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

July 18, 2013

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:	*Przepiora, Kimberly v. Sheriff Timothy Howard, Chief John Anthony, Sup'dt Thomas Diina, First Deputy Sup'dt John Rodriguez, Erie County Correctional Facility and County of Erie*
Document Received:	Verified Petition
Name of Claimant:	Kimberly Przepiora
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

KIMBERLY PRZEPIORA
171 Helen Street
Cheektowaga, New York 14206

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 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

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

Index No. I 2013-002108

This paper received at the
Erie County Attorney's Office
from [illegible] on
the 15th day of July, 2013
at 10:37 a.m./p.m.
Assistant County Attorney

FILED
07/15/2013/ 15:03:14
ERIE COUNTY CLERK
RECPT # 1311248
2013002108

NOTICE OF PETITION

PAID
CHECK____ CASH____
JUL 15 2013
ERIE COUNTY
CLERK'S OFFICE

and

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

Respondents.

PLEASE TAKE NOTICE, that upon the annexed Verified Petition with Exhibits of Kimberly Przepiora, dated the 12th day of July, 2013, 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 4th day of September, 2013 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for a Judgment and Order pursuant to CPLR Article 78:

(a) Taking judicial notice of existing case law from Erie County Supreme Court, Justice Feroleto, and declaring that Petitioner is entitled to §207-c benefits until and unless a physician determines that her disability related to the May 25, 2005 work injury has ceased;

(b) Granting Petitioner §207-c salary benefits for March 12, 2013, and any and all dates subsequent thereto, for which Petitioner requested but was denied §207-c salary benefits for dates she received medical treatments for symptoms of the May 25, 2005 work-related injury she suffered, and restoring to Petitioner's vacation, personal and/or sick leave accruals, any such time used by her in lieu of any §207-c benefits day(s) denied by Respondents;

(c) Ordering, adjudicating and declaring that the Respondents may not unilaterally discontinue §207-c salary benefits for dates on which Petitioner receives medical treatment for symptoms of her May 25, 2005 work-related injury;

(d) Requiring that if in the future, Respondents attempt to discontinue all or part of Petitioner's §207-c benefits, Respondents conduct an evidentiary hearing prior to termination of any part of, or all of, Petitioner's General Municipal Law §207-c coverage and benefits; and

(e) 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.

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: July 12, 2013
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 100
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 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

KIMBERLY PRZEPIORA
171 Helen Street
Cheektowaga, New York 14206

Index No. I-2013-002108

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

VERIFIED PETITION

and

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

and

THOMAS DIINA, as 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

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.

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

1. At all times hereinafter mentioned, the Petitioner was an employee of the County of Erie at the Erie County Correctional Facility, which upon information and belief is part of the Jail Management Division of the Office of the Erie County Sheriff, in the County of Erie, State of New York.

2. Upon information and belief, 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, Office of the Erie County Sheriff, 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' benefits and 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, Administrative Services for 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 Office of the Erie County Sheriff and the Erie County Correctional Facility, including but not limited to matters involving employees' benefits and 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 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 Office of the Erie County Sheriff and the Erie County Correctional Facility, including but not limited to matters involving employees' benefits and 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 Office of the Erie County Sheriff and Erie County Correctional Facility, including but not limited to matters involving employees' benefits and coverage under General Municipal Law §207-c.

8. I currently am, and was at all material times, a Correction Officer employed by Erie County, the Office of the Erie County Sheriff and the Erie County Correctional Facility; I

have been so employed since on or about August 16, 1997, although my original hire date as a County employee is July 25, 1989.

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 negotiation of a new contract.

11. It is also my understanding and belief that Correction Officers at the Erie County Correctional Facility are covered under that CBA; the CBA does not have a provision which governs or establishes a process to apply for §207-c coverage and benefits.

12. It is my understanding and belief that the County of Erie, the Sheriff of Erie County and CSEA are parties to a "Memorandum of Agreement" ("MOA") executed in January 2007 (see **Exhibit A**), which sets out various "Policy and Procedure" with respect to §207-c benefits.

13. It is my understanding that Section 7 of that MOA provides that:

> "**Section 7**
>
> Subsequent to the return to full duty, an employee who re-injuries a previous eligible 207-c injury or suffers a relapse of an eligible 207-c illness, said employee shall notify the Sheriff or his/her designee for the purpose of reopening their Section 207-c case within ten (10) working days of the discovery of the re-injury or relapse."

14. I complied with the provisions of Section 7 of the MOA with respect to medical services provided to me on March 12, 2013, necessitated by a reoccurrence of back spasms associated with my work-related injury of May 25, 2005. On March 15, 2013, I wrote to

Respondent Anthony requesting §207-c benefits for the March 12, 2013 reoccurrence of symptoms caused by my work-related back injury; I enclosed medical documentation. (See **Exhibit B**).

15. By letter dated March 22, 2013, Chief Anthony denied my request for §207-c benefits, stating that based upon a September 2, 2011 letter he sent, I had to use contractual leave time for any treatment dates associated with the work-related back injury. (See **Exhibit C**).

16. I first suffered a work-related back injury on May 25, 2005. I subsequently returned to work.

17. In June 2008, I submitted a written request for §207-c benefits for the period of June 10, 2008 through June 28, 2008. The medical reason stated on my submitted medical paperwork was for back spasms causally related to the May 25, 2005 work injury.

18. The Respondents denied that request for §207-c benefits and I was forced to commence a lawsuit in Erie County Supreme Court. That lawsuit, Index No. I-2008-011514, was concluded on or about September 24, 2009.

19. In the interim, I returned to work full duty on July 24, 2008. Occasionally, I needed to seek medical intervention by a chiropractor to relieve pain from back spasms causally related to my work injury on May 25, 2005, and I received §207-c benefits, by way of salary payments, for days on which I needed to be off work for those medical treatments.

20. Other than the occasional times I require those medical, chiropractic treatments to alleviate pain so as to allow me to continue to work, I work full time as a Correction Officer.

21. In August 2011, I underwent an Independent Medical Examination ("IME") with Dr. Thomas Denecke, as required by the County of Erie in my Worker's Compensation case. Dr. Denecke's IME report, attached as **Exhibit D**, concluded:

> "I would suggest she be allowed to continue to treat [with her chiropractor] at an interval of 2 times per month for an additional 3 months **as a result of her most recent exacerbation** which occurred at the end of July 2011. At that point the claimant would have reached maximum improvement with regards to the specific injury of 05/25/05. This examination should provide a base line for functional improvement **for any further care.** [Emphasis added.]

22. At no time in his IME report does Dr. Denecke opine that I am cured of the effects of the May 25, 2005 work-related injury. To the contrary, he states that the August 2011 IME, which specifically related to a July 2011 exacerbation of my symptoms, could serve as a baseline "for any further care."

23. It is my understanding, based upon the information set forth in the Affidavit of Diane M. Perri Roberts, Esq. in support of this Petition (see **Exhibit E** attached to and incorporated in this Petition), that the Respondents cannot simply discontinue my §207-c benefits without a physician determining that my disability has ceased; no physician or specialist has ever made such a finding.

24. Upon information and belief, the Respondents, failing to understand that Dr. Denecke's IME report relates only to treatments for the July 2011 exacerbation of my symptoms, as opposed to a "curing" of my disability, denied my request for §207-c pay for March 12, 2013 when I was off work and under chiropractic treatment for a new reoccurrence of back pain causally related to the work injury.

25. In his March 22, 2013 letter, Respondent Anthony referenced his September 2, 2011 letter to me (see **Exhibit F**). That letter, however, was in response to my request for §207-c benefits for the 2011 exacerbation of my symptoms. My request for §207-c benefits for March 12, 2013, relates to a new exacerbation of symptoms from the 2005 work injury.

26. The chiropractic treatments I receive alleviate my back pain and spasms, and allow me to work full time without restrictions, rather than being off work for longer periods of time on §207-c / Worker's Compensation.

27. The date for which I am seeking §207-c benefits and coverage is a date on which I was actively under treatment with Dr. Muller for a new reoccurrence of symptoms related directly to the work injury.

28. To this date, I have not received any coverage or benefits under §207-c for March 12, 2013, for which I submitted a request with medical documentation of my condition causally related to my work injury on May 25, 2005.

29. Respondents' unilateral action to terminate my benefits under §207-c without granting me an evidentiary hearing prior to that termination, makes review under Article 78 appropriate to determine whether Respondents improperly terminated and/or denied my §207-c benefits by denying benefits for March 12, 2013.

30. No previous application for the same or similar relief for this period of time 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:

(a) Taking judicial notice of existing case law from Erie County Supreme Court, Justice Feroleto, and declaring that Petitioner is entitled to §207-c benefits until and unless a physician determines that her disability related to the May 25, 2005 work injury has ceased;

(b) Granting Petitioner §207-c salary benefits for March 12, 2013, which Petitioner requested but was denied, when she received medical treatments for reoccurring symptoms of the

May 25, 2005 work-related injury, and restoring to Petitioner's vacation, personal and/or sick leave accruals, any such time used by her in lieu of §207-c benefits which were denied by Respondents;

(c) Ordering, adjudicating and declaring that the Respondents may not unilaterally discontinue §207-c salary benefits for dates on which Petitioner receives medical treatment for symptoms of her May 25, 2005 work-related injury;

(d) Requiring that, if in the future, Respondents attempt to discontinue Petitioner's §207-c benefits, Respondents conduct an evidentiary hearing prior to termination of any part of or all of Petitioner's General Municipal Law §207-c coverage and benefits; and

(e) 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: July 12, 2013
Buffalo, New York

Kimberly Przepiora

Kimberly Przepiora, Petitioner

LIPSITZ GREEN SCIME CAMBRIA LLP
Attorneys for Petitioner

By: Diane M. Perri Roberts

Diane M. Perri Roberts, Esq.
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VERIFICATION

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

Kimberly Przepiora, being duly sworn, deposes and says that she is the Petitioner in the within action and that she has read the foregoing Verified 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.

Kimberly Przepiora
Kimberly Przepiora

Subscribed and sworn to before me
this 12th day of July, 2013

Gloria R. Bogdan
Notary Public
GLORIA R. BOGDAN
Notary Public, State of New York
Qualified In Erie County
My Commission Expires Dec. 9, 2014