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 May 18, 2001, upon the following claims:

Claimant	Agency	Amount
1. Lois A. Endres	Department of Administration	$2,074.32
2. Anjelika Johnson	Department of Health and Family Services	$3,580.20
3. Arthur Polk	Department of Corrections	$535.00
4. Jack & Margot Raz	Wisconsin State Fair Park	$154,500.00
5. Julie & Ken Ganske	Circus World Museum	$3,466.31

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

Claimant	Agency	Amount
6. David J. Beranek	Department of Health and Family Services	$648.77
7. Lynette Henderson	Department of Employee Trust Funds	$4,940.00
8. J.T. Roofing, Inc.	Department of Administration	$508,323.00
9. Danette M. Sebastian	Department of Administration	$146.32
10. Ray Wilkinson Buick Cadillac Inc.	Department of Transportation	$625,864.00
11. Barbara Hill	University of Wisconsin	$500.00
12. Lebanon Athletic Association	Department of Revenue	$1,478.79

The Board Finds:

1. **Lois A. Endres** of Madison, Wisconsin claims $2,074.32 for lost wages and sick time caused by a fall that allegedly occurred at the State Capitol Building. The claimant states that on January 1, 2001, she was exiting the State Capitol when she slipped on ice and fell, landing on her left side. The claimant states that her companion took her immediately to the hospital, where she was treated for fractured ribs. The claimant alleges that the day was clear and sunny and that she encountered no other icy areas during her walk from Brittingham Park to the Capitol Building. The claimant believes that the state was negligent for failing to clear ice from the walkway. The claimant alleges that her injuries caused her to miss significant amounts of work. She requests reimbursement for 74.75 hours of sick time used and 11.25 hours of lost wages (after her sick time was used up). She also requests payment for $25 in medical bills and $96.48 for four hours of time to attend the Claims Board meeting. At her hearing, the claimant stated that she probably exited on the South or Southwest side of the Capitol and that she slipped on smooth glare ice.

The Department of Administration recommends denial of this claim. The claimant did not file a police report or contact anyone at the Capitol Building at the time of the accident and has presented no proof that the accident actually occurred at the Capitol Building.

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.

2. **Anjelika Johnson** of Madison, Wisconsin claims $3,580.20 for lost wages. The claimant works as a Registered Nurse providing home health care for Medical Assistance patients. The claimant states that she is paid by the Department of Health and Family Services through its fiscal agent, EDS and that she is required to have a number of approvals in place before she can be paid. She states that she did not realize that one of her authorizations had expired on April 21, 2000, and that the renewal date

had simply slipped her mind. EDS would not honor the claimant's request for payment of services delivered May 5 through June 12. The claimant states that she processed her renewal paperwork as soon as she found out her authorization had lapsed but that EDS would not backdate payments and could not pay her for the work performed after the expiration date. The claimant believes that there should be some allowance made for a simple mistake. She points to the fact that the work she performed was authorized by the budget and by EDS. The claimant believes that it would be helpful if reminders of authorization renewal dates could be sent to providers in order to keep a simple mistake from causing such harm. At her hearing, the claimant stated that she continued to provide home health service during the period when her authorization had expired. This was not disputed by DHFS.

The Department of Health and Family Services recommends denial of this claim. DHFS states that there was no negligence on the part of any state employee and does not believe there is an equitable basis for the claim. DHFS states that under the Wisconsin Administrative Code, all Medical Assistance providers are required to receive reimbursement authorization approval prior to provision of services. DHFS points to the fact that the claimant is not alleging that she was unaware of this requirement but that she forgot to submit her authorization renewal. DHFS points to HSF 107.03 (3)(c), which states that if prior authorization is not obtained "reimbursement shall not be made except in extraordinary circumstances such as emergency cases where the department has given verbal authorization for a service." The DHFS does not believe that the claimant's situation of forgetting to renew her authorization falls under this section. Finally, DHFS points to HSF 106.02 (9)(e), which states that the provider is solely responsible for prior authorization requests and also to HSF 106.03 (4) and HSF 107.11 (5)(e), which specifically state that services provided without the required authorizations are not covered if the authorization is not in place prior to the date of service.

The Board concludes the claim should be paid in the reduced amount of $2,000.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Health and Family Services appropriation s. 20.435 (4)(a), Stats.

3. **Arthur Polk** of Montello, Wisconsin claims $535.00 for restitution he never received. The claimant owns a warehouse that was damaged when Anatoly Nepscha broke into the building by driving his vehicle into the warehouse door. Mr. Nepscha was convicted of two counts of felony burglary and received four years of probation on both counts. The claimant states that he submitted a repair bill for his door to the court and that the court ordered Mr. Nepscha to pay restitution to the claimant in the amount of $535. The claimant states that he contacted the Adams County District Attorney's Office at the end of Mr. Nepscha's probationary period and claims that they told him they had made an error and failed to collect restitution from Mr. Nepscha.

The State Prosecutors Office (SPO) originally filed a response for this claim stating that the claim should be more properly brought against the Department of Corrections. The SPO advised that restitution was ordered for the claimant by means of a stipulation filed in Juneau County (where the claimant was convicted). The SPO states that the Juneau County DA's Office stated that they sent a copy of the restitution order to Mauston Probation and Parole Department (Juneau County). Mr. Nepscha's actual probation supervision occurred in Adams County and would have been overseen by a Probation and Parole Office in that county.

The Department of Corrections recommends denial of this claim. The DOC alleges that the Juneau County Clerk of Court's Office never sent the Department's agent's office the order of restitution pertaining to the claimant. Consequently, no restitution was collected for the claimant. DOC states that when the claimant contacted them about the problem, the DOC wrote the court and asked that a civil judgement be issued against Mr. Nepscha on behalf of the claimant for $535. The court did so on June 27, 2000. Section 973.20(1), Stats., provides that after probation is terminated, restitution such as that ordered for the claimant "is enforceable in the same manner as a judgement in a civil action by the victim named in the order to receive restitution..." The DOC believes that, since the claimant has received a civil judgement against Mr. Nepscha, he has the option provided for in the

statute of going through the ordinary judgement enforcement process. The DOC states that the claimant has provided no evidence that he has attempted to enforce the judgement and therefore believes he has not exhausted all available legal remedies. Finally, the DOC states that it has not been shown that any Department employee or agent was negligent in the handling of this matter. The DOC states that most crime victims do not receive full restitution for the crimes committed against them and the DOC does not believe it would be wise to make the state a guarantor for restitution claims against criminals.

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.

4. **Jack and Margot Raz** claim $154,500.00 for the purchase price of their delicatessen at Wisconsin State Fair Park. The claimants have leased land at SFP since 1977. In August 1998, the claimants state that they entered into a Business Purchase Agreement to sell their delicatessen for $154,000 to Greg Montoto and David Flores. The claimants allege that SFP orally approved and encouraged the sale but failed to issue written approval until almost two years later in August 2000. Prior to that approval, Montoto and Flores sued to recover their $30,000 down payment on the basis that SFP approval of the sale did not occur in a reasonable time. The court held that the time for the approval was not reasonable and that the contract was unenforceable, ordering the claimants to return the down payment.

Wisconsin State Fair Park recommends denial of this claim. The claimants' lease with SFP specifically provides that the claimants may not sell the business without prior written consent of the SFP Board and that the Board reserves the right to grant or refuse such consent. SFP states that the claimants' assertion that SFP orally approved the sale is untrue. SFP states that, because of the lease agreement, the claimants should have been fully aware that written approval was needed from the SFP Board. Furthermore, SFP states that the SFP executive director sent a letter to the claimants in April 1999 specifically stating that "without Board action, the sale or transfer of any stand may not take place." SFP states that the Board's delay in providing written approval was reasonable. The Board was in the process of conducting a thorough examination of the operation and configuration of SFP grounds. It was not until August 2000 that the master plan for the grounds was sufficiently developed so that the Board knew whether the business intended by the buyer of the claimants' site would fit with that plan. SFP claims that the statement by the court that the approval had not come within a reasonable time is not a judgement related to the behavior of the Board but is a determination that the buyers' obligation under their agreement with the claimants could not be completed because of the delay and that the contract was therefore unenforceable.

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.

5. **Julie and Ken Ganske** of Columbus, Wisconsin claim $3,466.31 for vehicle damage allegedly incurred while Julie Ganske was distributing literature for Circus World Museum, where she was employed. The claimant states that she was told by her supervisor that she had to use her personal vehicle to distribute information during the Great Circus Train tour. She alleges that he told her there was no money to rent an additional van and that she therefore had to use her own vehicle. She also claims that he told her that Circus World's insurance would cover any damage to her vehicle. The claimant states that damage to the vehicle was discovered at the end of the train tour weekend.

Circus World Museum recommends denial of this claim. CWM denies that the claimant's supervisor, Dale Williams, told her that she had to use her personal vehicle. CWM states that Williams discussed a number of options, including the claimant riding with another CWM employee, the claimant riding in the rented van, and the claimant using her own vehicle and being reimbursed for mileage at the standard state rate. CWM states that the claimant was never told that she must use her

personal vehicle but that it was mutually decided that she would do so. CWM also denies that Williams told the claimant any damage would be covered by state insurance. CWM states that Williams did tell the claimant that CWM insurance would likely protect employees against any liability for their actions during the train tour. CWM states that the claimant made no mention of any damage during the three days of the train tour, nor did she report it during the following week. CWM alleges that the claimant told Williams that she did not know where the damage occurred. CWM believes that there is no proof that the damage occurred during the train tour and that CWM should not be held responsible for any repairs. CWM states that the claimant was paid the standard state mileage rate for use of her personal vehicle and should not receive any additional payment.

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.

6. **David J. Beranek** of Eau Claire, Wisconsin claims $648.77 for damage to his automobile allegedly caused by Department of Health and Family Services employees. The claimant states that on December 23, 2000, his personal vehicle was parked in the parking lot of Northern Wisconsin Center, where the claimant is employed, when it was struck by a snow plow driven by members of the grounds crew. The claimant states that the two grounds crew employees came to him and told him that they had struck his vehicle while plowing the parking lot. The claimant has been told that his vehicle will be out of service for 4 days while it is being repaired. The claimant states that he would have to rent a vehicle for 4 days at a cost of $35 per day. The claimant has a $500 insurance deductible but his insurance does not cover the rental vehicle.

The Department of Health and Family Services recommends payment of this claim after the actual expenses have been incurred and the claimant submits copies of the receipts for the actual repair and car rental expenses.

The Board concludes the claim should be paid in the amount of $648.77 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Health and Family Services appropriation s. 20.435 (2)(gk), Stats.

7. **Lynette Henderson** of Madison, Wisconsin claims $4,940.00 for funeral expenses not covered by life insurance allegedly due to an error by the Department of Employee Trust Funds. The claimant's father was an annuitant of the Wisconsin Retirement System. While employed, he had applied for a disability annuity and his employer (DHFS) certified that he was disabled for purposes of waiving his life insurance premiums. This allowed Mr. Henderson to continue being covered under the group life insurance program (even after his employment terminated) and to pay no premiums as long as he was disabled. The claimant's father died in November 1997. The claimant states that her family was not notified of any cancellation of her father's life insurance. She states that her father contacted ETF to check on the status of his life insurance and received ETF's 2/34/94 letter in reply, which states that the value of his life insurance was $7,000. At her father's death, the claimant met with an ETF employee to discuss the insurance situation. The claimant states that the ETF employee went through the file page by page and never at any time indicated that the life insurance had lapsed. The claimant states that the ETF employee specifically told her that there was $7,000 worth of coverage and explained how to receive payment for funeral expenses. After her father's funeral, the claimant was told that ETF had made an error and that her father's insurance had been cancelled in 1988. The claimant appealed to the State of Wisconsin Group Insurance Board and was denied.

The Department of Employee Trust Funds makes no recommendation regarding payment of this claim. ETF states that in order for Mr. Henderson to continue life insurance coverage and the premium waiver granted due to his disability, he was required to submit two forms to Minnesota Life each year—a medical certification from his physician and a form concerning his current employment status. ETF states that in 1988, only the physician form was completed and returned. ETF states that Minnesota Life notified Mr. Henderson that his insurance was terminated on June 21, 1988. ETF

admits that it then erred when informing Mr. Henderson that he still had life insurance coverage in 1994. A copy of the Minnesota Life letter terminating coverage was in the file but was apparently missed by ETF staff. Later inquiries about the insurance by Mr. Henderson's family were also answered in error by ETF staff, who probably relied on the earlier erroneous correspondence they found in the file, thus repeating the earlier mistake. ETF regrets that its employees erroneously advised Mr. Henderson and his family that he was covered by life insurance after June 1988. ETF has instituted procedural changes to reduce this type of mistake. ETF reminds the board that the Attorney General has issued an official opinion stating that the Claims Board lacks authority to order payment from the Public Employee Trust Fund including the ETF appropriations in s. 20.515, see 74 Op. Atty. Gen. 193, 196 (1985). ETF does not believe it should advise the board how to expend Claims Board funds and therefore declines to make a recommendation.

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. **J.T. Roofing, Inc.** of Saukville, Wisconsin claims $508,323.00 for extra costs allegedly incurred on a state building project at Mendota Mental Health Institute. The claimant states that during construction numerous events occurred which necessitated additional compensation. The claimant requested additional payment but was denied by the Division of Facilities Development. The claimants state that project specifications provided for removal of existing loose vapor retarder but that application of a primer, which was not required in the specifications caused loosening of additional vapor retarder that required additional work to remove ($166,827). The claimant states that it was never informed that only two of the eight courtyards at the project would be open and claims that limited courtyard access caused delays ($252,960). The claimant states that it was never informed that additional time would be required to gain access to the facility and that its employees had to wait on numerous occasions for 45-60 minutes to gain access to the project site, causing delays ($14,535). The claimant states that two DFD employees, Mr. McClyman and Mr. Mohns, gave contradictory instructions thus causing delays and extra costs ($8,976). The claimant states that it was harassed in various ways ($65,025): The claimant states that Mr. Mohns did not review submitted drawings in a timely fashion and that he refused to accept specified materials without additional documentation; that the project was shut down early in the mistaken belief that the temperature would fall below 40 degrees when the temperature remained in the 50-65 degree range; and that Mr. McClyman made racially offensive remarks to the claimant's employees, which caused the claimant to spend extra time and effort addressing this issue with its employees, who were ready to walk off the project because of Mr. McClyman's remarks. The claimant believes that the time delays that occurred on the project were not its doing, but were the result of the project engineer's refusal to meet with the claimant to resolve issues existing in the project engineer's mind.

In December of 2000, DFD offered the claimant $50,000 in settlement of this claim, however, the claimant rejected this offer. The DFD states that application of the primer was required in the specifications, as was removal of all loose vapor retarder. DFD states that the claimant was informed that access to the site would require specific check-in procedures and that not all of the courtyards would be accessible at any given time. DFD states that the claimant's drawings were rejected because they were incomplete and incorrect. DFD states that it required additional documentation because the claimant's materials were not clearly labeled by the manufacturer, as the specifications required. DFD states that when the project was halted for the winter, the claimant was already beyond the completion date with only about 1/3 of the project completed. There was no way to finish the project before winter weather set-in, so DFD did not believe there was any reason to take a chance on the weather and shut the project down. Finally, DFD states that there were accusations of inappropriate comments made by both DFD and the claimant's employees. DFD removed Mr. McClymen from the project and feels that was sufficient response.

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.

9. **Danette M. Sebastian** of Doylestown, Wisconsin claims $146.32 for vehicle damage allegedly caused by negligent maintenance of the parking lot at the Department of Revenue building. The claimant states that when she arrived for work on January 30, 2001, the parking lot at her building was solid ice. The claimant's vehicle slid into a bike rack in the parking lot and her car was damaged. The claimant states that she drove 42 miles to work that morning and did not encounter any difficulties on the road until she arrived at the DOR parking lot. The claimant believes DOA does a poor job of maintaining DOR parking lots. She states that DOA crews were out at 5:30 am on the morning of her accident salting and sanding downtown office locations and she feels that a crew should have been sent to take care of the DOR parking lot as well. She requests reimbursement for her vehicle damages of $146.32. The claimant has a $500 insurance deductible.

The Department of Administration recommends denial of this claim. DOA states that on the day in question, the Madison area was hit by a major ice storm. DOA states that efforts to clear many parking lots in Madison area were delayed by the sheer volume of ice. The DOA does not believe there was any 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 not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

10. **Ray Wilkinson Buick Cadillac, Inc.** of Racine, Wisconsin claims $625,864.00 for reduced profits allegedly caused by a DOT highway construction project. The claimant's business is located on Washington Avenue in Racine, WI. In the summer of 2000, the DOT conducted a widening project of Washington Avenue. The claimant states that his business experienced a reduction in traffic because of the limited access during the road construction. The claimant claims that national auto sales increased 6.3% during this period while his sales went down 12.06%. The claimant states that his business lost $625,864 due to the road construction and requests reimbursement for his lost profits.

The DOT recommends denial of this claim. The DOT states that this road project was extremely difficult and complicated to conduct under traffic. The DOT states that the primary objective of this project was to increase the safety and flow of traffic. The DOT points to the fact that, despite the size and scope of the project, the claimant admits that drive by traffic remained at 50% to 65% of the normal volume. The DOT maintained access to the claimant's business throughout the entire project. The DOT believes that traffic interruptions and inconveniences, while unfortunate, are a part of every highway reconstruction project in the State. The DOT states that it makes every effort to keep the roads open to as much traffic as possible while balancing the safety of the public with the goals of the project. It is neither the practice nor the policy of the DOT to subsidize businesses during construction projects. The DOT points to the fact that the improvements made by this project will increase the volume of drive by traffic in the future and provide better access to the claimant's business, potentially increasing his sales in the future.

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. **Barbara Hill** of Oregon, Wisconsin claims $500.00 for automobile damage caused when claimant's vehicle was used for work related purposes. The claimant is a supervisor at UW-Madison. In September 2000, the claimant's department had a large shipment of packages that needed to be sent out according to a previously published schedule. Arrangements had been made to deliver supplies for the shipment to Delta Storage to prepare the packages. The claimant called UW Fleet several weeks before the shipment date to arrange for a van to transport the materials to Delta Storage, however, no

vehicle was available. The claimant's personal van was large enough to transport the materials and staff. The staff member chosen to drive the claimant's vehicle had a good driving record and had been previously cleared by UW Risk Management to drive Fleet vehicles. The claimant states that while the driver was backing into a darkened loading dock area at Delta, he failed to notice a black truck parked in the area and backed into it. Damage to both vehicles was minor. The repair estimate for the claimant's van is over $600 and the claimant's deductible is $500.

The UW System recommends payment of this claim. The claimant was forced to use her vehicle because no state vehicles were available. Ordinarily, employees who use their own vehicles on state business assume the responsibility for all repairs associated with that use. In this case, however, the UW believes there is an equitable basis for payment, since the claimant did not have access to a state vehicle and was making every effort to meet a work-related deadline.

The Board concludes the claim should be paid in the amount of $500.00 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)(i), Stats.

12. **Lebanon Athletic Association** of Watertown, Wisconsin claims $1,478.79 plus interest for refund of overpayment of sales taxes. The claimant states that the treasurer of his organization made an error when filing sales tax returns in 1997. The treasurer mistakenly paid taxes on both taxable income from sales and non-taxable income from donations that had been made to the claimant's organization. The claimant states that the DOR never informed them of any delinquency but that the DOR instead contacted the local town board, who revoked the claimant's liquor license, which forced them temporarily out of business. The claimant states that a new treasurer found the error in 1999 but that the DOR would not refund the money. The claimant believes that the overpayment, which was made in error, should be returned to his organization.

The DOR recommends denial of this claim. The claimant's sales and use quarterly tax return for June 30, 1997, was not timely filed and DOR issued an assessment in September 1997. DOR records indicate that this assessment was paid in November 1997. The DOR states that it received the missing quarterly sales tax return in October 1999. The claimant requested refund of a portion of the amount previously paid on the estimated assessment. The DOR states that it denied refund of the overpayment pursuant to s. 77.58 (4)(b), Stats. The DOR states that, based on the information provided by the claimant, it appeared that the tax was not being refunded to a customer and the request was not received until more than two years after the notice of assessment was issued.

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 concludes:

1. The claims of the following claimants should be denied:

Lois A. Endres
Arthur Polk
Jack & Margot Raz
Julie & Ken Ganske
Lynette Henderson
JT Roofing, Inc.
Danette M. Sebastian
Ray Wilkinson Buick Cadillac, Inc.
Lebanon Athletic Association

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

Angelika Johnson	$2,000.00
David J. Beranek	$648.77
Barbara M. Hill	$500.00

Dated at Madison, Wisconsin this _____ day of June 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