(10)

COUNTY OF ERIE

MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

October 30, 2014

Ms. Karen McCarthy, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Ms. McCarthy:

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:	*Mule, Lawrence v. County of Erie, et al.*
Document Received:	Verified Petition
Name of Petitioner:	Lawrence Mule 3849 Orangeport Road Gasport, New York 14067
Petitioner's attorney:	Diane M. Perri 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 Parker
First Assistant County Attorney

MMP:dld
Enc.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

LAWRENCE MULE
3849 Orangeport Road
Gasport, New York 14067

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

MARK N. WIPPERMAN, as Erie County Undersheriff
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

And

JOHN W. GREENAN, as Chief of Administration Services, Division of the Office of the Erie County Sheriff
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

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

CHECK PAID
CASH
OCT 27 2014
ERIE COUNTY CLERK'S OFFICE

NOTICE OF PETITION

Index No. I-2014-000184

This paper received at the Erie County Attorney's Office from Patrick Brooks on the 28 day of October, 2014 at 11:50 a.m./p.m.
Kelly Brinkworth
Assistant County Attorney

FILED
ACTIONS & PROCEEDINGS

OCT 27 2014

ERIE COUNTY CLERK'S OFFICE

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

Respondents.

PLEASE TAKE NOTICE, that upon the annexed Verified Petition with Exhibits of Lawrence Mule, dated the 27th day of October, 2014, 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 December, 2014 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, §7803(1) and (3):

(1) Compelling the Respondents to comply with their contractual obligations under the Collective Bargaining Agreement which was effective December 5, 2012 and covers the period January 1, 2007 through December 31, 2017, specifically Appendix "E" Section 7 therein;

(2) reversing as arbitrary and capricious, and/or as an abuse of discretion, all determinations made by Respondents which preclude Petitioner from eligibility for LDI/§207-c status for all time periods identified in this Petition for which Petitioner was not heretofore granted LDI/§207-c status;

(3) Granting Petitioner §207-c salary benefits for the periods (a) November 5, 14, and 27, 2013; (b) December 12 and 19, 2013; (c) January 27 through February 10, 2014; (d) May 28, 2014; (e) June 7 and 16, 2014; (f) July 8, 10, 17 and 29, 2014; and (g) September 25, 2014, all for which Petitioner requested but was denied §207-c salary benefits for dates he received medical treatments for symptoms of the July 21, 2003 work-related injury he suffered;

(4) Restoring to Petitioner's vacation, personal and/or sick leave accruals, any and all such time used by him in lieu of the §207-c benefits day(s) denied by Respondents;

(5) Compensating Petitioner for any and all dates for which he did not receive wages, or received partial wages, because he did not have sufficient accruals to cover said days when Respondents denied him §207-c benefits day(s); and

(6) Together with 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: October 27, 2014
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

Mark N. Wipperman, as Erie County Undersheriff
Erie County Sheriff's Department
10 Delaware Avenue
Buffalo, NY 14202

John W. Greenan, as Chief of Administrative Services,
Division of the Office of the Erie County Sheriff
Erie County Sheriff's Department
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Thomas Diina, as Superintendent of the Jail Management
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10 Delaware Avenue
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The Erie County Correctional Facility
as part of the Jail Management Division of the
Office of the Erie County Sheriff
10 Delaware Avenue
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

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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

VERIFIED PETITION

Index No.

And

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

Respondents.

The Petitioner, Lawrence Mule, 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 County of Erie and the Office of the Erie County Sheriff, 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 in Erie County for the County of Erie.

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, the Respondent Mark N. Wipperman was and still is the Erie County Undersheriff, Office of the Erie County Sheriff, having been duly appointed 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.

6. At all times hereinafter mentioned, upon information and belief, the Respondent John W. Greenan was and still is Chief of 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.

7. 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.

8. 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.

9. 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 1985.

10. 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").

11. It is my understanding and belief that CSEA, the County of Erie and the Office of the Sheriff are parties to a Collective Bargaining Agreement ("CBA") entered into effective December 5, 2012 and covering the period January 1, 2007 through December 31, 2017 (See signature page at **Exhibit 1**).

12. It is also my understanding and belief that Correction Officers at the Erie County Correctional Facility are covered under that CBA.

13. It is my understanding and belief that "Appendix E" of the CBA between the County of Erie, the Office of the Sheriff of Erie County and CSEA sets out the "Policy and Procedure" with respect to General Municipal Law §207-c benefits. (Also see **Exhibit 1**).

14. It is my understanding that relevant Section 7 of the CBA's Appendix E provides:

> **"Section 7"**
>
> **Subsequent to the return to full duty, an employee who reinjures a previously 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.**

15. I sustained an on-the-job injury on July 21, 2003 ("the 2003 injury"). I was approved subsequent to that for §207-c benefits because of that injury.

16. On December 3, 2012, the State of New York Workers' Compensation Board issued a "Notice of Decision" finding that I have a permanent impairment of 25% associated with the 2003 injury. I was and am classified by the Workers' Compensation Board as having a permanent partial disability caused by the 2003 injury. (See **Exhibit 2**).

17. Over the years since the 2003 injury, I have had sporadic flare-ups of symptoms related to and caused by the 2003 injury. At certain times those flare-ups require that I seek chiropractic treatment for pain and other symptoms, have tests such as MRIs performed associated with treatment of symptoms, and at other times I have had procedures performed to alleviate the severe symptoms.

18. When I had and have such flare-ups and need treatment, I have at times missed partial or full days of work to have the treatment done. When I miss time from work, I request that I receive §207-c benefits because the treatments are associated with the 2003 injury.

19. For example, on January 22, 2013, I was granted "LDI Status" ("line of duty injury", also known as "207-c"), for time used for a procedure done on January 7, 2013. (See **Exhibit 3**).

20. On March 13, 2013, I was granted LDI status for time lost on February 20, 2013 for a procedure associated with the 2003 injury. (See **Exhibit 4**). The note from my doctor, Dr. Gerald Peer, is also attached at Exhibit 4 and states that I remained under Dr. Peer's care for a chronic painful condition of my neck related to a work injury; it lists the "DOA" (date of accident) as "07/21/03". The note further states that I underwent a procedure in Dr. Peer's office that day and I was medically cleared to return to work the next day.

21. On May 16, 2013, I was granted LDI status for sick time I had to use on April 10, 2013 and May 1, 2013 for a medical procedure done by Dr. Peer related to the 2003 injury; the

memo granting LDI status, for unexplained reasons, emphasizes the word "procedure" as the reason for granting LDI status for the two days in question. (See **Exhibit 5**). Exhibit 5 also contains Dr. Peer's off-work notes dated April 10 and May 1, 2013; both of those notes by Dr. Peer are identical in wording to each other, as well as to the note by Dr. Peer found in Exhibit 4.

22. On August 10, 2013 I was granted LDI status for sick time I had to use on June 17, 2013 for a medical procedure done by Dr. Peer related to the 2003 injury; the memo granting LDI status, for unexplained reasons, emphasizes the word "procedure" as the reason for granting LDI status for the day in question. (See **Exhibit 6**). Exhibit 6 also contains Dr. Peer's off-work note dated June 17, 2013; this note by Dr. Peer is again identical in wording to the notes by Dr. Peer found in Exhibits 4 and 5.

23. On August 10, 2013 I received a second memo granting me LDI status for sick time to be used August 9 through August 23, 2013 because of a medical procedure to be performed because of the 2003 injury. (See **Exhibit 7**). Also at Exhibit 7 is the medical note from Dr. Peer advising about the procedure and the fact that I would be disabled through August 23, 2013; that note is otherwise identical to those found at Exhibits 4 –6. Lastly, Exhibit 7 contains the "Patient Instruction Sheet" for the August 9, 2013 procedure.

24. On November 4 and 14, as well as December 12 and 19, 2013, I suffered exacerbation/aggravation of the 2003 injury. I submitted notes from two doctors, Dr. Peer and Dr. Grazen, addressing my need to be off work due to this situation, each of which indicated the time off was due to the 2003 injury. (See **Exhibit 8**).

25. On February 4, 2014, I received a letter from former Chief of Administrative Services John Anthony, stating that the information I submitted was insufficient and "In the meantime, your request for LDI is denied for lack of medical documentation", and advising that

any additional medical documentation in my possession should be submitted immediately." (See **Exhibit 9**).

26. The February 4, 2014 letter from Chief Anthony also listed four "details" that he said have to be on any medical documentation submitted with regard to my work injury. All of the notes I had submitted, however, contained all of the details Chief Anthony listed in his February 4, 2014 letter. The notes at Exhibit 8 contain the same information as did all of my doctor's notes submitted in the past and for which I previously was approved for §207-c benefits.

27. Additionally, Section 7 of Appendix E to the CBA, recited in paragraph 14 above, requires only that I notify the Sheriff within 10 days of discovery, of any re-injury or relapse; Section 7 says nothing at all about having to provide documentation, nor does it require that medical documentation contain specific information in order for §207-c benefits to be approved. It also does not limit or restrict the "re-opening" of a prior approved §207-c benefits case to situations where a "procedure" is done; in fact, Section 7 specifically states "re-injury or relapse", and my situation falls squarely within the category of 'relapse" in accordance with my doctors' notes.

28. After I received Chief Anthony's February 4, 2014 letter, I mailed in additional doctor's notes finding me totally disabled from work for the period January 27, 2014 through February 10, 2014, due to an exacerbation of the 2003 injury, including limited range of motion, spasms and pain. (See **Exhibit 10**). Again, each note references the 2003 injury as the cause of the current problems.

29. I never received a written response of any type to my requests for LDI status and §207-c benefits for the two week period covered by the doctor's notes at Exhibit 10.

30. After receiving Chief Anthony's letter of February 4, 2014, I called his office and spoke to his assistant, Asiza Taher (sp?). Ms. Taher advised that I should re-send the doctors' notes. I did so on or about February 5 or 7, 2014, together with the doctors' notes found at Exhibit 10 for the additional two weeks I had to be off in late January-early February 2014.

31. Ms. Taher subsequently told me on several occasions that she was going to sit down with Chief Anthony to go over my submitted doctors' notes and the requests for the various time periods to be covered under LDI and § 207-c benefits.

32. Even though I did as requested both in the February 4, 2014 letter and from my telephone call with Ms. Taher, I still have not received correspondence giving me a final determination as to the time requested for LDI/§207-c for the doctors' notes covering the time periods identified in Paragraph 24 above. I have received no correspondence at all concerning the time periods in Paragraph 28 above.

33. On April 10, 2014, I was off work again due to a medical procedure performed by Dr. Peer, again related to the 2003 injury. A copy of the approval letter, from new Chief of Administrative Services John Greenan, for LDI/§207-c benefits is attached as **Exhibit 11**.

34. On June 4, 2014, I had another medical procedure done by Dr. Peer, and that time was approved by Chief Greenan for LDI/§207-c benefits. The doctors' note from Dr. Peer is identical to those found at attached Exhibits 4-7 in terms of information set forth in the note. (See **Exhibit 12**). This time was approved for LDI/§207-c status and benefits.

35. On June 6, 2014, I had an exacerbation again of the 2003 injury, and had a chiropractic treatment done by Dr. Jeffrey Grazen. I submitted a doctor's note from Dr. Grazen so I would be covered by LDI/§207-c benefits. (See **Exhibit 13**).

36. On June 18, 2014, I had a chiropractic treatment by Dr. Brendan Ciura due to an exacerbation of the 2003 injury on June 16, 2014. I submitted a doctor's note from Dr. Ciura so I would be covered by LDI/§207-c benefits for the one hour I missed work. (See **Exhibit 14**).

37. Dr. Ciura's note (Exhibit 14) contains information the same as Dr. Peer put on his notes, which in 2013 had been approved for LDI/§207-c benefits (Exhibits 4-6).

38. By letter dated June 27, 2014, Chief Greenan indicated that the information I submitted with respect to June 6 and 18, 2014 was insufficient and, again, "In the meantime, your request for LDI is denied for lack of medical documentation"; he also advised that any additional medical documentation in my possession should be submitted immediately." (See **Exhibit 15;** note the dates in this letter are inaccurate as compared to the doctors' notes).

39. The June 27, 2014 letter from Chief Greenan also listed the same four "details" as did the February 4, 2014 letter from Chief Anthony that they both claim must be on any medical documentation submitted with regard to my work injury. Again, all of the notes I had already submitted, contained all of the details Chief Greenan listed in his June 27, 2014 letter. The notes at Exhibits 13 and 14 contain the same information as did all of my doctor's notes submitted in the past and for which I previously was approved for §207-c benefits, including as recently as April 2014.

40. On July 2, 2014 I suffered another exacerbation of the 2003 injury, and Dr. Grazen had me off work on July 8 and 10, 2014 (see **Exhibit 16**); July 9, 2014 was not a regular work day for me. I submitted the doctor's note to Chief Greenan for LDI/§207-c benefits, but have not had any communication back from Chief Greenan.

41. On July 17, 2014, I had a chiropractic treatment by Dr. Ciura due to the 2003 injury. I submitted a doctor's note from Dr. Ciura so I would be covered by LDI/§207-c benefits for the one hour I missed work. (See **Exhibit 17**).

42. On July 29, 2014 and on September 25, 2014, I had medical procedures done by Dr. Peer; those times were also submitted to Chief Greenan for LDI/§207-c benefits. (See **Exhibit 18 and Exhibit 19**). The doctor's notes from Dr. Peer are identical to those found at attached Exhibits 4-7 and 12 in terms of information set forth in the note.

43. I have received no communication at all from Chief Greenan concerning my requests for LDI/§207-c for the time periods in Paragraphs 40-42 above.

44. The Respondents have no basis upon which to deny me LDI /§207-c benefits and status for all of the dates for which I submitted doctors' notes since November 2013. Nevertheless, the Respondents continue to fail to either respond at all to my requests for time off to be considered as LDI/§207-c benefit time, or fail to issue a final determination once I submit information to them for re-consideration as per their own letters to me.

45. Respondents appear to be attempting to add requirements to the type and amount of information I am required to submit to be granted LDI/§207-c benefit status, or to add new requirements as to what has been done during the time off, such as a "surgical procedure". Such actions by the Respondents are contrary to the requirements of the CBA at its Appendix E, Section 7, which only requires that I notify the Sheriff's Department of a re-injury or a relapse of the 2003 injury, since that injury was previously determined to be an eligible §207-c injury.

46. I am entitled to §207-c benefits for the period of time I requested because I was injured on the job during my course of duties, and partially permanently disabled, as was previously determined both by the Respondents as well as by the Workers' Compensation Board.

47. 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, §7803(1) and §7803(3), of the Civil Practice Law and Rules:

(1) Compelling the Respondents to comply with their contractual obligations under the Collective Bargaining Agreement which was effective December 5, 2012 and covers the period January 1, 2007 through December 31, 2017, specifically Appendix "E" Section 7 therein;

(2) reversing as arbitrary and capricious, and/or as an abuse of discretion, all determinations made by Respondents which preclude Petitioner from eligibility for LDI/§207-c status for all time periods identified in this Petition for which Petitioner was not heretofore granted LDI/§207-c status;

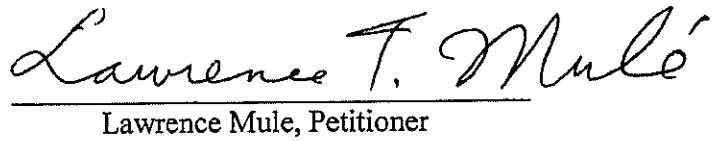
(3) Granting Petitioner §207-c salary benefits for the periods (a) November 5, 14, and 27, 2013; (b) December 12 and 19, 2013; (c) January 27 through February 10, 2014; (d) May 28, 2014; (e) June 7 and 16, 2014; (f) July 8, 10, and 29, 2014; and (g) October 9, 2014, all for which Petitioner requested but was denied §207-c salary benefits for dates he received medical treatments for symptoms of the July 21, 2003 work-related injury he suffered;

(4) Restoring to Petitioner's vacation, personal and/or sick leave accruals, any and all such time used by him in lieu of the §207-c benefits day(s) denied by Respondents;

(5) Compensating Petitioner for any and all dates for which he did not receive wages, or received partial wages, because he did not have sufficient accruals to cover said days when Respondents denied him §207-c benefits day(s); and

(6) Together with 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 27, 2014
Buffalo, New York



Lawrence Mule, Petitioner

LIPSITZ GREEN SCIME CAMBRIA LLP
Attorneys for Petitioner

By:

Diane M. Perri Roberts, Esq.
42 Delaware Avenue, Suite 100
Buffalo, New York 14202
(716) 849-1333 Ext. 465

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VERIFICATION

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

Lawrence Mule, being duly sworn, deposes and says that he is the Petitioner in the within action and that he 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.

Lawrence T. Mule

Lawrence Mule

Subscribed and sworn to before me
this 27th day of October, 2014

Notary Public

KATHLEEN A. BADDING NO. 01BA6077717
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
MY COMMISSION EXPIRES JULY 15, 2018