STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings in the State Capitol, Grand Army of the Republic Memorial Hall, Madison, Wisconsin, on December 7, 2001, upon the following claims:

Claimant	Agency	Amount
1. Alicia Bowman	University of Wisconsin	$156.00
2. Patrick D. Horkan	Department of Revenue	$1,700.00
3. Willie J. Wilks	Department of Revenue	$10,439.19
4. Pastori M. Balele	Department of Administration	$1,033.00

In addition, the following claims were considered and decided without hearings:

Claimant	Agency	Amount
5. Marquita Phillips	Department of Revenue	$2,158.00
6. James A. Mentek	Department of Justice	$1,022.23
7. Geoffrey T. Helmsen	Department of Administration	$354.66
8. Teck Trak/Terri L. Nielson	Department of Administration	$10,842.00
9. West Side Garage, Inc.	Department of Transportation	$2,579.34
10. James Cape & Sons, Co.	Department of Transportation	$1,483,781.60
11. Mary & Michael Brown	Department of Transportation	$88.12
12. Bryce Garrett	Department of Corrections	$157.80

In addition, the Board considered changing the payment funding source for the claim of Kenneth C. Ketterer, which was previously approved for payment from the Department of Revenue appropriation s. 20.566(1)(a), Stats., on September 21, 2001.

In addition, the Board considered a motion to refer the innocent convict claim (s. 775.05, Stats.) of Frederick Saecker to a hearing examiner.

The Board Finds:

1. **Alicia Bowman** of West Allis, Wisconsin claims $156.00 for uninsured medical expenses related to a fall at the UW-Milwaukee Union. The claimant alleges that she approached a stairwell and saw a custodian mopping the landing below. She alleges that there were no "wet floor" or caution signs displayed. She states that she began to descend the stairs and slipped on the third step, falling down the stairwell and injuring her arm. She alleges that after the accident she noticed drops of water on the steps, as though the custodian had carried a dripping mop down the stairs. She believes that this was what caused her fall. The claimant further states that when she returned to that area later in the day "caution, wet floor" signs had been placed at the top and bottom of the stairwell. The claimant believes that the UW custodian was negligent in not posting caution signs in the area, especially at the top of the stairwell.

The UW states that at the time of the incident, a custodian was mopping the landing between two flights of stairs. The UW alleges that the cart containing the mop bucket, marked with the words "wet floor," was blocking the upper entryway to the stairwell and that another warning sign was posted just below the landing, near the lower stairwell. The UW alleges that the claimant had to move the mop cart out of the way to enter the stairwell. The UW also claims that she was wearing "flip-flop" shoes and carrying a large backpack, which may have contributed to her fall.

The Board concludes the claim should be paid in the amount of $156.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the University of Wisconsin appropriation s. 20.285(1)(h), Stats.

2. **Patrick D. Horkan** of Prairie du Sac, Wisconsin claims $1,700.00 for Farmland Preservation Credit for the 1981 tax year. The claimant states that he was not able to get the appropriate form signed in time and that DOR therefore denied his Farmland Preservation Credit. The claimant believes that this money is rightfully his.

Because the tax year involved is so old, DOR records are very limited, however, DOR records do indicate a number of contacts with the claimant regarding this issue. According to the DOR's information, the claimant filed his 1981 income tax return in May 1983. The DOR has no record indicating that the taxpayer ever filed a Schedule FC for his Farmland Preservation Credit. According to the Wisconsin Statutes, a 1981 FPC claim had to be filed by December 31, 1982. The DOR states that even if its records are incorrect and the claimant did file his Schedule FC with his 1981 return, the return was filed past the December 31, 1982, deadline and the claimant would therefore not be entitled to the FPC. According to the Department's records, the claimant has contacted the DOR four times since 1984 requesting an explanation as to why he did not receive the credit. The DOR has responded to each inquiry, explaining the December 31, 1982 deadline.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

3. **Willie J. Wilks** of Waseca, Minnesota claims $10,439.19 for return of funds levied from his bank account to satisfy estimated tax assessments for the years 1993 through 1996. The claimant states that he was incarcerated during this period and never received any notices from the DOR. He further states that he did not earn enough money to necessitate filing during most of those years. The claimant states that when he did complete his 1993 through 1996 taxes, he owed no taxes for those years.

The DOR states that the claimant failed to file personal income tax returns for the years 1993 through 1996. Estimated assessments were issued for these years. The DOR states that it requested income tax returns from the claimant based on the fact that DOR records showed that he had received large interest payments indicating a filing obligation. The DOR states that the claimant failed to respond to multiple hearing notices over a four-year period. On November 17, 2000, the department levied the claimant's bank account and collected $10,439.19 to satisfy the delinquent assessments. The claimant filed the taxes for the years in question in May 2001, with no tax due. The DOR is prohibited from refunding the overpayment by s. 71.75(5), Stats. All notices were sent to the address of the claimant's spouse. This house is owned jointly by the claimant and his wife. The claimant's spouse resides there and has been receiving the claimant's mail. The DOR, however, cannot verify that she actually forwarded the notices to the claimant. The DOR states that if the Claims Board feels this mitigates the circumstances, The DOR would not object to payment of the claim.

The Board concludes the claim should be paid in the reduced amount of $5,000.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Claims Board appropriation s. 20.505(4)(d), Stats.

4. **Pastori M. Balele** of Madison, Wisconsin claims $1,033.00 for return of monies garnished from his pay for costs associated with a court case filed by the claimant against the State of Wisconsin six years ago. The claimant alleges that the court judgment garnishing his wages for court costs was actually a void judgment and that the DOA therefore illegally garnished his wages. The claimant alleges that in-house copying and printing costs are not recoverable under state law and that the court was therefore not authorized to award these costs to the State of Wisconsin. He requests return of the $1,033 garnished from his wages, plus the court filing fee.

The DOA states that the claimant provides no evidence that the judgment was void beyond his bald assertion to that effect. In Weingerd v. Rinehart, 114 Wis.2d 557 (Ct. of App. 1983), the Court held that a judgment is not void unless the court rendering it lacks subject matter or personal jurisdiction, or a party was denied due process of law. The Court further held that a party could waive any error that would form the basis for relief on a claim that a judgment is void. In Wengerd, failure to take subsequent action on a judgment for three years constituted a waiver. In this instance, the claimant was presented with a detailed bill of costs four and a half years ago. At that time, he had 10 days to file objections to those costs but did not do so. At any time between 1995 and the present, the claimant could have challenged the judgment but did not do so. The DOA believes that the claimant's failure to object, especially as his wages were being garnished more than five years ago, constitutes a waiver at this stage. The DOA believes that the claimant's claim is premature and that this is not the proper venue for him to object to the court judgment.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *[Member Rothschild not participating.]*

X 5. Marquita Phillips of Milwaukee, Wisconsin claims $2,158.00 for return of 2000 income tax refund, which was taken to satisfy outstanding estimated assessments for the years 1990-1994. The claimant states that she never received any notice of the assessments. She states that she moved in late August 1996 and did not file a change of address notice with the Post Office. She was then incarcerated from May 1997 until March 1999 and states she did not receive any notices regarding any tax delinquency during that time. Finally, the claimant points to the fact that she did not have any taxable income during the 1990-1994 period in question and therefore would not have owed any taxes for this period.

The DOR recommends that this claim be denied. DOR records indicate that estimated assessments were issued on June 24, 1996, for failure to file 1990 through 1994 income tax returns. The original assessments were mailed to the claimant and the Department has no record that these statements were returned as undeliverable. The first delinquent tax notice was sent to the claimant in early September 1996. The claimant provided the information necessary to adjust her account on July 25, 2001. Because this information was provided more than two years after the assessment date, the DOR is not able to issue a refund pursuant to s. 71.75(5), Stats.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *[Members Albers and Rothschild dissenting.]*

X 6. James A. Mentek, Jr. of Appleton, Minnesota claims $1,022.23 for costs allegedly related to a lawsuit against the State of Wisconsin. The claimant states that, after erroneous rulings by the Circuit Court and Court of Appeals, his case was reversed by the Wisconsin Supreme Court, which ruled that the state had denied him meaningful judicial review by relying on a statute that was inapplicable to his case. The case was remanded back to the Circuit Court. The claimant states that he attempted to recover his costs associated with the suit but was denied costs by the Clerk of the Supreme Court. The claimant believes that since he won his case, he is entitled to recover the costs associated with bringing his lawsuit. The claimant agrees that there is a long-standing rule that litigants cannot recover costs from the state. However, the claimant states that s. 809.25(4), Stats., provides for costs "against the respondent before the Supreme Court when the judgment of the Court of Appeals is reversed..." The claimant believes that the word "respondent" is all inclusive and does not preclude the state. The claimant believes that the DOJ made unreasonable and unjustified arguments in his case and that he should be awarded his court costs.

The DOJ recommends that this claim be denied. The DOJ states that it is a long-standing rule that litigants are not entitled to recover costs from the state, even when they win and that departure from this rule could prove quite expensive. The DOJ points to the fact that the claimant is an aggressive prison litigator, who has sued the state a dozen times. The DOJ believes that the claimant would need little incentive to increase his pace. The DOJ believes that it made fair legal arguments in the claimant's case and that the reasonableness of the state's argument was supported by the fact that the state won in the Court of Appeals. The fact that the Supreme Court disagreed does not mean that the state's arguments were unreasonable.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

7. **Geoffrey T. Hermsen** of Milwaukee, Wisconsin claims $354.66 for medical bills related to an injury sustained at the Milwaukee State Office Building. The claimant states that he was approaching the building at 8:00 AM on September 6, 2000, when he slipped on some fresh grass clippings on the sidewalk. He states that he fell against the stairs and dislocated his shoulder. The accident was witnessed by several other people. The claimant requests reimbursement for his ambulance bill and ensuing medical treatment.

The DOA recommends payment of this claim. The DOA notes that there were grass clippings on the sidewalk in the area where the claimant fell and that the grass had been recently mowed. The DOA further notes that the pavement in the area was dry. The DOA believes that the grass clippings left on the walkway may have contributed to the claimant's accident and recommend that he be reimbursed for his medical expenses.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

8. **Terri Nielson d/b/a Tech Trak Consulting** of Reedsburg, Wisconsin claims $10,842.00 for damages allegedly related to the termination of a contract with the DOA. The claimant, through her company, entered into a contract with the DOA to provide technical writing services at a rate of $39 per hour. The claimant states that the term of the contract was July 1, 1999 through June 30, 2000, and required the claimant to provide the DOA with up to 2,000 hours of technical writing services for a total of $78,000. The claimant states that in mid May of 2000 the DOA informed her that the contract would be terminated on May 31, 2000. The claimant alleges that this termination was done without her consent and that she never requested to be relieved of her projects. She claims that she understood the contract as providing her with full-time work for one year and that she would not have entered into the contract had this not been the case.

The DOA recommends that this claim be denied. The DOA contends that, when construing the contract as a whole, it is clear that it was to be open-ended, depending on the need for and quality of the claimant's services. The DOA states that the purchase requisition, which in essence is the contract, followed standard purchasing requirements. The DOA points to the fact that the total cost of the contract is estimated based upon the potential hours at the hourly rate. The DOA states that this was obviously not a final, firm contract amount or it would not have been estimated. Moreover, the DOA states that if the contract had been for a fixed 2,000 hours/$78,000, the DOA would not have paid the claimant by monthly invoice, as was the case in this instance. The DOA states that the claimant was paid on a monthly basis specifically in order to track the work performed and allow the DOA to review the work and, if necessary, terminate the contract at any time. Finally, the DOA states that the reason for the termination of the contract was the claimant's failure to perform her assignment after approximately 1700 hours of work under the contract. The DOA alleges that the claimant requested to be removed from the web-hosting project to which she was assigned. When notified that she was ceasing work on the project without finishing it, the DOA chose to terminate

the claimant's services. The DOA states that the contract did not guarantee that the claimant would receive work for the full 2,000 hours or that she would receive the absolute amount of $78,000.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *[Member Rothschild not participating.]*

9. West Side Garage, Inc. of Berlin, Wisconsin claims $2,579.34 for lost value of vehicle allegedly related to an error by DOT employees. The claimant received a 1999 pick up truck in trade, which was appraised for $18,000. The Wisconsin Vehicle Title was not marked salvage. The claimant states that when it attempted to sell the vehicle, it was discovered that the vehicle had been previously titled in Missouri as salvage and that the salvage brand from the MO title was not carried forward to the new WI title issued by the DOT. The claimant has since sold the vehicle, and claims a loss of $2,579.34.

The DOT recommends payment of this claim in the amount of $2,579.34. After conducting an investigation of the claim, the DOT does find negligence on the part of its employee, Nancy Davis, for not carrying forward the Missouri salvage brand and instead issuing a clean Wisconsin title.

The Board concludes the claim should be paid in the amount of $2,579.34 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Transportation appropriation s. 20.395(5)(cq), Stats.

10. James Cape & Sons, Inc. of Racine, Wisconsin claims $1,483,781.60 for additional construction costs allegedly incurred on a DOT construction project. The claimant alleges that, after they began construction work, the DOT notified them that the DOT would not allow the claimant to use excavated material for trench backfill. The claimant alleges that this is contrary to their interpretation of the contract, which they claim does allow for use of excavated material as backfill. The claimant also alleges that the DOT failed to provide them with access to the right of way, as provided for in the contract, thereby causing a delay in the project. The claimant alleges that the DOT failed to ensure that existing power lines and railroad tracks were relocated so as to avoid any interference with the project, and that the claimant incurred additional costs as a result of the delays.

The DOT requests that this claim be denied. The DOT states that the contract specifications require that trenches be backfilled with granular backfill. The DOT states that the claimant is an experienced state contractor and was well aware that the state always requires the use of granular backfill in such situations. The DOT alleges that specific conversations with the claimant indicate that they were aware that they would need to use granular backfill in the project. The DOT also alleges that at a meeting in April 1995, an employee of the claimant specifically admitted that he bid the project as using granular backfill. The DOT states that the claimant did have access to the right of way and that the contract did not require the DOT to ensure that the existing power lines and railroad tracks be relocated so as to avoid interference with the progress of the project. The DOT states that the contract advised the claimant to contact utilities and required the claimant to utilize applicable and safe construction methods when working around utility lines.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

11. Michael & Mary Brown of Brookfield, Wisconsin claim $88.12 for damage to tire allegedly caused by negligence of the DOT. The claimant states that at 10:30 PM on December 8, 2000, he was driving through a construction zone on Greenfield Avenue in Waukesha County. He states that there was a pole-style lane divider bent into his lane, which he had to swerve to avoid and that when he swerved, he hit a large pothole and damaged his tire and rim. The claimant states that he contacted

the road contractor in charge of the project and was told that they would not pay the bill. He requests reimbursement for his tire damage.

The DOT recommends that this claim be denied. The DOT states that the area in which the accident occurred was at that time in a construction zone. The DOT states that all state construction contracts have a hold harmless agreement, which says that the contract will indemnify and save harmless the state from all claims brought because of damages received by any person on account of any act, omission, neglect or misconduct of the contractor. Therefore, the DOT believes that any responsibility to address claims of negligence resulting in damage rests with Zignego, Inc., the prime contractor on this project. The DOT finds no negligence on the part of any state employee.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. The Board further concludes that the claimants' remedy rests with the contractor, Zignego, Inc.

12. Bryce Garrett of Boscobel, Wisconsin claims $157.80 for court costs incurred by the claimant. The claimant, an inmate at Supermax Correctional Institution, alleges that the DOC wrongly charged him with a violation of Wisconsin Administrative Code. The claimant appealed the discipline imposed on him, and filed a Writ of Certiorari in Dane County Circuit Court. The claimant states that Dane County Circuit Court reversed the decision of the DOC to discipline the claimant and ordered that the discipline be expunged from his correctional file. The claimant requests reimbursement for his court filing fee and the sheriff's fee to serve papers on the DOC. The claimant states that he will file two more lawsuits if the Claims Board does not pay this claim. He claims that the typical inmate lawsuit costs the state $4,100 and believes that the board should pay the claim rather than have the state incur $8,200 in lawsuit costs.

The DOC requests that this claim be denied. The claimant filed a motion for costs under s. 814.245(3), Wis. Stats., which the court denied, finding that the DOC was substantially justified in its position and that the claimant was therefore not entitled to costs. In addition, the DOC states that the claimant failed to serve the motion for costs on the assistant attorney general who represented the DOC in these matters. The DOC believes there is no legal basis to grant this claim. The claimant has not presented any reason why the Claims Board should ignore the circuit court decision or s. 814.25, Stats.

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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

Reconsideration of funding source for payment of claim of Kenneth C. Ketterer against the Department of Revenue. On September 21, 2001, the Claims Board decided to pay the claim of Kenneth C. Ketterer against the Department of Revenue in the amount of $4,221.92. The Board further indicated that this payment should be made from the Department of Revenue appropriation s. 20.566(1)(a), Stats. The Department of Revenue has requested that the Board reconsider their decision to pay the claim from DOR funds and instead consider paying the claim from the Claims Board appropriation s. 20.505(4)(d), Stats.

After reconsideration of the funding source for payment of the claim, the board declines to change its previous decision to pay the claim from the Department of Revenue appropriation s. 20.566(1)(a), Stats.

Consideration of motion to refer innocent convict claim of Frederick Saecker to a hearing examiner. Frederick Saecker has filed an innocent convict claim under s. 775.05, Stats., with the Claims Board. Claims Board Chairperson, Alan Lee, has made a motion that the claim should be heard by a hearing examiner designated by the board, rather than by the entire Claims Board. The

hearing examiner would conduct the hearing for the claim and would submit a proposed Findings of Fact and Decision to the Claims Board for their approval.

After consideration of the issue, the Board concludes that the claim of Frederick Saecker should be considered by a designated hearing examiner, who will then submit to the Board a proposed Findings of Fact and Decision for their approval.

The Board concludes:

1. The claims of the following claimants should be denied:
   Patrick D. Horkan
   Pastori M. Balele
   Marquita Phillips
   James A. Mentek, Jr.
   Geoffrey T. Hermsen
   Terri Nielson/Tech Trak Consulting
   James Cape & Sons, Inc.
   Michael & Mary Brown
   Bryce Garrett

2. Payment of the following amounts to the following claimants from the following appropriations is justified under s. 16.007, Stats:

Alicia Bowman	$156.00	s. 20.285(1)(h)
Willie J. Wilks	$5,000.00	s. 20.505(4)(d)
West Side Garage, Inc.	$2,579.34	s. 20.395(5)(cq)

3. The board declines to change its previous decision to pay the claim from the Department of Revenue appropriation s. 20.566(1)(a), Stats.

4. The Board concludes that the claim of Frederick Saecker should be considered by a designated hearing examiner, who will then submit to the Board a proposed Findings of Fact and Decision for their approval.

Dated at Madison, Wisconsin this 21ST day of December 2001.

Alan Lee, Chair
Representative of the Attorney General

John E. Rothschild, Secretary
Representative of the Secretary of Administration

Chad Taylor
Representative of the Governor

Sheryl Albers
Assembly Finance Committee