MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

October 30, 2012

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Padilla, David v. Sheriff Timothy B. Howard, et al.*
Document Received:	Verified Petition
Name of Claimant:	David Padilla 71 Barnsdale Avenue West Seneca, New York 14224
Claimant's attorney:	Diane M. Roberts, Esq. Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 100 Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enclosure

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DAVID PADILLA
71 Barnsdale Avenue
West Seneca, New York 14224

Petitioner

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

Against

TIMOTHY HOWARD, as Erie County Sheriff,
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

and

JOHN A. ANTHONY, as Chief,
Administration Services
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

and

THOMAS DIINA, as Acting Superintendent of the Jail Management Division of the Office of the Erie County Sheriff
10 Delaware Avenue
Buffalo, New York 14202

And

JOHN RODRIGUEZ, as First Deputy Superintendent of the Jail Management Division of the Erie County Sheriff
10 Delaware Avenue
Buffalo, NY 14202

and

This paper received at the
Erie County Attorney's Office
from Gregory Allen on
the 29 day of October, 2012
at 9:55 a.m./p.m.
Kristen M. Walden
Assistant County Attorney

NOTICE OF PETITION

Index No.: I-2012-003646

ORAL ARGUMENT REQUESTED

THE ERIE COUNTY CORRECTIONAL FACILITY,
as part of the Jail Management Division of the Office of the Erie County Sheriff
10 Delaware Avenue
Buffalo, NY 14202

and

THE COUNTY OF ERIE,
95 Franklin Street
Buffalo, NY 14202

Respondents.

PLEASE TAKE NOTICE, that upon the annexed Verified Petition with Exhibits of David Padilla, dated the 26th day of October, 2012, an application will be made before a Justice to be assigned at a special term to be held at the Erie County Courthouse located at 95 Franklin Street, Buffalo, New York, on the 7th day of December, 2012 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for a Judgment and Order pursuant to C.P.L.R. Article 78, ordering, adjudicating, declaring and requiring that Respondents provide Petitioner benefits and coverage pursuant to General Municipal Law §207-c, and granting the Petitioner such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that a Verified Answer and Supporting Affidavit(s), if any, are to be served at least five (5) days before the time at which the Verified Petition herein is noticed to be heard.

Erie County is designated as the proper venue as the parties conduct their normal business relationship in that County.

Dated: October 26, 2012
Buffalo, New York

LIPSITZ GREEN SCIME CAMBRIA LLP

By: Diane M. Perri Roberts

Diane M. Perri Roberts, Esq.
Attorneys for Petitioner
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

TO: Michael Siragusa, County Attorney
County of Erie
95 Franklin Street, 16th Floor
Buffalo, New York 14202

Timothy Howard, as Erie County Sheriff
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

John A. Anthony, as Chief – Administrative Services
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

Thomas Diina, as Acting Superintendent of the
Jail Management Division of the Office of the
Erie County Sheriff
10 Delaware Avenue
Buffalo, New York 14202

John Rodriguez, as First Deputy Superintendent
Jail Management Division of the Office of the
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

The Erie County Correctional Facility
as part of the Jail Management Division of the
Office of the Erie County Sheriff
10 Delaware Avenue
Buffalo, NY 14202

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DAVID PADILLA
71 Barnsdale Avenue
West Seneca, New York 14224

Petitioner

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

Against

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10 Delaware Avenue
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JOHN RODRIGUEZ, as First Deputy Superintendent of the Jail Management Division of the Erie County Sheriff
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and

VERIFIED PETITION

Index No.: I-2012-003646

ORAL ARGUMENT REQUESTED

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as part of the Jail Management Division of the Office of the Erie County Sheriff
10 Delaware Avenue
Buffalo, NY 14202

and

THE COUNTY OF ERIE,
95 Franklin Street
Buffalo, NY 14202

Respondents.

The Petitioner, David Padilla, by his attorneys, Lipsitz Green Scime Cambria LLP, Diane M. Perri Roberts of Counsel, as and for his Verified Petition, alleges as follows:

1. At all times hereinafter mentioned the Petitioner was an employee of the Erie County Correctional Facility in the County of Erie, State of New York.

2. The Erie County Correctional Facility is a division, department, and/or facility of the County of Erie providing correctional services for Erie County.

3. At all times hereinafter mentioned the County of Erie was and still is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of New York and its charter, having its principal offices in the County of Erie and State of New York.

4. At all times hereinafter mentioned, the Respondent Timothy Howard was and still is the Erie County Sheriff, Erie County Sheriff's Department, having been duly elected and acting as such with authority to oversee personnel-related administrative operations of the Erie County Correctional Facility including, but not limited to, matters involving employees' coverage under General Municipal Law §207-c.

5. At all times hereinafter mentioned, upon information and belief, the Respondent John A. Anthony was and still is Chief for Administrative Services for the Erie County Sheriff's Department, having been duly appointed and acting as such, with authority to act in matters involving certain of the personnel of the Erie County Sheriff's Department and the Erie County Correctional Facility, including but not limited to matters involving employees' coverage under General Municipal Law §207-c.

6. At all times hereinafter mentioned, upon information and belief, the Respondent Thomas Diina, was and still is Acting Superintendent of the Jail Management Division of the Erie County Sheriff's Department, having been duly appointed and acting as such, with authority to act in matters involving certain of the personnel of the Erie County Sheriff's Department and the Erie County Correctional Facility, including but not limited to matters involving employees' coverage under General Municipal Law §207-c.

7. At all times hereinafter mentioned, upon information and belief, the Respondent John Rodriguez, was and still is a First Deputy Superintendent of the Jail Management Division of the Office of the Erie County Sheriff, having been duly appointed and acting as such, with authority to act in matters involving certain of the personnel of the Erie County Sheriff's Department and Erie County Correctional Facility, including but not limited to matters involving employees' coverage under General Municipal Law §207-c.

8. I currently am, and was at all material times, a Correction Officer employed by Erie County and the Erie County Correctional Facility; I have been employed by the Respondent County of Erie since on or about July 29, 1996 in the Erie County Sheriff's Department as a Correction Officer.

9. I am and was at all material times, a member of the Civil Service Employees Association, Inc., Local 1000 A.F.S.C.M.E., AFL-CIO Erie Unit of Local 815 ("CSEA").

10. It is my understanding and belief that CSEA and the County of Erie are parties to a Collective Bargaining Agreement ("CBA") which has been in force for the years 2004 through 2006, and remains in place pending ratification of a new contract.

11. It is my understanding and belief that CSEA, Local 815 Erie County Correctional Unit, the County of Erie and the Sheriff of Erie County are parties to a "Memorandum of Agreement," signed in January 2007 ("MOA") (See **Exhibit 1** attached and incorporated hereto).

12. With respect to sickness or injury resulting from the performance of duties as Correction Officers, the MOA states as follows:

> **Section 1:** **<u>207-(c) Policy and Procedure</u>**
>
> The County of Erie and the Sheriff of Erie County recognizes that employees may become sick or injured as a result of the performance of their duties. It is the policy of the County of Erie and the Sheriff of Erie County to extend to its employees all those benefits that have been agreed to in the collective bargaining agreement as well as benefits granted by state and federal law.
>
> **Section 2:** **<u>Procedure</u>**
>
> a. Any employee who is injured in the performance of his/her duties, or is taken sick as a result of the performance of his/her duties, shall file a Line of Duty Injury Request Form (LDI) that must specify the nature of the injury or illness and it shall recite in detail how the injury/illness was incurred. In the event that an employee is unable to complete LDI Request Form, it shall be completed and submitted by the employee's immediate supervisor.
>
> b. Upon receipt of an employee's LDI report, it shall be the responsibility of the injured/sick employee's immediate supervisor to fill out and submit (on the same date as the injury/illness occurred) a C-2 form.
>
> c. The Sheriff shall have the authority to determine whether an employee is entitled to 207-(c) benefits. In making the determination, the Sheriff or his/her designee shall examine the facts and circumstances giving rise to the

application for such benefits. On an initial determination for benefits, the employee must cooperate with the Sheriff and provide all necessary information, reports and documentation.

d. The Sheriff or his/her designee shall have ten (10) working days to act on written request for 207-(c) benefits. In the case of a denial of benefits, the Sheriff shall issue a written determination to the effective employee setting forth the reasons for the Sheriff's decision.

. e. During the period of time when a request for benefits pursuant to Section 207-(c) of the General Municipal Law is pending, an employee shall be allowed to utilize any accumulated time to continue on payroll. If the request is ultimately granted, the time used shall be restored in the next pay period after the Section 207-(c) benefits.

f. If an employee's request is denied, he or she shall have the right to challenge the denial pursuant to the provisions set forth in Article 78 of the Civil Procedure Law and Rules.

13. On November 9, 2011, I was in firearms retention training at work in the Correctional Facility.

14. During one of the training exercise, I was resisting the force of a fellow Correction Officer who was forcibly trying to remove my gun from its holster. My resistance was so strong that my holster broke in half and I felt a sharp pain in the right side of my neck.

15. I did not report anything on that shift because the pain at that time was not too severe.

16. After completing my regular shift at approximately 7:00 a.m. on November 10, 2011, I began several days of "Regular Day Off" time.

17. I did not go to sleep until later in the day on November 10, 2011 and on the morning of November 11, 2011 when I awoke, I had a headache and stiffness in my neck and shoulder.

18. I was not due to report back to work until November 13, 2011.

19. I called in sick on November 13, 14 and 15, 2011 with a strained neck that occurred during the training session.

20. The "Employee Extended Absence Report" completed by Lt. Kevin Trapper, attached and incorporated at **Exhibit 2** hereto, indicates that the date of my original report of extended absence was on November 15, 2011.

21. When I called in sick, I spoke at times with different "Watch Commanders", depending on the day and shift when I called. However, each time I called in sick I stated that the reason was a neck injury, and on many of the call-ins I also added that I had twisted my neck in training.

22. On November 11, 2011, because of the pain I was experiencing, I saw my Chiropractor, Dr. Thomas Denecke. **Exhibit 3**, attached and incorporated hereto, is a printout of my office visits in November 2011 with Dr. Denecke.

23. I was due to return to my regular week schedule at 11:00 p.m. on Sunday, November 13, 2011. However, the pain I experienced that day was so excruciating that I had to go to the Immediate Care Center because Dr. Denecke's office was closed the following day, Monday, November 14, 2011. Attached at **Exhibit 4**, and incorporated herein, are the discharge instructions given to me at that time by Immediate Care, containing a diagnosis of Cervical Sprain.

24. I returned to Dr. Denecke's office the next time it was open, Tuesday, November 15, 2011. Dr. Denecke kept me off work through November 25, 2011. A "Disability Recommendations" form completed by Dr. Denecke on November 22, 2011, is attached and

incorporated as **Exhibit 5** hereto. Dr. Denecke states on the form that I am to be off work from November 13, 2011 until November 25, 2011 because of "Cervicobrachial Syndrome" and "Cervical Joint Dysfunction."

25. Unfortunately, Dr. Denecke's staff did not pick up the correct "day of injury," and left old information of that form, stating an injury date of August 5, 2011. Attached at **Exhibit 6** hereto is a statement from Dr. Denecke dated October 4, 2012, clarifying that the August 5, 2011 medical visit was for something different I experienced, and which was largely resolved by October 20, 2011. His note further clarifies that on November 11, 2011, I was seen for the November 9, 2011 work injury, which was new and separate from the pain I previously experienced, and which relates to the November 9, 2011 training exercise at work.

26. When I returned to work for the first time after the injury on November 26, 2011, I completed the "Employee Injury Report" form (**Exhibit 7** attached hereto and incorporated herein).

27. By letter dated December 7, 2011, Respondent Chief Anthony stated that he determined the November 9, 2011 "alleged neck injury," reported November 27, 2011, "does not reach the threshold for Workers Compensation eligibility," and "therefore it will not be filed with the County's Workers Compensation Program Administrator." Chief Anthony goes on to remind me that I must report any on-duty injury/illness to my supervisor immediately. A copy of Chief Anthony's December 7, 2011 letter is attached hereto as **Exhibit 8**, and incorporated herein.

28. As stated above, I *did* report the injury when I called in starting on November 13, 2011, which was my first scheduled work date following the incident. Lt. Trapper's "Employee

Extended Absentee Report" attached as Exhibit 2, reflects that I, at a minimum, originally reported the injury/absence on November 15, 2011.

29. Further, the Workers' Compensation Board on August 15, 2012, determined that I have a "work related injury to the neck," and found "total temporary disability" for at least the period November 15, 2011 through November 27, 2011 (1.8 weeks). (See **Exhibit 9**, Workers' Compensation Board Notice of Proposed Decision attached hereto).

30. In a "Notice of Decision" dated October 10, 2012 (see **Exhibit 10** attached and incorporated hereto), the Workers' Compensation Board found temporary total disability for the work related neck injury, covering the period November 13, 2011 to November 27, 2011, for 2.0 weeks. In the October 10, 2012 Notice of Decision, the Workers' Compensation Board held in abeyance the question of "intermittent lost time" for the period November 27, 2011 through May 8, 2012, and "held in abeyance" the period starting May 8, 2012 through the present. The case has been continued to November 1, 2012. (See **Exhibit 11**, attached and incorporated hereto).

31. Despite my excruciating neck pain, I worked for most of the period between November 27, 2011 and May 7, 2012, occasionally taking time off as "sick" because of the pain.

32. Beginning on May 8, 2012, I could not tolerate the pain from the injury at work, and left work and went off work on my doctor's advice. Attached at **Exhibit 12**, and incorporated herein, are several recent statements from Dr. Denecke keeping me off work because of the November 9, 2011 neck injury.

33. By certified letter mailed to me on or after June 28, 2012, Chief Anthony denied my request for General Municipal Law §207-c benefits. Chief Anthony, in his letter (see

Exhibit 13, attached and incorporated hereto), claims that I did not include any medical documentation to support my request and that it was untimely.

34. Since I returned to work on November 27, 2011, I have consistently turned in to Administration my notes from my doctors.

35. I have on at least two occasions after the June 28, 2012 denial letter, re-submitted to Chief Anthony all of my doctors' notes (see my memo to Chief Anthony dated September 5, 2012, attached and incorporated hereto as **Exhibit 14**).

36. Chief Anthony also stated in his June 28, 2012 letter denying me §207-c benefits, that my request was "untimely." However, nowhere in the MOA regarding §207-c policy and procedure (see Exhibit 1) is there a time restriction on my applying to receive §207-c benefits, or on my submission of medical proof as part of that request for §207-c benefits.

37. Pursuant to General Municipal Law §207-c, I am entitled to continuation of my salary and benefits as a covered employee because I provided medical evidence that my medical condition on and after November 13, 2011, was a result of the work-related injury which occurred in the line of duty on November 9, 2011.

38. Based upon the submission by me to Respondents showing both a work-related injury and a disability causally related to that injury, I presented a *prima facie* case for eligibility for benefits under General Municipal Law §207-c.

39. Worker's Compensation benefits have already been granted for November 13, 2011 through November 26, 2011, yet I have not been reimbursed for my sick leave accruals for those dates as of the filing of this Petition. I also have not been granted §207-c benefits for the

period of time I lost from work beginning on or about November 13, 2011 through November 27, 2011, intermittent dates in April 2012, and the period May 8, 2012 through the present.

40. Review under Article 78 is therefore appropriate, as also set forth in the MOA, and no previous application for the same or similar relief has been made.

WHEREFORE, the Petitioner prays that this Court will enter a Judgment and Order pursuant to Article 78 of the Civil Practice Law and Rules ordering, adjudicating and declaring that the medical proof offered by Petitioner is sufficient to require Respondents grant Petitioner benefits pursuant to General Municipal Law §207-c for all dates missed from work because of the work injury on November 9, 2011, and granting such other and further relief as the Court may deem just and proper in this circumstance, together with the costs, disbursements and attorneys' fees connected with this proceeding.

Dated: October 26, 2012
Buffalo, New York

LIPSITZ GREEN SCIME CAMBRIA LLP

By: Diane M. Perri Roberts

Diane M. Perri Roberts, Esq.
Attorneys for Petitioner
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

VERIFICATION

STATE OF NEW YORK)
)SS:
COUNTY OF ERIE)

David Padilla, being duly sworn, deposes and says that he is the Petitioner in the within action and that he has read the foregoing Petition and knows the contents thereof, that the same is true to Deponent's knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters Deponent believes them to be true.

David Padilla

Subscribed and sworn to before me
this 26th day of October, 2012

Notary Public

PAMELA M. STEGER
Notary Public, State of New York
Qualified in Erie County
Commission Expires Nov. 13, 2014

TO: Michael Siragusa, County Attorney
County of Erie
95 Franklin Street, 16th Floor
Buffalo, New York 14202

Timothy Howard, as Erie County Sheriff
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