STATE OF WISCONSIN CLAIMS BOARD

On October 20, 2020, via teleconference, the State of Wisconsin Claims Board considered the following claims:

Hearings were conducted for the following claims:

Claimant	Agency	Amount
1. Payne & Dolan, Inc.	Department of Transportation	$563,557.14

The following claims were decided without hearings:

Claimant	Agency	Amount
2. Mary A. Ross	Children & Families	$ 8,311.06
3. Deshawn Johnson	Corrections	$303.15
4. Jeffrey E. Olson	Corrections	$5,498.18
5. Denzel S. Rivers	Corrections	$14.19

With respect to the claims, the Board finds:
(Decisions are unanimous unless otherwise noted.)

1. Payne & Dolan, Inc. of Waukesha, Wisconsin claims $563,557.14 for damages related to a highway resurfacing project in Racine and Kenosha Counties. Payne & Dolan, Inc. (P&D) submitted their bid for this project on the basis that asphalt and concrete from the site would be recycled back into the project and that only unused asphalt and concrete was required to be trucked to a Kenosha County dump pursuant to Addendum Article 34. P&D notes that use of recycled materials was required on this project and that it is standard industry practice to recycle asphalt and concrete back into a project. P&D states that it did not seek "clarification" of Article 34 before bidding, because the language of the article was clear and only required that unused materials "removed" from the project site be taken to the Kenosha dump site. P&D believe that the Department of Transportation's interpretation of Article 34 is absurd, requiring P&D to remove all asphalt from the project, regardless of the need for recycled asphalt, truck that material to the Kenosha dump, only to have the trucks refilled with identical useable recycled material to bring back to the project site. DOT has provided no reason for requiring the removal of usable recycled material at great expense, when up to 75 % or more of that identical material had to be used on the project. P&D states that this claim is not for "extra compensation" as alleged by DOT, but for costs caused by DOT's misinterpretation of the contract, which led to substantial extra expense for P&D.

DOT points to Article 34, which clearly stated that the contractor "s*hall* transport *all* removed asphalt and concrete to a Kenosha County Facility" [emphasis added]. DOT believes this language is unambiguous and that "removed" clearly refers to all concrete and asphalt torn up from the roadway. DOT notes that recycling asphalt and concrete materials requires processing to make an aggregate. That processing takes place partially off-site, so "all removed asphalt and concrete" leaves no question whether site materials could be recycled by P&D. DOT notes that Article 34 was included in the solicitation materials and that bidders are responsible for requesting clarifications prior to submitting their bids, which P&D did not do. DOT states that it did not require transport of all removed asphalt and concrete for "no reason" as P&D alleges; Article 34 was the reason, and it is precisely because of Article 34 that standard industry practice did not apply to this project. DOT also notes that a result is not "absurd" or "unreasonable" just because a contractor does not agree with it. Finally, DOT points to Article IV § 26 of the Wisconsin Constitution which specifically prohibits the award of extra compensation to a contractor after the services have been rendered. DOT believes that

P&D has been fairly compensated for its work on the project and it not entitled to any additional compensation.

The Board concludes that the question of how the word "removed" should have been interpreted by bidders on this contract is a matter more appropriately evaluated by a court of law, and therefore denies this claim.

2. Mary A. Ross of New Franken, Wisconsin claims $8,311.06 for excess child support payments. Since 2006, Ross has been the relative caregiver for her grandson (B) under the Department of Children and Families' Kinship Care Program (KC). B's parents separated in 2005 at which time B's father was ordered to pay child support to Dawn Dachelet Baroun (B's mother and Ross's daughter). Ross alleges that when she applied for KC, she was told that in addition to the monthly KC grant payments, she would also receive any child support payments in excess of the KC grant amount. After Ross entered the program, Brown County Circuit Court issued an order designating her as the payee for child support payments made by B's parents. (Baroun was also ordered to pay child support after Ross assumed care of B.) Ross contacted the Brown County Child Support Agency several times questioning the amount she was receiving but was told the amount was correct. In June 2019, she received a letter from Brown County stating that the county had incorrectly sent excess child support payments to Baroun instead of to Ross as the court had directed. Ross argues that the assignment of child support to the state asserted by DCF is a restricted assignment and that, following each monthly review, she should have received any excess child support payments. Ross disputes DCF's assertion that her claim is against Brown County and points to the fact that the only parties to the KC agreement are herself and DCF. She believes that actions taken by counties during the administration of the KC program are done on the state's behalf and therefore, the state is responsible for those actions. Ross has a pending circuit court action against Brown County, DCF, and Dawn Baroun, but denies DCF's assertion that this claim is premature. Ross points to DCF's motion to dismiss the circuit course case, which asserts that Ross must go through the Claims Board process before pursuing a court action against DCF. That motion to dismiss is currently on hold pending the Claims Board's decision on this claim.

DCF states that upon review of the issues surrounding this claim, Brown County realized that neither the 2008 court order reducing child support payments nor the 2010 order increasing those payments named Ross as the payee. DCF states that upon this realization, the county withdrew its 7/19/19 affidavit stating that Ross was entitled to the child support payments. DCF notes that pursuant to federal law, the default payee for child support is the other parent and that it is not unusual for support payments to go to a parent when a child does not live with them, because family reunification is often the first goal in these cases and is rarely accomplished without financial assistance to the parent. DCF points to the fact that the KC application, which Ross signed many times, clearly references Wis. Stat., § 48.57(3m), which states that the KC relative assigns to the state any right to support or maintenance payments from any other person. DCF notes that contrary to Ross's assertion, the KC Notice of Assignment does not state that excess child support payments will be given to the KC caretaker. DCF states that the KC program is administered by counties (except for Milwaukee County) and that Ross's claim is therefore against Brown County, not DCF. DCF also believes that Ross has not pursued all available legal and administrative remedies because she has a pending circuit court case related to this claim. DCF argues that this position does not contradict the state's motion to dismiss because Ross's lawsuit is against DCF, Brown County, and Dawn Baroun. Therefore, even if the state is dismissed from the lawsuit, Ross still has a pending action against other parties related to this matter. For those reasons, DCF recommends denial of this claim.

The Board finds that because Ms. Ross could potentially recover from parties other than DCF as a result of her ongoing circuit court action, Ms. Ross has not yet exhausted all legal and administrative remedies available to her, and therefore her claim against DCF is premature. The Board therefore denies this claim in order to allow Ms. Ross to pursue her ongoing court action.

3. Deshawn Johnson of Waupun, Wisconsin claims $303.15 for the value of a television and other property allegedly lost by Department of Corrections staff at Waupun Correctional Institution. Johnson was removed from his cell on 4/6/20 and DOC staff packed and removed his personal property to the property room. Johnson alleges that when his property was returned, his gym shorts, tennis shoes, sweatpants, underwear, headphones, and laundry bag were missing. He also alleges that the television returned to him was not his; it had a different serial number from the one he owned and was broken. DOC staff confiscated the broken TV as contraband and Johnson was forced to purchase a new one. Johnson alleges that DOC is providing false information to the Claims Board about this incident and requests reimbursement for his missing property.

DOC notes that Johnson has filed multiple inmate complaints regarding his television and other property, including a 4/13/20 complaint in which he alleged that his television was damaged when it fell off a cart while being transported by staff. Review of video evidence proved that did not happen. As to the serial number discrepancy, DOC states that the number recorded when Johnson purchased his TV was taken from a sticker inside the unit, while the number recorded on the contraband slip was taken from the outside of the TV. DOC staff recently began recording the number from inside televisions because inmates are not able to tamper with that sticker. DOC believes it has appropriately handled all of Johnson's complaints regarding his television and other property and 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.

4. Jeffrey E. Olson of Waupun, Wisconsin claims $5,498.18 for the value of property items allegedly lost due to Department of Corrections staff negligence. Olson was sent to temporary lock-up (TLU) at Waupun Correctional Institution on 8/12/19. He alleges that DOC staff were negligent when they inventoried his property on 8/20/19 because they mixed up his property with that of another inmate. When he returned from TLU and received his property, he discovered that many of his own items were missing and that he had been given items belonging to another inmate, Kenneth Hubbard. DOC later admitted that some of Olson's property had been inadvertently sent out of the institution with another inmate who was released. Olson filed a complaint, which DOC dismissed as untimely. Olson argues that his complaint was filed within the required 14-day limit. He notes that included in his lost property were hundreds of property receipts, so it is not possible for him to provide exact purchase dates or descriptions for many of the missing items. Olson states that thousands of pages of legal documents also were lost. Olson disagrees with DOC's assertion that these receipts and legal papers have no value. He points to the fact that inmates are required to have receipts for all their property items, which can otherwise be confiscated by staff. He also states that he needs the legal papers in order to pursue his appeals and to assist other inmates with legal issues. Finally, Olson states that it is against his interest to make a false claim against DOC staff because he could face serious discipline for doing so. He requests reimbursement for the value of his missing property.

DOC believes there is insufficient evidence of staff negligence and that this claim should be denied. DOC points to the fact that it contacted Mr. Hubbard, who stated that he did not receive any of Olson's property when he was released. DOC notes that on 8/21/19, Olson received his TLU property inventory and all his miscellaneous papers, although his legal materials were to be exchanged bag for bag. Any inmate complaint regarding missing papers or items missing from the property inventory would have to have been filed within 14-days of that date, however, Olson did not file his complaint until 9/12/19. DOC argues that, even if staff did misplace some of Olson's property, he has failed to prove that property had a value. DOC points to Wis. Admin. Code § 309.20(5) which states: "In case of loss or damage caused by the staff of an institution, the value of an inmate's personal property shall equal its value at the time of loss or damage, not to exceed its purchase price." Olson does not clearly identify or provide purchase dates for many of the allegedly lost items. In addition, a number of the items Olson now claims are missing were not included in his original inmate complaint, which DOC believes speaks to his credibility. Although Olson has alleged that the lost legal papers have

value to assist him with future appeals, that is a theoretical value, not an actual one. He also asserts that he used the papers to help educate other inmates, however that does not give them value. Olson is able to use the institution's law library to view statutes and cases to assist him with both of those endeavors. DOC believes Olson has failed to provide sufficient evidence of DOC negligence and that the claim should be denied.

The Board concludes that compensation for 500 pages of documents at $0.15 per page is reasonable and appropriate and that the claim should therefore be paid in the reduced amount of $75.00 based on equitable principles. The Board further concludes, under authority of § 16.007 (6m), Stats., payment should be made from the Department of Corrections appropriation § 20.410(1)(a), Wis. Stat.

5. Denzel S. Rivers of Waupun, Wisconsin claims $14.19 for the value of a bath towel and religious storage box allegedly lost by Department of Corrections staff at Waupun Correctional Institution. On 3/5/20, Rivers was transferred to segregation (TLU). He alleges that at the time he was moved to TLU, his cellmate was not present and all his property, including the towel and storage box, was locked in his footlocker. On 3/12/20, Rivers filed an inmate complaint over the fact that he had not received his allowed property and property inventory form within 5 days of his transfer to TLU, as required by DOC rules. Rivers notes that his property was not inventoried by DOC staff until the day after he filed that complaint. Rivers was released from TLU and picked up his property on 3/16/20. Rivers states that he had gone without his hygiene items for six days and was therefore eager to have his property back. He states that he signed the property inventory form only because he had to do so in order to get his property and because everything appeared to be counted correctly on the form. Rivers states that it was only after his property was returned that he noticed his bath towel was not listed on the inventory form. He claims he checked through the bags containing his property and that the towel, religious storage box, and five other items were missing. Other than the towel, all of these items were listed on his 3/13/20 property inventory form. Rivers states that he contacted the property office staff and attempted to resolve the issue as DOC requires, and then filed an inmate complaint on 3/19/20. His complaint and later appeal were denied on the grounds that there was no evidence DOC staff had lost any of his property. Rivers points to the fact that DOC later found and returned the other five property items in his complaint. Rivers believes this proves that DOC staff was negligent in handling his property, did not conduct an adequate investigation of his 3/19/20 complaint, and is not credible in its continued denial of this claim. Rivers requests reimbursement for the lost towel and storage box.

DOC recommends denial of this claim. A DOC institution complaint examiner (ICE) investigated Rivers' 3/19/20 inmate complaint. The ICE contacted the property department and determined that Rivers had never contacted them about the missing items as he alleges. The ICE also attempted to locate the missing items but was unable to do so. Rivers' complaint and appeal were denied based on the fact that he waited three days before filing his complaint and the fact that he signed for his property on 3/16/20, which indicated that all of the property was accounted for and nothing was missing. DOC states that the fact that DOC returned additional property to him is proof all of Rivers' property has been returned and that this claim should 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.

The Board concludes:

That payment of the amount below to the identified claimant from the following statutory appropriation is justified under Wis. Stat. § 16.007(6)(b).

Jeffrey E. Olson	$75.00	§20.410(1)(a), Wis. Stat.

That the following identified claimants are denied:

Payne & Dolan, Inc.
Mary A. Ross
Deshawn Johnson
Denzel S. Rivers

Dated at Madison, Wisconsin this 5th **day of** November, **2020**

Corey F. Finkelmeyer
Corey Finkelmeyer, Chair
Representative of the Attorney General

Anne L. Hanson
Anne L. Hanson, Secretary
Representative of the Secretary of Administration

Luther Olsen
Senate Finance Committee

Terry Katsma
Assembly Finance Committee