

**COMMONWEALTH OF PENNSYLVANIA**

**VARTAN ENTERPRISES, INC.  
AGENT FOR THE MUSALAIR  
TRUST AND DAUPHIN COUNTY  
GENERAL AUTHORITY**

**VS.**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,  
ACTING THROUGH DEPARTMENT OF  
GENERAL SERVICES**

**: BEFORE THE BOARD OF CLAIMS**

**: DOCKET NO. 2947**

COMMONWEALTH OF PENNSYLVANIA

VARTAN ENTERPRISES, INC., : BEFORE THE BOARD OF CLAIMS  
Agent for The Musalair Trust and :  
Dauphin County General Authority :  
 :  
VS. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION, :  
acting through DEPARTMENT OF GENERAL :  
SERVICES : DOCKET NO. 2947

---

**FINDINGS OF FACT**

1. On October 2, 1995, Vartan Enterprises, Inc. ("Claimant" or "Vartan") and the Commonwealth of Pennsylvania, Department of Transportation, acting through the Department of General Services ("Defendant" or "Commonwealth") entered into Lease Agreement 91988 for a portion of the premises or part of the building situated at 555 Walnut Street in Harrisburg, Dauphin County, Pennsylvania ("Forum Place"). (Stip. No.1)
2. On or about October 17, 1996, Claimant and the Commonwealth executed the First Lease Amendment - Amendment 91988-1. (Stip. No. 2)
3. The First Lease Amendment increased the leased premises to 299,000 net usable square feet. (Stip. No. 3)
4. On March 12, 1997, Claimant and the Commonwealth executed the Second Lease Amendment - Amendment 91988-2. (Stip. No. 4)
5. On May 28, 1998, Claimant and the Commonwealth executed the Third Lease Amendment - Amendment 91988-3. (Stip. No. 5)
6. On April 22, 1999, Claimant and the Commonwealth executed the Fourth Lease Amendment - Amendment 91988-4. (Stip. No. 6)
7. Claimant, as owner and Lessor of Forum Place, collected rents and additional amounts due under the Lease from its inception until July of 1998. (Stip. No. 7)
8. On July 22, 1998, Forum Place was sold to the Dauphin County General Authority and in conjunction therewith, Claimant became the agent for the Dauphin County General Authority for affairs involving Forum Place. (Stip. No. 8)

9. Claimant, as agent for the Dauphin County General Authority, collected rents and additional amounts due under the Lease and continued to serve as agent until January of 2000. (Stip. No. 9)

10. There were extensive negotiations relating to design and configuration of the lease space occurring between representatives of Vartan and representatives of the Commonwealth. (N.T. 19)

11. The Commonwealth informed all bidders on the project that executives and upper management people would be in the building after hours. (N.T. 278)

12. Twelve (12) hours per day 5 days per week was considered to be normal working hours that the building would be operating. (Claimant Ex. No. 2)

13. The Commonwealth required each and every employee who worked in the building to have access to the building 24 hours a day, 7 days a week. (Claimant Ex. No. 2)

14. Section 8 of the Lease states as follows:

LESSOR, at its sole cost and in return for the RENT paid by LESSEE pursuant to this LEASE, shall provide, maintain and pay the periodic charges for heat, ventilation and air conditioning; all energy used and consumed on the PREMISES including but not limited to gas, oil, electric; water and sewer; hot and cold water; snow and ice removal from walks, driveways and parking area; janitorial services and supplies in accordance with Exhibit "B"; trash removal (from LESSOR's property); lawn and shrub care services; and lavatories and water coolers in accordance with Department of Labor and Industry requirements. The rental rate provided in this LEASE presumes a normal workweek from Monday through Friday, at the hours of 7:00 a.m. to 7:00 p.m. LESSEE may use the PREMISES beyond these hours but upon doing so, must, upon request by the LESSOR, reimburse the LESSOR for the reasonable and properly documented additional costs incurred in providing the above services.

(Stip. No. 11)

15. The operating hours of the Lease were subsequently re-negotiated by mutual consent, from 7:00 a.m. - 7:00 p.m. to 6:00 a.m. - 6:00 p.m. - Monday through Friday. (Stip. No. 12)

16. There were no restrictions on Commonwealth employees from the Department of Transportation from using the leased premises at Forum Place after the operating hours as set forth above. (Stip. No. 13)

17. During its period of tenancy, Commonwealth employees from the Commonwealth of Pennsylvania, occupied the leased premises located at Forum Place beyond the normal operating hours. (Stip. No. 14)

18. Every Commonwealth employee had a swipe card to access the garage, floors in the building, and his or her computer; this was referred to as the proxy card system. (N.T. 26)

19. The access cards permitted the computer to recognize which Commonwealth employee went into the building and the time the individual swiped the card to enter the building. (N.T. 26)

20. Forum Place was not designed to track the movements of each Commonwealth employee in the building. (N.T. 350-352)

21. Commonwealth employees were granted access to the garage, the elevators and the computers, by swiping the cards that were individually issued to them. (N.T. 27)

22. Only one swipe would be shown on the computer if more than one individual came in at a time. (N.T. 27)

23. In 1998 Vartan became aware of the Commonwealth actually using the space on an overtime basis. (N.T. 24-25, 38-39)

24. Beginning in 1998 through January of 2000, Vartan compiled records as to the number of Commonwealth employees who entered the building after hours. (Claimant Ex. No. 6)

25. A computer printout was produced showing card swipes in the evening from 7:00 p.m. until 6:30 a.m. (N.T. 28; Claimant Ex. No. 15)

26. Vartan informed the Commonwealth that a methodology had to be developed to determine Vartan's additional costs for overtime use of the building. (N.T. 31)

27. Vartan indicated that a reasonable figure to attribute to the overtime usage was 4.43% of the total usage of the building. (N.T. 34)

28. The rental payments on Forum Place by the Commonwealth for the Lease were approximately \$377,000.00 per month. (Claimant Ex. No. 2)

29. The amount being sought for additional rent in this litigation, 4.43% of the base rent, is approximately two months of rent for the building. (Claimant Ex. Nos. 6-16)

30. Claimant sent the Commonwealth invoices seeking additional rent for costs allegedly resulting from the additional time that employees from the Department of Transportation occupied the leased premises at Forum Place beyond the operating hours agreed to by the parties. (Stip. No. 15)

31. The Commonwealth has refused to pay the invoices submitted by Claimant inasmuch as it claims that insufficient documentation to support the invoice amounts has been provided. (Stip. No. 16)

32. On June 16, 1999, Claimant appealed the refusal to pay Claimant's invoices. (Stip. No. 17)

33. The Commonwealth denied the June 16, 1999 appeal and again requested additional supporting documentation to support Claimant's request for additional rent. (Stip. No. 18)

34. Vartan's claim is based on the figure of 75¢ per square foot per year which was proposed by Vartan to the Commonwealth as reasonable for overtime use of Forum Place by Commonwealth representatives. (Claimant Ex. No. 6)

35. Vartan seeks compensation of \$18,687.50 ( $299,000 \times \$0.75 \div 12$ ) per month from November, 1996 through January, 2000, for a total of \$728,812.50 with 6% statutory interest. (Claimant Ex. No. 2)

36. The Commonwealth requested additional information concerning payment of Vartan's additional costs at all times relevant to this proceeding. (N.T. 37)

37. It was not possible to determine the effect of extra usage of the building with respect to the electricity. (N.T. 47)

38. Gary L. Nalbandian was accepted as an expert in the field of commercial industrial real estate sales, leasing and marketing. (N.T. 188)

39. Mr. Nalbandian testified that the language in the Lease was not specific enough to indicate how the parties should deal with additional compensation for after hour usage. (N.T. 193)

40. Mr. Nalbandian testified that normally a lease would be written containing some kind of formula to enable the parties to calculate overtime usage. (N.T. 203)

41. Mr. Nalbandian testified that there was no manner of tracking actual costs for Forum Place by Vartan. (N.T. 205)

42. Mr. Nalbandian testified that a year's track record would be required to determine what costs were for normal usage so that costs for additional usage could be determined. (N.T. 208)

43. A significant amount of swipe card activity has not been directly attributable to Commonwealth employees. (N.T. 27)

44. No specific relationship has been established between the number of swipe card activities and additional costs attributable to the Commonwealth's overtime use. (N.T. 156)

45. There is no hard copy documentation of the actual costs for the additional overtime use and no documentation of such costs was presented to the Board. (N.T. 79; Board Finding)

46. No representative of the Commonwealth agreed to pay an additional 75¢ a square foot per year for overtime charges. (N. T. 76)

47. Vartan never provided the building's operating costs to the Commonwealth. (N.T. 232)

48. Throughout the entire process, the Commonwealth was looking for documented costs. (N. T. 303)

49. Overtime costs for the building could not be documented by the Commonwealth or DGS personnel. (N.T. 313)

50. No additional costs actually incurred as a result of the Commonwealth's overtime usage of the building were properly documented. (N.T. 313; Claimant Ex. No. 7, 9)

51. Vartan has not established that its additional costs for overtime were anything more than of a de minimus nature. (N.T. 319)

### CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction to hear this case pursuant to its enabling statute.

2. It is well established that the intent of the parties to a written contract is to be regarded as being embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement. Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 661 (1982)

3. The contract is ambiguous only if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. Hutchison v. Sunbeam Coal Corporation, 513 Pa. 192, 519 A.2d 385, 390 (1986).

4. Ambiguities in written agreements should not be found lightly. Steuart, 498 Pa. at 53, 444 A.2d at 663.

5. It is only where a contract document has been found to contain ambiguities that we then look to extrinsic evidence to determine the intent of the parties and construe the contract against the drafter. Glen-Gery Corporation v. Warfel Construction Company, 734 A.2d 926, 931 (Pa. Super.1999)

6. Paragraph eight of the lease between the parties is clear and unambiguous in that it requires the lessee, upon request by the lessor, to reimburse the lessor for the reasonable and properly documented additional costs incurred in providing the above services.

7. The Claimant did not, by a preponderance of the evidence, provide documented additional costs in accordance with paragraph eight of the Lease between the parties.

8. Claimant is not entitled to any reimbursement for additional costs incurred in accordance with the Lease because it did not provide properly documented additional costs.

9. The Commonwealth was justified in its refusal to pay the invoices presented by the Claimant since the Claimant failed to supply documentation of additional costs it incurred.

10. A claim of unjust enrichment or quantum meruit seeks recovery on the basis of a quasi contract, or a contract implied in law.

11. Such recovery is allowed if three elements are satisfied: (1) the Claimant must have conferred a benefit upon the Defendant; (2) there must have been appreciation of the benefit by the Defendant; and (3) the Defendant must have accepted and retained the benefit under circumstances rendering it inequitable for the Defendant to retain the benefit without paying the Claimant its reasonable value. Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc., 832 A.2d 501 (Pa. Super. 2003).

12. The Claimant in such a case is only entitled to recover if the enrichment of the Defendant is unjust. Id.

13. The doctrine of unjust enrichment or quantum meruit is not available to Claimant because Claimant and Defendant have entered into a written contract with a specific provision that governs the matter at issue, and Claimant has failed to comply with a requirement of that contract provision. See e.g., Third National Bank and Trust Co. of Scranton v. Lehigh Valley Coal Co., 353 Pa. 185, 192-3, 44 A.2d 571, 574 (1945); Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999)

14. Additionally, Claimant is not entitled to recover any monies from Defendant under a theory of quantum meruit or unjust enrichment because it has not established the cost or value of the benefit bestowed on Defendant is other than de minimus.

## OPINION

This case involves a claim by the Plaintiff, Vartan Enterprises, Inc., against the Commonwealth of Pennsylvania, Department of Transportation, acting through Department of General Services, for additional monies the Claimant believes are owed pursuant to a Lease entered into by the parties on October 2, 1995. The total amount Claimant is seeking is \$728,812.50 along with 6% statutory interest. The gist of the claim revolves around the interpretation of Section Eight of the Lease executed by the parties. Specifically, Claimant asserts that Section Eight of the Lease requires the Defendant to pay this additional amount for occupying the premises during overtime hours, and Defendant asserts that Claimant has not properly documented these additional costs as required.

It is well established that the intent of the parties to a written contract is to be regarded as being embodied in the writing itself, and when the words are clear and unambiguous, the intent is to be discovered only from the express language of the agreement. Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 661 (1982). The contract is ambiguous only if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. Hutchison v. Sunbeam Coal Corporation, 513 Pa. 192, 519 A.2d 385, 390 (1986).

The first determination to be made by the Board is whether or not the contract between the parties is ambiguous with respect to the provision of Section Eight of the Lease. Importantly, no one from the Claimant's side of the case testified that the contract was ambiguous. Secondly, the Board's review of Paragraph Eight confirms that the paragraph is clear and unambiguous. It requires the Lessee, upon request by the Lessor, to reimburse the Lessor for the reasonable and properly documented additional costs incurred in providing the above services beyond the normal hours of operation. There are several key words in this provision. Initially, there must be



a request by the Lessor. It is quite clear that Vartan has made a request upon the Defendant for reimbursement. Next, the costs must be reasonable. There has been expert testimony in this case indicating that the request of the Claimant is reasonable. Finally, the costs incurred must be properly documented. This is where the Claimant's case falls short. The Claimant offers no documented additional costs.

Since the contract is unambiguous, the words contained within it must be given their normal meaning. The key phrase to look at in the Lease is "properly documented." Webster's Dictionary defines the noun "document" as "an official paper that can be used to furnish evidence or information" and defines the verb as "to prove with, support by, or provide by documents." The Claimant did not provide any documentation indicating additional costs on the part of the Commonwealth for overtime usage. The Claimant only provided the results of swipe card activity by the Commonwealth that had no demonstrated correlation to actual overtime costs. In addition, the figure of 75¢ per square foot per month that Claimant wants to charge the Commonwealth appears to have been derived not from any documentation of costs, but rather from a determination that the number was "reasonable." The number may, in fact, be reasonable, but it has not been documented and, therefore, does not meet the requirements of the Lease. Because Claimant fails to provide properly documented additional costs, it cannot recover in this case.

Two defense witnesses, Ms. Cvejkus and Mr. Ritchie, who had nothing to gain or lose in the outcome of this hearing and whom the Board found credible, further discredit Claimant's argument. Ms. Cvejkus is a retired former Commonwealth employee, and Mr. Ritchie is Executive Director of the DCGA. Ms. Cvejkus testified that the Commonwealth was looking for

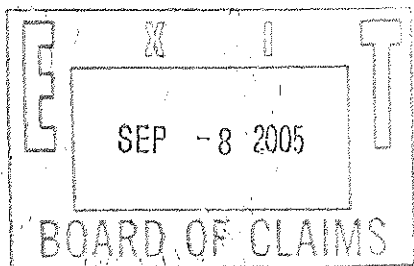
documented costs from Vartan, but received none. Mr. Ritchie testified that the costs of overtime could not be documented and were of a de minimus nature.

Claimant also makes a claim for unjust enrichment or quantum meruit on the basis of a quasi contract, or a contract implied in law. To recover under such a theory three elements must be met: (1) the plaintiff must have conferred a benefit upon the defendant; (2) there must have been appreciation of the benefit by the defendant; and (3) the defendant must have accepted and retained the benefit under circumstances rendering it inequitable for the defendant to retain the benefit without paying the plaintiff its reasonable value. Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc., 832 A.2d 501 (Pa. Super. 2003).

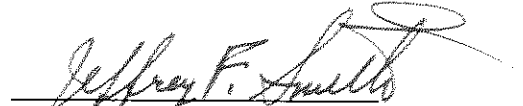
First of all, pursuant to our findings, Claimant has failed to establish that the benefit conferred upon Defendant was of anything other than de minimus in cost or value. Secondly, it is clear under Pennsylvania law that plaintiff, in an unjust enrichment case, is only entitled to recover if the enrichment of the defendant is unjust. We cannot conclude that Defendant's refusal to pay Claimant the additional sums demanded is unjust when there is an express provision in the written agreement between the parties dealing with this specific issue, and Claimant has not met the requirements of that provision. See e.g., Third National Bank and Trust Co. of Scranton v. Lehigh Valley Coal Co., 353 Pa. 185, 192-3, 44 A.2d 571, 574 (1945); Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999).


**ORDER**

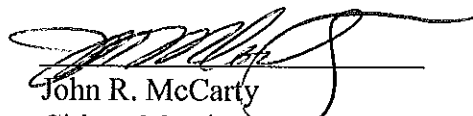
**AND NOW**, this 8th day of September, 2005, after hearing in this matter and a review of the briefs and record, it is hereby **ORDERED** and **DECREED** that the claim of Vartan Enterprises, Inc., against Commonwealth of Pennsylvania, Department of Transportation, acting through Department of General Services, is hereby **DENIED**. Each party shall bear its own costs and attorneys' fees.



BOARD OF CLAIMS

  
Jeffrey F. Smith  
Chief Administrative Judge

  
Ronald L. Soder, P.E.  
Engineer Member

  
John R. McCarty  
Citizen Member