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

January 16, 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:	*Mule, Lawrence v. Sheriff Timothy Howard, Undersheriff Mark N. Wipperman, John W. Greenan, Thomas Diina, the Erie County Correctional Facility and the County of Erie*
Document Received:	Verified Petition
Name of Claimant:	Lawrence Mule 3849 Orangeport Road Gasport, New York 14067
Claimant'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 M. 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 ___ CASH ___ PAID
JAN 12 2015
ERIE COUNTY CLERK'S OFFICE

NOTICE OF PETITION

Index No. I-2015-000007

FILED
ACTIONS & PROCEEDINGS
JAN 13 2015
ERIE COUNTY CLERK'S OFFICE

PAID
01/13/2015 15:14:59
ERIE COUNTY CLERK
RCPT # 15005542
I 2015000007

2015 JAN 14 AM 10:

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 12th 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 95 Franklin Street, 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, §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, the December 17, 2014 determination made by Respondents which precludes Petitioner from eligibility for LDI/§207-c status for the time period identified in this Petition for which Petitioner was not heretofore granted LDI/§207-c status;

(3) Granting Petitioner §207-c salary benefits for the period November 21, 2014 – December 6, 2014 for which Petitioner requested but was denied §207-c salary benefits for a medical procedure which alleviated symptoms caused by the July 21, 2003 work-related injury he suffered;

(4) Granting Petitioner §207-c benefits for December 30, 2014 when he had a procedure performed, which was causally related to the July 2003 work injury;

(5) 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;

(6) 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

(7) 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: January 12, 2015
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
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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
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10 Delaware Avenue
Buffalo, NY 14202

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

LAWRENCE MULE
3849 Orangeport Road
Gasport, New York 14067

Petitioner

VERIFIED PETITION

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

Index No. I-2015-000007

Against

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

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. 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 for a relapse or re-injury.

16. 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.

17. 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**).

18. 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.

19. 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 and necessitated by the 2003 injury.

20. 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**).

21. 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.

22. 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.

23. 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.

24. 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, "Radiofrequency."

25. On October 27, 2014, I commenced an Article 78 proceeding which was assigned to Justice Henry Nowak, titled Lawrence Mule v. Timothy Howard, as Erie County Sheriff, Mark N. Wipperman, as Erie County Undersheriff, John W. Greenan, as Chief of Administration Services, Thomas Diina, as Superintendent of the Jail Management Division, The Erie County Correctional Facility and The County of Erie, Index No. I-2014-000189. That action was based upon the disapproval, and/or lack of response to, requests I made for §207-c benefits for certain dates on which I experienced exacerbation of symptoms caused by the 2003 injury, or periods during which my medical service provider had me off work because of treatments or procedures associated with addressing on-going symptoms and issues caused by the 2003 injury.

26. Upon information and belief, the pending Article 78, Index No. I-2014-000189, was heard in Court on December 17, 2014 and is scheduled before Justice Nowak again on February 4, 2015.

27. On October 27, 2014, I was advised by Dr. Peer that another Radio Frequency Ablation, the same procedure done in August 2013, could be performed to help lessen my pain instead of being prescribed and using controlled substances which likely interfere with my ability to go to work. Dr. Peer provided a note excusing me from work from November 21, 2014 until

December 7, 2014, with a return to work on December 7, 2014. (See **Exhibit 8**). I requested §207-c benefits for that period of time.

28. On November 10, 2014 Chief Greenan wrote to me and indicated it was "premature" at that time to approve the "LDI" status because the procedure had not yet taken place. (See **Exhibit 9**).

29. On November 21, 2014, I had the "Radio Frequency Ablation" procedure performed by Dr. Gerald Peer at DeGraff Hospital. While this procedure was referred to as "elective" in that it was not an emergency situation, the procedure has been performed on me in the past to help alleviate the pain symptoms associated with the 2003 injury, thereby allowing me to continue working full-time without restrictions and lessening the likelihood of needing controlled substances to always control the pain. (See January 8, 2015 explanatory letters of Dr. Peer at **Exhibit 10**). I have pending approvals through Worker's Compensation for disk grafting surgery should I choose to have that procedure done instead; since that surgical procedure is much more invasive and potentially risky, and involves being out of work a number of months, I "elected" to have the less intrusive radio frequency ablation procedure done since it has alleviated my pain symptoms for extended periods of time in the past.

30. When the same procedure was performed on me in August 2013 (see Exhibit 7), I was approved for §207-c benefits.

31. The physician's note dated December 1, 2014, (See **Exhibit 11**) from Dr. Peer contains an obvious typographical error in that it returns me to work full duty, full-time as of November 7, 2014 – which clearly was prior to the procedure even being done and more than three weeks before the note was written.

32. I requested §207-c benefits on December 12, 2014, to cover the period of time I was off work due to the procedure performed to alleviate symptoms caused by the 2003 injury.

33. By certified letter dated December 17, 2014 (See **Exhibit 12**) (the same day my pending Article 78 was first heard in Court), Respondent Greenan denied my application for §207-c benefits, stating "there has been no reported aggravation or re-injury in the line of duty and no submission of medical evidence establishing the required causal connection," and that I had not "submitted any medical evidence establishing that the necessity of this elective procedure is causally related to your work activities."

34. On December 30, 2014, I had a procedure done at Dr. Peer's office related to the 2003 injury; I submitted a note from Dr. Peer for the day (see **Exhibit 13**), and requested §207-c benefits, but have yet to receive a response from Chief Greenan.

35. The Respondents have no basis upon which to deny me LDI /§207-c benefits and status for the time I missed work to have a procedure done to alleviate symptoms caused by the 2003 injury; the procedure, which has been done in the past and for which I received §207-c benefits while off work, allows me to perform my Correction Officer duties full-time without restrictions.

36. Respondents appear to be continuing to attempt to add requirements to the type and amount of information I am required to submit to be granted LDI/§207-c benefit status. 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. In this instance, the on-going experience of pain symptoms caused by the 2003 injury led to the

decision to have the procedure done in November 2014, to alleviate the symptoms and allow me to continue working without restrictions and without having to take controlled substances.

37. I am entitled to §207-c benefits for the period of time I requested because I was injured in 2003 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. My pain and symptoms are on-going, and my condition is permanent. No physician has ever determined that I have fully recovered from the July 2003 work injury, because factually, there is permanency in my injury.

38. No previous application for the same or similar relief for this specific 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 §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, the December 17, 2014 determination made by Respondents which precludes Petitioner from eligibility for LDI/§207-c status for the time period identified in this Petition for which Petitioner was not heretofore granted LDI/§207-c status;

(3) Granting Petitioner §207-c salary benefits for the period November 21, 2014 – December 6, 2014 for which Petitioner requested but was denied §207-c salary benefits

for a medical procedure which alleviated symptoms caused by the July 21, 2003 work-related injury he suffered;

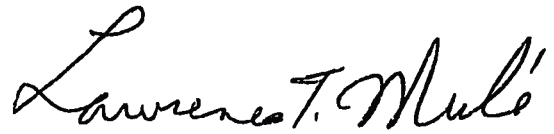
(4) Granting Petitioner §207-c benefits for December 30, 2014 when he had a procedure performed, which was causally related to the July 2003 injury;

(5) 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;

(6) 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

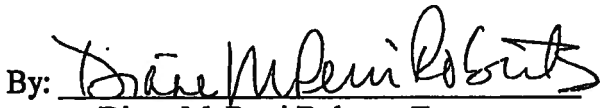
(7) Together with such other and further relief as the Court may deem just and proper in this circumstance, together with the costs, disbursements and attorneys' fees connected with this proceeding.

Dated: January 12, 2015
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

TO: Michael Siragusa, County Attorney
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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.

L. F. Mule

Lawrence Mule

Subscribed and sworn to before me
this 1 20th day of January, 2015

Carol L. Caine

Notary Public CAROL L. CAINE

Notary Public State Of NY
Qualified in Erie County
My Commission Expires 3/30/18

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