No. APL-2019-00182

To be argued by:
OWEN DEMUTH
15 minutes requested

State of New York
Court of Appeals

IN THE MATTER OF THE APPLICATION OF
WENCESLAO JUAREZ, SERAFIN RODRIGUEZ, MICHELLE SORIANO,
DANIEL VELEZ, AND GORDON, JACKSON & SIMON, ESQS.,

Petitioners-Respondents,

-AGAINST-

NEW YORK STATE OFFICE OF VICTIM SERVICES, ELIZABETH CRONIN,
VIRGINIA MILLER, JOHN WATSON, AND MAUREEN FAHY, SUED IN THEIR
OFFICIAL CAPACITIES AS MEMBERS OF THE NEW YORK STATE OFFICE OF
VICTIM SERVICES,

Respondents-Appellants.

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules.

REPLY BRIEF FOR APPELLANTS

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Dated: February 14, 2020

Supreme Court, Albany County, Index No. 7770-16
Third Department No. 526699

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PRELIMINARY STATEMENT

In its response to the Office's appeal, petitioners parrot the Appellate Division's flawed statutory analysis in an effort to show that the Office's amended regulations limiting the availability of attorneys' fees are ultra vires. These arguments reflect little more than disagreements with the Office's discretionary decisions as to how to best implement the Legislature's goal of compensating crime victims for "reasonable attorneys' fees for representation before the [O]ffice and/or before the appellate division upon judicial review." Executive Law § 626 (1). For the most part, plaintiffs' policy arguments implicate the rationality of the amended regulations, not the Office's authority to promulgate them. Because the Office has authority under the statute to award "reasonable attorneys' fees" and the amended regulations merely identify which fees the Office will consider reasonable, the Office had authority to promulgate them.

ARGUMENT

THE OFFICE'S AMENDED REGULATIONS GOVERNING ATTORNEYS' FEES ARE A LAWFUL AND RATIONAL EXERCISE OF THE OFFICE'S STATUTORY AUTHORITY

Petitioners concede (Pet. Br. at 29) that the Office has the authority to deny attorneys' fees for work performed filling out the victim compensation claim form, but contend that the Office may do so only if it finds that such fees were unreasonable after a case-by-case analysis of the fee request. They maintain that the Office lacks authority to deny fees as unreasonable for exactly the same work under a general rule derived from the Office's experience implementing the statutory scheme.

Thus petitioners' argument reduces to the proposition that the statute forbids categorical rules of what is or is not reasonable attorney compensation, and affirmatively mandates a case-by-case analysis of *all* aspects of a request for attorneys' fees. But the statutory language on which petitioners rely does not say any of these things. Rather, the statute simply provides that out-of-pocket loss "shall . . . include . . . the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review." Executive Law § 626(1). It does not say that attorneys' fees "for representation before the

office" must be awarded for "all stages" of the claims process. Nor does it mandate a case-by-case examination of every phase of a fee application.

Although the statute specifies in considerable detail the process the Office's regulations must provide for determining crime victims' compensation claims, *see* Executive Law § 627(1)(a)-(g), the statute is largely silent as to what the Office's regulations must provide in determining attorneys' fee awards. Other than specifying that out-of-pocket loss shall include the cost of "reasonable attorneys' fees for representation before the office and/or before the appellate division" and that such fees may not exceed $1,000, Executive Law § 626(1), the statute does not dictate the substance of the Office's rules and regulations governing fee awards.

Thus, the statute does not dictate what methodology the Office must employ in determining the reasonableness of a request for attorneys' fees. What petitioners characterize as a limit on the Office's authority is their own policy preference for how the Office should determine attorneys' fee awards.

The Legislature gave the Office the authority to determine what approach is best. Based on its experience, the Office determined that

attorneys' fees for filling out the compensation claim form are unreasonable, given the ease of that task and the availability of victim assistance programs to help crime victims complete the forms. The Office's judgment in this regard is rational, even if it might also be rational to employ the approach petitioners and the Appellate Division demand.

Rather than identifying statutory language mandating a case-by-case analysis of all aspects of a fee application, petitioners point to the Office's own regulations, which provide for the determination of counsel fees based upon specified factors. *See* 9 N.Y.C.R.R. § 525.9(d). But nothing in the statute prohibits the Office from amending its regulations, as it did here, to provide that attorneys' fees are categorically unreasonable for the initial stage of the claims process, and should be considered under a multi-factor analysis for the remainder of the claims process. As further described in the Office's opening brief, there is no conflict between the new regulations and the pre-existing regulation providing for the use of specified factors. (Br. at 25-26.)

Petitioners' contention that the Office's regulations "overlook[] the more complicated cases" in which an attorney's assistance might be

needed (Pet. Br. at 5) does not establish that the Office lacked the statutory authority to promulgate them. *See* Office's Opening Br. at 29-30. The Office disputes the Third Department's conclusion that petitioner Soriano's application for emergency moving and storage benefits presents a matter that necessarily "require[es] the assistance of an attorney" (504). The forms to which the court referred are standard, preprinted forms that – like the initial claim form – are readily available on the Office's or other government websites, and no specialized legal expertise is required to complete them. In any event, the Office reasonably addressed the hypothetical "rare case" by funding and training its state-wide network of Victim Assistance Programs (VAPs), which are specially equipped to help crime victims navigate these situations.

Petitioners' arguments that the Office could not rationally rely on the availability of VAPs fare no better. Unable to deny that the VAPs are available to help crime victims complete the compensation claim forms, petitioners resort to accusing the Office of impropriety. Petitioners assert that the Office has a "policy" of "actively discouraging crime victims" from using attorneys to represent them before the Office, "punishes" crime

victims who use attorneys by refusing to reimburse them for legal services, and "pressures and threatens crime victims with attachments or liens" if they use attorneys (Pet. Br. at 27-28). The Office's motivation for this supposed policy, petitioners allege, is to "overfund its now vast VAP bureaucracy" (Pet. Br. at 28).

There is no evidence to support these allegations. Insofar as the amended regulations encourage crime victims to use the services of VAPs, such a result is consistent with article 22's goals. Also meritless is petitioners' contention that VAPs "deprive crime victims of their right to select counsel of their choice" (Br. at 28). As Supreme Court aptly observed in its June 2017 decision and order, "the amended regulations in no way affect a claimant's right to retain an attorney at any stage of the administrative process before [the Office] and upon judicial review" (R. 440).

Petitioners further assert that encouraging crime victims to use VAPs is irrational because applications submitted with the assistance of VAPs have a success rate that is "often well less than 50%," whereas "[t]he Gordon Firm enjoys a high degree of success" (Pet. Br. at 10). This contention ignores that private attorneys are free to choose only clients

with potentially meritorious claims, whereas VAPs may not refuse assistance to anyone who requests it. Petitioners also ignore that VAPs provide without charge many of the same services that any private attorney can offer with respect to the claim processing, at least at the beginning stages of a claim.

Finally, petitioners lack standing to challenge the part of the Office's amended regulations that limit attorneys' fees to "*successful* applications for administrative reconsideration or *successful* judicial appeal" (Pet. Br. at 3, 26). The Third Department specifically held that none of the petitioners suffered any direct harm from these amendments and, therefore, lacked standing to challenge them (R. 506-507). Petitioners have not cross-appealed, so this issue is thus not before the Court.

In any event, the amended regulations are not arbitrary merely because they require an administrative application to be successful in order to be eligible for attorneys' fees. That is no more than what article 22 and the Office's regulations have always required, *i.e.*, that there must first be an award before a claimant can recover attorneys' fees. 22 N.Y.C.R.R. former § 525.9(c) (the Office may approve reasonable

attorneys' fees "[w]henever an award is made to a claimant"). As even petitioner Gordon acknowledged, "[a]s private attorneys, we recognize that we do not receive compensation unless a successful application is submitted and all efforts are made to ensure successful treatment of the application" (R. 404).

CONCLUSION

The Third Department's order should be reversed and Supreme Court's judgment reinstated.

Dated: Albany, New York
February 14, 2020

Respectfully submitted,

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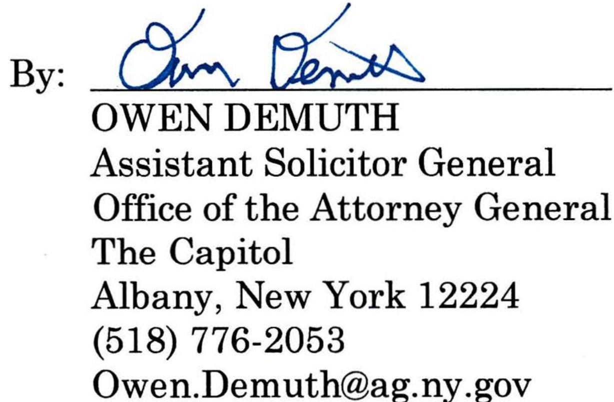

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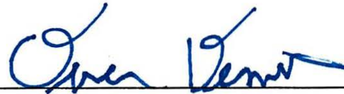
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Owen Demuth, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 1,358 words, which complies with the limitations stated in § 500.13(c)(1).



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