

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on December 2, 2009, upon the following claims:

| <u>Claimant</u> | <u>Agency</u> | <u>Amount</u> |
|---------------------|--|---------------|
| 1. William Vyvyan | Natural Resources | \$20,000.00 |
| 2. Bonnie Bjodstrup | University of Wisconsin | \$14,539.00 |
| 3. Joseph Starkey | Corrections/Justice | \$2,714.50 |
| 4. Jane Tuchalski | Corrections | \$4,184.20 |
| 5. Jarrett Adams | Innocent Convict, § 775.05 Wis. Stats. | \$81,111.12 |

The following claims were considered and decided without hearings:

| <u>Claimant</u> | <u>Agency</u> | <u>Amount</u> |
|-----------------------|----------------|----------------|
| 6. Janet M. Hubbard | Transportation | \$398.44 |
| 7. Monchello C. Louis | Corrections | \$110.09 |
| 8. Jael Speights | Corrections | \$866.25 |
| 9. Kathleen Kopp | Administration | \$186.89 |
| 10. Dore & Associates | Administration | \$1,761,719.20 |

The Board Finds:

1. **William R. Vyvyan**, d/b/a Timberline Whitetails of Neillsville, Wisconsin claims \$20,000.00 for the value of two buck fawns which allegedly died due to the actions of DNR. The claimant raises whitetail deer. He has participated in the CWD monitoring program for over six years and his herd is TB Accredited. The claimant states that approximately five years ago he sold a single buck to Alligator Creek Hunting Ranch. The claimant states that the animal was harvested within several days of the sale and tested negative for CWD. In September 2008, a doe was harvested at Alligator Creek and tested positive for CWD. In October 2008, DNR told the claimant they needed to inspect the fences on his farm because of his prior sale to Alligator Creek. The claimant did not believe the inspection was necessary. He had a fence inspection certificate issued by DNR in 2003 which was good for 10 years. He states that he was concerned about inspectors coming near his pens because it was close to the rut and his animals were very nervous. The claimant states that he was worried they would spook and injure themselves against the fences. The claimant contacted DATCP about the inspection. The claimant states that DATCP personnel expressed surprise that DNR wanted the inspection. The claimant states that DATCP did not believe his sale to Alligator Creek five years earlier was cause for concern. Three DNR wardens inspected the claimant's farm on October 23, 2008. The claimant states that the wardens were very professional and tried to avoid spooking the deer, however, when they approached the buck fawn pen, the animals spooked. One fawn ran into the fence and died instantly and another died later that night from its injuries. The claimant believes that the inspection by DNR was not necessary and requests reimbursement for the two dead fawns. The claimant does not usually sell buck fawns. He places the value of the animals at \$10,000 each based on previous sales of 1-2 year old breeder bucks and bucks sold in ranch hunts.

DNR recommends denial of this claim. DNR states that the claimant's farm was one of 12 farms inspected which had sold deer to Alligator Creek. DNR personnel took great care to avoid spooking the deer. In fact, DNR states that the claimant commented at the time that he did not know why the deer spooked and that he did not blame the wardens. DNR notes that deer fawns can become easily spooked. Based on the fact that the fawns ran towards the warden when they spooked, it appears that something on the other side of the pen set them off.

Warden Lundin saw one fawn go down but never saw a second animal hit the fence or become injured and DNR notes that the claimant has submitted no proof that a second animal died as a result of the spook. Furthermore, DNR believes the claimant has over-valued his animals. DNR points to the fact that it is well established under the law of damages that the value of a young animal is not the same as the value of that animal as an adult. DNR states that the claimant's own documentation shows the value of a fawn to be approximately \$1500. DNR believes that the inspection was appropriately and carefully conducted pursuant to the agency's duties and responsibility and that there is no evidence that the claimant's damages were caused by DNR personnel.

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. *(Member Crawford not participating.)*

2. Bonnie Bjodstrup of Milwaukee, Wisconsin claims \$14,539.00 for allegedly unpaid amounts due under contracts with the UW-Milwaukee School of Social Welfare. The claimant entered into various contracts between 2000 and 2004. The contracts were for work on five externally funded research projects. The terms of the contracts varied with and within each of the five projects, depending on the needs of the study and the external funding. The claimant states that the multiple contracts became very confusing and made it impossible for her to determine the accuracy of UWM's payments. She states that she did not receive copies of the contracts and that UWM's former business manager signed the claimant's name to the contracts prior to 2003. She also alleges that the business manager made errors regarding her payment time periods and that UWM at times made late payments, lumping together multiple time periods, which added to the confusion. The claimant states that UWM cancelled several contracts in December 2002 but that these contracts covered work completed between July 1 and December 31, 2002. She states that UWM did not notify her of the cancellations until January 28, 2003, by which time all of the work under these contracts had been completed. The claimant does not dispute that the contracts allow for cancellation at any time and for any reason but she finds it impossible to believe that this clause allows for cancellation of contracts for which the work has already been completed and accepted. Although the claimant does not dispute that there was discussion of the contract/payment confusion with UWM in 2003, she states that she was unable to discover the underpayment until she received copies of the contracts. She states that she requested copies in 2003 but was not provided them until her attorney made a public records request in May 2008. She states that when she compared the contracted amounts to her 1099's, she discovered that she had been underpaid in the amount of \$14,539.

The UW recommends denial of this claim. UWM states that all of the claimant's payment issues were resolved with her full involvement and agreement. UWM agrees that the multiple contracts caused confusion, however in January 2003, multiple meetings and emails with the claimant brought both parties to the agreement that she would be compensated an additional \$5,237 to fully resolve the issue. The claimant received written notice of this agreement on January 28, 2003. UWM notes that the claimed amount only relates to contracts prior to 2003 and that the claimant made no further allegations regarding payment problems during the remaining 2 years that she contracted with UWM. UWM believes that the claimant certainly would have spoken up after receiving the January 28th memo or during the ensuing 2 years if she believed she was still owed over \$14,500. UWM states that the claimant's comparison of her 1099's and the contracts to arrive at the alleged underpayment ignores the January 2003 communications, meetings, and the agreed to resolution, as well as the lack of any further complaints by her. UWM also notes that all of the contracts entered into by the claimant allow for termination for any reason upon 60 days notice. Finally, UWM points to the fact that the statute of limitations under § 893.43, Stats., has run out for any payments due prior to December 8, 2002, which disallows her entire 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.

3. Joseph Starkey of Hudson, Wisconsin claims \$2,714.50 for attorneys fees related to investigations conducted by DOC and DOJ in response to a false allegation of sexual assault against the claimant. The claimant is a probation and parole agent and the allegation was made by an offender supervised by the claimant. The claimant denies that he assaulted the probationer or ever visited her home alone. The claimant was suspended with pay from August 1, 2008 to October 5, 2008. The claimant states that the investigation by DOC continued for at least three weeks after he returned to work. The claimant states he was not told by DOC that he was cleared when he returned to work. The claimant also states that DOJ put its investigation on hold pending the outcome of the DOC investigation. The investigations eventually concluded the charge were unfounded. The claimant believes the delay in concluding the investigations was excessive. The claimant states that he hired an attorney to assist him with clearing his name and obtaining records relating to the investigation. He requests reimbursement for that expense.

DOC recommends denial of this claim. DOC records indicate that on August 1, 2008, an offender alleged she had been sexually assaulted by the claimant during a home visit. On October 18, 2008, DOC received the results of the investigation, which cleared the claimant of wrongdoing. DOC notes that no charges were ever filed against the claimant. DOC also notes that billing records show provided by the claimant show only 3.6 attorney hours incurred as of the date he was cleared. Finally, DOC notes that the claimant's field supervisor has long encouraged agents to conduct home visits in pairs.

DOJ also recommends denial of this claim. DOJ states that it conducted an aggressive investigation of the allegations and cleared the claimant in a timely fashion. DOJ believes that, considering the seriousness of the allegation against the claimant, an 8-9 week investigation is reasonable. DOJ also states that no authority exists for payment of this claim because no charges were filed against the claimant, nor was he accused of abusing a resident of an institution.

The Board concludes that the claim should be paid based on equitable principles. After consulting the attorney's fees standards set forth by § 814.245, Stats., and the Equal Access to Justice Act, the Board further concludes that the amount claimed for attorneys fees, \$2,714.50, is reasonable. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment of this claim should be made from the Department of Corrections appropriation § 20.410(1)(b), Stats.

4. Jane Tuchalski of Brookfield, Wisconsin claims \$4,184.20 for unreimbursed medical expenses related to a fall in the parking lot of Thompson Correctional Center in December 2006. The claimant states that she was visiting her husband, who was an inmate at the time, and that the parking lot had not been cleared of snow and ice. She states that she slipped and injured her shoulder in the icy driveway and that her injury required surgery for a torn rotator cuff in July 2007. The claimant states that she delayed the surgery until she had insurance coverage. The claimant states that her insurance has covered the majority of the cost but that she is responsible for a balance of \$4,184.20. She requests reimbursement for this amount because she believes the state was negligent in failing to clear the snow and ice.

DOC recommends denial of this claim. The department believes if there had been any real negligence, the claimant should have filed a Notice of Claim with the Attorney General pursuant to § 893.82(3), Stats. The department further states that it has no liability for the incident because the claimant slipped on a natural buildup of ice and snow, not an artificial one. Finally, the DOC notes that no one else was injured that day, therefore, the department believes that the claimant was not exercising the ordinary care necessary when walking in Wisconsin during the winter.

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. Jarrett Adams of South Holland, Illinois claims \$81,111.12 for Innocent Convict Compensation pursuant to § 775.05, Wis. Stats. The claimant was convicted, along with co-defendant Dimitri Henley, of 2nd Degree Sexual Assault, and sentenced to 20 years in prison for each of three counts and 8 years in prison each for two additional counts. The claimant has maintained his innocence at all times and did not in any way contribute to bring about his

conviction. The claimant was imprisoned from his 12/16/98 arrest until he posted bail on 3/31/99 and then incarcerated immediately upon conviction on 2/9/00. On 6/30/06, the 7th Circuit US Court of Appeals reversed the conviction and remanded the case to the state for a new trial. The claimant posted bail on 1/18/07. The state decided not to pursue a new trial and dismissed the charges on 2/12/07. The claimant states that significant, exculpatory evidence was not presented at his trial. He also points to the Court of Appeals reversal, which found that his trial counsel was ineffective. The claimant states that the attorneys representing him and Mr. Henley offered no defense witnesses and failed to call a critical witness who could have cast doubt on the victim's story. The claimant points to the fact that a third defendant (Mr. Hill), who obtained his own counsel and was granted a separate trial, called multiple defense witnesses. Mr. Hill's trial resulted in a hung jury and the charges against him were eventually dismissed. The claimant also states that there are significant inconsistencies in the victim's testimony, which call her version of the story into question. The claimant states that he suffered significant emotional and financial damages as a result of his seven years in prison and he requests the maximum reimbursement amount of \$25,000. The claimant also points to prior decisions by the Claims Board allowing for the payment of post-conviction attorneys' fees in addition to the \$5,000 per year set forth by § 775.05, Stats. He therefore also requests reimbursement for \$22,088.04 in post-conviction attorneys' fees as well as \$34,023.08 in attorney's fees for preparation of this claim.

Assistant Attorney General, David Wambach, responding on behalf of the Jefferson County District Attorney's Office, recommends denial of this claim. Mr. Wambach notes that the majority of the arguments and evidence presented by the claimant was also available for consideration by the jury which convicted him. Mr. Wambach notes that Mr. Hill's jury considered the remainder of the evidence relied on by the claimant but did not acquit Mr. Hill. Although the claimant points to the fact that the jury was unable to reach a verdict in Mr. Hill's case, he cannot claim that a hung jury is the same thing as proof of innocence. Mr. Wambach notes that the US Court of Appeals held "Adams failed to show that the Wisconsin Court of Appeals acted unreasonably when it found sufficient evidence to support his convictions." Mr. Wambach notes that the US Court of Appeals reversed the conviction based on ineffective assistance of counsel; it did not exonerate the claimant or find him innocent. Finally, Mr. Wambach states that the only reason the claimant was not retried after this reversal was in deference to the wishes of the victim, who did not want to relive the trauma of the sexual assault.

The Board concludes that the evidence is not clear and convincing that the claimant was innocent of the crime for which he suffered imprisonment and that the claim should be denied.

6. Janet M. Hubbard of Muskego, Wisconsin claims \$398.44 for for vehicle damages allegedly caused by a road hazard in a construction zone. The claimant states that she was driving through a construction zone on Forest Home Road in Milwaukee in July 2009, when she encountered a length of rebar in the roadway. The claimant states that there was no way to avoid driving over the rebar, so she did so slowly, however, the rebar punctured the oil pan on her vehicle. The claimant notes that she lives on disability; therefore, it is difficult for her to bear the burden of this expense and she requests reimbursement from the state.

DOT recommends denial of this claim. DOT states that this accident occurred in a construction zone and points to the fact that all state construction contracts contain hold harmless language which indemnifies the state from these types of claims. DOT states that this claim should be pursued with the prime contractor in charge of this construction project, Payne and Dolan, Inc. DOT believes there has been no negligence on the part of the state or its employees.

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.

7. Monchello C. Louis of Waupun, Wisconsin claims \$110.09 as the purchase price of television allegedly damaged and then improperly destroyed by DOC staff. The claimant states that he was placed in Waupun Correctional Institution's Health and Segregation Complex (HSC) from September 30 – December 24, 2008, and that DOC property

staff had control of his television during that period. The claimant alleges his TV was in good working order before he went to HSC and he points to the fact that DOC property room staff checks property for damage upon receipt and noted no damage to the TV when they received it. The claimant alleges that when his TV was returned to him in December 2008, it was no longer working. The claimant states that he has properly pursued all of his available administrative remedies with DOC but his complaints were dismissed. The claimant further alleges that DOC staff improperly destroyed his television before he had exhausted his appeals. Although he originally requested the depreciated value of TV, because he believes DOC should not have destroyed his property, he now requests reimbursement for the original purchase price of the television.

DOC recommends denial of this claim. DOC agrees that there was no damage to the television documented by staff when the claimant entered HSC. However, DOC notes that it does not compensate inmates for property damage unless it is clear that damage was caused by DOC staff. DOC records indicate that the claimant reported the TV did not turn on when it was returned to him but that there was still no obvious damage to the unit. DOC states that it is not always possible to determine why an electronic device stops working and notes that the TV was almost four years old. DOC believes the claimant has not provided any evidence that the television failed due to damage or improper handling by DOC staff. Finally, although the claimant alleges that DOC improperly destroyed the television before he completed his appeals, DOC notes that the claimant was given the opportunity to have the unit sent out for repairs but he failed to contact the property department within the 10 day response window. DOC administrative rules provide that property is held through an inmate's administrative process only until the Warden makes a decision. In this instance, the warden made his decision on January 28, 2009, and the claimant was notified on January 30 that he had 10 days to contact the property room regarding sending his TV for repair. Because the claimant failed to respond, the television was destroyed on February 9, 2009.

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. Jael Speights of Boscobel, Wisconsin claims \$866.25 for the per-page court cost to replace 693 pages of transcript allegedly damaged by the shower in the claimant's cell. The claimant is an inmate at the Wisconsin Secure Program Facility. He states that inmate cells do not have shelving or adequate storage for large volumes of legal paperwork and that this lack of storage necessitated him storing his legal transcript on the floor of his cell. The in-cell showers are controlled by the institution staff and inmates are unable to turn them on or off. The claimant alleges that on March 19, 2009, the shower in his cell turned on during breakfast and that his 693 page transcript was water damaged. The claimant states that he counted the damaged pages in front of Corrections Officer Starkey and that CO Starkey confirmed that the entire transcript was water damaged. The claimant further alleges that CO Starkey told him to throw away the transcript pursuant to DOC rules defining damaged property as contraband. The claimant states that he threw the transcript away on CO Starkey's instructions and to avoid mold contamination in his cell from the wet pages. The claimant states that CO Starkey affirmed the number of pages damaged and the need to dispose of the transcript when he signed the claimant's Claims Board claim and several of his complaints. The claimant requested reimbursement from DOC at the court rate of \$1.25 per page but was only awarded \$0.15 per page for five pages. The claimant alleges that Inmate Complaint Examiner Kelly Trumm lied when she stated that CO Starkey told her only 5 pages were damaged. The claimant states that Officer Starkey would not have signed his complaints unless he had read and agreed with them.

DOC recommends denial of this claim. DOC does not dispute that the claimant's shower turned on and that the claimant's transcript was stored on the floor of his cell at the time. DOC notes that there is sufficient storage space for legal paperwork under the claimant's bed and it was imprudent for him to store legal papers under the shower head. DOC points to affidavits from CO Starkey and Sergeant Matti attesting that they inspected the transcript after the incident and found only five seriously damaged pages and three more with small water spots. DOC flatly denies the claimant's assertions that CO Starkey supports his allegation that the entire transcript was damaged. DOC states that when Inmate Complaint Examiner Trumm

investigated, there was no way to corroborate the number of damaged pages claimed because the claimant had thrown away the transcript. DOC flatly denies that CO Starkey instructed him to do so. DOC notes that the claimant would not have been at risk for disciplinary action simply for retaining the evidence relating to his complaint. DOC states that, because the claimant had no evidence to the contrary, ICE Trumm relied on the initial incident report filed by Sgt Matti and statements provided by CO Starkey to determine that only 5 pages were damaged. Because the water damaged pages could have easily been replaced by photocopying them, DOC reimbursed the claimant the cost he would have been charged for photocopies, \$0.15 per page. DOC states that CO Starkey signed the claimant's complain form only because he was badgered to do so. CO Starkey states that he did not carefully read the document before signing and that he was only intending to confirm there were three additional pages with water spots, not any of the claimant's other allegations. Finally, DOC notes that this transcript was likely related to the claimant's criminal proceedings and he was therefore entitled to free copies of it upon request. DOC does not believe he should be paid \$1.25 per page for a transcript he received for free.

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.

9. Kathleen Kopp of Madison, Wisconsin claims \$186.89 for cost to replace a damaged tire. The claimant has an assigned parking stall in the DOA building. There is a drain covered by a metal plate located in the floor of the claimant's assigned stall. The claimant states that on June 19, 2009, she pulled into her stall and her tire was punctured by a long screw that had come loose from the drain cover. The claimant states that the concrete around the drain cover was broken up, consistent with the metal cover being popped off by heavy rain the night before. The claimant states that it was not possible to repair the tire and she had to purchase a new one. The claimant requested reimbursement for the cost of the new tire on a travel voucher, which was approved by her administrator; however, DOA accounting did not allow reimbursement for this type of expense on a travel voucher. The claimant was referred to the Claims Board and requests reimbursement for her damages.

DOC recommends payment of this claim. DOA does not dispute the facts as presented by the claimant. DOA notes that there was no negligence on the part of the state. DOA does believe, however, that due to the fact that this drain is located in the claimant's parking stall, she should be reimbursed for her damages.

The Board concludes the claim should be paid in the amount of \$186.89 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Administration appropriation § 20.505(5)(kb), Stats. (*Member Renlund not participating.*)

10. Dore & Associates Contracting, Inc. of Bay City, Michigan claims \$1,761,719.20 for unpaid work and additional costs allegedly due pursuant to the claimant's contract with the Department of Administration for demolition work at Ogg Hall on the University of Wisconsin-Madison campus. The claimant states that it incurred additional costs due to DOA's demand for an engineered scaffolding system and scaffolding extending into areas not specified by the contract. The claimant alleges that DOA's additional scaffolding requirements caused significant delays, impacting Dore's intended schedule and sequence of work. The claimant states that these delays pushed their work farther into the winter, causing inclement weather issues. The claimant states that the delays also required Dore to work on both towers of Ogg Hall simultaneously, thus preventing the reuse of scaffolding from the West Tower for the East Tower, as the claimant had intended. The claimant alleges that these additional requirements and DOA's refusal to grant schedule extensions caused significant engineering, equipment and personnel expenses in the amount of \$755,795.94. The claimant also alleges that DOA wrongfully terminated the contract without providing any notice and opportunity to cure as required by the contract. The claimant states that, although it had received a February 14, 2008, letter from DOA, the claimant had responded to that letter and had reached an agreement with DOA regarding measures to be taken in response to the issues raised. The claimant states that the March 19, 2009, termination letter referred to an incident on March 18, which was not one of the issues raised in the February 14 letter. The claimant

believes that DOA terminated its contract without notice. The claimant alleges that this wrongful termination caused it to incur additional losses relating to lost salvage income, unpaid work, additional rental charges, and retainage in the amount of \$1,005,982.26. The claimant requests reimbursement for its total loss, before and after contract termination, in the amount of \$1,761,719.20.

DOA recommends denial of this claim. DOA states that the Ogg Hall demolition project called for certain safety measures to protect people and property, given that the project took place on campus during the school year and students would regularly pass within 10-30 yards of the project site. DOA states that the project specifications required that the contractor erect scaffolding in compliance with all codes around each tower and above the roof line or current floor under demolition. DOA states that this scaffolding was required specifically to prevent the fall of debris upon people and property adjacent to the work site. DOA alleges that the claimant failed to submit timely or sufficiently detailed information regarding project schedules and scaffolding. DOA states that the claimant's initial scaffolding proposal did not meet the project requirements and lacked adequate details regarding safety and building code requirements. The department requested that the claimant provide these additional details. In February 2008, DOA notified the claimant that it would terminate the contract if certain safety and compliance issues were not resolved within 10 days. DOA states that it worked with the claimant for another month, in an attempt to bring the project to a successful conclusion and that during this period, the claimant was aware there were ongoing safety concerns and contract violations. DOA states that on March 18, 2008, due to the claimant's failure to adequately comply with safety requirements, a large block of concrete fell from the tower and crushed a parked vehicle. Based upon that incident as well as prior problems, the department terminated its contract with the claimant. The department believed that the claimant's continuation on the project presented an unacceptable safety risk to UW students, employees and property. DOA believes that the record shows it attempted to resolve issues with the claimant but that the claimant continually failed to respond appropriately to ongoing safety issues. DOA states that the contract was properly terminated following the notice provided in its letter dated February 14, 2008.

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. *(Member Renlund not participating.)*

The Board concludes:

That the following claims are denied:

William Vyvyan, Timberline Whitetails
Bonnie Bjodstrup
Jane Tuchalski
Jarrett Adams
Janet M. Hubbard
Monchello C. Louis
Jael Speights
Dore & Associates Contracting, Inc.

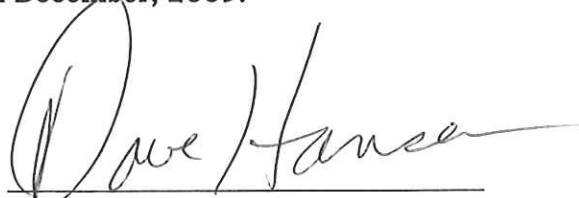
That payment of the below amounts to the identified claimants from the following statutory appropriations is justified under § 16.007, Stats:

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|----------------|------------|-------------------------|
| Joseph Starkey | \$2,714.50 | § 20.410(1)(b), Stats. |
| Kathleen Kopp | \$186.89 | § 20.505(5)(kb), Stats. |

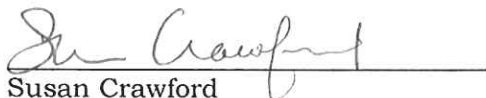
Dated at Madison, Wisconsin this 17th day of December, 2009.



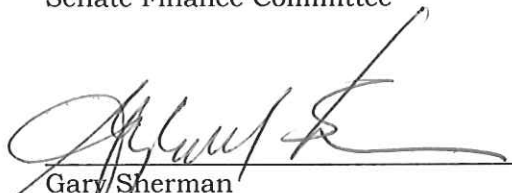
Cari Anne Renlund, Secretary
Representative of the Secretary
of Administration



Dave Hansen
Senate Finance Committee



Susan Crawford
Representative of the Governor



Gary Sherman
Assembly Finance Committee