COUNTY OF ERIE

MICHAEL SIRAGUSA
ERIE COUNTY ATTORNEY

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY TOTH
SECOND ASSISTANT COUNTY ATTORNEY

January 13, 2015

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:	*Kimberly Przepiora vs Sheriff Howard, et al.*
Document Received:	Notice of Petition and Petition
Name of Claimant:	Kimberly Przepiora 666 Cayuga Creek Road Cheektowaga, NY 14227
Claimant's Attorney:	Lipsitz Green Scime Cambria LLP Diane M. Pierri Roberts, Esq., of Counsel

Should you have any questions, please call.

Very truly yours,

MICHAEL SIRAGUSA
Erie County Attorney

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

MMP/crb
Enc.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

KIMBERLY PRZEPIORA
666 Cayuga Creek Road
Cheektowaga, New York 14227

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

FILED
ACTIONS & PROCEEDINGS
JAN 06 2015
ERIE COUNTY
CLERK'S OFFICE

NOTICE OF PETITION

Index No. I-2015-000001

PAID
CHECK ____ CASH ____
JAN 06 2015
ERIE COUNTY
CLERK'S OFFICE

FILED
01/06/2015/ 15:38:56
ERIE COUNTY CLERK
RCPT # 15002157
I.2015000001

2015 JAN -7 PM 1:2

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 ___ day of January, 2015, 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 25 Delaware Avenue, Buffalo, New York, on the **4th day of February, 2015 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, including but not limited to §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 §207-c benefits for all time periods identified in this Petition for which Petitioner was not heretofore granted §207-c benefits;

(3) 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 fully ceased;

(4) Granting Petitioner §207-c salary benefits for September 4, 2013, June 9, 2014 and September 3, 2014, for which Petitioner requested but was denied §207-c benefits 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 the §207-c benefits denied by Respondents;

(5) 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;

(6) 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;

(7) Awarding Petitioner attorney's fees paid in connection with the filing and prosecution of this proceeding; and

(8) 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: January 6, 2015
Buffalo, New York

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
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
Erie County Attorney's Office
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
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

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
666 Cayuga Creek Road
Cheektowaga, New York 14227

Petitioner

For an Order and Judgment Pursuant to Article 78 of the
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Against

TIMOTHY HOWARD, as Erie County Sheriff,
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And

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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

VERIFIED PETITION

Index No. I-2015-000001

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

CONTRACTUAL AGREEMENT REGARDING §207-c BENEFITS

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 at **Exhibit 1**).

14. 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.**

WORK INJURY AND §207-c HISTORY

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

16. 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.

17. 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.

18. 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.

19. 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.

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.

INDEPENDENT MEDICAL EXAMINATION

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 2**, 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 3** attached to and incorporated in this Petition), that the Respondents cannot simply discontinue my §207-c benefits without a physician determining that my disability, specifically the back injury which causes me periodic spasms, has ceased; no physician or specialist has ever made such a finding.

2013 COURT ACTION

24. In 2013, I experienced a reoccurrence of my back spasm symptoms, and sought chiropractic treatment. I submitted a request for §207-c benefits for the time lost. By letter dated March 22, 2013, former Chief of Administrative Services Anthony denied my request for §207-c benefits, stating that based upon a September 2, 2011 letter he sent following the Dr. Denecke IME, I had to use contractual leave time for any treatment dates associated with the work-related back injury.

25. I was forced to file another Article 78 petition to secure the §207-c benefits I sought; a complete copy of that 2013 Article 78 petition, Erie County Supreme Court Index Number I-2013-002108, is attached at **Exhibit 4**.

26. Oral argument on my 2013 Article 78 petition took place on October 16, 2013; a copy of the certified transcript from oral argument is attached at **Exhibit 5.**

27. On December 19, 2013, by ruling of the Honorable Henry J. Nowak, J.S.C., §207-c benefits were ordered owed to me for March 12, 2013, as sought through that petition. A copy of Justice Nowak's Order is attached at **Exhibit 6.**

28. The Respondents to that action filed a Notice of Appeal, which was never perfected and was dismissed on April 16, 2014, following my motion to dismiss filed with the Appellate Division, Fourth Department; a copy of that Order Dismissing Appeal is attached at **Exhibit 7.**

DENIAL OF BENEFITS UNDER §207-c

29. During the pendency of my 2013 Article 78 action, and in the months following the dismissal of the appeal by the Respondents to that action, I suffered several re-occurences of back spasms caused by the May 25, 2005 work injury previously determined to be a certified §207-c eligible injury.

30. I complied with the provisions of Section 7 of Appendix E of the CBA with respect to medical services provided to me on September 4, 2013, June 9, 2014, and September 3, 2014, necessitated by reoccurrences/exacerbations of back spasms associated with my work-related injury of May 25, 2005.

31. Immediately following the time lost on September 4, 2013 and June 9, 2014, I wrote to the former Chief of Administrative Services, John A. Anthony, requesting §207-c benefits for each of those two days on which I was treated for reoccurrence/exacerbation of symptoms caused by my work-related back injury; I enclosed medical documentation. On September 3, 2014, hearing no response from former Chief Anthony, and recognizing there was a

new Chief of Administrative Services, Respondent Greenan, I wrote to Chief Greenan concerning the outstanding request for September 4, 2013 and again enclosed the medical documentation. (collectively see **Exhibit 8**).

32. On September 3, 2014, I again suffered back spasms caused by the May 25, 2005 work injury. That same day I wrote to Respondent Chief Greenan and requested §207-c benefits for that day as well, and enclosed medical documentation from my chiropractor. (See **Exhibit 9**).

33. By certified letter dated October 17, 2014, Respondent Chief Greenan denied my request for §207-c benefits for the three outstanding dates, stating that based upon a September 2, 2011 letter sent by former Chief Anthony, I had to use contractual leave time for any treatment dates associated with the work-related back injury. A copy of Chief Greenan's October 17, 2014 letter to me is attached as **Exhibit 10**; a copy of former Chief Anthony's September 2, 2011 letter is "Exhibit F" to my 2013 Article 78 petition, which is found at **Exhibit 4** to the instant Petition.

34. Upon information and belief, and as set forth also in my 2013 Article 78 Petition that was decided by Justice Nowak in my favor, the Respondents fail to understand that Dr. Denecke's 2011 IME report relates only to treatments for the *specific July 2011* exacerbation of my symptoms, as opposed to either a "curing" of my disability or to other possible subsequent exacerbations. Using that incorrect interpretation of Dr. Denicke's conclusions in that 2011 IME, Respondents have again denied my request for §207-c pay, this time for September 4, 2013, June 9, 2014 and September 3, 2014 when I was off work and under chiropractic treatment for *new* reoccurrences of back pain causally related to the 2005 work injury.

35. My requests for §207-c benefits for September 4, 2013, June 9, 2014 and September 3, 2014, relate to new incidents of exacerbation of symptoms from the 2005 work injury.

36. The dates for which I am now seeking §207-c benefits and coverage are dates on which I was actively under treatment with Dr. Muller for new reoccurrences of symptoms related directly to the work injury.

37. To this date, I have not received any coverage or benefits under §207-c for September 4, 2013, June 9, 2014 and September 3, 2014, for which I submitted timely requests with medical documentation of my condition causally related to my work injury on May 25, 2005.

38. Respondents' unilateral action to terminate my benefits under §207-c, in contravention of the CBA and also without granting me an evidentiary hearing prior to that termination, makes review under Article 78 appropriate to determine whether Respondents are failing to comply with an obligation with which they are required to comply; whether Respondents improperly terminated and/or denied my §207-c benefits by denying benefits for September 4, 2013, June 9, 2014 and September 4, 2014; and to compel Respondents to grant me §207-c benefits for those dates.

39. The circumstances herein are identical to the actions and posture taken by Respondents in my 2013 Article 78 Petition, on which the Court determined I was entitled to §207-c benefits and that such benefits could not be denied under circumstances identical to those found in this present action. Respondents have knowingly acted to deny me §207-c benefits under circumstances they know entitle me to such benefits, and thereby have caused me to have to file yet another court action to obtain benefits to which they know I am entitled.

40. 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, including but not limited to §7803 (1) and (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 §207-c status for all time periods identified in this Petition for which Petitioner was not heretofore granted §207-c status;

(3) 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 fully ceased;

(4) Granting Petitioner §207-c salary benefits for September 4, 2013, June 9, 2014 and September 3, 2014, for which Petitioner requested but was denied §207-c benefits 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 the §207-c benefits denied by Respondents;

(5) 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;

(6) 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;

(7) Awarding Petitioner attorney's fees paid in connection with the filing and prosecution of this proceeding, the second such action petitioner has had to file in approximately one year; and

(8) 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: January 6, 2015
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.
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333 Ext. 465

TO: Michael Siragusa, County Attorney
Erie County Attorney's Office
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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 6th day of January, 2014

Notary Public

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