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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT IV

Case No. 2021AP373

DERRICK A. SANDERS,

Petitioner-Appellant,

v.

STATE OF WISCONSIN
CLAIMS BOARD,

Respondent-Respondent.

ON APPEAL FROM A JUDGMENT AFFIRMING THE
DECISION OF THE WISCONSIN CLAIMS BOARD,
ENTERED IN DANE COUNTY CIRCUIT COURT, THE
HONORABLE STEPHEN E. EHLKE, PRESIDING

BRIEF OF RESPONDENT-RESPONDENT
STATE OF WISCONSIN CLAIMS BOARD

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TABLE OF CONTENTS

INTRODUCTION	6
STATEMENT OF THE ISSUES.....	7
STATEMENT ON ORAL ARGUMENT OR PUBLICATION.....	7
STATEMENT OF THE CASE	7
I. Factual background	7
II. Procedural background.....	19
A. Proceedings before the Claims Board	19
1. Sanders's petition for compensation and pre- decision proceedings	19
2. The Claims Board's compensation award	12
3. The Claims Board's decision denying Sanders's petition for rehearing	13
B. Proceedings before the circuit court.....	19
1. Sanders's petition for judicial review and the Claims Board's response.....	19
2. The circuit court's decision	17
STANDARDS OF REVIEW.....	18
ARGUMENT	19
I. The Claims Board properly awarded the maximum compensation it may lawfully award to Sanders.....	19
A. The Claims Board need not address additional compensation unless it finds that the statutory maximum	

compensation is inadequate, and review of its decision is limited.....	19
1. The Claims Board only needs to address additional compensation if it finds that the statutory maximum is inadequate.....	19
2. Chapter 227 limits review of the Claims Board's decisions.....	20
B. Because the Claims Board determined that the statutory maximum constituted appropriate compensation for Sanders, it did not need to address additional compensation.....	21
C. Sanders cannot show any departure from Claims Board practice.	24
D. Insofar as he still advances the argument, Sanders also cannot show any equal protection violation.....	26
II. The Claims Board properly declined Sanders's request for waiver of sovereign immunity, and Sanders's sovereign immunity arguments fail.....	27
A. A state entity cannot waive Wisconsin's immunity from suit unless the Legislature authorizes it do so.	27
B. The Claims Board has no authority to waive sovereign immunity to enable Sanders to	

sue the State for additional compensation.....	27
III. Sanders cannot show that the Claims Board engaged in any <i>ex parte</i> communications with the District Attorney's Office that prejudiced him.	29
CONCLUSION.....	31

TABLE OF AUTHORITIES

Cases

<i>Barron Elec. Co-Op v. Pub. Serv. Comm'n of Wis.</i> , 212 Wis. 2d 752, 569 N.W.2d 726 (Ct. App. 1997).....	25, 26
<i>Bunker v. Labor and Industry Review Comm'n</i> , 2002 WI App 216, 257 Wis. 2d 255, 650 N.W.2d 864.....	23
<i>Cemetery Services, Inc. v. Wisconsin Dep't. of Regulation and Licensing</i> , 221 Wis. 2d 817, 586 N.W.2d 191 (Ct. App. 1998).....	26, 28
<i>Cords v. State</i> , 62 Wis. 2d 42, 214 N.W.2d 405 (1974)	27
<i>Eau Claire County v. DNR</i> , 119 Wis. 2d 62, 349 N.W.2d 723 (1984)	25
<i>Epic Staff Mgmt., Inc. v. LIRC</i> , 2003 WI App 143, 266 Wis. 2d 369, 667 N.W.2d 765.....	18
<i>Houslet v. DNR</i> , 110 Wis. 2d 280, 329 N.W.2d 219 (Ct. App. 1982).....	23
<i>Lister v. Board of Regents of the University of Wisconsin System</i> , 72 Wis. 2d 282, 240 N.W.2d 610 (1976)	27
<i>Ocanas v. State</i> , 70 Wis. 2d 179, 233 N.W.2d 457 (1975)	26
<i>Seebach v. PSC</i> , 97 Wis. 2d 712, 295 N.W.2d 712 (Ct. App. 1980).....	30

<i>State Farm Mut. Auto. Ins. Co. v. Hunt</i> , 2014 WI App 115, 358 Wis. 2d 379, 856 N.W.2d 633	23
<i>State v. Pettit</i> , 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).....	25, 29
<i>Tetra Tech EC, Inc. v. DOR</i> , 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21	18, 19
<i>Wisconsin Professional Police Ass’n. v. Public Serv. Com’n. of Wisconsin</i> , 205 Wis. 2d 60, 555 N.W.2d 179 (Ct. App. 1996).....	18

Statutes

Wis. Stat. § 16.007(2)	15, 29
Wis. Stat. § 227.49(3)	13, 21
Wis. Stat. §§ 227.52 and 227.53	14
Wis. Stat. § 227.57(4)	14, 15
Wis. Stat. § 227.57(5)	21, 22
Wis. Stat. § 227.57(6)–(8)	15
Wis. Stat. § 227.57(8)	14, <i>passim</i>
Wis. Stat. § 227.57(10)	19
Wis. Stat. § 775.01	27
Wis. Stat. § 775.05	19, 23
Wis. Stat. § 775.05(2)	19, 29
Wis. Stat. § 775.05(3)	12, 20
Wis. Stat. § 775.05(4)	6, <i>passim</i>
Wis. Stat. § 775.05(5)	20

INTRODUCTION

This appeal concerns Derrick A. Sanders's challenges to decisions made by the State of Wisconsin Claims Board (hereinafter "Claims Board") on his petition for compensation for wrongful imprisonment. In the early 1990s, Sanders and two co-actors participated in the physical assault of another man. One of Sanders's co-actors subsequently shot and killed that man. Though Sanders consistently maintained that he did not participate in the shooting after the assault, Sanders—as a result of errors on the part of the circuit court and counsel—pled no contest to first degree intentional homicide as a party to a crime and spent over 25 years in prison for his conviction. His co-actor who shot the man confirmed that Sanders did not participate in the shooting, the circuit court granted plea withdrawal in 2018, and the State dismissed the case against him.

The Claims Board properly exercised its discretion by awarding Sanders the maximum amount it could award him by law—\$25,000. In this appeal, Sanders nevertheless raises a series of challenges to the Claims Board's decisions, all of which fail. Sanders's primary argument rests on a misreading of the plain language of Wis. Stat. § 775.05(4), he hints at constitutional challenges he does not develop, and he emphasizes a clarification email that he labels improper *ex parte* communications that fails to show prejudice. This Court should affirm the Claims Board's decisions.

STATEMENT OF THE ISSUES

The Claims Board reframes Sanders's five issues as three issues:

1. Did the Claims Board properly award compensation to Sanders?

The circuit court answered yes.

This Court should answer yes.

2. Did the Claims Board properly reject Sanders's request that it waive sovereign immunity?

The circuit court answered yes.

This Court should answer yes.

3. Did Sanders fail to establish that he was prejudiced by the Claims Board asking the prosecutor's office for clarification of its position on his petition?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT OR PUBLICATION

The Claims Board does not seek oral argument. Publication is unwarranted as this case involves application of the facts to law that does not require further clarification.

STATEMENT OF THE CASE

I. Factual background

Sanders and two other men severely physically assaulted a man at two different houses. (R. 5:31.)¹ After the

¹ The Claims Board primarily cites the circuit court's findings of facts in its August 2018 decision vacating Sanders's no contest plea in providing this factual background.

physical assault, Sanders's co-actors took the man to another location, and one of Sanders's co-actors, Boddie, shot and killed him. (R. 5:31.)

Sanders pled no contest to first-degree intentional homicide as party to a crime, and he was sentenced to life in prison in 1993. (R. 5:31.) In 1995, the Court of Appeals vacated his no contest plea, concluding that Sanders did not knowingly and intelligently enter it because he did not fully understand the punishments. (R. 5:31.)

Sanders received new counsel. He told her that though he was involved in the physical assault, he was neither aware of nor involved in the shooting. (R. 5:32–33.) He told her that Boddie sent him away after the physical assault. (R. 5:32.) Counsel nevertheless led Sanders to stipulate to re-enter the same no contest plea and receive the same sentence. (R. 5:32.) Sanders explained that he re-entered the plea because he believed that by participating in the beating, he was strictly liable for the homicide. (R. 5:33.) In 1996, Boddie signed an affidavit stating that he alone was responsible for the shooting. (R. 5:33.)

In 2017, Sanders filed another postconviction motion to withdraw his no contest plea. (R. 5:30.) He testified that his attorney who had him re-enter that no contest plea never explained to him how his conduct established party-to-a-crime liability. Had he understood, he would not have entered a no contest plea. (R. 5:32–33.)

The circuit court vacated Sanders's no-contest plea in August 2018. (R. 5:34–35.) It concluded that the State failed to show any factual basis for his no contest plea and failed to show that he entered it knowingly and intelligently with an understanding of party-to-a-crime liability. (R. 5:34.)

Police re-interviewed Boddie. He again stated that although Sanders participated in the beating, Sanders was

not involved in the shooting. (5:54–59.) The State therefore dismissed the charges against Sanders. (5:36–41.)

II. Procedural background

A. Proceedings before the Claims Board

1. Sanders’s petition for compensation and pre-decision proceedings

Sanders filed an initial petition for compensation with the Claims Board. (R. 5:4.) The Claims Board explained that Sanders had submitted the incorrect form, but it provided the correct form and asked him to resubmit it. (R. 5:5.) Sanders submitted the corrected petition form, which the Claims Board received on February 11, 2019. (R. 5:6.) He requested the statutory maximum of \$25,000, and requested additional compensation of \$5,729,965. (R. 5:6.)

As support for his request for additional compensation, Sanders explained that he had no prior criminal record and had been honorably discharged from the Navy after serving in Iraq. (R. 5:16.) He explained that he graduated high school in the top 30% of his class, and—prior to his arrest—was employed full-time, making \$9.25 per hour. (R. 5:16.)

He asserted that his “wrongful confinement” led to over \$500,000 in lost wages and property. (R. 5:17.) He also explained that his “wrongful conviction and confinement” for 26 years led to “missed career opportunities.” (R. 5:17.) He asserted that he could have had a career making \$150,000 to \$200,000 per year, and he multiplied those yearly salaries by 26 years to estimate lost earnings between \$3.9 and \$5.2 million. (R. 5:17.)

In his petition, Sanders further requested that “should the [Claims Board] or legislature deny [his] claims/request, Mr. Sanders request [sic] waiver of the States [sic] immunity to file a civil rights lawsuit for injuries, damages, and the wrongful conviction.” (R. 5:13.)

The Claims Board forwarded Sanders's petition to the Milwaukee County District Attorney's Office (hereinafter "the District Attorney's Office"). (R. 5:61.) The Claims Board explained, "[t]o ensure that the Claims Board has all the facts and that the state's interests are safeguarded, we are asking that you review the enclosed claim, and recommend an appropriate response to the claim." (R. 5:61.)

The District Attorney's Office provided a letter from District Attorney John Chisholm via email. (R. 5:62–63.) The letter explained that Sanders's claim was reviewed by the assistant district attorney who handled Sanders's criminal case when it came back to the circuit court the previous year. (R. 5:63.) It concluded: "Based upon his review of the facts surrounding the crime and Mr. Sanders' petition for compensation, the Milwaukee District Attorney's Office does not oppose his petition." (R. 5:63.)

The Claims Board provided the District Attorney's Office's letter to Sanders. (R. 5:64.) The Claims Board further corresponded with Sanders via email about the scheduling of the hearing on his petition. (R. 5:66–68.) The Claims Board also corresponded with the District Attorney's Office about the scheduling of the hearing on Sanders's petition. (R. 5:71.)

At a meeting in August 2019, the Claims Board decided to defer its decision on Sanders's petition to a later date to allow the scheduling of a hearing at which both Sanders and the District Attorney's Office could answer questions. (R. 6:16.)

Sanders inquired about why an additional hearing was necessary, as the "DA did not oppose [his] claim." (R. 6:27.) The Program & Policy Analyst for the Claims Board, who handled the email correspondences, explained that the Claims Board felt "it need[ed] additional information before deciding [his] claim." (R. 6:27.)

Prior to that hearing, a deputy district attorney informed the Claims Board via email that the District Attorney's Office would not have anyone to send to the hearing. He noted they had "nothing further to add other than what was stated on the record in open court" by the assistant district attorney "at the time this matter was dismissed." (R. 6:31.)

The Claims Board responded via email, asking: "DA Chisholm's April 1, 2019, response to the Claims Board stated that the Milwaukee DA's Office 'does not oppose' Mr. Sanders' petition. To clarify, are you saying that the DA's office does not oppose payment of \$5,754,965 to Mr. Sanders?" (R. 6:31.)

The District Attorney's Office responded, explaining that their previous letter intended to express their "general support for Mr. Sanders' petition for compensation." (R. 6:31.) "We originally saw his form that requested the statutory maximum amount of \$25,000, which we support. Regarding his other claims for damages, which appears to have varied over the course of this process, we are not taking any position on those claims, as we understand the claims board is better situated to make that determination." (R. 6:31.)

The Claims Board held a hearing on Sanders's petition on December 10, 2019. (R. 7:63–71.) Sanders appeared; the District Attorney's Office did not. (R. 7:64.) Sanders noted that the District Attorney's Office had not opposed his petition and reiterated his innocence on the homicide conviction. (R. 7:64–66.) One of the Claims Board members asked him how he arrived at "the \$5 million." (R. 7:66.) Sanders responded that though he "laid out" his "earning potential," he was "not trying to say [he] would have earned \$5 million"; rather, he felt that amount was appropriate compensation due to recent awards in other cases. (R. 7:66–67.)

2. The Claims Board's compensation Award

The Claims Board issued its final decision awarding compensation to Sanders on February 12, 2020. (R. 7:56–59.) In recounting the factual history, the Claims Board noted that “Sanders consistently maintained that he was not involved in or aware of the shooting.” (R. 7:57.) The Claims Board also noted that the District Attorney’s Office did not “oppose Sanders’ claim for \$25,000, which is the statutory maximum amount” and took “no position on Mr. Sanders’ claim for additional damages and believe[d] the Claims Board [was] better suited to make a determination regarding those damages.” (R. 7:58.)

In reaching its findings as required under Wis. Stat. § 775.05(3)—whether clear and convincing evidence established that Sanders was innocent of the crime for which he was imprisoned—the Claims Board concluded that though Sanders had participated in the beating prior to the homicide, the evidence reflected that Sanders was not involved in the homicide itself. (R. 7:58.) The Claims Board also reasoned that while the entry of a no contest plea had in other instances constituted actions contributing to the conviction (another statutorily-required consideration), the evidence here reflected that the entry of both no contest pleas was “legal error.” (R. 7:59.)

The Claims Board found that the evidence was clear and convincing that Sanders was innocent of the homicide charge. (R. 7:59.) The Claims Board further “conclude[d] that compensation in the amount of \$25,000 shall be awarded from the Claims Board appropriation § 20.505(4)(d).” (R. 7:59.) The Board’s decision reflects a “5-0” vote. (R. 7:59.)

3. The Claims Board's decision denying Sanders's petition for rehearing

Sanders filed a petition for rehearing pursuant to Wis. Stat. § 227.49(3), received on March 3, 2020. (R. 7:68–71.)

Sanders made the following arguments in support of his request: (1) the Claims Board made a “material error of fact” in concluding that the District Attorney’s Office took no position on his claim for additional damages beyond \$25,000; (2) the Claims Board made a material error of law when it awarded him compensation “without ever addressing Mr. Sanders’ additional damages claim” or providing “reasoning.” (R. 7:68–71.)

On March 31, 2020, the Claims Board, by its Chairperson, denied Sanders’s request for a rehearing. (R. 8:3–6.) As to Sanders’s first argument, the Claims Board explained that the District Attorney’s Office had clarified via email that it was not opposing Sanders’s petition for \$25,000 but took no position on his request for additional compensation beyond that. (R. 8:3.) It attached the emails reflecting that correspondence. (R. 8:4–6.)

As to Sanders’s second argument, the Claims Board explained that its decision “clearly states that the board unanimously voted to award compensation in the amount of \$25,000.” (R. 8:4.) It continued: “Because the Board did not conclude that the amount which it was able to award was ‘not adequate compensation,’ it is not required to submit a report to the legislature ‘specifying an amount which it considers adequate.’” (R. 8:4.) It concluded that the “absence of an explicit statement regarding the request for additional damages does not render the Board’s decision incomplete.” (R. 8:4.)

B. Proceedings before the circuit court

1. Sanders's petition for judicial review and the Claims Board's response

On April 27, 2020, Sanders, pursuant to Wis. Stat. §§ 227.52 and 227.53 filed a petition for judicial review of the Claims Board's decisions awarding compensation and denying rehearing. (R. 1.) He raised four arguments. (R. 1:3; 14; *see also* 19 (Sanders's reply brief).)

First, he argued that the Claims Board's "exercise of discretion is inconsistent with agency rule and prior practice," in violation of Wis. Stat. § 227.57(8). (R. 14:5–6.) He pointed to two prior cases where the Claims Board had concluded that \$25,000 did not constitute adequate compensation and made recommendations to the Legislature for additional compensation, for individuals who spent "less time incarcerated" than him. (R. 14:6–7.) He pointed to another case where the Claims Board had stated that it was "[d]eclin[ing] . . . to recommend additional damages to the legislature . . ." (R. 14:18.)

Sanders argued that "no explanation or reason was provided, nor can one be given. . . as to why [the Claims Board] deviated from prior practice and failed to make a recommendation to the legislature on Petitioner's claim for additional damages." (R. 14:7.) Sanders argued that he was "similarly situated" to the other petitioners who had received additional compensation—"essentially," he argued, he was raising "an equal protection claim." (R. 14:15–16.)

Second, Sanders argued that the "fairness of the proceedings or the correctness of the action has been impaired by material error in procedure or a failure to follow prescribed procedure," in violation of Wis. Stat. §§ 227.57(4) and (8). (R. 14:8–9.) He argued the Board "failed to exercise discretion" to address his claim for additional damages or explain why it did not "refer the matter to the legislature."

(R. 14:7.) He asserted that the Claims Board's decision to hold the December hearing on his petition reflected that the Claims Board "must have at least thought about his damages claim." (R. 14:8.) He argued that by not making a recommendation for additional compensation to the Legislature, the Claims Board had deprived him of his First Amendment "right of access to the Courts to file suit against the state." (R. 14:10.)

Third, Sanders argued that the Claims Board's "exercise of discretion is outside the range of discretion delegated to" it, "is inconsistent with agency rule or prior practice," "or based on facts without a hearing," in violation of Wis. Stat. § 227.57(6)–(8). He argued that the Claims Board exceeded its authority by relying on "ex parte communication" with the District Attorney's Office "outside the hearing record, and petitioner's knowledge." (R. 14:10.) He noted he did not learn about the clarification email communication with the District Attorney's Office until the Claim Board's decision denying rehearing and argued this violated Wis. Stat. § 16.007(2). (R. 14:12–13.) As to how this prejudiced him, Sanders argued that he would have "inquired" about why the Deputy District Attorney offered the clarification about the position in District Attorney Chisholm's original letter. (R. 14:20–21.)

Lastly, Sanders argued that the "fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or failure to follow prescribed procedure," in violation of Wis. Stat. § 227.57(4). (R. 14:13.) Here, he argued that the Claims Board did not "consider or address" his "request for waiver of immunity"—that by not making a "recommendation" for additional compensation to the Legislature, the Legislature did not review his request; in turn, he argued, this prevented him from arguing that the Legislature should have waived sovereign immunity.

(R. 14:13–14.) He argued that this “due process” problem cannot “be deemed a harmless error.” (R. 14:21–22.)

The Claims Board asked the circuit court to dismiss Sanders’s petition and affirm its decisions in all respects. (R. 15.) The Claims Board asserted that Wis. Stat. § 775.05(4) only requires it to recommend an award of additional damages to the Legislature if it, in its discretion, finds that the statutory maximum is not adequate compensation. (R. 15:7.) Therefore, it asserted, the statutory language requires no action on a request for additional compensation unless the Claims Board finds that the statutory maximum is inadequate. (R. 15:7.)

The Claims Board further argued that its prior decisions in other individual cases, which were “based on the unique facts of each of those matters,” do not constitute a “prior agency practice” under Wis. Stat. § 227.57(8). (R. 15:5–6.) As to Sanders’s “equal protection” argument, the Claims Board responded that Sanders’s position would eliminate the Claims Board’s discretion and produce absurd results—it would mean that the Claims Board would *always* have to recommend additional damages because it had done so in instances in the past, even though the statute says otherwise. (R. 15:9.)

As to Sanders’s arguments that the Claims Board did not address his request for waiver of immunity and that its actions deprived him of access to courts to file suit against the State contrary to the First Amendment, the Claims Board noted that Sanders conceded that the Legislature is the only proper body to authorize suits against the State. (R. 15:7–9.)

With regard to Sanders’s argument that it engaged in improper *ex parte* communications with the District Attorney’s Office, the Claims Board responded that Sanders “does not adequately explain how this was a violation of the

statutes, nor does he explain how he was prejudiced by this action.” (R. 15:8 (footnote omitted).)

2. The circuit court’s decision

The circuit court issued a written decision and order affirming the Claims Board’s decision and dismissing Sanders’s petition for judicial review. (R. 23.)

The circuit court noted that Sanders’s first two arguments “relate to the same question” of whether the Claims Board properly exercised its discretion and acted consistently with agency rule and prior practice in awarding Sanders the statutory maximum compensation “without expressly addressing his claim for additional damages.” (R. 23:4.)

The court noted that Sanders pointed to “no administrative rule, policy, or prior practice that requires the Board to expressly address his additional damages claim in its final decision.” (R. 23:5.) The court found “unpersuasive” Sanders’s reliance on the text of Wis. Stat. § 775.05(4) itself, as that text provides that the Claims Board only needs to submit a recommendation for additional damages “if it finds the statutory maximum is not adequate.” (R. 23:5 (emphasis in original).) Because the Claims Board “did not make a finding that \$25,000 was inadequate compensation,” “it was therefore not required to take further action.” (R. 23:5.)

The circuit court also rejected that the two prior examples of the Claims Board recommending additional compensation to the Legislature established “prior agency practice” the Claims Board had to follow. (R. 23:6.) The court noted that Sanders’s case is “factually distinguishable” from the others and the Board makes decisions on a case-by-case basis. (R. 23:6.)

The court next rejected Sanders’s argument that the Claims Board engaged in improper *ex parte* communications with the District Attorney’s Office. (R. 23:6.) The court held

that his argument was “undeveloped and fail[ed] to show that the Board materially relied on any ex parte communication in reaching its final decision.” (R. 23:6.) The court also pointed out that the Claims Board had “engaged in similar notice giving and follow-up communication with him during its investigation into his claim,” as it did with the District Attorney’s Office. (R. 23:6.)

The court also rejected Sanders’s argument that the Claims Board did not consider his request to waive sovereign immunity on behalf of the State, because—as Sanders recognized—only the Legislature could do so. (R. 23:6–7.) Moreover, the circuit court concluded, the Claims Board “is not required to recommend additional damages to the legislature.” (R. 23:7.)

Lastly, the Court rejected Sanders’s “harmless error and prejudice[]” arguments as “unpersuasive.” The court concluded that the Claims Board “adequately exercised its discretion and did not otherwise act outside of the law, administrative rules, or agency prior practice.” (R. 23:7.)

Sanders filed an amended notice of appeal on May 27, 2021. (R. 26.)

STANDARDS OF REVIEW

This Court reviews the Claims Board’s decision, not the circuit court’s. *See Epic Staff Mgmt., Inc. v. LIRC*, 2003 WI App 143, ¶ 13, 266 Wis. 2d 369, 667 N.W.2d 765.

This Court upholds the Claim Board’s factual findings as long as they are supported by substantial evidence. *Wisconsin Professional Police Ass’n. v. Public Serv. Com’n. of Wisconsin*, 205 Wis. 2d 60, 67, 555 N.W.2d 179 (Ct. App. 1996).

This Court reviews the Claim Board’s legal conclusions de novo. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21. This Court nevertheless

affords due weight to the experience and specialized knowledge of the Claims Board, as well as to its conferred discretionary authority. Wis. Stat. § 227.57(10). “Due weight” means this Court gives “respectful, appropriate consideration to the agency’s views” while still independently deciding legal questions. *Tetra Tech*, 382 Wis. 2d 496, ¶ 78.

ARGUMENT

I. The Claims Board properly awarded the maximum compensation it may lawfully award to Sanders.

A. The Claims Board need not address additional compensation unless it finds that the statutory maximum compensation is inadequate, and review of its decision is limited.

1. The Claims Board only needs to address additional compensation if it finds that the statutory maximum is inadequate.

Innocent persons convicted of crimes may petition the Claims Board for compensation under Wis. Stat. § 775.05. The statute provides that any person who has been imprisoned as the result of a Wisconsin conviction “of which crime the person claims to be innocent” “may petition the claims board for compensation for such imprisonment.” Wis. Stat. § 775.05(2).

The Claims Board “shall hear” these petitions, and “shall transmit a copy thereof to the prosecutor who prosecuted the petitioner and the judge who sentenced the petitioner,” “for the information of these persons.” Wis. Stat. § 775.05(2).

“After hearing the evidence on the petition,” the Claims Board must find either that clear and convincing evidence

shows that the person is innocent of the crime that led to the imprisonment, or not. Wis. Stat. § 775.05(3).

Most relevant here, Wis. Stat. § 775.05(4) addresses how much compensation the Claims Board may award. It provides, in full:

If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and a rate of compensation not greater than \$5,000 per year for the imprisonment. Compensation awarded by the claims board shall include any amount to which the board finds the petitioner is entitled for attorneys fees, costs and disbursements. If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying the amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172(2).

Thus, \$25,000 is the maximum amount the Claims Board may award to a petitioner it determines is entitled to compensation. Only “[i]f” the Claims Board “finds” that \$25,000 is inadequate, *then* “shall” it submit a report to the Legislature recommending the amount it views as adequate.

2. Chapter 227 limits review of the Claims Board’s decisions.

The Claims Board’s findings and claims award are subject to chapter 227 procedures and review. Wis. Stat. § 775.05(5).

The Claims Board must only grant petitions for rehearing on the basis of a material error of law or fact, or the discovery of new evidence sufficiently strong to reverse the

order which could not have previously been discovered. Wis. Stat. § 227.49(3).

Chapter 227 also limits the scope of judicial review of the Claims Board's decisions. Pursuant to Wis. Stat. § 227.57(8), the reviewing court "shall not substitute its judgment for that of the [Claims Board] on an issue of discretion."

Instead, a court shall reverse or remand if it finds that the agency's exercise of discretion falls "outside the range of discretion delegated" by law, is inconsistent with the Claims Board's rules, official stated policies or prior Claims Board practices, "if deviation therefrom is not explained to the satisfaction of the court," or if the discretionary exercise is "otherwise in violation of a constitutional or statutory provision." Wis. Stat. § 227.57(8).

A court may also require an entity subject to ch. 227 review to take further action if the court finds that it has "erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 227.57(5).

B. Because the Claims Board determined that the statutory maximum constituted appropriate compensation for Sanders, it did not need to address additional compensation.

Sanders's core argument is that the Claims Board erred by not explicitly rejecting his claim for additional compensation beyond the statutory maximum of \$25,000 that the Claims Board may lawfully award. (See Sanders's Br. 2–9.) This argument necessarily fails because Wis. Stat. § 775.05(4) only requires the Claims Board to address additional compensation if it first makes the affirmative finding that the statutory maximum it may award is

inadequate. And the statute does not require the Claims Board to make that affirmative finding.

The statute sets forth what the Claims Board *must* do if it finds that the petitioner was innocent of the offense for which he served imprisonment, and did not through his actions contribute to the conviction or imprisonment: it “shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000.” Wis. Stat. § 775.05(4). Sanders neither does nor could raise any argument that the Claims Board did not find an amount of compensation—it awarded him the maximum amount it could by law.

The statute also then sets forth what the Claims Board must do *if*—and only if—it first makes an affirmative finding that \$25,000 is inadequate compensation: “If the claims board finds that the amount it is able to award is not adequate compensation it shall submit a report specifying the amount which it considers adequate” to the Legislature. Wis. Stat. § 775.05(4).

Put differently, unless the Claims Board affirmatively finds that \$25,000 is inadequate compensation, Wis. Stat. § 775.05(4) does not require the Claims Board to do anything beyond awarding compensation within the statutory range it is authorized to award. Sanders therefore cannot show that the Claims Board was required to take any further or different action under the statute. *See* Wis. Stat. §§ 227.57(5), 227.57(8).

He also cannot show that the Claims Board erroneously exercised its discretion under Wis. Stat. § 775.05(4). The Claims Board unanimously found that the statutory maximum constituted the proper amount of compensation. (R. 7:59.) Given that finding, the Claims Board had no further requisite findings it needed to make or explanation it needed to offer. Sanders may disagree with the Claims Board’s finding that \$25,000 constituted adequate

compensation, but his disagreement does not render the Claims Board's exercise of discretion erroneous.

Nor could Sanders show that he was in any way harmed because the Claims Board did not explicitly state: "we find that \$25,000 is adequate compensation." *See, e.g., Houslet v. DNR*, 110 Wis. 2d 280, 329 N.W.2d 219 (Ct. App. 1982) (applying harmless error analysis to ch. 227 review of agency action). He cannot do so because the Claims Board's decision awarding him \$25,000 shows that it found that amount to be adequate compensation. Sanders also cannot plausibly claim that the Claims Board was somehow unaware of his request for additional compensation, given that a Claims Board member questioned Sanders about his additional compensation request at the hearing, and the Chairperson of the Board rejected Sanders's petition for rehearing. (R. 7:66; 8:4.)

On appeal, Sanders also tries to take his argument one step further to say that the Claims Board was *required* to forward his request for additional compensation to the Legislature. (Sanders's Br. 2.²) This argument is inconsistent with the plain language of the statute and would nullify the discretion afforded the Claims Board by the statute. Wisconsin Stat. § 775.05(4) explicitly gives the Claims Board discretion to "find the amount which will equitably

² Sanders's appellate arguments suggest that he is also now challenging Wis. Stat. § 775.05 itself. (*See, e.g., Sanders's Br. 2*). Insofar as Sanders now tries to do so, whether on constitutional or other grounds, he has forfeited such arguments by not raising them before the Claims Board or circuit court. *Bunker v. Labor and Industry Review Comm'n*, 2002 WI App 216, ¶ 15, 257 Wis. 2d 255, 650 N.W.2d 864 ("It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency"); *see also State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶ 32, 358 Wis. 2d 379, 856 N.W.2d 633 ("Arguments raised for the first time on appeal are generally deemed forfeited.") (citation omitted). Sanders's challenges have, prior to appeal, concerned the Claims Board's exercise of discretion regarding his petition specifically.

compensate the petitioner.” And it only requires the Claims Board to “submit a report” for distribution to the Legislature if the Claims Board first finds \$25,000 to be inadequate. *Id.*

Sanders’s interpretation would require this Court to rewrite the statute to provide that the Claims Board “shall” “submit a report” for distribution to the Legislature whenever a petitioner seeks more than \$25,000 in compensation, regardless of the Claims Board’s discretion in finding the proper compensation amount. It would also require this Court to rewrite the statute to impose an affirmative requirement that if a petitioner seeks compensation over \$25,000, the Claims Board “shall” make a finding as to the appropriateness of the request for additional compensation, even if the Claims Board determines that compensation within the statutory range is adequate. None of that language can be found in Wis. Stat. § 775.05(4).

As Sanders cannot show a statutory violation, he also cannot show a due process violation. Sanders makes the broad claim that his due process rights were violated because he “meets the criteria” for the “remedial statute” and “relied on the assurance that the Claims Board will follow the statute in its entirety.” (Sanders’s Br. 2.) Put differently, Sanders argues that his due process rights were violated because the Claims Board’s decision awarding him the statutory maximum did not “follow the statute in its entirety.” As explained above, however, the Claims Board followed Wis. Stat. § 775.05(4)’s requirements.

C. Sanders cannot show any departure from Claims Board practice.

Sanders’s “prior agency practice” arguments similarly fall short. Sanders asserts that the Claims Board improperly departed from prior practice by either (a) not awarding him additional compensation beyond the statutory maximum, and/or (b) not explicitly rejecting his request for additional

compensation beyond that statutory maximum. (See Sanders's Br. 6–9.)

Courts have repeatedly held that single, factually distinguishable decisions do not constitute a “prior agency practice” under Wis. Stat. § 227.57(8). See, e.g., *Barron Elec. Co-Op v. Pub. Serv. Comm'n of Wis.*, 212 Wis. 2d 752, 771, 569 N.W.2d 726 (Ct. App. 1997); *Eau Claire County v. DNR*, 119 Wis. 2d 62, 64, 349 N.W.2d 723 (1984).

And Sanders can point to nothing more than isolated, factually distinguishable discretionary decisions. (See Sanders's Br. 8–9.) He names three other petitioners (“Hemauer, Stinson, and Avery”), and argues that the Claims Board “failed to explain its rationale in its disparate treatment” of his petition when juxtaposed with those. (See Sanders's Br. 8.) However, Sanders does not provide this Court with any context about those other decisions or any explanation as to how this limited number of other individual, fact-based discretionary decisions constitutes an “agency practice.” This Court therefore can and should reject Sanders's prior practice argument as undeveloped. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (this Court need not address undeveloped arguments).

But even if this Court chooses to address this undeveloped argument, it does not help Sanders. Indeed, Sanders's argument appears to be that because the Claims Board has on two prior occasions found that the statutory maximum did not constitute adequate compensation, it was required to reach the same result here. (See Sanders's Br. 8–9). But that argument erroneously eliminates the Claims Board's discretion.

Nor can a single, factually distinguishable instance of the Claims Board affirmatively stating in a decision that it was declining to recommend additional compensation

constitute a prior across-the-board agency practice. *Barron Electric*, 212 Wis. 2d at 771.

Because Sanders cannot show that the Claims Board actually departed from something that could be considered a “prior agency practice,” this Court need not address his arguments concerning the proper standard of review for assessing the propriety of such a departure. (*See Sanders’s Br.* 6–7.)

D. Insofar as he still advances the argument, Sanders also cannot show any equal protection violation.

Relatedly, insofar as he continues to try and advance an argument, Sanders cannot show an equal protection violation. To start, Sanders does not develop this argument at all—he does not even use the term “equal protection.” (*See generally Sanders’s Br.*) He just asserts that he is “similarly situated to prior claimants.” (*See Sanders’s Br.* 8.) This is not enough. “Constitutional claims are very complicated from an analytic perspective, both to brief and to decide. A one to two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of [such] constitutional issues to this court.” *Cemetery Services, Inc. v. Wisconsin Dep’t. of Regulation and Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

But even if this Court does address it, different decisions in individual, fact-based discretionary determinations are not ipso facto proof of an equal protection violation. An exercise of discretion based on individual factual circumstances necessarily means that the decisions will not all be the same—if they were, that would reflect a lack of an exercise of discretion. *See, e.g., Ocanas v. State*, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975) (equal protection does not preclude different criminal sentences for persons convicted of the same crime based on their individual circumstances).

Sanders neither has nor can show any equal protection problem with the Claims Board's decision.

II. The Claims Board properly declined Sanders's request for waiver of sovereign immunity, and Sanders's sovereign immunity arguments fail.

Sanders's sovereign-immunity related arguments also fail. As Sanders has consistently himself recognized, a state officer cannot waive Wisconsin's sovereign immunity unless the Legislature has authorized it to do so.

A. A state entity cannot waive Wisconsin's immunity from suit unless the Legislature authorizes it to do so.

"[T]he legislature is the proper body to authorize suits against the state. An agency or officer of the state may not waive the state's immunity from suit unless specifically authorized to do so." *Lister v. Board of Regents of the University of Wisconsin System*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). The Wisconsin Supreme Court has rejected arguments that a citizen has a "right" to sue the State. See *Cords v. State*, 62 Wis. 2d 42, 52, 214 N.W.2d 405 (1974).

Wisconsin Stat. § 775.01 provides that a claimant may only commence an action against the State if the Legislature refuses to allow the claim.

The legal principles concerning the Claims Board's statutory duties and the limitations of its authorities, set forth in Section I.A.1, *supra*, also apply here.

B. The Claims Board has no authority to waive sovereign immunity to enable Sanders to sue the State for additional compensation.

Related to his first set of claims, Sanders similarly argues that by not "address[ing] his additional compensation claim an/or forward[ing] the claim to the Legislature," the

Claims Board deprived him of his “First Amendment Right” to “access the court.” (Sanders’s Br. 5.) These arguments fail.

Most simply, the Legislature—not the Claims Board—is the body responsible for waiving sovereign immunity for the State. Because the Claims Board determined that \$25,000 constituted the proper level of compensation, it did not need to submit a report to the Legislature. Sanders’s arguments mistakenly suggest that by concluding that \$25,000 constituted the proper level of compensation, the Claims Board “rendered the statutory process incomplete” so as to deprive him from the ability to seek waiver of sovereign immunity. (*See* Sanders’s Br. 6.)

But the statutory process *was* complete and in full compliance with the statutory scheme the Legislature enacted through Wis. Stat. § 775.05(4). That statutory scheme gives the Claims Board discretion to decide what constitutes proper compensation. If the Claims Board determines that adequate compensation falls within the statutorily authorized range of up to \$25,000, the Legislature does not need to be involved. If the Claims Board concludes adequate compensation is higher than \$25,000, then it must involve the Legislature. Moreover, Sanders does not have a constitutional right to sue the State. *See Cords*, Wis. 2d at 52. Sanders’s sovereign immunity argument should be rejected.

Also, Sanders fails to meaningfully explain how the Claims Board’s compliance with the statutory scheme violates his First Amendment rights. This Court, therefore, can reject the argument out of hand. *See Cemetery Services*, 221 Wis. 2d at 831 (this Court generally rejects undeveloped constitutional arguments).

III. Sanders cannot show that the Claims Board engaged in any *ex parte* communications with the District Attorney's Office that prejudiced him.

Sanders lastly argues that the Claims Board's email communication with the Milwaukee County District Attorney's Office—seeking clarification of its position provided in its response letter—constituted unlawful *ex parte* communications that “prejudiced” him. (Sanders's Br. 10–13.) Sanders's argument here too falls short.³

First, Sanders again fails to develop his argument. He does not establish that rules about *ex parte* communications applied to the Claims Board's review of his petition for compensation in the first place. He points to Wis. Stat. § 16.007(2). (See Sanders's Br. 12.) That subsection, however, provides that, with an exception not relevant here, the Claims Board “shall *not* be bound by common law or statutory rules of evidence.” It also provides that the Claims Board “may take official notice of any generally recognized fact or established technical or scientific fact,” but the parties “shall be notified” of the noticed facts and “afforded an opportunity to contest the validity of the official notice.” Wis. Stat. § 16.007(2).

The Claims Board is required to notify the prosecuting office about a petition for compensation from wrongful imprisonment. Wis. Stat. § 775.05(2). Sanders fails to explain how clarification from the District Attorney's Office on the position it offered would fall under the “fact[s]” of which the Claims Board may take official notice. See Wis. Stat. § 16.007(2). This Court should therefore reject Sanders's argument as undeveloped. *Pettit*, 171 Wis. 2d at 646–47.

But even insofar as prohibitions against *ex parte* communications would apply to the Claims Board seeking

³ The legal principles concerning the Claims Board's statutory authority and duties, set forth in Section I.A.1, *supra*, also apply here.

clarification from the District Attorney's Office, Sanders's claim still fails because he cannot show that such error was material. "[M]aterial error occurs when a party not notified of an *ex parte* communication is prejudiced by the inability to rebut facts presented in the communication and where improper influence upon the decision-making process appears with reasonable certainty." *Seebach v. PSC*, 97 Wis. 2d 712, 721, 295 N.W.2d 753 (Ct. App. 1980). The party alleging prejudice from such *ex parte* communication bears the burden of showing it. *See id.*

Sanders cannot show he suffered any prejudice from not being notified earlier of the District Attorney's Office's clarification of its position. Why not? Because the District Attorney's Office originally made clear that it had no objection to Sanders's petition. When the District Attorney's Office provided clarification, it *still* had no objection to the petition—it simply made clear that it did not oppose the request for the statutory maximum and took no position on additional damages because the Claims Board was better situated to address that. (*Compare* R. 5:63 *with* R. 6:31.) Put simply, the clarification email did not offer any new objection to—or facts against—Sanders's request for additional compensation beyond the statutory maximum. Sanders therefore cannot show that he suffered any prejudice.

Sanders's primary prejudice argument appears to be that because the clarification correspondence was sent from a Deputy District Attorney and the original correspondence was signed by the District Attorney, he was denied an opportunity to inquire as to who the Deputy District Attorney "was speaking for." (Sanders's Br. 12–13.) But Sanders has not offered anything that would even indicate, let alone prove, that the Deputy District Attorney was somehow speaking on behalf of some entity other than the prosecuting office that wrote the original response.

Other than that, Sanders also asserts that the Claims Board Program & Policy Analyst who corresponded with the District Attorney's Office "held improper influence" over the Claims Board because she was not one of the voting Board members. (Sanders's Br. 26–27.) Sanders fails to connect any dots to explain how or why there could have been any "improper influence" or how or why that would show prejudice. Sanders has not met his burden to show that any *ex parte* communication constituted material error.

CONCLUSION

This Court should affirm the circuit court's order dismissing Sanders's petition for judicial review.

Dated this 1st day of December, 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,010 words.

Dated this 1st day of December 2021.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on December 1, 2021 to:

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Dated this 1st day of December 2021.

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