

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA INDUSTRIES FOR THE : BEFORE THE BOARD OF CLAIMS
BLIND & HANDICAPPED :
 :
 :
 VS. :
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 :
 COMMONWEALTH OF PENNSYLVANIA, :
 STATE SYSTEM OF HIGHER EDUCATION, :
 SLIPPERY ROCK UNIVERSITY : DOCKET NO. 2550

FINDINGS OF FACT

1. Pennsylvania Industries for the Blind and Handicapped (hereinafter **PIBH@**) is a Pennsylvania non-profit corporation having offices at 1007 North Front Street, Harrisburg, PA. (Complaint and Answer, para. 1)

2. Respondent, Commonwealth of Pennsylvania, State System of Higher Education, Slippery Rock University (hereinafter **Slippery Rock@** or **Commonwealth@**) is an instrumentality of the Commonwealth of Pennsylvania with principal offices in Slippery Rock, PA. (Complaint and Answer, para. 2)

3. PIBH was created by approximately 90 to 100 member agencies, and PIBH's Board of Directors is comprised of representatives from its member agencies. PIBH is the central marketing arm for handicapped-made products and services and contracts with customers, which are typically state agencies. PIBH then sub-contracts the work to a member agency. PIBH searches the contracts for products that are available to the state system and then finds members who can provide the services or products for those contracts. Most of the service work performed through PIBH is custodial in nature and 75% of the employees performing such services must have a disability. (N.T. 18-20, 148)

4. PIBH started a relationship with Slippery Rock for the fiscal year commencing July 1, 1996, at the price of \$413,796.00 with an additional \$24,750.00 allowed for additional services, if required. The actual work was performed by Keystone Blind Association (hereinafter **Keystone@**), a member agency. (N.T. 21-24, 35; Exhibit P-1, pg. 26)

5. Based upon a verbal agreement between the parties, reached through their representative, James Revesz for Slippery Rock and Susan D. Miduri for PIBH, respectively, performance of the custodial

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services for the year previous to the year in question pertinent to the instant claim, commenced on July 1, 1996. (N.T. 21, 23, 25)

6. While performance actually started on July 1, 1996, full performance of custodial services by PIBH for Slippery Rock, proceeded based upon a hand shake and good faith i.e. A verbal agreements and then there were follow-up letters or facsimiles and ultimately a contract was received. It was not unusual for PIBH to start services before a written contract was prepared and executed. In fact, a written contract was not executed until May of 1997 for the year prior to the year which is the subject of the instant claim. (N.T. 21, 22, 27, 89, 90; Exhibit P-1)

7. PIBH had the right to renew the initial contract with an increase based upon the consumer price index; however, PIBH's member agency (Keystone) felt that it could not perform at that price and PIBH requested from the Department of General Services (hereinafter ADGS) a new fair market price for the fiscal year beginning July 1, 1997. There was also an apartment complex that was going to be added to the new contract as well. (N.T. 28, 29)

8. On June 26, 1997, Mr. Revesz transmitted to Ms. Miduri a new fair market price of \$426,864.00. It was not unusual for a new fair market price to be made available only four (4) days before the expiration of the contract. (N.T. 30, 31; Exhibit P-2)

9. PIBH declined the contract based upon the fair market price and appealed the determination of the fair market price to DGS. Ms. Miduri requested a contract value of \$532,608.60 for base services and \$25,492.50 for 3,000 hours of extra cleaning be considered. (N.T. 32, 33; Exhibit P-3, P-4)

10. On Friday, June 27, 1997, Mr. Revesz called Ms. Miduri and advised her that he and Mr. Kowatch, an employee of DGS, had developed a new fair market price of \$466,118.80. (N.T. 34-36)

11. During that conversation, Mr. Revesz and Ms. Miduri discussed the detailed breakdown of the new price, and Ms. Miduri told Mr. Revesz that she would check with Keystone, PIBH's member agency. Mr. Revesz asked Ms. Miduri to respond by noon on Monday, June 30, 1997, the last day of the existing contract. (N.T. 37, 38, 177, 186)

12. On June 30, 1997, after confirming that Keystone could perform at the new price, Ms. Miduri called Mr. Revesz at approximately 10:40 a.m. and told him that PIBH accepted the contract at the new price of \$466,118.80. In the early afternoon of June 30, 1997, Ms. Miduri confirmed the acceptance by facsimile issued to Mr. Revesz. (N.T. 39; Exhibit P-5, P-6)

13. It was not unusual for PIBH and the recipient of their services to negotiate, compromise and reach an agreement after the filing of an appeal. The terms of the contract, other than price, were those set forth in the bid specifications. (N.T. 39, 40, 42; Exhibit P-8)

14. PIBH believed that the price of \$466,118.80 represented the new fair market price and constituted an offer by Slippery Rock. It is typical that if PIBH could reach an agreement with its customer, DGS would use the compromised figure as the basis for a new fair market price. (N.T. 44, 66, 69-71, 117-119, 154)

15. PIBH, through Ms. Miduri, issued its confirmation of acceptance by facsimile on June 30, 1997. Ms. Miduri was authorized, at all pertinent times, to contractually bind PIBH. (N.T. 18, 39, 45, 46; Exhibit P-5, P-6)

16. Slippery Rock, through Mr. Revesz, advised PIBH that there was no agreement between Slippery Rock University and PIBH. In his note of June 30, 1997, Mr. Revesz indicates that "[a]s you will recall, in our conversation of Friday, June 27, 1997, I told you that [\$466,118/year] was the fair market price set by DGS. I was not making an offer, but simply wanted to know what PIBH's reaction to that price would be if it were offered. Since then, I have spoken to Mr. Kowatch and he informed me that the dollar amount above was erroneously (*sic*) calculated." (N.T. 45, 46; Exhibit P-7)

17. Ms. Miduri communicated only with Mr. Revesz from Slippery Rock on contractual matters and Mr. Revesz never advised Ms. Miduri that he had any limits on his authority to contract on behalf of Slippery Rock. Mr. Revesz executed the previous contract on behalf of Slippery Rock. (N.T. 47, 48, 210, 211; Exhibit P-1, pg. 35)

18. Mr. Revesz initially testified that on June 30, 1997, a meeting was held at 12:00 noon in Slippery Rock's Vice-President's office and it was decided that since no response was received, Slippery Rock was moving forward with another service provider, Metro Maintenance. (N.T. 188, 189)

19. Mr. Revesz later testified that he probably had a phone call with Sue Miduri later on in the day, i.e. late in the day on the 30th. Mr. Revesz then testified, under cross-examination, "I mean, Sue testified that there was a call. And I guess my testimony is, I know she did not accept a number the morning of the 30th." (N.T. 195, 198)

20. In response to the question whether or not the phone conversation ever took place on the 30th of June, 1997, Mr. Revesz subsequently testified: "I may have had a phone conversation with her." (N.T. 199)

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21. Mr. Revesz continued with equivocal testimony. Again, during cross-examination, Mr. Revesz indicated in reference to Ms. Miduri's assertion that she called Mr. Revesz at 10:30 a.m. the morning of June 30, 1997, as follows:

Well, she testified while I sat there saying that she had called at 10:30. And I'm not saying that she did not call at 10:30. I mean, that's my testimony. She said she called at 10:30, she may have called at 10:30. I'm not denying that she did not call at 10:30, that's my point.

(N.T. pg. 202)

22. In addition testimony was introduced from the Determination Appeal, taken of Mr. Revesz, on August 13, 1997. On page 192 of that transcript, when asked if he spoke to Ms. Miduri prior to noon on June 30, 1997, Mr. Revesz testified as follows: "There's a problem, my telephone log, I don't think I got a call from Sue. My records indicate that I called her afternoon on Monday the 30th to find out what their answer was. . . ."

(N.T. 201; Exhibit D-20, pg. 193)

23. When questioned as to precisely how an offer of approximately \$466,000.00 might have been received by Ms. Miduri and she, in turn might have interpreted as a proposal, Mr. Revesz testified as follows:

. . . Andy Kowatch told me to bounce the number off her. How I put that across to Sue Miduri, I might not have used the name, the wording "I'm bouncing this off you, Sue." I would have said something, Andy Kowatch said to offer this amount, something in that terminology.

When asked if it would shock Mr. Revesz that Ms. Miduri felt his wording led her to conclude that it was a proposal for approximately \$466,000.00, Mr. Revesz simply answered: "No. . . [t]hat's correct, that would not have shocked me." (N.T. 210)

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24. It was then pointed out to Mr. Revesz that he also gave testimony during a deposition on

June 16, 2000. During the deposition, Mr. Revesz was asked "Did you receive a call from Susan Miduri during the morning of June 30, 1997?" Mr. Revesz responded: "I did not receive a call during the morning." When asked if he was certain of that fact, Mr. Revesz responded: "I am certain of that." (N.T. 214; Exhibit D-21, pg. 54)

25. In the current proceeding, when asked: "Am I correct, Mr. Revesz, that the first time you testified that you spoke to or may have spoken to Susan Miduri during the morning of June 30, was today?" Mr. Revesz answered "That's correct." (N.T. 215, 216)

26. Keystone's employees reported to work on July 1, 1997, but were not permitted to perform their services and were not greeted openly. (N.T. 47)

27. On July 8, 1997, PIBH filed a Petition for Injunctive Relief with the Commonwealth Court of Pennsylvania. (N.T. 92)

28. A hearing was held before the Honorable Judge Ross on July 17, 1997, and she issued a decision in PIBH's favor on July 18, 1997. (N.T. 94; Exhibit P-9)

29. PIBH acquired its injunction bond, at the cost of \$3,300.00 on July 23, 1997 and reasonably expected that Keystone's employees would be returning to work at Slippery Rock throughout the course of the proceedings. PIBH kept their work force available for performance. (N.T. 97, 99, 100, 111, 131, 157; Exhibit P-16)

30. On July 21, 1997, Slippery Rock appealed Judge Ross's order resulting in an automatic stay, which was vacated by order dated July 28, 1997. Prior to vacation of the automatic stay, custodial services were performed by another contractor and once the stay was vacated, Slippery Rock had the custodial services performed by its own employees. (N.T. 75, 95, 96; Exhibit P-10, P-11)

31. PIBH filed proceedings for enforcement, and a hearing was held before Judge Ross who issued an order on September 16, 1997. Judge Ross's Order, certified from the record on September 17, 1997, held that:

[t]he Court finds that the parties pending appeal have agreed that petitioner will perform janitorial services for respondents from the period September 22, 1997, until further order of Court or until the entry of the parties into a new contract at the fair market price established by the Department of General Services or until contrary decision is made by the Supreme Court of Pennsylvania. The performance pending appeal or resolution of this case otherwise shall be at the fair market price of \$426,864. In the event the parties enter into a new contract for the year

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July 1, 1997, through June 30, 1998, based upon the fair market price to be established by the Department of General Services, respondent shall pay Petitioner the difference between \$426,864. and that price. Other questions relating to damages allegedly suffered by petitioner shall be deferred for future resolution.

(Exhibit D-1)

32. Keystone employees began performance on behalf of PIBH on or about September 22, 1997 and entered into a compromise written agreement for the remainder of the fiscal year, and the parties retained their right to pursue all legal positions. (N.T. 97; Exhibit D-1)

33. Under the compromise agreement, the sum of \$328,000.00 was paid to PIBH by Slippery Rock. This amount was for services rendered between September 22, 1997 and June 30, 1998, representing payment made according to an annual figure of \$426,864.00. (N.T. 49)

34. Between July 1, 1997 and September 21, 1997, Keystone paid its employees, based upon hours they would typically have worked, except for employees who had secured other employment. PIBH agreed with Keystone to incur the obligation to keep the work force available. (N.T. 75, 100, 101)

35. PIBH incurred payroll expenses for the Keystone employees in the amount of \$56,599.39 for the period beginning July 1, 1997 and ending September 21, 1997. That figure represents the total wages that were incurred to keep Keystone's work force available. (N.T. 106; Exhibit P-14)

36. PIBH also incurred airfare and witness expenses for the proceedings other than the Board of Claims hearing in the amount of \$2,350.00. (N.T. 107-110; Exhibit P-15)

37. PIBH incurred legal fees and costs for the injunction and related proceedings in the amount of \$16,697.50. (N.T. 113, 114; Exhibit P-17)

38. PIBH incurred legal fees and costs in pursuing the appeal of the fair market price in the amount of \$17,071.44. (N.T. 150; Exhibit P-18)

39. PIBH also pursued its appeal of the fair market price determination of \$426,864.00 and Hearing Officer, Edward Morris, ruled in favor of PIBH. However, this decision was reversed by DGS. PIBH appealed to the Commonwealth Court which affirmed the decision of DGS. The Pennsylvania Supreme Court declined PIBH's appeal. On March 26, 1998, in consideration of Slippery Rock's

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willingness to enter into a contract with PIBH, the Commonwealth Court of Pennsylvania, per the Honorable Eunice Ross, dissolved the injunction entered by the Court on July 18, 1997. (Exhibit P-12, P-13, P-19; Exhibit D-2)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of this action. 72 P.S. § 4651-4.
2. The Board of Claims has personal jurisdiction over the parties.
3. The Board finds the testimony of Susan D. Miduri to be credible and persuasive regarding the issue of whether or not PIBH accepted an offer by James Revesz of Slippery Rock University in the amount of \$466,118.80 for PIBH to provide custodial services to Slippery Rock University.
4. The Board finds Ms. Miduri's testimony regarding acceptance of Mr. Revesz's offer on the specific date of June 30, 1997, to also be credible.
5. The Board finds Mr. Revesz's denial of Ms. Miduri's acceptance of Slippery Rock's offer for PIBH to provide custodial services to the University at the fair market price of \$466,118.80 to be unbelievable and without merit.
6. The Board finds that as a matter of law a binding contract was established as between PIBH and the Commonwealth of Pennsylvania, State System of Higher Education, Slippery Rock University as of June 30, 1997.
7. The Board finds that the parties, under a compromise agreement, acknowledged that PIBH would be paid \$328,000.00 for the period September 22, 1997 through June 30, 1998. This figure paid by Slippery Rock to PIBH for custodial services represented payment according to an annual figure of \$426,864.00.
8. PIBH incurred payroll expenses for Keystone employees in the amount of \$56,599.39 for the period beginning July 1, 1997 and ending September 21, 1997, representing the total wages incurred to keep Keystone's workforce available.
9. PIBH is entitled to judgment in the amount of \$56,599.39 against Slippery Rock University.

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10. The Board does not believe PIBH is entitled to the costs associated with an injunction bond and attorneys fees associated with collateral actions filed with other tribunals and no award will be made regarding PIBH's request for such costs and attorneys fees.

OPINION

This action was initiated by Pennsylvania Industries for the Blind and Handicapped (hereinafter APIBH) against the Commonwealth of Pennsylvania, State System of Higher Education, Slippery Rock University of Pennsylvania (hereinafter ASlippery Rock or ACommonwealth) on December 30, 1997. The amount of the initial claim was \$119,232.77. On January 26, 1998, an Answer was filed on behalf of the Commonwealth and on January 28, 1998, a letter was sent to the parties directing the parties to commence with discovery. The Board requested letters from the parties with respect to the status of the case on August 3, 1998 and again on April 3, 2000. On July 27, 2000, Slippery Rock filed a Petition for Leave of Board to Amend Answer to Claim and to Plead New Matter; however, this Petition was withdrawn by the Commonwealth on August 30, 2000.

On March 19, 2001, the Board sent the parties another letter again requesting the status of this matter. Subsequent to receipt of the responses from both parties, the Board rendered an Order on May 10, 2001, scheduling the matter for hearing on November 27, 2001 and continuing through November 30, 2001, if necessary. That hearing was rescheduled to the Board's Panel for hearing on December 17, 18, & 19, 2001. The matter proceeded before the Board's Panel and was completed on December 18, 2001.

PIBH's Proposed Findings of Fact, Conclusions of Law and Post-Hearing Brief were filed on March 1, 2002 and Slippery Rock's Brief which contained Findings of Fact and Conclusions of Law was submitted to the Board on April 2, 2002. The Panel Report has been submitted and reviewed.

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PIBH was created by approximately 90 to 100 member agencies. PIBH's Board of Directors is comprised of representatives from its member agencies. PIBH is the central marketing arm for handicapped-made products and services and contracts with customers, which are typically state agencies. PIBH then sub-contracts the work to member agencies. Most of the service work performed through PIBH is custodial in nature and 75% of the employees performing such services must have a disability.

PIBH started a relationship with Slippery Rock for the fiscal year commencing July 1, 1996, at the price of \$413,796.00 with an additional \$24,750.00 allowed for additional services, if required. The actual work was performed by member agency, Keystone Blind Association (hereinafter AKeystone@). Performance of the custodial services for the year previous to the year in question regarding the instant claim commenced on July 1, 1996, pursuant to a verbal agreement between the parties. The representative for Slippery Rock was James Revesz and the representative for PIBH was Susan D. Miduri. Although performance started for that year on July 1, 1996, full performance of custodial services by PIBH for Slippery Rock proceeded upon a Ahand shake and good faith@ and then there were follow-up letters or facsimiles ultimately resulting in a contract. It was not unusual for PIBH to start services before a written contract was prepared and executed. In fact, a written contract was not executed until May of 1997 for the year prior to the year which is the subject of the instant claim.

Regarding the instant claim, PIBH had the right to renew the initial contract with an increase based upon the consumer price index; however, PIBH's member agency (Keystone) felt that it could not perform at that price and PIBH requested from the Department of General Services (hereinafter ADGS@) a new fair market price for the fiscal year beginning July 1, 1997.

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On June 26, 1997, Mr. Revesz transmitted to Ms. Miduri a new fair market price of \$426,864.00. It was not unusual for a new fair market price to be made available only four days before the expiration of the contract. PIBH declined the contract based upon the aforementioned fair market price and appealed the determination of the fair market price to DGS.

On Friday, June 27, 1997, Mr. Revesz called Ms. Miduri and advised her that he and Mr. Kowatch, an employee of DGS, had developed a new fair market price of \$466,118.80. Mr. Revesz asked Ms. Miduri to respond by noon on Monday, June 30, 1997, the last day of the existing contract. On June 30, 1997, after confirming that Keystone could perform at the new price, Ms. Miduri called Mr. Revesz at approximately 10:40 a.m. and told him that PIBH accepted the contract at the new price of \$466,118.80. In the early afternoon of June 30, 1997, Ms. Miduri followed up and confirmed the acceptance by facsimile, which was issued to Mr. Revesz. The terms of the contract, other than the price, were those set forth in the bid specifications.

Slippery Rock, through Mr. Revesz, notified PIBH on June 30, 1997, that Slippery Rock was not making an offer, but rather wanted to know what PIBH's reaction to the price would be if it were offered. Slippery Rock, again through Mr. Revesz, also indicated that the dollar amount quoted to Ms. Miduri had been erroneously calculated. Throughout their communications, Ms. Miduri had negotiated only with Mr. Revesz from Slippery Rock on all contractual matters and Mr. Revesz never advised Ms. Miduri that he had any limits on his authority to contract on behalf of Slippery Rock. It was Mr. Revesz that had executed the previous contract on behalf of Slippery Rock.

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While Ms. Miduri's testimony regarding the all-important conversation with Mr. Revesz of June 30,

1997, was consistent and quite creditable, the same certainly can not be said with regard to Mr. Revesz's testimony. In fact, Mr. Revesz's testimony was consistently conflicting so as to render it wholly unbelievable. As the fact finder, this Board has to judge the creditability of the witnesses and weigh their testimony. Miller v. C.P. Centers, Inc., 334 Pa. Super. 623, 483 A.2d 912 (1984). In the instant case Mr. Revesz initially testified that on June 30, 1997, a meeting was held at 12:00 noon in Slippery Rock's Vice-President's office and it was decided that since no response was received, Slippery Rock was moving forward with another service provider. Mr. Revesz later testified that he "probably" had a call with Sue Miduri later on in the day, i.e. "late in the day on the

30th." Mr. Revesz then testified, on cross-examination, "I mean, Sue testified that there was a call. And I guess my testimony is, I know she did not accept a number the morning of the 30th."

Mr. Revesz continued to waiver regarding his equivocal position as to whether or not the phone call even took place. He testified: "I may have had a conversation with her." He also stated: "A . . . I'm not denying that she did not call at 10:30, that's my point." This testimony was in direct conflict with testimony introduced from prior proceedings, which were directly related to this claim, wherein, Mr. Revesz denied receiving a call from Ms. Miduri until the afternoon on June 30, 1997. In a deposition taken on June 16, 2000, in response to whether or not Mr. Revesz received a call from Ms. Miduri the morning of June 30, 1997, Mr. Revesz responded "I did not receive a call during the morning." When asked if he was certain of that fact Mr. Revesz responded "I am certain of that." Yet during trial, Mr. Revesz testified: "Well, she [Sue Miduri] testified while I sat there saying that she had called at 10:30. And I am not saying she did not

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call at 10:30. I mean, that's my testimony. She said she called at 10:30, she may have called at 10:30.@ Remarkably, when confronted with these glaring discrepancies in his testimony, Mr. Revesz acknowledged the discrepancies. When asked whether or not, during the trial before the Board, if that instance would have been the first time that Mr. Revesz testified that he spoke or may have spoken to Sue Miduri during the morning of June 30, 1997, Mr. Revesz answered: "That's correct.@ Given this testimony, the Board finds Mr. Revesz's testimony to be inherently unreliable and therefore finds that the Commonwealth's offer for custodial services to be provided by PIBH through its member agency, Keystone, was accepted by Susan D. Miduri on June 30, 1997. The Board finds that both Ms. Miduri and Mr. Revesz had authority to negotiate on behalf of their respective agencies to bind the parties to a legal contract, and did so. It is well settled that there are certain principal and primary elements for a contract to be enforceable, those being an offer, acceptance, an exchange of consideration and a meeting of the minds. Schreiber v. Olan Mills, 426 Pa. super. 537, 627 A.2d 806 (1993). It is also well settled under Pennsylvania law that each party to a contract has an implied duty to act in good faith and deal fairly with the other party to the contract during the performance and enforcement of the contract. Commonwealth of Pennsylvania v. W.P. Dickerson & Son, Inc., 42 Pa. Cmwlth. Ct. 359, 400 A.2d 930 (1979); Commonwealth of Pennsylvania, Dept. of Property & Supplies v. Berger, 11 Pa. Cmwlth. Ct. 332, 312 A.2d 100 (1973). It is clear to the Board that, notwithstanding Mr. Revesz's testimony to the contrary, all of the requisite elements for a binding contract are present in this case. It is equally clear that the Commonwealth did not act in good faith regarding the performance of the contract.

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Due to the brevity of life, we will not reiterate the proceedings directly related to this case which

were pending at the Appellate Court levels and before DGS. Suffice it to say, the parties reached a compromise agreement wherein PIBH would be paid by Slippery Rock the sum of \$328,000.00 for services rendered between September 22, 1997 and June 30, 1998. That payment was calculated according to an annual fair market price of \$426,864.00 and that figure seems to be a fair and reasonable amount that the parties agreed to, *albeit* after the fact. Because Keystone paid its employees \$56,599.39, based upon hours they would typically have worked between July 1, 1997 and September 21, 1997, PIBH is entitled to reimbursement of that money. This is particularly true given the fact that PIBH was successful in the proceedings before the Commonwealth Court of Pennsylvania and had reason to believe it was prudent to keep employees available to perform the

contract reached with Slippery Rock University. The Board will not, however, enter judgment for the costs associated with various related, but separate, proceedings before other tribunals. An appropriate Order shall be entered.

ORDER

AND NOW, this 9th day of December, 2002, it is hereby **ORDERED** and **DECREED** that judgment be entered in favor of the Plaintiff, Pennsylvania Industries for the Blind & Handicapped and against the Commonwealth of Pennsylvania, State System of Higher Education, Slippery Rock University, in the amount of Fifty-Six Thousand Five Hundred Ninety-Nine Dollars and Thirty-Nine Cents (\$56,599.39).

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The Board also awards six percent (6%) interest on that amount from the date of the Commonwealth's

breach, i.e. last day of the contract year in question which was June 30, 1998.

Each parties to bear its own costs and attorneys fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien
Engineer Member

John R. McCarty
Citizen Member

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