

STATE OF WISCONSIN CLAIMS BOARD

On December 9, 2014, at the State Capitol Building in Madison, Wisconsin, the State of Wisconsin Claims Board considered the following claims:

Hearings were conducted for the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Marek & Stella Szymanski	Transportation	\$26,610.77
2. David Albino	University of Wisconsin	\$3,748.97
3. Maxwell Verkuilen	Innocent Convict Compensation	\$450,000.00
4. Canadian Pacific Railway	Transportation	\$500,715.13

The following claims were decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
5. Pastori Balele	Revenue	\$5,661.30
6. Charles Sheppard	Corrections	\$110.00
7. Hortense Lewallen	Transportation	\$93.84
8. Antonio Ferrer	Transportation	\$500.00

With respect to the claims, the Board finds:

1. **Marek & Stella Szymanski** of Lake Delton, Wisconsin claim \$26,610.77 for lost income and property damage caused by flooding and road closures allegedly related to a DOT road project in Wisconsin Dells. The second phase of the project took place from March to July 2013. This phase completed the westbound lanes of USH 12, the east Frontage Road (FR) and other connections to USH 12. The claimants' restaurant and motel are located on the west side of the FR. The claimants state that they had to close their restaurant due for 12 days due flooding on 6/13/13 and again for 8 days due to additional flooding on 6/25/13.

The claimants allege that DOT miscalculated the potential stormwater runoff from the hill on the east side of the FR. They state that the project removed the drainage ditch formerly on the east side of the FR, so that stormwater no longer ran down the ditch, but instead crossed the FR and came onto their property. The claimants state that during construction, DOT completely blocked off the only catch basin and the storm sewer on the east side of the FR, which should have been left open to catch stormwater runoff. The claimants state that prior to the project, there were no curb/gutters on the west side of the FR. The project design included adding curb/gutters on the west side of the FR, so the claimants requested a curb cutout on their property so they could maintain street access for deliveries and moving dumpsters. The claimants point to the fact that they are not engineers and, because they were unaware of DOT's project design errors, could not have anticipated this cutout would increase the risk of flooding on their property.

From June 12-13, 2013, the Wisconsin Dells area received 3.2 inches of rain and the claimants' restaurant and the basement of their motel flooded. The claimants allege that sound engineering and construction practices would have accommodated this rainfall but that because DOT had covered up access to the drainage system, their property was damaged. The claimants point to the fact that after the flooding, DOT took multiple steps to correct the problem, including paying to clean the restaurant and replace flooring and damaged equipment, installing an additional catch basin and a drainage ditch on the west side of the FR, and replacing the curb cutout on the claimants' property with curb/gutter and an elevated concrete pad to accommodate the claimants' dumpsters. The claimants have not pursued a claim against the project contractor because they believe it was DOT's project design errors that caused the flooding problem.

The claimants dispute DOT's assertion that its employees observed no flooding or damage in the motel basement. The claimants state that two DOT employees inspected the motel basement and took pictures of the water and property damage there. The claimants note that DOT has failed to provide copies of these pictures. The claimants also state DOT's allegation that the claimants never mentioned the loss of food/perishables in the restaurant is false and its analysis of how the loss occurred inaccurate. The claimants state that the cleaning company hired by DOT to clean the restaurant installed large fans with heating units to dry the space. Unbeknownst to the claimants, the fans/heaters were improperly calibrated by the cleaners and left on overnight. When the claimants returned the next morning, the heat in the restaurant was so high that the refrigerator/freezer unit broke down and the contents were lost. The claimants note that DOT paid to replace the broken fridge/freezer unit. The claimants believe it is ridiculous for DOT to accept fault for damage of the unit but not the contents therein. The claimants also state that a DOT employee took pictures of the food that was lost but again, DOT has failed to provide those pictures.

The claimants state that DOT's assertion that it reached some type of settlement/compromise with the claimants is false. The claimants point to the fact that DOT has provided no written documentation which shows that the initial repair and clean-up costs paid by DOT constituted a settlement of claim.

The claimants also request compensation for lost profits from May 2013, during which time they allege access to their property was severely limited by the construction project. The claimants discussed the lack of access with the contractor and steps were eventually taken to cure the entrance problems, but not before the business had been closed for 11 days due to lack of access.

The claimants state that they were unaware of the 120-day limit for filing a claim with DOT for additional damages. The claimants requested the necessary forms from DOT in September and received the forms approximately two-weeks before the expiration of the 120-day time limit. The claimants state that their claim to DOT was submitted late because they were unaware of the 120-day deadline and because it took more than two weeks to gather documentation to support their claim for the additional damages.

DOT recommends denial of this claim. DOT denies that there were errors calculating the stormwater runoff and states that the project was reasonably designed and executed to handle historically average rainfall events. DOT states that, contrary to the claimants' assertions, the project had appropriate stormwater drainage and that access to the catch basin and storm sewer was never intentionally blocked. DOT states that, per DNR requirements, the contractor installed silt fencing to reduce the amount of fine material entering waterways but that during the unusually heavy rain event of June 12-13, the silt fencing became plugged. DOT notes that historically, the area receives an average rainfall of 4.69 inches for the entire month of June, therefore, the 3.2 inches that fell in the 24 hours prior to the flooding was an unanticipated amount of rain.

DOT does not dispute that the claimants' restaurant was flooded after this heavy rain event. DOT points to the fact that, despite the department's immunity protection, project staff agreed to assist the claimants with cleanup of the restaurant and replacement of damaged equipment. DOT states this was done as a goodwill effort to assist the claimants' neighborhood business. DOT notes that the cost for these repairs and replacements was \$66,900.14. DOT states that this money was paid from road-project funds and did not go through the risk management process. DOT therefore believes the claimants have already been adequately compensated for their flooding-related losses. DOT believes the claimants' allegations of lost profits due to flooding have not been adequately documented.

DOT states that two DOT employees toured the property and found no similar flooding damage at the claimants' motel. DOT believes the claim for lost food/perishable items at the restaurant should be denied because it was the claimants' responsibility to ensure their freezers were working properly during the cleanup.

DOT also alleges that the claimants share some responsibility for the flooding because they requested DOT alter the original curb/gutter design on the west side of the FR to include a curb cutout. DOT states that if this cutout had not been added, the curb would have kept water away from the claimants' property and the flooding would not have occurred.

Finally, DOT believes the claimants have not proven their claim of lost profits due to restricted property access during the construction project. DOT states that any road project has an impact on traffic flow, but that access to the claimants' property was not completely closed at any point in the project.

DOT believes there was no negligence on the part of any DOT employee or contractor during this project and that the claimants have been reasonably compensated for appropriately documented damages caused by the June 13 flooding event. DOT states that the claimants' claim to DOT for additional damages was denied by DOT Risk Management because it was received after the 120-day limit for filing a claim had expired.

The Board concludes the claim should be paid in the reduced amount of \$10,000.00 based on equitable principles. The Board finds that the claimants have shown negligence on the part of DOT and that DOT's failure to follow appropriate internal policies and risk management protocols exacerbated the issues surrounding this claim. The Board further concludes, under authority of § 16.007(6m), Stats., payment should be made from the Department of Transportation appropriation § 20.395(9)(qh), Stats.

2. David Albino of Madison, Wisconsin claims \$\$3,748.97 for reimbursement of GI Bill tuition amount awarded by VA but later required to be paid back by claimant, allegedly due to UW's mistaken interpretation of federal and state law.

Claimant is a student at UW-Madison and is eligible for non-veteran Post-9/11 GI Bill benefits due to his father's military service. The claimant is also employed as a TA at UW. UW sent the claimant's information, including the cost of full tuition, to the VA for calculation of his GI Bill benefits for the fall 2013 semester. The VA remitted a benefit of \$3,965.22. From this amount, the claimant paid the \$565.04 balance he owed for segregated fees after his TA tuition remission reduced his fall 2013 tuition and fees to that amount. UW refunded to the claimant the remaining \$3,400.18 on 9/9/13. The claimant used the refunded money to pay various living expenses.

In January 2014, UW contacted the claimant and told him they had erred in sending the full tuition amount to the VA and that they were resubmitting his tuition amount to the VA with his TA tuition remission subtracted from the full tuition. The VA responded with a corrected benefit amount of \$377.90 based on the information submitted by UW. UW told the claimant he had to reimburse the UW for the \$3,587.32 "overpayment" for his tuition. The claimant was required to reimburse UW before he could register for the spring 2014 semester. Because the money had already been spent, he took out a loan to cover the cost.

The claimant disputes UW's assertion that the TA tuition remission constituted a "tuition waiver" specifically designated for the sole purpose of defraying tuition and fees. The claimant notes that nowhere in state statute is the purpose of the TA tuition remission defined in this manner. The claimant states that the tuition remission is part of a TA's compensation package and, therefore, its sole purpose is not the defraying of tuition and fees. In support of this position, the claimant points to Negotiating Note No. 6 of the Agreement between UW and the Teaching Assistants' Association in existence prior to 2011 WI Act 10, which states: "[c]onsistent with legislative intent, the remission will achieve equity with counterparts at our peer institutions and will eliminate a serious impediment at UW Madison to attracting the highest quality graduate students. The contract terms, reflecting that legislative intent, establish a level of reasonable compensation and other benefits which were derived from comparisons with our peer institutions."

The claimant points to federal IRS regulations, which consider tuition reductions provided to an employee to be a form of compensation. The claimant notes that the only reason the IRS considers such compensation non-taxable is because graduate level tuition remission compensation is specifically exempted from taxable income under Chapter 26 U.S.C. § 117 as a "qualified scholarship." The claimant states that, despite this exemption, the IRS considers tuition remission as compensation. The claimant believes UW is deliberately ignoring federal law when making its argument. The claimant alleges that the UW has not contacted the VA to inquire as to whether the UW is correctly interpreting federal rules regarding this matter.

The claimant states that educational assistance under the Post-9/11 GI Bill (38 U.S.C. § 3313) is net of any tuition remission specifically designated for the sole purpose of defraying

tuition and fees, which is clearly not the sole purpose of the TA remission. The claimant points to the fact that the VA pays full tuition benefits even when tuition is paid by Title IV funds (such as Pell grants or loans), scholarships, or other aid that is not designated specifically for the sole purpose of defraying tuition and fees. The claimant notes that under UW's definition of tuition remission, these funding sources would also be reportable as additional non-GI Bill funds even though the statute specifically excludes such funding from consideration.

Finally, the claimant states that this is not a matter of "simple overpayment" as alleged by UW. The claimant states that UW adjusted the tuition amount submitted to the VA in error and that this error created a debt between UW and the VA. The claimant believes UW had no authority to transfer that debt—created by UW's own error—to the claimant.

UW recommends denial of this claim. UW states there is no merit to the claimant's argument that the TA tuition remission constitutes wages. UW states that TAs receive a separate stipend (the amount of which is determined based on a comparison of stipends at peer institutions) for their services, which constitutes their taxable wage. UW states that a separate state statute requires the university to also remit tuition for TAs in certain circumstances, but does not identify that remission as "wages." UW notes that it makes tuition remission available to other graduate assistants (such as research assistants) who are not considered UW employees. UW states that the sole purpose of this tuition waiver is defraying tuition and fees.

UW notes that, under IRS regulations, the tuition remission is considered a form of scholarship and therefore TAs are not taxed on the value of their tuition remission. UW states that it is not ignoring federal law but rather following the requirements of the IRS and other statutory regulations.

UW points to the fact that under the Post-9/11 GI Bill, the claimant received three awards, one for housing, one for books, and the amount disputed in this claim for tuition. UW states that it appears the claimant inappropriately spent his tuition benefit award on non-tuition related expenses such as housing and bills.

UW states that the tuition waiver provided to the claimant meets the definition under Section 103 of the Veterans Educational Assistance Improvements Act of 2010 for "waivers, scholarship, aid, or assistance provided directly to the institution and specifically designated for the sole purpose of defraying tuition and fees." Therefore, the amount of the tuition waiver needed to be reported to the VA for proper calculation of the claimant's VA benefit. UW states that the initial application for benefits included the full amount of tuition in error and that pursuant to federal regulations; UW was required to submit the corrected amount as soon as the error was discovered. UW notes that, although it is quite rare that corrections are necessary for students receiving Post-9/11 GI Bill benefits, it does occasionally happen. For example, if a student adds or drops a class, has a change in residency status, withdraws from UW, or has a change in other tuition restricted funds, UW is required to submit an adjusted benefit application to the VA.

UW believes that this is a simple case of overpayment and that, regardless of whether an overpayment is made to a student or an employee, that individual is not entitled to keep the funds. UW believes that the claimant's position—that he is entitled to receive both a tuition waiver from UW as well as funding from the VA to pay tuition—is untenable and would result in double dipping, which is neither logical nor allowed by the VA. UW notes that it has consulted with the VA regarding the issues involved in this claim because they have been raised in prior instances. Finally, UW states that because the claimant was the recipient of a benefit to which he was not legally entitled, the claimant is responsible for reimbursing that amount to the university. To require UW to bear this expense would unjustly enrich the claimant at the expense of other students and state taxpayers.

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 with the state should assume and pay based on equitable principles.

3. Maxwell Verkuilen of Appleton, Wisconsin claims \$450,000.00 for Innocent Convict Compensation pursuant to §775.05, Wis. Stats. The claimant requests \$450,000.00 for three years of wrongful imprisonment.

The claimant states that on 6/10/02, he was at a bar with friends in Appleton, WI, when Erin Schubert introduced herself. He states that when he left the bar in the early morning hours of 6/11/02, Ms. Schubert followed him from the bar and asked him for a ride. He states that during this conversation, Ms. Schubert twice lifted her skirt above her waist. After further discussion, the claimant brought Ms. Schubert to his residence—a room he rented from his sister and her husband. The claimant states that he and Ms. Schubert engaged in consensual sexual intercourse and then slept. The claimant states that after waking that morning, Ms. Schubert declined an invitation from the claimant's sister to stay for breakfast and gave the claimant her phone number.

On 6/12/02, the claimant was arrested and charged with two counts of 3rd degree sexual assault. Because of his arrest, a previous sentence that had been stayed was revoked and converted to nine months in jail. The claimant was therefore incarcerated from the time of his arrest until his case was overturned in February 2007. The claimant's father hired a private attorney but after his father's unexpected death, the claimant requested and received a public defender, Attorney John Norby. The claimant was found guilty on both counts of sexual assault and on 2/23/04 was sentenced to 3 years in prison and 6 years extended supervision for count 1, and 4 years in prison and 6 years extended supervision for count 2 (concurrent).

During the trial, the prosecution presented expert witness testimony from a trained Sexual Assault Nurse Examiner (SANE), who had examined the victim. The SANE nurse testified that the results of her examination showed the sex was non-consensual. The claimant states that Attorney Norby failed to call any witnesses to rebut the SANE nurse's testimony. He states that Norby also failed to call as witnesses the claimant's friends who were present at the bar where he met Ms. Schubert, and his sister and brother-in-law, who were home when the assault allegedly took place.

The claimant appealed his conviction and on 2/27/07 the Court of Appeals overturned the verdict and remanded the case back to the state. The Court of Appeals found that Attorney Norby's failure to call an expert to rebut the testimony of the SANE nurse "effectively stripped Verkuilen of any defense" and "essentially allowed the State to scientifically 'prove' its complaining witness was telling the truth." The claimant notes that ineffective assistance of counsel was the first of nine issues he raised in his appeal and that because the Court of Appeals found in his favor on this first issue, the court did not review the other eight issues.

When the case was remanded for a new trial, the Circuit Court granted a motion requiring Ms. Schubert to sign releases for her medical and mental health records but she refused to do so, which barred her testimony at trial. The state dismissed the charges against the claimant on 8/20/07.

On 11/5/08 the claimant commenced a civil action against Attorney Norby. On 2/3/10, the jury returned a special verdict finding by a preponderance of the evidence that the claimant was not guilty of the underlying crime and that Mr. Norby was guilty of legal malpractice. The claimant states that, contrary to the assertions of the Outagamie County DA's Office, the civil jury did not rely on the DA's dismissal of the charges in order to find the claimant not guilty of the crime—that dismissal was not presented or discussed in the civil case. In fact, unlike the criminal trial, the civil jury heard testimony from two expert witnesses rebutting the testimony of the state's SANE nurse. The claimant notes that one of these rebuttal witnesses was another SANE nurse who had examined Ms. Schubert three days after the alleged assault and found no evidence of sexual assault. They also heard testimony from the individuals present with the claimant at the bar where he interacted with Ms. Schubert, the claimant's brother-in-law, who was present in the residence where the alleged crime took place, and the claimant's sister, who was both present in the residence where the alleged crime took place and who spoke with Ms. Schubert on the morning of 6/11/02, after the alleged assault.

The civil jury awarded a judgment of \$700,000 to the claimant. The court reduced that judgment to \$456,191.50, based on the jury's assignment of 35% causal negligence to the claimant. The claimant states that, contrary to the Outagamie County DA's Office's statement that this partial assignment of negligence weakens his claim of innocence, the apportionment of negligence in a civil claim is based upon a determination that both parties failed to exercise ordinary care. In other words, the civil jury determined that the claimant was partially

negligent because, having seen Mr. Norby's failure to present adequate witnesses, the claimant failed to force a more reasonable presentation of his case. The claimant believes that even this partial assignment of negligence puts too large a burden on him, given that he was incarcerated from his arrest throughout the criminal trial, had no legal training, and had never previously been tried for a crime. The claimant states that it was not until after his conviction that he had any reason to believe Mr. Norby had acted inadequately in presenting his defense.

The claimant states that Attorney Norby did not have malpractice insurance and believes the Public Defender's Office should not have allowed Mr. Norby to represent him without that insurance. The claimant states that Mr. Norby declared bankruptcy and the claimant's civil judgment was extinguished in 2010 without payment by Mr. Norby.

The claimant has based the amount of this claim on the amount approved by the court in the civil case and requests reimbursement of \$450,000.00. The claimant states that at the time he was arrested, he had been working for a construction company for over 10 years and had risen to the level of foreman. He states he earned approximately \$50,000 per year, including unemployment compensation paid during the winter months. The claimant states that after his release from prison, it was very difficult to find housing and employment and that he is still owes money to family members for loans incurred for his defense. Finally, the claimant states that his wrongful imprisonment was a traumatic experience and destroyed his relationships with several friends and family members. He requests reimbursement in the amount of \$450,000.00.

The Outagamie County DA's Office (DA) recommends denial of this claim. The DA states that the claimant's conviction was overturned for ineffective assistance of counsel, he was not exonerated. The DA points to the claimant's failure to provide DNA or other evidence which would truly serve to exonerate him. The DA notes that §775.05, Stats., requires the claimant to prove "he was innocent of the crime by clear and convincing evidence and that he did not, by his act or failure to act, contribute to the conviction and imprisonment." The DA does not believe the claimant has met his burden to provide clear and convincing evidence of innocence.

The DA states that a civil trial is very different than a criminal trial and has a much lower standard of proof. The DA also notes that the civil action was against Mr. Norby, not the state. Because the state was not a party to this action, no one from the DA's office testified at the civil trial or had any control over the manner in which evidence was presented. The DA presumes the civil jury relied upon the court's dismissal order when it found the claimant did not commit the offenses for which he was convicted. The DA notes that the civil verdict, specifically question three of the special verdict, does not constitute a finding of innocence, an exoneration, or a "not guilty" verdict. The DA further believes that the fact that the civil jury assigned 35% negligence to the claimant suggests that the claimant contributed to his own conviction and imprisonment. The DA states that when the case was remanded for a new trial, the Circuit Court ordered Ms. Schubert to sign releases for her medical and mental health records prior to the date of the offense. Ms. Schubert did not want to share this extremely private information and go through the jury trial process again and was satisfied that the claimant had served a considerable portion of his sentence. Therefore, after careful consideration, Ms. Schubert decided not to sign the release for her records, which barred her testimony at trial. Based on Ms. Schubert's inability to testify, the DA dismissed the charges against the claimant. The DA has every confidence that had Ms. Schubert signed the release and the case continued to trial a second time, the claimant would have been found guilty again.

Based on the written and testimonial evidence in this case, the Board concludes Mr. Verkuilen should be awarded compensation for three-years and one month wrongful imprisonment. The Board notes the unique circumstances of this case, in which a post-conviction civil jury found Mr. Verkuilen did not commit the offenses. In determining the specific amount of compensation, the Board notes that § 775.05, Stats., provides for innocent convict compensation in an "amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment. The Board concludes that equitable principles justify an award in the amount of \$15,416.76 to compensate Mr. Verkuilen for his three-year and one month imprisonment. In addition, the Board concludes that the compensation should include \$9,600 for Mr.

Verkuilen's post-conviction legal fees challenging his original conviction. The Board further concludes, under authority of § 16.007(6m), Stats., that the total award of \$25,016.76 should be made from the Claims Board appropriation § 20.505.(4)(d), Stats.

4. Canadian Pacific Railway of Minneapolis, Minnesota claims \$500,715.13 for expenses incurred in 2009 and 2010 as part of the High Speed Rail project. The claimant states that beginning in early 2009, it expended substantial resources assisting DOT with an application for a Federal Railroad Administration (FRA) grant for high speed passenger rail service between Milwaukee and Madison. The claimant states that it is primarily a freight carrier and would not have undertaken this project on its own behalf and only did so at the insistence of then Governor Doyle, DOT, and the US Secretary of Transportation. The claimant states that DOT pushed to complete three-way negotiations between DOT, Amtrak, and the claimant prior to the 2010 election and that these negotiations resulted in the preliminary design documents and executed primary agreements necessary to fulfill the requirements of the FRA grant. The claimant states that in early December 2010, DOT abruptly terminated work on the contract. The claimant states that it invested substantial resources based on an oral contract with the state and that DOT assured the claimant it would be paid for its work. The claimant notes that neither the statute authorizing the project, nor Wisconsin law requires a formal, written contract. The claimant also believes it is entitled to reimbursement under the principle of equitable estoppel. The claimant believes its claim can be distinguished from that of WI & Southern Railroad (5/31/13 Claims Board meeting) by the fact that the claimant never had the opportunity to enter into a written contract with DOT, while WSOR did. WSOR's claim was limited to expenses it had incurred before entering into a written contract with DOT and WSOR could have addressed those expenses when negotiating the written contract. The claimant had no such written contract with DOT and therefore the claimant was unable to expressly contract for any of the expenses it incurred. The claimant states that its only agreement with DOT was the oral agreement evidenced by the project documentation and the claimant's successful completion of the duties requested by DOT. The claimant states that it "provided valuable services to the State... at the request of the State, for the benefit of the State and with the knowledge of the State." The claimant believes there are no grounds for the state to decline payment for those services.

DOT states that it has no statutory authority or obligated funds to pay this claim. DOT points to the fact that there is no written contract with the claimant. DOT also disagrees with the claimant's assertion that it had an oral contract with DOT. DOT states that a contract (written or implied) is based on a meeting of the minds and that the record shows that the state and the claimant never had such a meeting of the minds relating to the payment of the services that are the subject of this claim. DOT points to the fact that several of the documents provided by the claimant as proof of an implied contract do not authorize payment of the services claimed. Although the claimant has documented its involvement in the passenger rail project, the project was not pursued and the federal grant that was to pay for the project was withdrawn. DOT notes that state law does allow for direct payment of invoices for occasional purchases but a written contract is required for a project such as this one. DOT states that although the "Direct Pay" memo referenced by the claimants was proposed for approval by the Secretary, DOT Legal recommended the memo not be signed because direct payment was not authorized by state law in this case. When the project was canceled, DOT did submit the claimant's expenses to the FRA for payment, however, payment was denied because the claimant had no contract with DOT. DOT states that, in view of the emphasis placed on rushing this project by the prior administration and the good faith efforts of the claimant, it is arguable that some of the claimed amounts could be paid by the state. DOT notes that the board may wish to consider equitable principles of law such as promissory estoppel in this claim, but that as a matter of law, these principles may well not be applicable to the state.

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 with the state should assume and pay based on equitable principles. The Board also concludes that, to the extent this claim involves unique theories of equitable

recovery, those theories would best be pursued in a court of law. *[Member Hagedorn not participating.]*

5. Pastori Balele of Madison, Wisconsin claims \$5,661.30 for tax refunds allegedly denied by DOR due to racism. The claimant started a temporary job business in 2002. He states that he was a single father raising two children and was struggling financially. He states that he took a low-wage cashier job in 2004 and filed a W-4 form so that no state or federal taxes would be deducted from his paycheck. The claimant states that because of his low wages, he believed he would not owe taxes but be eligible for tax refunds. The claimant states that due to his financial difficulties and the struggles of being a single parent, he forgot to file tax returns for the years 2002-2010. The claimant states that in 2004, he noticed deductions taken from his paycheck by DOR. He contacted DOR and negotiated a lower amount for the garnishments. The claimant states that DOR again garnished his wages in 2011. The claimant states that he was not given notice of his right to a hearing before either of the garnishment actions. The claimant filed his 2002-2010 tax returns in 2011 and the filed returns showed he should have received refunds totaling \$5,661.30. The claimant states that DOR refused to give him the refunds. The claimant believes DOR denied the refunds because he is black and that DOR employees were motivated by racism. The claimant states he appealed the denial of his refunds to the Wisconsin Tax Appeals Commission (TAC) in February 2012, but his appeals were denied because the TAC did not have jurisdiction. The claimant filed suit in state court. The case was referred to federal court, which dismissed his claim. The claimant believes that §73.16(4), Stats., trumps the statute of limitations for issuing a refund. This section states that "The department shall not impose a penalty on a taxpayer...unless the department shows that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause." The claimant notes that DOR never gave him the opportunity to explain why he had not filed his tax returns and therefore violated §73.16(4), Stats. The claimant states that the personal hardships he went through from 2002-2010 constituted "reasonable cause" for him to not file his tax returns. He states that his failure to file the returns was obviously not "willful neglect" because he expected to receive tax refunds and no one expecting a tax refund would consciously decide not to file tax returns. The claimant believes DOR's treatment of his tax issues stems from racism and requests reimbursement in the amount of his 2002-2010 refunds.

DOR recommends denial of this claim. DOR states that the claimant's 2002-2005 tax refunds were denied as untimely based on the statute of limitations set forth in §71.75(2), Stats. DOR states that it adjusted the claimant's refund amounts for the years 2006-2010 based on disallowance of the working families credit, which does not apply to taxpayers whose filing status is single if their income exceeds \$10,000. DOR states that the claimant received a reduced refund for 2009. DOR states that the claimant's 2010 earned income credit was reduced based on the allowed amount for federal EIC. This resulted in a small tax balance due for 2010, which was deducted from the claimant's 2011 tax refund. DOR states that the claimant appealed DOR's determinations for 2002-2008 to the TAC but only paid the filing fee for 2002. In April 2012, the TAC appeals for 2003-2008 were dismissed for failure to pay the filing fee. The TAC appeal for 2002 was dismissed by the TAC in November 2012 based on the statute of limitations and also on the grounds that the TAC had no jurisdiction to hear claims of racial discrimination. DOR states that the claimant's allegation that his wages were garnished without notice is without merit. DOR records indicate no judicial garnishments against the claimant. DOR did initiate two administrative wage certification actions within the last five years pursuant to §71.91(7), Stats., however nothing in that section requires notice and a hearing. DOR notes that the claimant had notice to appeal his adjustments. DOR denies that it discriminated against the claimant. DOR notes that all taxpayers, regardless of race, who make untimely claims for refund are denied refunds for those periods for which the statute of limitations has expired. In addition, DOR does not reopen cases for which the TAC has made a final determination, regardless of the taxpayer's race. DOR states that it provided all required notices and opportunities for hearing on the claimant's tax assessments before proceeding through administrative action to collect on those assessments. Finally, DOR notes

that the claimant's allegations have been adjudicated before the TAC and in federal court and that his cases were dismissed in both instances.

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 with the state should assume and pay based on equitable principles.

6. Charles Sheppard of Boscobel, Wisconsin claims \$110.00 for the cost of headphones allegedly broken by DOC staff (issue #1), and for reimbursement of \$74.63 taken from the claimant's inmate account for canteen items he states he did not order or receive (issue #2). Regarding issue #1, the claimant states that on 6/1/12, while he was housed at Columbia Correctional Institution, he was placed in segregation and his property was packed and stored by DOC staff. Upon his release from segregation, the claimant's property was returned to him and his headphones were found to be broken. The claimant requests reimbursement of \$29 for the cost of his headphones.

Regarding issue #2, the claimant alleges that his inmate account was charged \$74.63 on 9/12/12 for canteen items he never ordered. The claimant states that he did not authorize this deduction from his account. In support of that assertion, he points to the fact that DOC is unable to produce either his signed trust account statement authorizing the charge, or a copy of the signed canteen order showing he received the items. The claimant states that both of these forms are required by DOC policies and procedures and he believes that DOC's failure to produce them is proof that he never authorized this order or received the canteen items. The claimant notes that DOC does not respond to this lack of documentation in their reply to his claim. The claimant believes that the DOC's sovereign immunity defense is absurd and notes that if the DOC is immune from any liability based on the doctrine of sovereign immunity, why did they agree to reimburse him for his headphones? Finally, the claimant states that DOC issued a conduct report related to the canteen order issue solely in order to cover up their own failure to produce any evidence that the claimant actually ordered the items.

Regarding issue #1, DOC recommends the claimant be awarded \$24, the depreciated amount of his headphones. DOC agrees that the headphones were under DOC staff control at the time they were broken. DOC notes that the claimant's receipt indicates he paid \$26.04 for the headphones, not \$29 as stated in his original claim. The headphones were received in February 2012; therefore, based on DOC's standard depreciation schedule, the claimant should be reimbursed in the amount of \$24.

DOC recommends denial of the second part of this claim. DOC states that it is not legally liable for tort damages due to the doctrine of sovereign immunity. DOC also believes that the facts do not support the claimant's allegations. DOC notes that on 9/12/12, the claimant received a conduct report for engaging in enterprise and fraud by placing and receiving a canteen order and then stating he never received the canteen. The claimant was found guilty of this offense and received discipline as a result. DOC states there is no basis in law or equity for award of the amount claimed in item #2.

The Board concludes the claim should be paid in the reduced amount of \$24.00 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), Stats.

7. Hortense Lewallen of Nekoosa, Wisconsin claims \$93.84 for cost of tire damaged by a road heave on Hwy. 13 near Wisconsin Rapids in June 2014. The claimant states that she was south bound on Hwy. 13 and could not avoid driving over the heave due to oncoming traffic. The claimant's rear driver's side tire went over the heave, which slashed the tire. The impact with the heave also scratched and dented the vehicle; however, the claimant is not requesting reimbursement for that damage. She requests reimbursement for the cost of replacing her tire, which was only 11 days old at the time of this incident.

DOT recommends denial of this claim. DOT states that it has a maintenance and repair contract with Wood County, which covers the location where this incident occurred. DOT states that it has referred the claimant to Wood County for payment of her claim. DOT notes that incidents of pavement heaving are impossible to predict or prevent.

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 with the state should assume and pay based on equitable principles.

8. Antonio Ferrer of Milwaukee, Wisconsin claims \$500.00 for reimbursement of insurance deductible related to an 8/24/2012 accident on North Mayfair Road in Wauwatosa, Wisconsin. The claimant states that he and a passenger were on his motorcycle going northbound on North Mayfair road when he struck a large chunk of concrete in the roadway, damaging his motorcycle. The claimant states that there was only one lane of traffic open at the time due to road construction. The claimant believes that the road construction contractor had a duty to keep the traffic lane safe and free from construction debris and failed to do so. He requests reimbursement for his \$500 insurance deductible.

DOT recommends denial of this claim. DOT states that Payne and Dolan was the primary contractor for this road construction project. DOT notes that all state construction contracts have a hold harmless agreement by which the contractor agrees to indemnify and hold harmless the state from all claims for damages received by any person on account of any act, omission, neglect or misconduct of the contractor. DOT believes the claimant should pursue his claim for damages with Payne and Dolan and that his claim against the DOT 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 with the state should assume and pay based on equitable principles.

The Board concludes:

That the following identified claimants are denied:

David Albino
Canadian Pacific Railway
Pastori M. Balele
Hortense Lewallen
Antonio Ferrer

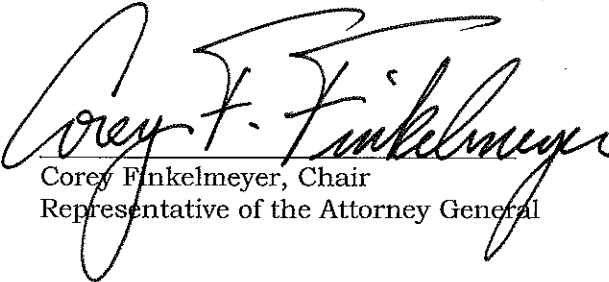
That payment of the amount below to the identified claimant from the following statutory appropriation is justified under § 16.007, Stats:

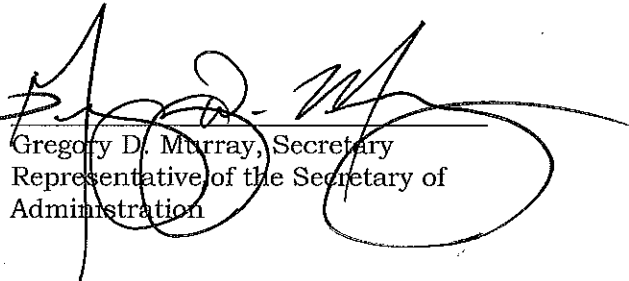
Marek & Stella Szymanski	\$10,000.00	§ 20.395(9)(qh), Wis. Stats.
Charles Sheppard	\$24.00	§ 20.410(1)(a), Wis. Stats.

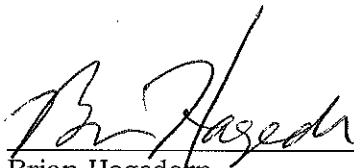
That payment of the amount below to the identified claimant from the following statutory appropriation is justified under § 775.05, Stats:

Maxwell Verkuilen	\$25,016.76	§ 20.505(4)(d), Wis. Stats.
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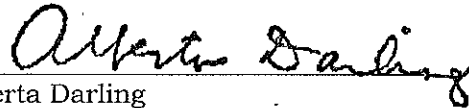
Dated at Madison, Wisconsin this 29th day of December, 2014


Corey Finkelmeyer, Chair
Representative of the Attorney General


Gregory D. Murray, Secretary
Representative of the Secretary of
Administration



Brian Hagedorn
Representative of the Governor



Alberta Darling
Senate Finance Committee



Patricia Strachota
Assembly Finance Committee