

STATE OF WISCONSIN CLAIMS BOARD

On March 22, 2022, the State of Wisconsin Claims Board met via Zoom videoconference and considered the following claims:

Hearings were conducted for the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Daryl D. Holloway	Innocent Convict Compensation	\$1,100,110.13
2. PG Creative, Inc.	Department of Justice	\$480,000.00
3. Integrity Grading & Excavating	Department of Transportation	\$12,807,111.00
4. Pheifer Bros. Construction	Department of Transportation	\$201,197.70

The following claims were decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
3. Lashaun Benjamin	Department of Corrections	\$40.00
4. Terrence Thomas	Department of Corrections	\$154.27

With respect to the claims, the Board finds:

(Decisions are unanimous unless otherwise noted.)

1. Daryl Dwayne Holloway, *The Board's conclusion for Mr. Holloway's claim for innocent convict compensation will be issued in a separate decision.*

2. PG Creative, Inc. of Plantation, Florida claims \$480,000 for damages related to an alleged unlawful taking of intellectual property. PG Creative (PGC) creates and markets campaigns to entities such as state and local governments and school districts. In 2014, PGC created a prescription drug abuse prevention campaign called Dose of Reality. The campaign included the slogan in a stylized font and related items such as t-shirts and brochures. PGC promoted the campaign across the county through its website and direct emails to states, including Wisconsin. PGC's records indicate that between September 2014 and March 2015, computers at Wisconsin's State Council on Alcohol and Other Drug Abuse and the Department of Administration accessed PGC's website multiple times. PGC records also show that three days after Affirm signed its contract with DOJ the PGC website was accessed by a computer in Pewaukee, Wisconsin, where Affirm is located. In September 2015, DOJ launched a "Dose of Reality" campaign, which it licensed to other states. In 2019, DOJ intervened in PGC's federal registration of the Dose of Reality mark by claiming that DOJ owned it. DOJ ultimately did not oppose the registration and PGC was granted federal trademark protection. PGC states that it is indisputable trademark law that ownership rights vest with the first user of a mark in commerce, regardless of registration. PGC states that it created the Dose of Reality marks, is the rightful owner of the marks, a made use of the marks in commerce in Wisconsin a year before DOJ launched its competing campaign. PGC states that it holds a property interest in the Dose of Reality marks and disputes DOJ's argument that no taking has occurred. PGC notes that, although intellectual property differs from physical property, it is property entitled to protection from government takings, nonetheless. PGC believes DOJ has interfered with its use and ownership of its Dose of Reality campaign and has unfairly deprived PGC of its fundamental rights as a property owner without compensation.

In 2015, DOJ hired the marketing company Affirm to create an opioid abuse public awareness campaign and slogan. Affirm presented three campaign ideas to DOJ in May 2015 and DOJ selected Affirm's "Dose of Reality" campaign. Affirm's president declared in federal court under penalty of perjury that he first learned of PGC's claim to the Dose of Reality mark in 2018 and that Affirm independently created the "Dose of Reality" campaign used by DOJ. DOJ states that it first learned of PGC's claim to the Dose of Reality trademark in 2019 when

PGC filed a federal trademark application. DOJ believed its legal rights to use the mark in Wisconsin were firmly established and therefore decided not to challenge PGC's trademark registration. DOJ disputes PGC's claim to have used the Dose of Reality marks in Wisconsin before DOJ. DOJ notes that Dose of Reality was not used as a trademark to identify PGC's services but was a slogan PGC developed for use by its clients. DOJ argues that advertising agencies have no trademark protection in slogans they create for their clients' use and therefore PGC's claim to own the marks in Wisconsin fails under trademark law. DOJ believes there is no legal support for PGC's claim that DOJ's use of its trademark constitutes a taking under Wisconsin's Constitution. DOJ believes PGC is only pursuing this novel takings claim because a trademark infringement claim would be barred by sovereign immunity.

The Board concludes that there was insufficient evidence presented to the board that a taking occurred, and therefore denies payment of this claim. [*Member Finkelmeyer not participating.*]

2. Integrity Grading & Excavating, Inc. of Schofield, Wisconsin claims \$12,807,111 for damages related to a road construction project in the City of Madison. Integrity states that pursuant to the contract specifications and construction law, contractors are not liable when extra work is required because of design errors committed by others, differing site conditions, or unforeseen site conditions. Integrity alleges that MSA Professional Services' pipe design was defective because it relied on old soil and groundwater data. Integrity claims that the groundwater levels encountered on site were dramatically higher than those represented in the contract, which rendered MSA's pipe design unsuitable for the actual conditions of the site. Integrity states that it properly alerted the project Owners of the elevated groundwater conditions. Integrity also encountered soils subsidence, of which the Owners were aware before or simultaneously to Integrity learning of the condition. Integrity states that in addition to the defective pipe design and differing site conditions, a catastrophic flooding event in 2018 caused the pipe joints to fail. Integrity expended considerable additional resources to remediate the pipe failure and the resulting product was superior to that anticipated in the original contract. Integrity believes this extra work caused by the negligent project design, differing site conditions, and the unforeseen flooding event, and that Integrity should be compensation for that extra work.

DOT points to the fact that this project involved a local road that is not part of a state facility or the state highway system. The City of Madison, City of Verona, and Dane County (the "Owners") funded and designed the project. A portion of the funding came from the Federal Highway Administration, which required DOT to administer the project using its standard specifications. DOT notes that its role was limited to administration of the contract. DOT believes the Claims Board has no authority to determine issues arising from exclusive use of municipal or federal funds and that the claim should be denied. DOT notes that it was not responsible for the pipe design or specifications which are the premise of Integrity's claim. DOT states that no water table was included in the contract documents and that soil borings were provided to indicate the character of the soil, not the water depth. DOT points to the proposal guarantee signed by Integrity, which affirms that DOT does not warrant the soil boring reports and prebid documents. Given that water tables fluctuate over time and season, DOT believes it was unreasonable for Integrity to rely on the 2011 soil borings report for the existence of water levels in 2017. DOT believes Integrity waived any claim against the design by installing the pipe and failing to alert DOT about any concerns. DOT claims that the design, manufacture, sealing materials, and installation of the pipes were the responsibility of Integrity's subcontractors and points to project records referencing poor quality work by the pipe installer. Finally, DOT notes that at the time of the 2018 flooding, the pipes were not fully connected and only received 10% of their maximum water flow, which is inconsistent with Integrity's claim that a catastrophic weather event contributed to the pipe failure.

The Board concludes that this claim raises questions of fact regarding the appropriateness of the design that are better evaluated by a court of law, and therefore, the Board denies payment of this claim.

3. Pheifer Brothers Construction Co. Inc. of Neenah, Wisconsin claims \$201,197.70 for damages related to the 2019 Ahnapee River Bridge project in Kewaunee County. Pheifer states that DOT's bidding documents indicated subsurface boulders and cobbles, not bedrock, and that Pheifer based its bid on that information. Pheifer claims that it found bedrock on the project site and that DOT project representatives admitted that Pheifer hit bedrock. Pheifer states that the existence of bedrock constituted a differing site condition for which Pheifer incurred significant additional costs. Pheifer notes that DOT made multiple design changes to the project because of the bedrock. Pheifer claims that it had no obligation to do its own soil borings or subsurface investigation prior to bidding on the project and notes that courts have recognized that pre-bid "sight" investigations are adequate. Pheifer disputes DOT's contention that compensation is prohibited by the Wisconsin Constitution. DOT's standard specifications provide that the department will adjust the contract in the event of differing site conditions and DOT routinely provides additional compensation for differing site condition claims. Pheifer believes it has provided sufficient support for its damage claims and notes there is no requirement that damages be proven to mathematical exactitude.

DOT denies Pheifer's assertion that there was a differing site condition. DOT was never able to verify the existence of bedrock and a DOT Soils Engineer concluded that the soils on the site closely resembled the material depicted in the project plans. DOT states that the design changes were made at Pheifer's request in order to facilitate fulfillment of the contract, not because a differing site condition existed. DOT notes that the standard specifications impose an affirmative duty on a bidder to perform a reasonable site investigation prior to bidding and the project plans clearly state that DOT does not warrant subsurface conditions. DOT points to the fact that the contract only stated "subsurface material" without specifying or warranting the type of material therefore, even if bedrock was found, that would not conflict with the conditions described in the contract. DOT believes Pheifer failed to properly investigate the site prior to bidding and that DOT should not be held responsible for any expenses resulting from that failure. DOT believes Pheifer's claim is without merit and that additional compensation would be contrary to both the contract and article IV, section 26 of the Wisconsin Constitution.

The Board concludes that this claim raises questions of fact regarding whether bedrock existed at the relevant project site that are better evaluated by a court of law, and therefore, the Board denies payment of this claim.

5. Leshawn Benjamin of Waupun, Wisconsin claims \$40 for the value of shower shoes allegedly stolen by staff at Waupun Correctional Institution. Benjamin ordered the shower shoes, a fan, and a pair of headphones in June 2021. On 7/13/21, a corrections officer brought him the shower shoes but not the fan or headphones. Benjamin alleges that because part of his order was missing, he refused the shower shoes and told the officer to return them to the vendor. When he did not receive a refund from the vendor, Benjamin filed an inmate complaint, which DOC denied. Benjamin alleges that the officer involved in this incident was later fired for stealing. He believes DOC is lying about his shoes and requests reimbursement.

DOC investigated Benjamin's complaint and found no evidence of staff negligence. The shower shoes were delivered to Benjamin on 7/13/21, and he signed a property receipt indicating that he received them. DOC withheld the fan and headphones because Benjamin had to surrender his old fan and headphones before receiving new ones. DOC notes that all available documentation shows that Benjamin received the shower shoes and that he has provided no evidence to the contrary. DOC 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.

6. Terrence Thomas of Fox Lake, Wisconsin claims \$154.27 for the value of a radio confiscated as contraband by staff at Fox Lake Correctional Institution. In September 2020, Thomas received a conduct report alleging he had altered his radio, which DOC staff confiscated. The conduct report was later overturned by the warden on the grounds that there was no evidence to support the allegation. Thomas tried to get his radio back for many months,

but DOC staff refused to return it. Thomas states that he did not understand why he would need to file an inmate complaint about a conduct report that was overturned in his favor. He claims that the radio worked properly and was not altered at the time it was confiscated. Thomas does not believe DOC staff are qualified to inspect electronics and that only a certified electronics expert employed by the maker of the radio can determine whether it has been altered. Thomas states that DOC has provided no proof that the photos they submitted to the board are pictures of his radio. He notes that the broken posts, broken seal, and altered circuit board were not mentioned in the conduct report and that if that damage had been present when the radio was confiscated, the conduct report would not have been dismissed. Thomas believes DOC has provided no proof that his radio was altered.

DOC believes this claim should be denied because Thomas failed to timely file a complaint through the Inmate Review Complaint System. DOC notes that the conduct report was dismissed because the report lacked information to support the charge that Thomas altered the radio himself, not because the radio was unaltered. DOC states that regardless of who altered the radio, it was altered and therefore properly designated as contraband. DOC states that staff inspected the radio and found a broken security seal, broken plastic posts inside the radio, and a small wire added to one of the circuit boards. DOC notes that inmate electronics are restricted to a limited number of items from a small number of vendors. DOC states that property staff are very familiar with these devices and are well-qualified to inspect them for alteration or damage.

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

The Board concludes:

That the following identified claims are denied:

PG Creative, Inc.
Integrity Grading & Excavating, Inc.
Pheifer Brothers Construction Co. Inc.
Lashaun Benjamin
Terrence Thomas

Dated at Madison, Wisconsin this 8th **day of** April **, 2022**

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Corey Rinkeimeyer, Chair
Representative of the Attorney General

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Anne L. Hanson, Secretary
Representative of the Secretary of
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