 308 NY 620, 626-627, 127 NE2d 705; *Matter of Watson v. McGoldrick*, 286 NY 47, 55, 35 NE2d 645 [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD;

Respondent 3; Petitioner 4].

While the Board of Trustees has the ultimate authority to make decisions with respect to entitlement to a pension, it must rely upon “credible evidence”. See *Matter of Borenstein v. NYCERS, supra*. The Court of Appeals has characterized “credible evidence” as evidentiary in nature and not merely a conclusion of law nor mere conjecture or unsupported suspicion. See *Matter of Meyer v. Board of Trustees, supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

When an agency has not observed its own standards or has violated lawful procedure in its denial of an applicant’s statutory rights, its determination cannot be sustained. See *CPLR Section 7803(3); Pell v. Bd. of Ed., supra*. Consequently, this Court finds that Respondent NYCERS acted in an arbitrary, capricious and unlawful manner in its denial of Petitioner’s disability application since it failed to adhere to the governing law or to adequately conduct the type of required thorough, independent investigation. It wilfully ignored evidence of medical treatment, causation and disability by refusing to adhere to the proper legal standards [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

New York State Constitution Article 5, Section 7 guarantees that membership in any pension or retirement system of the state or of a civil division shall be a contractual relationship, the benefits of which shall not be diminished or impaired. As the Court of Appeals found in *Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. Regan*, 71 NY2d 653 (1988), the *New York State Constitution, Article 5, Section 7* provides valued safeguards for public employees against the diminishment or impairment of pension rights which are fixed and determined by the laws and conditions in existence at the time membership in the pension system commences. *New York Constitution, Article 5, Section 7* provided that upon attainment of membership in a retirement system, a contractual relationship arises, the benefits of which cannot be diminished or impaired. See *Day v. Mruk, supra; Birnbaum v. New York State Teachers Retirement System, supra*. Since membership in the Pension Fund and entitlement to the accrued benefits are not a mere gratuity, they reflect the substantial contributions to the Fund by the member. See *New York City Administrative Code Section 13-203; O’Marah v. Levitt, supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Although Respondent NYCERS conceded that Petitioner established two disabling conditions, it failed to demonstrate that it conducted the balancing test required in the assessment of the relative weight and validity of conflicting medical evidence regarding causation. While the Medical Board is indeed entitled to resolve conflicts in medical evidence and rely upon its own physical examination of the applicant, this Court finds that fairness demands that all available medical evidence be considered by the Medical Board and the Board of Trustees prior to its proper rejection of an applicant’s claim to accident disability retirement. See *Borenstein v. NYCERS, supra; Matter of Kiess v. Kelly, supra*. Moreover, the Medical Board must clearly state the reasons for its recommendations in the form of an articulated, rational and fact-based medical opinion. See *Meyer v. Bd. of Trustees of the New York City Fire Dept., Article 1-B Pension Fund by Safir, supra; Montauk Improvement, Inc., v. Proccacino, supra; Matter of Samadjopoulos v. NYCERS, supra; Agnelli v. Kelly*, 96 AD3d 471 (1st Dept., 2012) [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Although a difference in medical opinion does not render a Medical Board’s determination to be arbitrary and capricious, the key facts, evidence and circumstances when viewed as a whole in this instance make the Medical Board’s medical conclusions legally deficient. See *Matter of Cook v. New York State Comptroller*, 135 AD3d 1117 (3rd Dept., 2016); *Matter of Stack v. Board of Trustees*, 38 AD3d 562 (2nd Dept., 2007); *Agnelli v. Kelly*, 96 AD3d 471 (1st Dept., 2012); *Matter of Gaudioso v. Board of Trustees, supra; Matter of Rodriguez v.*

Board of Trustees, supra [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

This Court duly notes Respondent NYCERS Chairperson Adler's ("Adler") erroneous statement about an incorrect standard for the determination of causation. Chairperson Adler declared that Petitioner's inmate-related incidents must be the "direct and proximate cause" of his disability. However, the Court of Appeals clearly enunciated in *Matter of Tobin v. Steisel, supra* that causation requires that an injury be a "natural and proximate cause" but not its "direct" cause. Thus, for the purposes of accidental disability retirement benefits, an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury and satisfies the test. See also *Occhipinti v. McCall*, 305 AD2d 924 (3rd Dept., 2003) [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

This Court observes that at the NYCERS Board of Trustees meeting on May 10, 2018, NYCERS Medical Board Dr. Joseph Bottner, M.D. ("Bottner") and NYCERS Chairperson Adler discounted Petitioner's "tear" because they found it to be in a setting of arthritis, deeming it a degenerative arthritic condition. They claim that there was no documentation about the knee and shoulder, having additional damage. Consequently, they postured that there was no medical evidence which confirms the assertion of inmate contact incidents of November 2013 and 2012 as the cause of the conditions which necessitated the surgeries to the shoulder and knee in 2015 and 2016. Therefore, they determined that there was no evidence of the "direct" and proximate cause of the injuries which caused the disability for Petitioner [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

However, this Court duly notes that NYCERS Medical Board Dr. Joseph Bottner and NYCERS Chairperson Adler only cursorily commented upon the January 29, 2018 Affirmed Medical Report of Surgeon McCulloch, M.D. which meticulously dealt with Petitioner's complete history of his inmate-related injuries. Since Surgeon McCulloch, M.D. remains Petitioner's treating physician, he has a command of Petitioner's medical woes as result of his work-related injuries. He chronicled Petitioner's complete medical history regarding his inmate-related injuries from the initial incident on April 9, 2012 through January 29, 2018. He noted that any delays in surgical treatment from the time of Petitioner's initial visit until surgical intervention were secondary to delays in obtaining authorization, notifying Petitioner about various approvals, his work obligations and his preference to attempt conservative measures and non-surgical treatment [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Surgeon McCulloch stated that as of July 21, 2017, Petitioner complained about ongoing pain in his right knee which initially began with the work-related injury of April 9, 2012. Petitioner continued to have positive findings on history, examination and MRI of the right knee meniscus tear. While he followed conservative measures, Petitioner remained in pain in his left shoulder with ongoing loss of range of motion and painful provocative maneuvers. His August 4, 2017 MRI evaluation of the right knee demonstrates complex tearing of the medial meniscus with early arthritic changes and joint effusion. He discussed surgical intervention for his right knee meniscus tear on August 18, 2017, requesting authorization from the Worker's Compensation Board ("Board"). The Board subsequently granted right knee arthroscopic meniscal debridement and postoperative physical therapy on October 13, 2017 [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Six years later after Petitioner's inmate-related assaults, Surgeon McCulloch found on January 29, 2018 that Petitioner continues to reveal evidence of unresolved injury to his bilateral shoulders, bilateral hips, bilateral knees, bilateral wrists, neck and back. He is status post surgical intervention for his right shoulder, bilateral hips and left knee. He has been authorized for surgical intervention of his right knee. He has a severe impairment due

to the injury to his bilateral shoulders, bilateral wrists, bilateral hips, bilateral knees, neck and back. He is restricted from his usual line of work with DOC. He is restricted from activities of prolonged sitting, prolonged standing, prolonged walking, kneeling, squatting, stairs, repetitive reaching, repetitive lifting, repetitive overhead activities, pushing, pulling, climbing or operating heavy machinery. *Surgeon McCulloch, M.D. found with a reasonable degree of medical certainty based upon his history, review of medical records, physical examination findings, radiographic findings and intraoperative finds, that the injuries in question are directly causally related to the work-related incidents of April 9, 2012; August 29, 2013 and November 25, 2013 (emphasis added)* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Despite Surgeon McCulloch, M.D.'s well documented report, Respondent NYCERS failed to challenge any part of it which causally connected Petitioner's disabling conditions to his previous inmate-related injuries. The Medical Board merely asserted that Surgeon McCulloch, M.D.'s review and summary of his own contemporaneous treatment notes, the diagnostic tests which he personally ordered and reviewed in addition to his own personal recollections from Petitioner's first inmate-related injury in April 2012 were "conclusory". Thus, it failed to consider the "credible evidence". See *CPLR Section 7803(3); Pell v. Bd. of Ed., supra; Matter of Borenstein v. NYCERS, supra; Matter of Meyer v. Board of Trustees, supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

This Court finds unavailing NYCERS Medical Board Dr. Bottner's testimony about Petitioner's right shoulder MRI as consistent with degenerative changes. See *Matter of Tobin v. Steisel, supra; Matter of Meyer v. Board of Trustees, supra*. The record is replete with the documentation that Petitioner injured his right shoulder as the result of an inmate altercation. Since his first inmate-related injury in April 2012, Surgeon McCulloch, M.D. has been his sole treating surgeon. He offered a detailed progression of his injuries in support of his application. He unequivocally found those injuries to have caused his disability to a degree of medical certainty. Thus, the Board of Trustees failed to meet its burden to demonstrate that any connection between the inmates' actions and Petitioner's injuries was too attenuated to afford coverage under the statute. See *Boyd v. NYCERS*, 60 Misc. 3d 608, 72 NYS3d 792 (NY Sup. Court 2018). Therefore, this Court finds that Respondent NYCERS has not observed the proper standard of law because it failed to rebut that it did not impermissibly pick and choose evidence which weighs against a finding that the disability resulted from work related injuries without providing an explanation of its reasons. See *Boyd v. NYCERS, supra; Matter of Canfora v. Board of Trustees, supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

This Court finds unacceptable Respondent's finding that he is not entitled to a full disability pension simply because Petitioner returned to duty following his inmate-related injuries. As Petitioner credibly testified, he returned to work unable to perform the full duties of a corrections officer while still suffering from his inmate-related injuries. He nobly disclosed that it was his sense of obligation to his employer and his family. He returned to work despite not one but numerous assaults to his body by huge violent inmates. Moreover, when he returned, he only performed *administrative duties (emphasis added)*. In addition, Petitioner's attorney informed the meeting that Petitioner switched tours instead of taking time off. As the Appellate Division ruled in *Cook v. New York State Comptroller*, 135 AD3d 117 (3rd Dept., 2016), the dispositive inquiry for purposes of determining accidental disability retirement benefits is not whether the petitioner is capable of indefinitely performing the clerical tasks assigned to him when he was placed on restricted duty but rather whether he was capable of performing the full duties of his job as a police lieutenant [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

This Court denies Petitioner's request for an Order, pursuant to *CPLR 2307(a)*, directing Respondent NYCERS to serve and file: 1) all reports, recommendations, certificates and all other documents submitted to the

NYCERS Board of Trustees by the Department of Correction Health Management Division regarding any retirement application of Petitioner; ii) copies of the minutes of each meeting of the Board of Trustees in its consideration, discussion or actions relating to any of Petitioner's retirement applications; and iii) copies of any and all medical records, reports or notes on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division regarding Petitioner. The motion papers are replete with all necessary documents regarding Petitioner's retirement application [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

As the Appellate Division found in *Day v. Board of Trustees of New York City Fire Department Article I-B Pension Fund*, 74 AD2d 507 (1st Dept., 1980) when it is in the interest of making sure that no injustice has been done and that no relevant evidence has been overlooked, a court can remand an improperly denied application to NYCERS for a proper consideration with strict handling instructions. Accordingly, this Court is hereby remanding the matter for reconsideration of Petitioner Rathour's *RSSL Section 507-c* Performance of Duty Retirement because it did not properly follow its own procedures. This Court instructs NYCERS to immediately schedule the matter for a determination within thirty (30) days of the Notice of Entry of this Decision/Order. NYCERS is to make an independent evaluation of Petitioner's disability in its determination of whether the April 12, 2012; August 29, 2013; and November 25, 2013 inmate-related assaults and/or altercations were the "natural and proximate cause" of his injuries in question. Moreover, this Court urges NYCERS to expeditiously reach a fair and lawful decision, considering all facts and circumstances. When NYCERS releases its determination, it is instructed to simultaneously provide Petitioner with a copy of the transcript of the meeting so Petitioner may see the full reasons for its decision. See *Agnelli v. Kelly, supra*; *Rodriguez v. Board of Trustees, supra*; *Occhipinti v. McCall, supra*; *Tobin v. Steisel, supra*; *Canfora v. Board of Trustees, supra*; *Meyer v. Board of Trustees, supra*; *Matter of Bridgewood v. Board of Trustees, supra* [Petitioner 1, Exhs. A-Z; Respondent 2, Exhs. A-DD; Respondent 3; Petitioner 4].

Based on the foregoing, it is hereby ORDERED as follows:

Petitioner Rathour's request for an Order to annul Respondent NYCERS' decisions, dated March 20, 2017 and May 10, 2018, denying Petitioner's application for a *RSSL Section 507-c* Performance of Duty Disability Retirement is GRANTED; and NYCERS' March 20, 2017 and May 10, 2018 decisions are ANNULLED because they are ARBITRARY, CAPRICIOUS, UNREASONABLE and UNLAWFUL.

Petitioner Rathour's request for an award of a *RSSL Section 507-c* Performance of Duty Disability Retirement Pension as a matter of law is DENIED.

Petitioner Rathour's application for a *RSSL Section 507-c* Performance of Duty Disability Retirement is REMANDED to Respondent NYCERS with the following INSTRUCTIONS:

Petitioner's Rathour's application for a *RSSL Section 507-c* Performance of Duty Disability Retirement is to be SCHEDULED within thirty (30) days of the Notice of Entry of this Court's Decision/Order;

Respondent NYCERS is to make an INDEPENDENT EVALUATION of Petitioner's disability in its determination of whether it was a natural and proximate result of his injuries received in the April 12, 2012; August 29, 2013 and November 25, 2013 inmate-related incidents;

Respondent NYCERS is to EXPEDITIOUSLY reach a FAIR and LAWFUL decision, considering ALL

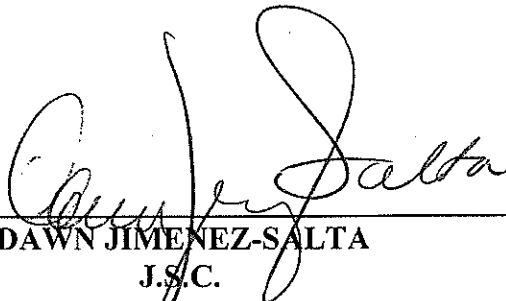
THE FACTS and CIRCUMSTANCES and it is NOT TO DISREGARD the rulings in this Decision/Order;

When Respondent NYCERS releases its determination, it is to SIMULTANEOUSLY provide Petitioner Rathour with a COPY of the TRANSCRIPT of the meeting WITH A FULL EXPLANATION OF THE REASONS for its DECISION;

Petitioner Rathour's request for an Order, pursuant to *CPLR 2307(a)*, directing Respondent NYCERS to serve and file: I) all reports, recommendations, certificates and all other documents submitted to the NYCERS Board of Trustees by the Department of Correction Health Management Division regarding any retirement application of Petitioner; ii) copies of the minutes of each meeting of the Board of Trustees in its consideration, discussion or actions relating to any of Petitioner's retirement applications; and iii) copies of any and all medical records, reports or notes on file with the NYCERS Pension Fund and/or the Department of Correction Health Management Division regarding Petitioner is DENIED.

This constitutes the Decision and Order of the Court.

DATE: March 5, 2020
In the Matter of Raja Rathour v.
New York City Employees' Retirement
System
(#2267/2018)



DAWN JIMENEZ-SALTA
J.S.C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court