

Mo. No. 2019-533
APP. DIV. THIRD DEPT. NO. 526699
ALBANY COUNTY INDEX NO. 16-770

**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.,

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,

Appellants.

**RESPONDENTS' OPPOSITION TO APPELLANTS'
MOTION FOR LEAVE TO APPEAL**

BOIES SCHILLER FLEXNER LLP
George F. Carpinello
Teresa A. Monroe
Mark A. Singer
30 South Pearl Street
Albany, New York 12207
Tel: (518) 434-0600
Fax: (518) 434-0665
Attorneys for Respondents

Dated: June 13, 2019

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

ARGUMENT 3

CONCLUSION 7

DISCLOSURE STATEMENT..... 8

PRELIMINARY STATEMENT

Article 22 of the Executive Law empowers and obligates OVS to provide financial assistance to crime victims. In relevant part, Executive Law § 626(1) requires OVS to reimburse crime victims for out-of-pocket loss, which “shall . . . include . . . the cost of reasonable attorneys’ fees for representation before [OVS] and/or before the appellate division upon judicial review,” up to \$1,000. Consistent with that clear legislative mandate, OVS awarded attorneys’ fees to crime victims for work performed at the early stages of their claims for many years. In January 2016, however, OVS adopted new regulations that limit awards of counsel fees to only those incurred in the representation of clients in successful applications for administrative reconsideration or successful judicial appeal. Around the same time, without any statutory or regulatory authority, OVS began placing item-by-item caps on crime victims’ essential personal property (“EPP”) awards and also began capping attorneys’ fees at amounts equal to the total EPP awarded to crime victims.¹

As justification for its *ultra vires* acts, OVS relies on its decision to bestow dozens of millions of dollars annually upon its non-attorney Victim Assistance Programs (“VAPs”) throughout the State. The long and short of it, however, is that OVS does not get decide whether it is good or bad policy for victims to recover

¹ While OVS claimed below that the per-item EPP caps benefited crime victims, it is mathematically impossible for OVS’s capping practices to ever result in a larger total award to crime victims. Indeed, the caps had the effect of reducing total EPP awards to the Respondents in this case.

attorneys' fees for "representation before the office" at all stages of a claim. The Legislature has already spoken. The Legislature could have said that attorneys' fees may only be awarded in OVS's discretion when a victim successfully brings a motion for reconsideration before OVS or on a successful judicial appeal. But it did not.

While OVS denigrates the work performed by attorneys who represent crime victims as insufficiently "novel" or "complex" to warrant significant fees, fees for such work are already subject to a modest \$1,000 cap, even in cases that prove to be very time-consuming. As the Legislature recognized, attorneys need some incentive to be involved in these cases. Moreover, it is beyond dispute that the attorneys' work benefits their clients, who enjoy a much higher rate of success than crime victims that receive assistance from VAPs. If OVS believes as a policy matter that VAPs are a superior alternative to private attorneys, that is an argument OVS needs to make to the Legislature.

In sum, OVS has unilaterally and without statutory authorization taken it upon itself to eliminate attorneys from the representation of crime victims filing claims with OVS. For the reasons explained in greater detail below, leave to appeal to this Court should be denied.

PROCEDURAL HISTORY

By judgment dated April 29, 2016, the trial court invalidated (1) OVS's practice of capping the monetary value of individual EPP items at specific, predetermined amounts and (2) OVS's practice of capping attorneys' fees awards at the level of EPP awards. OVS did not appeal that judgment. The trial court held, however, that it was within OVS's power to award attorneys' fees only upon a successful administrative appeal or a successful judicial appeal.

By opinion and order dated January 31, 2019, the Appellate Division, Third Department, by a unanimous panel, annulled OVS's amended regulations that limit counsel fee awards for crime victims to fees incurred during successful administrative appeals and successful appellate judicial review, on the ground that the amended regulations are inconsistent with the language and purpose of the Executive Law and in excess of the authority granted to OVS by the Legislature.

By decision and order dated April 25, 2019, the Third Department denied OVS's request for leave to appeal the Third Department's January 31, 2019 opinion and order to this Court.

ARGUMENT

Leave to appeal is not warranted because this matter concerns a clear case of regulatory overreach and straightforward issues of statutory interpretation. As the Third Department correctly found, there is "no authorization in the statute's plain

language for OVS to conclude that counsel fees are never 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in every instance." A25, 1/31/2019 Order at 5 (emphasis in original). "Instead, Executive Law § 626 (1) uses broad, mandatory language in providing that out-of-pocket loss 'shall' include reasonable counsel fees for 'representation,' with no qualifications or limitations other than the \$1,000 ceiling." A26, 1/31/2019 Order at 6.

OVS argues that leave to appeal is warranted for three reasons: (1) the issues presented are of statewide importance because the regulations govern the award of fees to crime victims; (2) whether Executive Law § 626 prohibits OVS from adopting a rule that interprets the meaning of "reasonable" so as to limit fee awards to attorney work performed at certain stages, is a leave-worthy issue; and (3) whether OVS's categorical rule is rational is also a leave-worthy issue. These arguments fail for the following reasons.

First, the fact that this matter concerns vulnerable victims of crime cuts against permitting leave to appeal, because OVS would seek on appeal an order that permits it to reduce awards to crime victims by prohibiting the award of attorneys' fees incurred in connection with the preparation of their initial applications. As the Third Department correctly found, "the broad purpose of Executive Law article 22" is "to provide financial assistance to needy crime victims." A28, 1/31/2019 Order at 8.

That general purpose is not served by OVS's curtailment of crime victims' statutory rights.

Moreover, Appellants' assertion that awarding attorneys' fees for work performed at the early stages of crime victims' claims would be an unwarranted "drain" on the office's resources overlooks the fact that it is already the case that OVS need not award fees for work performed at the early stages of a claim where it properly finds, on a case-specific basis, that the fees incurred were unreasonable.

Second, whether article 22 of the Executive Law prohibits OVS from adopting a rule that interprets the meaning of "reasonable" so as to limit fee awards only to attorney work performed at certain stages is not a leave-worthy issue but rather a straightforward case of statutory interpretation. *See* A25, 1/31/2019 Order at 5. "Reasonable" is a well-understood term of art that inherently contemplates a case-by-case determination.

Even if OVS did have the authority to re-define "reasonable" to preclude awards for whole categories of tasks regardless of case-specific circumstances (and it does not), OVS's amended provisions "are not consistent" with another of its own regulations that "requires OVS to determine the reasonableness of a counsel fee award based upon specified factors, such as the time and labor required, the novelty and difficulty of the issues raised, the attorney's experience and skill and the results obtained." A27, 1/31/2019 Order at 7. As the Third Department correctly found,

“the language in Executive Law § 626 (1) that directs OVS to award reasonable counsel fees as part of reimbursement for out-of-pocket loss necessitates a case-by-case examination that applies the required regulatory factors to the circumstances of each application.” A28, 1/31/2019 Order at 8.

Third, whether OVS’s categorical rule that prohibits awards for fees incurred in connection with crime victims’ initial applications is rational is not a leave-worthy issue, because it is not a decision for OVS to make. The Legislature has already decided that crime victims’ out-of-pocket loss “shall . . . include . . . the cost of reasonable attorneys’ fees for representation before [OVS] and/or before the appellate division upon judicial review.” Executive Law § 626(1). That should be the end of the matter.

Moreover, contrary to Appellants’ contention, the Third Department did not misinterpret this Court’s precedents by finding that “categorical rules are per se irrational,” Appellants’ Motion at 21. Rather, the Third Department correctly found that OVS’s amended regulations are *ultra vires* because of the specific statutory language at issue in this case:

OVS’s internal decisions on how to allocate its resources for assisting crime victims in preparing claims *cannot countermand the statutory language that requires it to include reasonable counsel fees in awards for out-of-pocket loss*, nor may OVS refuse to allocate its resources for a purpose specifically directed by the Legislature. Whether VAPs provide sufficiently comprehensive assistance to replace representation by counsel in every claim that does not involve an administrative or judicial appeal is a policy determination to be made by the Legislature

and not by OVS, which may not, in the exercise of rule-making authority, engage in broad-based policy determinations.

A28-A29, 1/31/2019 Order at 8-9 (emphasis added) (quotation omitted).

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that Appellants' motion for leave to appeal be denied.

Dated: June 13, 2019
Albany, New York

BOIES SCHILLER FLEXNER LLP

By: 

George F. Carpinello

Teresa A. Monroe

Mark A. Singer

30 South Pearl Street

Albany, NY 12207

Telephone: (518) 434-0600

Facsimile: (518) 434-0665

Email: gcarpinello@bsflp.com

tmonroe@bsflp.com

msinger@bsflp.com

Attorneys for Respondents

DISCLOSURE STATEMENT

Gordon, Jackson & Simon, Esqs., is a New York law firm located at 70 East Sunrise Highway, Suite 500, Valley Stream, NY 11581. Gordon, Jackson & Simon, Esqs., has no parents, subsidiaries, or affiliates.