

# STATE OF WISCONSIN

# Senate Journal

## One-Hundred and First Regular Session

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TUESDAY, June 25, 2013

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The Chief Clerk makes the following entries under the above date.

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### REPORT OF COMMITTEES

The committee on **Economic Development and Local Government** reports and recommends:

#### **Senate Bill 150**

Relating to: local ordinances regarding possession of marijuana or a synthetic cannabinoid.

Passage.

Ayes: 4 - Senators Gudex, Petrowski, Leibham and Lassa.

Noes: 1 - Senator L. Taylor.

#### **Senate Bill 183**

Relating to: the applicability of a county shoreland zoning ordinance in a shoreland area annexed by, or incorporated as, a city or village.

Passage.

Ayes: 3 - Senators Gudex, Petrowski and Leibham.

Noes: 2 - Senators Lassa and L. Taylor.

#### *RICHARD GUDEX*

Chairperson

Committee on Economic Development and Local Government

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### PETITIONS AND COMMUNICATIONS

#### State of Wisconsin Claims Board

June 20, 2013

Enclosed is the report of the State Claims Board covering the claims heard on May 31, 2013. Those claims approved for payment pursuant to the provisions of s.16.007 and 775.05 Stats., have been paid directly by the Board.

This report is for the information of the Legislature. The Board would appreciate your acceptance and publication of it in the Journal to inform the members of the Legislature.

Sincerely,

*GREGORY D. MURRAY*

Secretary

#### STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on May 31, 2013, upon the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Casimir Borzowski	Revenue	\$18,455.04
2. J&L Steel and Electrical Services	Administration	\$217,499.00+
3. Clear Channel Outdoor, Inc.	Transportation	\$385,812.95
4. Wisconsin & Southern Railroad	Transportation	\$160,371.86

#### The following claims were decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
5. Progressive Universal Insurance	Administration	\$1,633.30
6. Jacqueline Metzler	Transportation	\$11,194.00
7. Andrew W. Nahas	Safety and Professional Services	\$3,414.88
8. Elbert Compton	Corrections	\$105.84
9. David Jessick	Corrections	\$221.29
10. Mario A. Martinez, Jr.	Corrections	\$66.45
11. Anthony J. Machicote	Corrections	\$156.27
12. Ross Nashban	Corrections	\$70.00
13. Terrance J. Shaw	Corrections	\$275.00
14. Timothy Talley	Corrections	\$822.00
15. Da Vang	Corrections	\$5,309.60

#### The Board Finds:

**1. Casimir Borsowski** of Waupaca, Wisconsin claims \$18,455.04 for sales tax overpayments based on assessments by DOR. The claimant states that his business closed in early 2010 and that in the process of closing the business, the bookkeeper neglected to file the October, November, and December 2009 sales tax forms. When the business was sold in November 2011, DOR seized monies from the sale to pay assessments for the missing sales tax returns. The claimant states that when the sales tax returns for October, November, and December 2009 were filed in May 2012, they resulted in overpayments of \$4,586.12, \$6,958.21 and \$6,910.71, respectively. The claimant states

that he has suffered undue hardship due to the closure of his business and still has outstanding debts related to the closure. He requests reimbursement of the sales tax overpayments so that he can reimburse his remaining creditors.

DOR recommends denial of this claim. DOR states that it is prohibited from refunding the sales tax overpayments because no refund was claimed with the two-year time limit prescribed by § 71.75(5), Stats. DOR notes that the October-December 2009 sales tax returns were not filed until May 23, 2012. DOR also states that 25 notices, a number of which contained information about the statute of limitations for claiming a refund, were sent to the claimant regarding his late sales tax returns.

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.

**2. J&L Steel and Electrical Services** of Hudson, Wisconsin claims \$217,499.00 for increased bid costs, expert witness fees and attorney's fees related to an allegedly incorrect interpretation of the bid/contract for a visual nurse call system at a new DVA skilled nursing facility. DOA ran the bidding process for the call system for the DVA facility. The claimant states that section 28 52 23 of the bid specifications called for a "Rauland Responder 4000 or approved equal system." The claimant points to the fact that the bid's general conditions required that substitutions be submitted for approval 10 days prior to bid but did not require the same pre-bid submission of "approved equals" to the Rauland system. The claimant notes that the general conditions also specified that bidding was not restricted to the Rauland system but that the brand name was only used to provide a standard of quality for the required system. The claimant states that it called both a Rauland system supplier and a Jeron system supplier for price quotes but that only the Jeron supplier called back. The claimant states that it based its bid on the Jeron supplier's verbal quote. The claimant won bid to provide the system. The claimant states that in July 2011, pursuant to the contract, it provided a submittal to the Division of Facilities Development (DFD, formerly the Division of State Facilities) showing the intended use of the Jeron system. The claimant states that at a September 2011 project meeting, both DFD and DVA approved use of the Jeron system. The claimant states that the Rauland system supplier contacted DFD in September 2011; erroneously alleging that the claimant's bid was non-responsive because the claimant did not submit the Jeron system as a "substitute" 10 days prior to bidding. The claimant believes this is a misunderstanding of the bid/contract documents and that because the Jeron system is equal to the Rauland system, pre-bid submittals were not required. The claimant notes that there is only one supplier for the Rauland system and the claimant believes the supplier's contact with DFD was improper and suspect, motivated by supplier's desire to obtain a windfall as the only source for the Rauland system. In October 2011, DFD rejected the claimant's proposed use of the Jeron system, indicating that it did not match "the

manufacturer/vendor listed in the specifications" and was therefore not acceptable. The claimant appealed this rejection. The claimant notes that DFD's November 2011 response to the appeal stated "...this project was specified to provide a particular manufacturer and model (in this case Rauland Responder 4000)..." The claimant believes that this proves that DOA conducted an unlawful sole-source procurement in violation of WI law, DOA regulations and its contract with the claimant. The claimant states that if DOA wanted to conduct a sole-source procurement, it was required to obtain a sole-source waiver from the Governor and the State Bureau of Procurement prior to opening the project for bidding. The claimant notes that DFD has never provided a technical basis for rejecting the Jeron system. It was rejected only because it was not the Rauland system, which results in a de facto sole-source procurement in violation of WI law. The claimant believes that DFD is attempting to justify the rejection based on trivial technicalities. Finally, the claimant points to numerous examples in case law where courts have ruled that when a contractor proposes to use an "equal" component, it has a contract right to be granted approval of that component.

DOA recommends denial of this claim. Section 28 00 00 of bid specifications (Division 28 of contract) states, "Where the Contractor wishes to use equipment or methods other than those listed by name, that equipment must be approved by the Engineer." Section 28 further states that that submittal "shall be received in the Engineer's office 10 business days prior to bidding." DOA states that the claimant did not submit its intent to use the Jeron system until over four months after the bid opening, which violated the contract and denied DFD the opportunity to make the existence of the Jeron system known to other contractors, which would have improved competition. DOA notes that the claimant submitted information on the Jeron system to the Architectural and Engineering firm but did not submit that information or a Request for Submittal Approval form to DFD as required by Articles 16 and 17 of the General Conditions. DOA also notes that although the claimant cites various court cases in support of its position, none of the cases are applicable to the facts from which this claim arose. DOA states that the claimant failed to follow the proper procedures in the contract related to approval of the Jeron system and in doing so, denied DFD the opportunity to protect the interests of the public in a competitive bidding process. DOA does not believe the claimant should be rewarded for failing to follow the terms of the contract.

The Board concludes this claim would best be resolved in a court of law. Therefore, weighing the equities, this claim is denied. *[Member Murray not participating. Members Leibham and Marklein dissenting.]*

**3. Clear Channel Outdoor, Inc.** of Pewaukee, Wisconsin claims \$385,812.95 for loss of three billboard structures and future revenue allegedly caused by DOT's revocation of the claimant's permit for the billboards. Since 1999, the claimant has maintained and operated three billboards in the Town of Wayne. The claimant states that it justifiably relied on three outdoor advertising permits previously issued by DOT for the billboards. DOT revoked those permits in 2010, stating that they were granted in

error, and ordered the claimant to remove the billboards. The claimant appealed the permit revocation but in August 2012, the Division of Hearings and Appeals upheld DOT's decision. The claimant notes that although the administrative law judge held that, as a matter of law, the claimant could not invoke estoppel against DOT, the ALJ recognized the merits of the claim and directed the claimant to make a claim with the Claims Board for compensation. The claimant requests reimbursement for the loss of the billboards and the loss of future revenue that would have been generated by leases which ran until 2018 (two billboards) and 2020 (one billboard).

DOT recommends denial of this claim. The claimant is a worldwide outdoor advertising specialist doing business in 29 countries and across the US. In the late 1990's, the claimant purchased two billboards from Cochran Sign Company and then applied for a permit for a third sign. The two original sign permits were approved based on false and misleading application materials regarding zoning submitted by the signs' original owner. The claimant repeated that false and misleading zoning information when it applied for the third sign's permit. In 2010 a subcontractor of the claimant, Good Tree Care, requested a permit to cut down trees on the highway near the billboards. In its permit application, Good Tree Care correctly identified the lands' proper zoning category for purposes of outdoor advertising control. DOT states that this was the first time the claimant or the prior owners of the billboards disclosed the true zoning category of the property. DOT states that it investigated the discrepancy between Good Tree Care's application and the original sign applications made by the claimant and prior billboard owners. DOT's investigation concluded that the property was not eligible for billboard permits under state or federal law and DOT revoked the permits. Although the claimant attempts to blame DOT for the fact that the permits were issued in violation of the law, in fact, the permits were issued because the original applicant and Town of Wayne officials acted to circumvent state law. DOT notes that it is not uncommon for sign owners to "cheat" in order to erect illegal signs. DOT points to the fact that the claimant is a sophisticated actor in the industry and was aware of the risk when it purchased the signs. DOT believes that the claimant should have investigated the property prior to purchasing the signs. DOT states that the claimant can pursue a warranty claim against the company from which it purchased the signs or, if it waived warranty claims against the seller, then the claimant assumed the risk that the signs were illegal. Finally, DOT states that the claimant's claim for the "loss" of the signs is baseless. The claimant has removed the signs, still owns them, and may erect them in a legal location. In addition, the claim for lost profits has no merit. The claimant has no right to make revenue from illegal billboards and should not seek to augment already ill-gotten gains by hitting up Wisconsin taxpayers for another \$400,000.

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

assume and pay based on equitable principles. [*Member Leibham dissenting.*]

**4. Wisconsin & Southern Railroad Company of Milwaukee, Wisconsin** claims \$160,371.86 for expenses incurred as part of the High Speed Rail project between June and November 2010. The claimant believes it is entitled to reimbursement under the principle of equitable estoppel. The claimant states it was assured by DOT that it would be reimbursed for the costs incurred assisting DOT with the High Speed Rail project on an expedited basis. The claimant states that it relied on these assurances given by DOT before and throughout the negotiation process. The claimant states that the expedited timeframe for the negotiations was imposed by DOT and Amtrack. The claimant also states that it was given no choice about continuing negotiations because Amtrack stated it was legally authorized to seize the claimant's rail lines for passenger service use, regardless of whether the claimant had a contract with DOT. The claimant notes that, while it is true that many of its expenses were incurred prior to the 10/5/10 execution date of the contract, multiple agreements were being negotiated with DOT and the claimant had no control over the order in which the agreements were negotiated. The claimant also notes that DOT specifically reassured the claimant that it would not be a problem to get federal funding to pay the claimant's costs even though the various interrelated agreements had not yet been executed. As to DOT's claim that it did not give prior approval for the expenses, the claimant notes that DOT representatives were present, working side by side with the claimant at the very meetings where those costs were incurred. The claimant believes it is disingenuous for DOT to assure the claimant it would be paid for the work, watch them perform the work, and now claim the work was not properly approved. Finally, the claimant notes that the fact that DOT ultimately received no federal funding for the project was the state's choice and was an abrupt reversal of the repeated assurances made by DOT to the claimant. The claimant points to the fact that DOT's response to this claim states that the state would have been eligible for federal reimbursement if DOT had already paid the claimant but that the claimant had not been paid because "the State/WisDOT process was not correctly followed in procuring those services." The claimant notes that several times during the negotiation process, it suggested the project should be delayed until after the election in order to be clear about the state's future plans, however, the claimant's suggestion was rejected and the claimant was assured that the project would go forward regardless of the outcome of the election. The claimant states that it acted in good faith and relied upon the repeated assurances by DOT that it would be paid for this work and therefore requests reimbursement for these costs.

DOT reviewed the question of whether the construction contract on which this claim is based is legally valid. DOT has concluded that the contract is valid and binding on DOT despite the fact that it did not in any way properly follow applicable DOT directives or procedures. DOT notes that the effective date of the contract is 10/5/10 and the contract is not expressly retroactive and therefore does not contemplate payment of any expenses incurred prior to the

effective date. DOT also notes that almost all of the expenses claimed in this matter are for work performed prior to the effective date of the contract. DOT states that it has no record of prior written approval for the work claimed in this matter. DOT notes that the hourly rates of pay for the claimant's employees in the contract and the invoiced hourly rates do not match, which brings into question the amounts claimed on the invoices. DOT also points to the fact that the contract was for work performed by the claimant's employees and specifically stated "[i]f it is necessary to retain any other contractor, the STATE will hire the contractor, with WSOR's cooperation." Two of the invoices submitted by the claimant are for outside contractors (an outside attorney and Knapp Railroad Builders) who were not hired by the state. DOT states that the board may also wish to consider the impact Article IV, §26 ¶(1) of the Wisconsin Constitution regarding a claim made for amounts in excess of what a contract allows. Finally, DOT states that it is arguable that some of these damages may fall under equitable principles, given the emphasis placed on rushing these contracts by the prior administration and the good faith of the claimant.

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. *[Member Hagedorn not participating.]*

**5. Progressive Universal Insurance Company** of Los Angeles, California claims \$1,633.30 subrogation costs for vehicle damage allegedly caused by a state driver. The claimant states that on 10/23/12 its insured driver, Tanya Arce was stopped in a driveway on Chief Hill Drive in Green Bay, Wisconsin when a DOA vehicle pulled into a driveway on the opposite side of the street. The claimant alleges that Ms. Arce backed out of the driveway into the street and was putting her vehicle into drive to proceed forward when the DOA vehicle driver, Danielle Neurer, backed out of the driveway across the street and struck the side of Ms. Arce's vehicle. The claimant requests reimbursement for both the insured damage costs and Ms. Arce's \$500 deductible.

DOA recommends denial of this claim. DOA alleges that Ms. Neurer's statement indicates that she was stopped in the street preparing to go forward when Ms. Arce pulled out of the driveway across the street and struck DOA's vehicle. DOA points to the fact that the police report relating to the incident does not show either party as contributing to the accident. DOA believes that this shows there was no negligence by any state officer, agent, or employee and that the claim should be denied.

Based on its longstanding tradition of denying subrogation claims, 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. *[Member Murray not participating.]*

**6. Jacqueline Metzler** of Springfield, Pennsylvania claims \$11,194.00 for water damage to her basement, allegedly caused by alterations in water flow by the 2011 Hwy. 13 reconstruction/improvement project. The claimant states that the property has been in her family for 50 years and they have never before had water in the basement. She states that prior to the Hwy. 13 project, water flowed south from the home into a pond then into a ditch running along the south side of the property. The claimant states that the ditch on her property drained west, into the highway ditch along the East side of Hwy. 13. The claimant states that in March 2012, there was 8-10 inches of water in her basement. The claimant states that because the house is on high land and not in a flood plain, she never felt the need to obtain flood insurance. Her homeowner's insurance denied her damage claim. She filed a Notice of Claim against the state in May 2012, however, her claim was denied because the DOJ stated that the Hwy. 13 contractor was the responsible party. The contractor denied responsibility, claiming that DOT was the responsible party because they had approved the Hwy. 13 construction plans. The claimant notes that in the fall of 2011, before the project was completed, she met with an individual on the construction site, Don Andre, and expressed concerns about the project's impact on drainage. The claimant states that Mr. Andre told her he would try to alter the flow of her ditch to the east, but the claimant told him she did not believe that would work, because the southeast side of her property was higher than the southwest side. The claimant states that a sump pump was installed in the home when it was built based on the recommendation of a plumber. She also states that additional drainage pipes and tile were installed around the house during a septic tank replacement project, not because of any existing flooding problems. The claimant states that the drainage ditch on her property has always drained to the west, towards Hwy. 13, contrary to DOT's assertions. Finally, she notes that DOT had the Hwy. 13 contractor install an inlet to the storm sewer at the west end of her ditch after she reported her flooding problem. The claimant believes that the Hwy. 13 construction project altered drainage patterns near her property, which caused the flooding, and that if the inlet on the west end of her ditch had been installed during the original construction project, the flooding damage could have been avoided.

DOT recommends denial of this claim. DOT states that topographical maps show that the ditch on the claimant's property is relatively flat but drains east, towards Corrections Creek. DOT was unaware at the time of the project that the ditch sometimes backs up, which would make it appear that the water was flowing westward, towards Hwy. 13. DOT states that changing the flow of the claimant's ditch was never part of the project. The Hwy. 13 project included installation of a curb, gutter and storm sewer system along the highway. As part of the project, DOT also installed an inlet to the north of the claimant's driveway, which would reduce the amount of water flowing south towards the claimant's ditch. Topographical studies did not show the need for an inlet at the west end of the claimant's ditch and the project's storm sewer system was properly designed to handle water flow from the DOT's

required design year event. DOT believes that a long-standing issue with drainage on the claimant's property is evidenced by her need for a sump pump, drainage tile and pipes around the house, and the fact that her ditch does periodically back up to the west. DOT believes that the age of the claimant's sump pump, combined with a 17-inch snow event that melted quickly, and an apparent high groundwater table in early 2012 all contributed to the claimant's flooding. DOT returned to the claimant's property and, as a good neighbor gesture, installed an inlet at the west end of her ditch in order to mitigate her long-standing drainage issues. DOT believes that the project's impact on the drainage patterns was most likely beneficial to the claimant because of the inlet installed north of her driveway and at the very least, did not aggravate any long-standing drainage problem. DOT states that the Hwy. 13 project was properly designed and executed and that there is no evidence of negligence on the part of any DOT employee.

Recognizing that the Hwy. 13 construction project may have played a partial role in the flooding experienced by the claimant, the Board concludes that a portion of the claim should be paid based on equitable principles; the Board determines to pay one-half of the claimed amount for the "repair of basement water damage," and for the water "damage to furniture" for a total payment of \$3,912.00. 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.

**7. Andrew W. Nahas** of Boscobel, Wisconsin claims \$3,414.88 for the cost of state approved building plans which were required by DSPS but eventually found to be unnecessary. The claimant has a private pilot's license and received permission from his local airport to build a private hangar there. The week of 2/18/13, the claimant's contractor met with the Boscobel city building inspector and Dennis Hampton from DSPS about the hangar project. The claimant states that it was made very clear that the hangar would be a private building; however, Mr. Hampton told the contractor that he would have to develop state approved plans which met the commercial building code. The claimant's contractor felt unsure about this requirement and contacted Mr. Hampton several days later to confirm that this private building needed state approved plans. Mr. Hampton stated unequivocally that state approved plans were required. The claimant was surprised by this requirement, so on 3/19/13, he contacted Mr. Hampton's supervisor, Charlotte Martin. He stressed again that the hangar would be for private use only. Ms. Martin stated that state approved plans were necessary but added that she would check with her supervisors to be certain. Ms. Martin called the claimant the following day and said that it was the consensus of her supervisors that state approved plans were required for the hangar project. The claimant asked for a code or statute that supported this requirement but was not given one. Based on the information provided by DSPS, the claimant told his contractor to develop the plans. The claimant decided to try and find a statute or code related to the requirement, so that he could inform the airport staff in case any future parties wished to build private hangars. The claimant found Comm.

61.02, Wis. Adm. Code on the DSPS website, which stated, "An aircraft hangar which is not a public building or place of employment is outside the scope of the Wisconsin Commercial Building Code." The claimant contacted the Boscobel City Administrator, who emailed Mr. Hampton regarding the code. Mr. Hampton checked with his supervisor and replied twelve days later on 4/1/13 that the state approved plans were required. The claimant was astonished and contacted Mr. Hampton himself on 4/3/13, pointing out that it clearly stated on the DSPS website that the plans were not needed. On 4/4/13, the claimant received a voice mail message from Ms. Martin stating that "after much discussion," DSPS staff had decided that state approved plans were not needed for the claimant's private hangar. The claimant requests reimbursement for the cost of developing the state approved plans.

DSPS does not contest payment of this claim. DSPS believes that the claimant has accurately documented the exchanges he had with department employees who, unfortunately, provided incorrect information. Ultimately, DSPS staff did provide the correct information, but only after the expense of developing state approved plans was incurred by the claimant. DSPS does believe that its employees acted in good faith in the normal course of business and therefore requests that payment not be taken from DSPS funds.

The Board concludes the claim should be paid in the amount of \$3,414.88 based on equitable principles. The Board further concludes, under authority of § 16.007(6m), Stats., payment should be made from the Department of Safety & Professional Services appropriation § 20.165(2)(j), Stats.

**8. Elbert Compton** of Waupun, Wisconsin claims \$105.84 for the value of property allegedly lost by DOC. The claimant is an inmate at Waupun Correctional Institution. He states that when he received his property on 4/23/12, a number of items were missing, including a pair of tennis shoes, three brand new shirts, two brand new pairs of socks, and two pairs of ear buds. The claimant requests reimbursement for the lost items.

DOC recommends denial of this claim. DOC notes the constitutional protection of Sovereign Immunity, which provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." DOC asserts that the Wisconsin Supreme Court and Wisconsin Court of Appeals have found that the legislature never grants consent to be sued in tort actions and that there is no statutory consent by the state to be sued in tort actions. DOC states that this claim is a tort action and is therefore barred by the doctrine of Sovereign Immunity. DOC also states that the facts in this case do not support the claimant's allegations. DOC records indicate that the claimant was placed in segregation from 4/14/12 to 11/23/12. Inmates housed in segregation are not permitted to possess much of their personal property, including non-standard issued clothing and shoes. DOC notes that when the claimant received his property and when he filed this claim, he was still in segregation and therefore was not allowed to possess the tennis shoes and non-standard clothing items that are the subject of this claim. DOC points to the fact that the

claimant's property inventory shows that his tennis shoes and clothing items were in his property, he was simply not allowed access to them while in segregation—a rule about which the claimant should have been well aware. As for the two allegedly missing pairs of ear buds, DOC notes that the claimant's property inventory showed the claimant possessed no ear buds when his property was packed and inventoried by staff upon his transfer to segregation. DOC states that it is entirely possible that the ear buds were lost, disposed of or stolen while they were under the claimant's control prior to his transfer to segregation. DOC believes the claimant has presented no evidence that DOC lost or mishandled his property and that the 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 with the state should assume and pay based on equitable principles.

**9. David Jessick** of Fox Lake, Wisconsin claims \$221.29 for the full replacement cost of a TV allegedly broken by DOC staff. The claimant was transferred from Waupun Correctional Institution (WCI) to Fox Lake Correctional Institution (FLCI) in January 2013. He alleges that his TV was in good working condition when it was packed up by the property staff at WCI prior to his transfer. He believes that the DOC staff who handled his property during the move treated it roughly and/or dropped the box because when he received his property at FLCI one day later, the TV screen was shattered. He requests reimbursement of the full replacement cost of his TV because it was only six months old.

DOC recommends denial of this claim. DOC notes the constitutional protection of Sovereign Immunity, which provides that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state." DOC asserts that the Wisconsin Supreme Court and Wisconsin Court of Appeals have found that the legislature never grants consent to be sued in tort actions and that there is no statutory consent by the state to be sued in tort actions. DOC states that this claim is a tort action and is therefore barred by the doctrine of Sovereign Immunity. DOC also notes that the WCI property inventory states that the claimant's TV was broken when it was received at the WCI property room for packing prior to the claimant's transfer to FLCI. DOC further states that the WCI property department received a note from another inmate informing them that the claimant had broken his own TV and was going to try and blame the damage on DOC staff. DOC believes there is no evidence in law or equity that DOC is responsible for the damaged TV 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 with the state should assume and pay based on equitable principles.

**10. Mario A. Martinez, Jr.** of Boscobel, Wisconsin claims \$66.45 for the value of tennis shoes that were allegedly improperly destroyed by DOC staff. The claimant

is an inmate at Waupun Correctional Institution (WCI). On 9/3/12, the claimant received notice that several of his property items were designated as contraband because they were over the limit and that the claimant's Nike shoes were designated as contraband because they were in a damaged/altered condition. The claimant states that WCI property staff asked him what he wanted to do concerning the items and he indicated on his property receipt form that he wanted to mail out several items, allow destruction of several items, but that he was going to file a complaint (ICE) regarding his shoes being designated as contraband. The claimant filed the ICE regarding his shoes on 9/4/12. On 9/5/12, the complaint was returned to the claimant stating that he had to attempt to resolve the issue with the property staff before filing an ICE. The claimant states that he wrote Capt. Olson of the property staff on 9/13/12. The claimant states that Capt. Olson did not respond and therefore the claimant resubmitted his ICE on 9/25/12. On 9/26/12, the claimant's ICE was acknowledged as received and assigned a complaint number. On 10/24/12 the claimant's ICE was rejected. DOC's stated reason for the rejection was that the claimant had never informed the property staff that he had filed an ICE for his shoes and therefore, the shoes were destroyed 30 days after being declared contraband, pursuant to WCI rules. The claimant states that he attempted to appeal the decision and submitted additional evidence that he did contact the property staff but that DOC refused to accept the additional evidence and rejected his appeal. The claimant believes that DOC is not following its own rules. He states that he informed property staff that he was going to file an ICE the day that he received notice his shoes were not allowed and later sent an interview request to Capt. Olson but that Olson did not respond. When Capt. Olson did not respond to his interview request, the claimant waited a reasonable period of time as required by DOC and then resubmitted his ICE. The claimant requests reimbursement for the full purchase price of his shoes.

DOC recommends denial of this claim. DOC rules require that property designated contraband be disposed of (either sent out or destroyed) within 30 days. DOC rules also allow inmates to file a complaint regarding seized property declared contraband. However, in order to ensure that the disputed property is not disposed of pending resolution of the complaint, inmates are required to send a written interview request to the Property Department specifically informing them of the complaint number assigned to their ICE. This requirement is clearly stated in the WCI Rules and Information Handbook. DOC states that the claimant failed to follow this rule and that because the property staff was unaware of the ICE, the shoes were destroyed 30 days after being designated contraband. DOC believes that because the claimant failed to follow the rules, his claim has no merit and his shoes were properly disposed of by WCI property staff.

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.

**11. Anthony J. Machicote** of Winnebago, Wisconsin claims \$156.27 for property allegedly lost or damaged by DOC staff. The claimant was an inmate at Green Bay Correctional Institution (GBCI). He was placed in temporary lock up (TLU) at GBCI on 4/7/11. His property was packed up by GBCI staff and he was transferred to a single cell. On 8/31/11 the claimant was transferred from GBCI TLU to the Wisconsin Secure Program Facility (WSPF). He states that when he received his property at WSPF, a number of items were missing. The claimant states that he did not have access to these items while in TLU at GBCI and that, because he was in a single cell, the items could not have been used, traded, stolen, or given away as DOC alleges. The claimant also states that his dictionary was in good condition when he left GBCI but was damaged when he arrived at WSPF. WSPF staff did not allow him to have the damaged dictionary. The claimant notes that if the dictionary had been damaged prior to his transfer, GBCI staff would not have packed it up with his property. The claimant also states that his fan, which was packed up at GBCI prior to his transfer, never arrived with his property at WSPF. The claimant was reimbursed by DOC for the depreciated value of the fan. He believes he should be reimbursed for the full value of the fan because it was only a month old. The claimant requests reimbursement for the value of his lost and/or damaged property.

DOC recommends denial of this claim. DOC notes the constitutional protection of Sovereign Immunity, which provides that “[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state.” DOC asserts that the Wisconsin Supreme Court and Wisconsin Court of Appeals have found that the legislature never grants consent to be sued in tort actions and that there is no statutory consent by the state to be sued in tort actions. DOC states that this claim is a tort action and is therefore barred by the doctrine of Sovereign Immunity. DOC notes that the claimant has presented no evidence that he actually had much of this property in his possession when he was placed in TLU. DOC states that having a property receipt for an item and actually possessing the item are two different things. DOC notes that inmates often trade or barter items or use them up. DOC states that staff has no reason not to pack up all of an inmate’s property upon transfer to TLU or another institution. DOC states that the claimant was fairly reimbursed for his fan, which was obviously lost during the transfer to WSPF. DOC also states that it appears GBCI staff did not notice the damage to the dictionary when packing the claimant’s property for transfer, but WSPF staff found that the inside of the dictionary was no longer attached to the spine and therefore did not allow the claimant to have the dictionary. WSPF staff also did not allow the claimant to receive his deodorant or laundry detergent because the items were already open, which is against WSPF rules. DOC believes it is entitled to Sovereign Immunity and that the claimant’s allegations are meritless and that the 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 with the state should assume and pay based on equitable principles.

**12. Ross Nashban** of Glendale, Wisconsin claims \$70.00 for money lost while in the custody of Division of Community Corrections (DCC). On 1/18/12 the claimant was placed in custody by his probation and parole agent and his property was left with the agent including \$213, which was placed in an envelope. When the claimant was released on 4/12/12 and his property was returned to him by DCC staff it was discovered that \$70 of the cash was missing. The claimant requests reimbursement for the money lost while under DOC control.

DOC recommends payment of this claim. DOC agrees with the facts of the situation as described by the claimant. The claimant had no control over the money once he was taken into custody on 1/18/12 and DOC believes he should be reimbursed based on equitable principles.

The Board concludes the claim should be paid in the amount of \$70.00 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)(B), Stats.

**13. Terrance J. Shaw** of Oshkosh, Wisconsin claims \$275.00 for the value of a watch allegedly lost or stolen by DOC staff. The claimant is an inmate at Oshkosh Correctional Institution (OSCI). He states that on or about 10/3/11 he gave his watch to OSCI property staff to mail out for repair. The claimant states that he wanted to send the watch via US mail but that the property staff would not let him do so and required that it be sent by UPS. The claimant alleges that when he gave his watch to OSCI staff it created a legal bailment and that from that point on OSCI had a ministerial duty to return the watch to him. In early December 2011, Miller Clock Service informed the claimant that they had never received the watch. The claimant filed an inmate complaint, which was denied because OSCI told him he had to take the issue up with UPS. The claimant asked OSCI staff to provide him with the address for UPS but they refused to do so and told him to look it up in the library. The claimant notes that it would have been extremely easy for OSCI property staff to provide the UPS address because they have it on file. He also notes that it is a half mile walk to the prison library, which is difficult for him because of chronic arthritis and a heart condition. Finally, the claimant states there is no proof that OSCI staff ever gave the watch to UPS. He believes the watch may have been lost or stolen by OSCI staff. The claimant requests reimbursement for the value of his watch after depreciation, approximately \$275.

DOC recommends denial of this claim. DOC records show that the claimant’s watch, with its UPS tracking number, was among the packages picked up by UPS at OSCI on 10/6/11. DOC states that once a package leaves the institution’s hands, it is no longer DOC’s responsibility and that any alleged “bailment” relationship between the claimant and OSCI ended once the package was picked up by UPS. DOC states that the claimant has access to the OSCI library and was free to look up the address and phone number of UPS in the phone book available to inmates.

OSCI property staff gave the claimant the tracking number for his package and he should have pursued the issue with UPS but chose not to do so.

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.

**14. Timothy Talley** of Portage, Wisconsin claims \$822.00 for 10 months of back wages due to his allegedly wrongful termination from the Badger State Industries (BSI) print shop at Columbia Correctional Institution. The claimant states that he injured his back while working at the print shop on 4/27/11. He went to the Health Services Unit (HSU) and was seen by the prison doctor, who gave him a form restricting him to “light duty” work. The doctor also said she would send a back brace to him for support. The claimant notes that the definition of “light duty” allows for inmates to return to work and to work at their “own pace” which is what the claimant did for the remainder of the day. The claimant states that the following morning he received a box from HSU with the back brace and some “miscellaneous papers.” He states that he did not read the papers at that time because a guard was waiting to escort him to work. He states that he again injured his back while working and returned to HSU for additional treatment. The claimant states that when he returned to his cell he was told he would receive a conduct report because he went to work while on a “no work” restriction. The claimant states that staff showed him the HSU paperwork accompanying his back brace, and that paperwork stated he was not allowed to work. The claimant notes that this form was filled out by an HSU nurse, not the doctor who examined him on 4/27/11. The claimant states he was also told he was fired from BSI and was not given a reason why. On 5/12/11 a disciplinary hearing was held regarding the conduct report and the charges against the claimant were dismissed due to the contradictory paperwork sent by HSU regarding the claimant’s work restriction. On 5/24/11 the claimant filed a complaint regarding his termination from BSI. The claimant alleges that during the investigation, BSI print shop supervisor, Ed Sawyer, said that the claimant was fired due to the conduct report. On 7/12/11, the claimant’s complaint was upheld, the decision stating: “if the basis of his termination was because of the conduct report then ICE recommends that the complaint be affirmed.” The claimant wrote to Mr. Sawyer about returning to work but Mr. Sawyer told the claimant he would not be re-hired. The claimant alleges that it was only then that Mr. Sawyer stated that the claimant was fired for failing to inform his supervisor of his “light duty” work restriction on 4/27/11. The claimant believes Mr. Sawyer lied about the reason the claimant was fired. He also notes that Mr. Sawyer failed to follow DOC rules, which require supervisors to file a written decision regarding terminations with the Social Services Unit. Mr. Sawyer did not do so. The claimant requests reimbursement of his back wages.

DOC recommends denial of this claim. On 4/27/11, the claimant hurt his back at work and was sent to HSU for treatment. HSU issued him a Medical Classification

document proscribing all but light activity. DOC states that the claimant violated DOC 313.08 (7), Adm. Code when he failed to inform his supervisor of his “light duty” restriction when he returned to work on 4/27/11. DOC states that the claimant was terminated for failure to follow this rule. DOC does not deny that the claimant received conflicting Medical Classification forms from HSU. Although the claimant’s conduct report complaint was upheld, the decision stated “if the basis of [the claimant’s] termination was because of the conduct report...” DOC states that the claimant was not terminated due to the conduct report but because he failed to inform his supervisor of any medical restrictions on his work duties issued by HSU on 4/27/11. DOC notes that Prison Industries are intended to be rehabilitative for inmates. DOC states that inmates employed by BSI are not employees of the state and have no right to employment at BSI, and that the claimant therefore cannot claim that he was “wrongfully discharged” from his position.

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.

**15. Da Vang** of Stanley, Wisconsin claims \$5,309.60 for lost wages incurred because the claimant was not rehired for a Badger State Industries (BSI) job at Columbia Correctional Institution (CCI). The claimant states that he worked in the BSI print shop from 11/7/04 to 8/3/07. The claimant states that he gave two-week’s notice on 7/23/07 that he was quitting his job because he needed to focus on legal matters. The claimant alleges that the BSI shop supervisor at the time, Dave Ditter, twice asked him not to quit. The claimant also alleges that he was told by several BSI workers that Mr. Ditter was very upset that the claimant was quitting. The claimant states that he had received good work reviews from Mr. Ditter during his time in the BSI shop. The claimant states that on 8/12/07, six days after his last day at work, Mr. Ditter completed a poor work evaluation of the claimant, stating that he “would not rehire” him. The claimant believes this bad work review was retaliatory because Mr. Ditter was angry at the claimant for quitting. In July 2009, the claimant reapplied for a job at the BSI print shop but was not rehired. The claimant alleges that the current shop supervisor, Ed Sawyer, was influenced by BSI workers to hire their friends, who were less qualified than the claimant. The claimant also believes that Mr. Sawyer relied on Mr. Ditter’s final work evaluation, which was retaliatory and unfair. Finally, the claimant notes that there are no Asian workers at BSI and he believes this is discriminatory and contrary to BSI’s affirmative action policies. The claimant requests reimbursement for the wages he would have earned if he had been rehired at BSI.

DOC recommends denial of this claim. DOC disputes the claimant’s allegation that Mr. Sawyer’s hiring decisions are influenced by other inmates working at BSI. DOC states that inmates are hired based on their experience (both before and during incarceration) and on recommendations by staff from other jobs the inmates have held while at CCI. DOC notes that the claimant worked under the former shop supervisor, Dave Ditter, who is now retired. When the



claimant reapplied for a job at BSI, Mr. Sawyer reviewed the claimant's past evaluation and termination records, which showed that the claimant repeatedly failed to follow instructions and failed to complete jobs in a timely manner. Mr. Ditter specifically noted on the termination report that the claimant should not be rehired. Based on this information, Mr. Sawyer decided not to rehire the claimant. DOC believes this claim has no merit and recommends it 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:**

- Casimir Borsowski
- J&L Steel and Electrical Services
- Clear Channel Outdoors, Inc.
- Wisconsin & Southern Railroad
- Progressive Universal Insurance Company
- Elbert Compton
- David Jessick
- Mario A. Martinez, Jr.

- Anthony J. Machicote
- Terrance J. Shaw
- Timothy Talley
- Da Vang

**That payment of the amounts below to the identified claimants from the following statutory appropriations is justified under § 16.007, Stats:**

Jacqueline Metzler	\$3,912.00	§ 20.395(9)(qh), Stats.
Andrew W. Nahas	\$3,414.88	§ 20.165(2)(j), Stats.
Ross Nashban	\$70.00	§ 20.410(1)(B), Stats.

**Dated at Madison, Wisconsin this 31<sup>st</sup> day of June, 2013.**

*STEVE MEANS*

Chair, Representative of the Attorney General

*GREGORY D. MURRAY*

Secretary, Representative of the Secretary of Administration

*BRIAN HAGEDORN*

Representative of the Governor

*JOSEPH LEIBHAM*

Senate Finance Committee

*HOWARD MARKLEIN*

Assembly Finance Committee