

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on January 24, 2008, upon the following claims:

| <u>Claimant</u> | <u>Agency</u> | <u>Amount</u> |
|--------------------|---|---------------|
| 1. David Sanders | Innocent Convict, § 775.05, Wis. Stats. | \$23,240.00 |
| 2. Jennifer Addis | Health & Family Services | \$2,260.00 |
| 3. Antonio Perkins | Corrections | \$2,467.90 |

The following claims were considered and decided without hearings:

| <u>Claimant</u> | <u>Agency</u> | <u>Amount</u> |
|---------------------------|--|---------------|
| 4. Allen Tony Davis | Corrections | \$479.83 |
| 5. Nancy Severson | Commerce | \$5,400.00 |
| 6. John & Judy Davis | Agriculture, Trade & Consumer Protection | \$997.17 |
| 7. Sandra L. Hay-Doxtater | Revenue | \$291.70 |
| 8. Christopher N. Jacques | Natural Resources | \$500.09 |
| 9. Richard Seiberlich | Revenue | \$5,551.59 |

The Board Finds:

1. **David Sanders** of Louisville, Kentucky, claims \$23,240.00 compensation for Innocent Convict pursuant to § 775.05, Stats. The claimant, a Catholic Brother, was convicted of sexually assaulting a minor. The victim told police he had been assaulted by a man named "Brother David" and identified the claimant as his assailant. While the case was pending, the victim's grandmother maintained that the claimant was the wrong "Brother David" and that there was a different Brother David who had assaulted the victim. However, the grandmother was not able to provide any additional information to identify the other Brother David and the case proceeded against the claimant. He was convicted in December 2006. In May 2007, the victim's grandmother found a letter written by David Nickerson, a brother of the victim's father. David Nickerson was also a Catholic Brother and was also known as Brother David. The letter was dated during the time period of the assault and thanked the victim's father for allowing the child to come visit him in Delaware, the location where the assault had taken place. Milwaukee Police also determined that the address on the letter was across the street from a park, which matched another detail provided by the victim. Milwaukee Police located David Nickerson in California and he confessed to the crime. On June 22, 2007, based on the new evidence, the Court vacated the jury verdict and dismissed the charges against the claimant with prejudice. The claimant incurred \$18,240 in legal defense costs, as well as substantial additional debt when he was unable to pay his rent or taxes. The claimant requests payment of \$5,000 for his time in prison and reimbursement for his legal fees.

The Milwaukee County District Attorney's Office does not object to payment of this claim in the amount requested. Although this office believes that the prosecution of the claimant was handled in a thoughtful and responsible fashion, when evidence came to light that the claimant was innocent, the Milwaukee County District Attorney's Office acted in the interest of justice in deciding to dismiss the matter. The District Attorney's Office believes that clear and convincing evidence exists to support this claim and that the claimant should be compensated in the amount requested.

The Board concludes that there is clear and convincing evidence that the claimant is innocent of the crime for which he was convicted. The Board concludes the claim should be paid in the amount of \$5,000, plus attorney's fees in the amount of \$18,240, for a total award of \$23,240. The Board further concludes, under authority of § 16.007 (6m), Stats., payment should be made from the Claims Board appropriation § 20.505(4)(d), Stats. (*Member Hunter*

dissents in part and concurs in part. He concurs that the claimant has proven his innocence and should be awarded \$5,000. He dissents with the payment of pre-conviction attorney's fees.)

2. Jennifer Addis of Hancock, Wisconsin, claims \$2,260.00 reimbursement for out-of-pocket cost of a wheelchair seat not covered by Wisconsin Medicaid. The claimant is a quadriplegic and is on Social Security Disability. In 2006, she was covered by the Wisconsin Health Insurance Risk Sharing Plan (HIRSP). She requested prior approval from HIRSP for a power wheelchair with attendant features. HIRSP granted full approval for the chair in August 2006. Shortly after receiving the approval, the claimant was hospitalized and remained so until September 26, 2006. During that time, the wheelchair was prepared pursuant to the approved specifications and was ready for delivery upon the claimant's discharge from the hospital. While she was hospitalized, the claimant received notification that she was Medicaid eligible retroactive to June 1, 2006. On September 18, 2006, HIRSP notified her that, due to her Medicaid eligibility, she was no longer eligible for HIRSP and that her coverage would end on September 29, 2006. On September 26, 2006, the wheelchair provider submitted a prior authorization request to Medicaid. On October 12, 2006, Medicaid approved the wheelchair, with the exception of the power adjustable seat, which was disallowed. In order to receive the wheelchair, the claimant was required to pay for the power adjustable seat out-of-pocket. The claimant acknowledges that she received the October 10, 2006, written notice of her Medicaid appeal rights. However, she points to the fact that the appeal instructions notified her to either call the County Human Services office or write a letter to the Division of Hearings and Appeals. The claimant chose the first option and contacted Waushara County Human Services (WCHS) about the denial. WCHS responded that HIRSP had told them that the retroactive Medicaid would not be an issue. The WCHS employee went on to encourage the claimant to file a grievance against HIRSP. The claimant believes that WCHS should have also advised her to file a Medicaid appeal but instead, erroneously steered her away from appealing to Medicaid in a timely fashion and that she therefore lost her right to a Medicaid appeal. The claimant believes that she could have won a Medicaid appeal by proving that, in her case, the power seat is medically necessary and not a "comfort and convenience" item. The claimant's grievance to HIRSP was denied and the claimant was left with no other recourse but to borrow money to pay for the power seat in order to receive her wheelchair. She requests reimbursement of that expense in the amount of \$2,260.

The Department of Health & Family Services recommends denial of this claim. In accordance with Medicaid regulations, the provider of the claimant's wheelchair correctly requested prior approval from Medicaid because the order fell within the retroactive Medicaid approval period. Medicaid denied coverage of the power lift adjustable seat pursuant to section HSF 107.24(5)(f), Wis. Adm. Code, which provides that comfort and convenience items such as "cushion lift power seats or elevators, or luxury features which do not contribute to the improvement of the recipient's medical condition" are not covered by Medicaid. DHFS believes that the claimant's power lift adjustable seat falls into this category of comfort and convenience items and cannot be covered by Medicaid. The claimant was notified of her Medicaid appeal rights in the October 10, 2006, notice of denial, which she acknowledges receiving. DHFS states that, even if the claimant had pursued a Medicaid appeal, the outcome would have been the same. Exceptions cannot be made to the rule regarding comfort and convenience items and the seat was appropriately denied. Finally, in regards to any dispute the claimant may have with HIRSP, DHFS points to the fact that HIRSP is no longer part of any state agency as of July 1, 2006. Any claim against HIRSP is not a claim against the state and therefore is not an appropriate claim before the Claims Board.

The Board concludes that the claim should be referred to a Hearing Examiner at the Division of Hearings and Appeals. The Board specifically requests that the Hearing Examiner determine whether the power adjustable seat, as used by the claimant, is medically necessary and "contributes to the improvement of (her) medical condition" rather than being an item "for comfort and convenience" and, ultimately, whether or not the seat is covered by Medicaid. After it has received the recommendation of the Hearing Examiner on that issue, the Board will again consider the merits of the claim.

3. Antonio Perkins of Milwaukee, Wisconsin, claims \$2,467.90 for damages related to an incident at Columbia Correctional Institution in July 2006. In his initial filing, the claimant states that he was attacked by another inmate and suffered a concussion as a result. In a subsequent filing, the claimant alleges that his injuries were not caused by the other inmate, but by correctional officers who beat the claimant after they responded to the fight. The claimant alleges that when he was attacked by the other inmate, he repeatedly requested assistance from the on-duty correctional officer, who refused to assist him. The claimant alleges that after he "neutralized" the other inmate, he was beaten by additional responding officers, who were angry that the claimant had not allowed the on-duty officer to put him in handcuffs. The claimant alleges that he can produce witnesses to verify his allegations because there were other inmates present in the gym where the incident took place. The claimant further alleges that the correctional officers altered the incident report to cover-up their misconduct. The claimant states that he was informed that he had to reimburse the institution for \$2,467.90 in medical bills and that CCI took money from his inmate account. The claimant requests payment of \$2,467.90.

The Department of Corrections recommends denial of this claim. DOC states that when on-duty CO Lambrecht witnessed the claimant and another inmate engaged in a fight, he followed proper procedure by repeatedly ordering both inmates to stop while waiting for back-up to arrive. DOC states that both inmates ignored CO Lambrecht's orders and continued to fight until the claimant was struck in the head and fell to the floor unconscious. The claimant was transported to the hospital for medical treatment. A major disciplinary hearing was later held, with the claimant present, and he was found guilty of Fighting and Disobeying Orders. Pursuant to DOC policy, several penalties were imposed on the claimant, including an order of restitution. DOC notes that the claimant was ordered to pay \$800, not \$2,467.90 as he claims. DOC further notes that of the \$800 restitution owed, to date the claimant has only paid \$108.43. DOC believes there is no merit to this claim and recommends that it be denied.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

4. Allen Tony Davis of Portage, Wisconsin, claims \$479.83 for legal documents allegedly lost by the Department of Corrections. In May 2007, the claimant was transferred from the Wisconsin Secure Program Facility (WSPF) to Columbia Correctional Institution (CCI). The claimant states that one day prior to his transfer, WSPF staff took all of his property, including his legal documents, to be packed and shipped to CCI. The claimant alleges that after his arrival at CCI, many of his legal documents were not returned to him. The claimant filed a number of complaints relating to his missing legal documents and other missing property, but alleges that his legal documents were never returned. The claimant believes that the DOC should conduct a detailed, itemized inventory of a prisoner's legal documents when it takes those documents from him. The claimant argues that the fact that DOC fails to adequately inventory legal documents should not absolve the department from responsibility when those documents are lost. The claimant believes that his constitutional property rights have been violated and requests reimbursement for the loss of his documents.

The Department of Corrections recommends denial of this claim. DOC rules allow inmates to have personal property in their possession, including any necessary legal material. Legal material is in the possession and control of the inmate and no itemized inventory of legal material is required by DOC. DOC states that it would be unrealistic to require DOC to itemize the legal materials of every inmate and would place an incredible burden on DOC staff. Prior to the claimant's transfer from WSPF to CCI, his property was inventoried and the inventory list clearly indicates that legal materials were included in the property that was transferred to CCI. DOC points to the fact that the claimant had complete control over his legal materials prior to his transfer. At any time he could have mailed materials out, given them to another inmate or thrown them away. DOC believes that the claimant has provided insufficient evidence to prove that any legal materials were lost by DOC and that the agency should not be held liable for the alleged loss of legal materials that were under the claimant's control.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

5. Nancy Severson of Argyle, Wisconsin, claims \$5,400.00 for damage to her shrubs, lawn and sidewalk allegedly caused by the driver of a state vehicle. In December 2006, a Department of Commerce employee lost control of his state vehicle and drove across the claimant's front lawn, hitting several bushes. The claimant states that a number of bushes were badly damaged, there was damage to her lawn caused by broken auto debris, and her steps and sidewalk were damaged. The claimant's initial submission included an estimate of \$5,400 to replace bushes and repair the lawn, steps and sidewalk. The claimant later submitted an estimate of \$691 to repair the steps and sidewalk. The claimant requests reimbursement for the damage caused by the accident. In the interest of concluding this dispute, which has gone on for over a year, the claimant is willing to accept the department's offer of \$200.

The Department of Commerce recommends payment of this claim in the reduced amount of \$200. The department does not dispute that the accident occurred, but disagrees with the extent of the damage alleged by the claimant. The department states that photographs taken in September 2007 seem to show that the claimant's shrubs survived the impact of the vehicle and those which were hit appear to be in similar condition with those on the opposite side of the yard, which were not struck. The department further objects to payment of the cost of replacing the claimant's entire sidewalk and steps. The department points to the fact that no damage to the steps or sidewalk is mentioned in the police report of the accident. The department also states that photographs show that the entire sidewalk and steps were in a state of disrepair at the time of the accident, with loose tiles and grass growing between the bricks. The department believes that it should not be held liable for replacement of the claimant's entire sidewalk and steps. In the spirit of compromise, the department recommends payment of \$200 for any damage that may have been caused to the claimant's bushes and steps during the accident.

The Board concludes the claim should be paid in the reduced amount of \$200 based on equitable principles. The Board further concludes, under authority of § 16.007 (6m), Stats., payment should be made from the Department of Commerce appropriation § 20.143(3)(j), Stats.

6. John Davis of Kennan, Wisconsin, claims \$997.17 reimbursement for a broken thermometer on his milk pasteurizer. The claimant states that this is the third time that the DATCP inspector has incorrectly reassembled his pasteurizer after inspection, resulting in broken thermometers. The claimant states that he has not complained in the past because he did not want to jeopardize his relationship with his inspector, however, he does not believe he should have to bear the cost of this error and requests reimbursement for the thermometer broken in July 2007.

The Department of Agriculture, Trade & Consumer Protection does not object to payment of this claim. DATCP states that quarterly testing of pasteurizers includes removing three thermometers on the pasteurizer to test their accuracy. The thermometers rest in three small ports in close proximity to each other on top of the pasteurizer. Because the thermometers may be of various sizes, if they are not put back into the proper ports, the agitator can hit the stem of a thermometer when the pasteurizer is turned on, breaking the thermometer. DATCP agrees that it is likely that its inspector incorrectly reassembled the pasteurizer, resulting in the damage claimed.

The Board concludes the claim should be paid in the amount of \$997.17 based on equitable principles. The Board further concludes, under authority of § 16.007 (6m), Stats., payment should be made from the Department of Agriculture, Trade & Consumer Protection appropriation § 20.115(1)(a), Stats.

7. Sandra Hay-Doxtater of Milwaukee, Wisconsin, claims \$291.70 for refund of sales taxes relating to the purchase of a motor vehicle. The claimant states that she purchased a Ford Aerostar in 1999 and that all sales taxes and fees were included in the loan. In 2002, the claimant received notice from DOR alleging that she had underreported the purchase price of the vehicle. The claimant states that the dealer where she had purchased the vehicle had completed all of the necessary paperwork and that she did not have copies of the requested documentation. The claimant states that she requested copies of the paperwork from the dealer but that they never cooperated. Because she could not provide documentation of the purchase price, the DOR assessed an additional \$291.70 in sales tax. The claimant states that

she recently found copies of the paperwork in an unused safety deposit box and submitted the documentation to the Department of Revenue. She requests reimbursement of the additional tax.

The Department of Revenue recommends denial of this claim. First, the DOR notes that all of the documentation submitted by the claimant is for the wrong vehicle—a Ford Aerostar purchased in 1999. The purchase of that vehicle was not the subject of this audit. This case relates to the purchase of a Dodge vehicle in 2002. That vehicle was registered in October of 2002 with a purchase price of \$75, well below average for that vehicle. DOR contacted the claimant in July 2003 and February 2004 requesting documentation of the reported purchase price. DOR records indicate that the only response received was a letter from the claimant stating that the dealer had submitted the paperwork and she could not find her receipt. Because the claimant failed to submit the requested documentation, DOR issued an assessment for additional sales tax in May 2004. The assessment was not paid or appealed and therefore became delinquent. In February 2006, DOR seized a tax refund as partial payment of the delinquency. In April 2007, DOR also applied portions of payments made by the claimant for other tax delinquencies towards the sales tax delinquency, which was older. DOR notes that the claimant has still not provided documentation of the vehicle's purchase price and that any claim for refund for this assessment would have had to be made by May 16, 2006. DOR therefore recommends denial of this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

8. Christopher N. Jacques of DeForest, Wisconsin, claims \$500.09 for vehicle damages related to a series of catalytic converter thefts in the Madison area. The claimant is employed at the DNR Science Operations Center. In September 2007, he took a state vehicle to an out-of-town meeting and left his personal vehicle parked at his workplace. When he returned from his trip two days later, he noticed a metal plate hanging down underneath his personal vehicle. He did not immediately suspect vandalism but then learned of a rash of catalytic converter thefts in the area. Approximately 27 vehicles along Progress Road had their catalytic converters stolen, including several trucks at a neighboring business, as well as 4-5 state-owned vehicles and 3 personal vehicles in the Science Center parking lot. The claimant took his vehicle in to have the catalytic converter replaced and to identify the source of an oil leak. The claimant's insurance covered a portion of the bill but the claimant was left with \$500.09 in out of pocket charges (\$398.77 for the catalytic converter and \$101.32 for inspecting for the oil leak).

The Department of Natural Resources recommends partial payment of this claim. Although the department does not normally recommend payment for damaged employee personal property, the DNR feels that circumstances in this case warrant making an exception to that policy. The DNR states that, but for the claimant's need to use a state vehicle for a business trip, his vehicle never would have been damaged. The department further states, "one could easily assume that had the state vehicle been left overnight, that *its* converter would have been stolen instead of Mr. Jacques' converter. Either way, the DNR would have incurred a loss." The DNR believes that for equitable reasons, the claimant should not have to bear the cost of replacing his converter. However, the DNR does not support payment of costs associated with the oil pan leak because it was a pre-existing condition unrelated to the theft of the claimant's converter. The department therefore recommends payment of \$398.77.

The Board concludes the claim should be paid in the reduced amount of \$398.77 based on equitable principles. The Board further concludes, under authority of § 16.007 (6m), Stats., payment should be made from the Department of Natural Resources appropriation § 20.370(3)(mu), Stats.

9. Richard Seiberlich of Ladysmith, Wisconsin, claims \$5,551.59 for a 1998 tax refund and return of money taken through a property lien placed on his home. The claimant states that he filed both his federal and state taxes in 1998. He submits as evidence a receipt showing that he paid for preparation of both his federal and state 1998 returns on December 20, 1999. The claimant states that he mailed both returns on the same day and that the federal return was received by the IRS on December 26, 1999. The DOR later issued an assessment for the 1998 return, intercepted the claimant's 2003 tax refund and collected

\$5,223.59 from a lien on the claimant's home. The claimant states that his tax returns were timely filed and requests return of the money seized by the DOR.

The Department of Revenue recommends denial of this claim. The DOR issued an estimated assessment for 1998 in March 2003. DOR records indicate that the claimant contacted the department in April 2003 and was advised that the DOR had no record of receiving his 1998 return and that it needed to be filed to resolve the assessment. The DOR intercepted the claimant's 2003 tax return in 2004 and applied it to 1997 and 1998 delinquencies. The DOR states that the claimant's brother contacted the department in June 2005 and stated that the claimant was in prison and was in the process of preparing his returns. The brother also indicated that there was a pending offer on the purchase of the claimant's home. In July 2005, the brother called again to discuss releasing the lien on the claimant's home. The DOR informed the brother that any money collected on the 1998 assessment was closed to refund because of the statute of limitations. The DOR received payment of \$5,223.59, which was applied to both the 1997 and 1998 delinquent tax liabilities (\$4,552.77 to the 1998 liability). The DOR received late filed returns for 1998 through 2002 in July 2006. Finally, the DOR does not believe that the claimant has provided verification that the 1998 return was timely filed. Section 71.80(18), Stats., provides that timely filing means actual mailing and receipt by the DOR within five days of the prescribed due date. The DOR states that a thorough review of its records indicate that the 1998 return was not received. The two-year statute of limitations expired on March 17, 2005; therefore the DOR does not believe the claimant is entitled to any refund.

This claim was originally presented at hearing on November 15, 2007. At that time, Board members requested that DOR submit additional information showing how the estimated assessment amount was calculated.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

The Board concludes:

That the claims of the following claimants should be denied:

- Antonio Perkins
- Allen Tony Davis
- Sandra Hay-Doxtater
- Richard Sieberlich

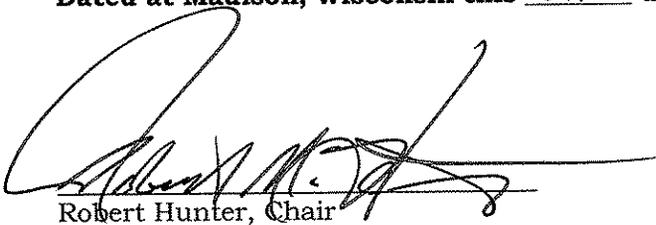
That payment of the following amounts to the following claimants from the following statutory appropriations is justified under s. 16.007, Stats:

| | | |
|---------------------|-------------|-------------------------|
| David Sanders | \$23,240.00 | § 20.505(4)(d), Stats. |
| Nancy Severson | \$200.00 | § 20.143(3)(j), Stats. |
| John Davis | \$997.17 | § 20.115(1)(a), Stats. |
| Christopher Jacques | \$398.77 | § 20.370(3)(mu), Stats. |

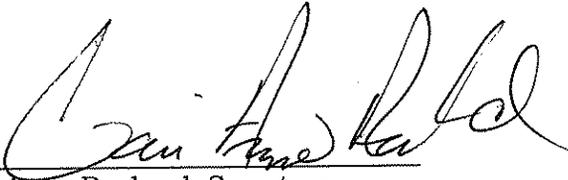
That decision of the following claim should be deferred at this time:

- Jennifer Addis

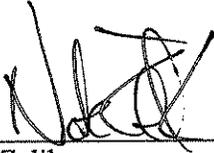
Dated at Madison, Wisconsin this 5TH day of FEBRUARY, 2008.



Robert Hunter, Chair
Representative of the Attorney General



Cari Anne Renlund, Secretary
Representative of the Secretary of Administration



Nate Zolik
Representative of the Governor



Mark Miller
Senate Finance Committee



Jeffrey Stone
Assembly Finance Committee