APP. DIV. THIRD DEPT. NO. 526699
ALBANY COUNTY INDEX NO. 16-770

Court of Appeals
Of the State of New York

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.

MOTION FOR LEAVE TO APPEAL

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Dated: May 30, 2019

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NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the annexed papers, and the record and briefs, the undersigned will move this Court at a Motion Term to be held on June 10, 2019, for an order granting appellants leave to appeal to the Court of Appeals. Leave to appeal is sought from the Opinion and Order of the Appellate Division, Third Department, entered January 31, 2019, which modified the judgment of Supreme Court (Platkin, J.), entered in Albany County on December 20, 2017.

The motion will be submitted without oral argument.

Dated: Albany, New York
May 30, 2019

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QUESTION PRESENTED

The Office's amended regulations (9 N.Y.C.R.R. §§ 525.3, 525.9) limit attorneys' fee awards for crime victim claimants to the costs incurred on applications for administrative reconsideration and on judicial review. The question presented is whether those regulations are rational and consistent with the Office's statutory authority to determine a claimant's eligibility for reasonable attorneys' fees.

TIMELINESS OF THIS MOTION

The Appellate Division's opinion and order, together with notice of entry, was served by regular first class mail on February 13, 2019 (A.20-31). On March 20, 2019, the Office moved in the Appellate Division for permission to appeal. That motion was denied in an order entered April 25, 2019, notice of entry of which was served by regular first class mail on April 26, 2019 (A.32-34). This motion is being served on May 30, 2019, within 35 days of service of notice of entry of the Appellate Division's order denying leave and is therefore timely. *See* C.P.L.R. 5513(d), 2103(b)(2).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal under C.P.L.R. 5602(a)(2). This combined article 78 proceeding and declaratory judgment action originated in the Supreme Court. In its opinion and order, the Appellate Division, Third Department granted the petition/complaint in part by declaring invalid and annulling 9 N.Y.C.R.R. § 525.9 to the extent it limits counsel fees awarded by the Office to those incurred in administrative appeals and/or judicial review (A. 29, 31). The Appellate Division's order remitted the matter to the Office to reconsider the counsel fee applications for two petitioners on a case-by-case basis (A. 29, 31).

In directing the Office on remittal to reevaluate the fee applications on a case-by-case basis, the Appellate Division's order requires the Office to take non-ministerial, quasi-judicial administrative action; consequently, the Appellate Division's order is non-final. However, because the order requires the Office to act in an adjudicatory capacity on remittal, this Court has jurisdiction to grant leave to appeal under C.P.L.R. 5602(a)(2). *See Matter of Mercy Hosp. of Watertown v. New York State Dept. of Social Services,* 79 N.Y.2d 197, 203 n.3 (1992); *Matter of the Power Authority of the State of New York v.*

Williams, 60 N.Y.2d 315, 323 (1983); *Matter of F. J. Zeronda, Inc. v. Town Bd.*, 37 N.Y.2d 198, 201 (1975).

The issues presented are preserved. The Office asserted in Supreme Court (R. 253-254, 266-272) and in its Appellate Division brief (pp. 12-22) that the Office's regulations were a lawful and rational exercise of the agency's statutory authority. These are pure questions of law.

STATUTORY AND REGULATORY BACKGROUND

Article 22 of the Executive Law authorizes the Office to provide financial assistance to persons who can demonstrate that they are the victims of a crime. Executive Law § 620; *see id.* § 623(5) (the Office has the authority to "hear and determine all claims for awards filed with the board pursuant to this article, and to reinvestigate or reopen cases as the board deems necessary"). The Office's determination to provide such assistance is "a matter of grace." Executive Law § 620 (declaration of policy and legislative intent).

The Office's enabling statutes provide that in its discretion, the Office may make awards to crime victims for "out-of-pocket loss," which includes "the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review."

Executive Law § 626(1). No attorneys' fees award may "exceed one thousand dollars." *Id.* Executive Law § 623(3) authorizes the Office to promulgate "rules for the approval of attorneys' fees for representation before the office and/or before the appellate division upon judicial review."

Exercising its rule-making authority, the Office enacted regulations which formerly provided that "[w]henever an award is made to a claimant who is represented by an attorney, the office shall approve a reasonable fee commensurate with the services rendered, up to $1000." 9 N.Y.C.R.R. former § 525.9(c). Such fees, if determined by the Office to be reasonable, were available "at all stages of a claim." 9 N.Y.C.R.R. former § 525.9(a).

THE OFFICE AMENDS ITS REGULATIONS

Effective January 13, 2016, the Office amended its regulations to limit an award of reasonable attorneys' fees to those incurred in either of two circumstances: "(1) the administrative review for reconsideration of such decision pursuant to section 627(2) of the Executive Law; and/or (2) the judicial review of the final decision of the office pursuant to section 629 of the Executive Law." 9 N.Y.C.R.R. § 525.9(a); *see id.*

§ 525.3(h) (defining "reasonable attorneys' fees" as those reasonably incurred by a claimant during the two stages described in section 525.9[a]).

Like the old regulations, the new rules capped attorneys' fees awards at $1000, and required the Office to first consider a statement of services rendered provided by the crime victims' attorney and the factors in section 525.9(d). And in those two circumstances where attorney's fees are available, the Office continued to evaluate their reasonableness using the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the fee customarily charged in the locality for similar legal services;
> (3) the amount involved and the results obtained;
> (4) the time limitations imposed by the client or by the circumstances;
> (5) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (6) whether any part of the cost of the legal service provided to the claimant has been paid or is payable by a third party.
>
> 9 N.Y.C.R.R. § 525.9(d)

The amended rules were formally promulgated after the Office fully complied with the relevant notice, public comment and publication requirements of the State Administrative Procedure Act § 322; *see*

(170-172). In a Regulatory Impact Statement, the Office cited Executive Law § 623(3) as its promulgation authority. This statute authorizes the Office to "adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law" (172).

The basic purpose of the new regulations was to clarify which fees were "reasonable" (172). Under the old rule, "one could assert that attorneys' fees include any assistance during the course of a claim–from assisting victims and/or claimants in completing and submitting the [the Office] claim applications themselves, to making phone calls to check on the status of a claim on a claimant's behalf" (*id.*). In the agency's view, because these largely clerical tasks were not "reasonable expenses," the old regulations "far exceed[ed] the scope of the law" (*id.*).

In finding that such expenses were not reasonable, the Office considered the increasing importance of federally and state-funded Victim Assistance Programs (VAPs) (*id.*). *See* https://ovs.ny.gov/victim-assistance-program. The VAPs provide free, 24-hour assistance to crime victims who wish to file claims for reimbursement under Executive Law article 22. Unlike private attorneys, VAPs cannot pick their clients. The Office "funds 228 local [VAPs] across New York State, distributing in

excess of $35 million to these programs to assist and advocate on the behalf of victims and claimants" (172). VAPs are required "to assist victims and/or claimants in completing and submitting [Office] applications," and to provide assistance "through[out] the claim process" (*id.*).

The amended regulations were necessary, the agency explained, because the old regulations "far exceed the plain language of the law and are not what the Legislature intended in [the office's] enacting statute" (*id.*). The old regulations covered expenses, including attorneys' fees, that "cannot be considered reasonable expenses, particularly when [the office] has invested so much in building a statewide network of VAPs, serving every county in New York State, to assist in this very matter" (*id.*).

FACTS AND PROCEDURAL HISTORY

Represented by the Gordon law firm, petitioners applied for awards from the Office at various times between 2001 and 2016, seeking reimbursement of losses they allegedly suffered as a result of crimes committed against them (366-370, 379-385). Only the applications of Velez and Soriano were affected by the amended regulations. The Office compensated them for loss of "essential personal

property." *See* Executive Law §§ 621(8), 631(9). Neither award, however, was eligible for attorneys' fees under the amended regulations, because they did not involve a successful request for administrative reconsideration or judicial review (373, 390).

Petitioners commenced this combined declaratory judgment action and article 78 proceeding in December 2016 (20-39). Petitioners alleged that the Office's amended regulations were "arbitrary, capricious and ultra vires" because they were "contrary to the plain language of the Executive Law and the stated intent of the Legislature," which—according to petitioners—envisioned that attorneys' fees would be awarded "without restriction" (35-36).

The Office moved to dismiss the petition, supported by an affidavit from its General Counsel, John Watson, who explained that the amended regulations effectuated the Legislature's stated intention that attorneys' fees awards be reasonable. He observed that "[t]he process of preparing and submitting a claim for reimbursement to [the Office] is neither novel nor difficult, nor does it require any specialized, legal services" (327). Indeed, Watson noted that "[m]any thousands of [the Office's] claimants do so without any third-party assistance every year" (327). And the statewide network of 223 local VAPs, to whom the Office

distributed "in excess of forty-three (43) million dollars," were always available to claimants needing third-party assistance (327). Watson explained that because the old regulations allowed for attorneys' fees to be awarded based on "any assistance during the course of a claim," including the making of phone calls, perfunctory completion of claim forms and other simple tasks, such fees were not reasonable and thus "far exceeded the scope of the law" (321).

DECISIONS BELOW

Supreme Court (Platkin, A.J.S.C.) dismissed the petition, holding that the Office's amended regulations constituted an appropriate and lawful exercise of its authority under article 22 of the Executive Law (A. 2-19).

The Third Department reversed, holding that the Office's regulations conflicted with the statute because the statute did not distinguish "among the stages of a victim's representation before [the Office]" (A. 25-26). Additionally, that court held that the amended regulations conflicted with another Office regulation that required the agency to evaluate attorney's fees awards using certain fact-specific criteria (A.27). In the Third Department's view, "[t]hese factors necessarily contemplate a case-by-case examination of the

circumstances of each claim" (*id.*). The amended regulation, however, "disregards these specified factors and precludes such case-by-case consideration for fees incurred in the early stages of a claim, determining the reasonableness of a fee award based solely upon the stage of representation when the fees were incurred – a factor that does not appear in the regulation." (*id.*, citing 9 N.Y.C.R.R. § § 525.9[d]).

Finally, the Third Department disputed the Office's rationale that crime victim applications for compensation at the preliminary stages were necessarily pro forma, noting that one of the victims had made a request for an emergency award that required the attachment of several additional forms, in addition to the Office's standard application (A.27-28). Accordingly, the court annulled the Office's regulations limiting the availability of attorney's fees and remitted the matter to the Office to reconsider the applications for counsel fee awards on a case-by-case basis, regardless of the stage to which the claim had progressed (A.31).

REASONS FOR GRANTING LEAVE TO APPEAL

POINT I

THE ISSUES PRESENTED ARE OF STATEWIDE IMPORTANCE

The Third Department's order warrants review by this Court for several reasons. First, the regulations govern the award of fees to crime victims statewide, so the case is of public importance. If the Appellate Division's decision is allowed to stand, there are thousands of claims before the Office that attorneys may seek to reopen in attempts to secure the $1,000 attorney fee award readily available under the former regulations. And the more of these unnecessary attorneys' fee awards the Office is required to pay out, the less money the Office will have to compensate crime victims.

The resulting drain on the amount of Office funds available for distribution works to the detriment of the very crime victims whom the statute is designed to protect; indeed, the fee applications often exceed the actual compensation sought by the victims. For example, the Gordon law firm sought $937.50 in attorneys' fees for Juarez, who received a $315 award (85, 87, 95-97). Additionally, the Gordon law firm sought $1,437.50 in attorneys' fees for assisting Rodriquez, who received an award of just $205 (99-100, 108-109). And this firm

submitted an application for $1,250 in attorneys' fees based on the Office's $125 award to Soriano (131-132). Even after applying the $1,000 limit on fee awards, the fees would be multiple times greater than the victims' award—even though much of the attorney time was spent performing clerical tasks such as completing the form and making simple requests for client information (*see, e.g.* 96-97, 108-109, 393-394).

This perverse scenario undermines the Legislature's intent. The Third Department's opinion disrupts the reasonable balance the Office's regulations strike between the salutary goal of compensating crime victims for their losses and the need to conserve limited program funds.

POINT II

THE ISSUES PRESENTED RAISE NOVEL QUESTIONS CONCERNING THE OFFICE'S AUTHORITY TO ENACT CATEGORICAL RULES GOVERNING FEE AWARDS

Second, this appeal raises a leave-worthy issue on the proper interpretation of Executive Law § 626(1), governing fee awards for crime victims. In annulling the challenged regulation, the Third Department emphasized that the statute provides that reimbursement for crime victims "shall" include the cost of reasonable attorneys' fees for representation before the Office. Nevertheless, a leave-worthy issue is raised concerning whether that language prohibits the Office from

adopting categorical rules that interpret the meaning of "reasonable" so as to limit fee awards to attorney work performed at certain stages. The very same statute confers on the Office the authority to determine "reasonable attorneys' fees" in the first instance. Contrary to the Third Department's view, the statute contemplates that the Office has the authority *not* to award attorneys' fees if it determines that an award would not be reasonable under the circumstances. *See Matter of Kigin v. State of New York Workers' Comp. Bd.*, 24 N.Y.3d 459, 467 (2014) (holding that because the Legislature authorized the Workers Compensation's Board to issue a list of pre-authorized medical procedures, "[t]hat determination necessarily meant that the Board consider what is *not* best practice and what may *not* be medically necessary") (emphasis in original).

In Executive Law § 626(1), the Legislature authorized the Office to compensate crime victims for out-of-pocket losses, but only for those "reasonably incurred" because of the crime, including "the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review not to exceed one thousand dollars." Reading section 623(3)'s authorization to the Office to adopt rules governing the approval of attorneys' fees together with

section 626(1)'s requirement that attorneys' fees be "reasonable," the Office plainly has the authority to make categorical judgments about when fees may or may not qualify as "reasonable."

Based on its experience adjudicating applications for crime victim compensation, the Office determined that, in the overwhelming majority of cases, assistance by an attorney is not necessary for the simple task of filling out an application form. As the Office's general counsel explained, the former regulations were so open-ended that "one could assert that attorneys' fee includes any assistance during the course of a claim," including such simple tasks as assisting claimants in completing and submitting the claim applications themselves and making phone calls to check on the status of a claim (321; see 172, 479). These forms have even been available on the Office's website for several years, before Velez and Soriano filed their claims; indeed, Velez utilized this application (376-385). *See* https://ovs.ny.gov/victim-compensation. (providing link to Victim Services Portal, permitting claimants to upload documents in support of their claim and to monitor its progress). The completion of these forms, the Office determined, "is neither novel nor difficult, nor do [they] require any specialized, legal services" (483).

Indeed, "[m]any thousands of [the Office's] claimants do so without any third-party assistance every year" (483).

Consequently, the Office determined that fee awards for this stage of the process are not reasonable, and embodied its judgment in categorical rules that promote administrative efficiency and consistent decision-making. Even if, as the Third Department found, in rare cases assistance with completing those forms would be useful or needed, the Office reasonably determined that this need would be adequately met by the numerous victim assistance programs throughout the state. These programs are available to assist victims in completing the forms free-of-charge.

The Third Department concluded that Executive Law § 626(1) did not authorize the Office "to conclude that counsel fees are *never* 'reasonable' during the early stages of the claim" (A.24 [emphasis in original]). However, nothing in the statute *prohibits* the Office from adopting rules that impose categorical limits on fee awards. The statute does not require the Office to determine all fee applications on a case-by-case basis. Rather, it gives the Office discretion to determine whether fee applications are reasonable either on a case-by-case basis or by using categorical rules, or by some combination of both. Thus, in

invalidating the Office's regulations, the Appellate Division ignored settled law holding that "an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose." *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 221 (2017), citing *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 N.Y.3d 249, 254 (2004).

POINT III

THE RATIONALITY OF THE CHALLENGED REGULATION PRESENTS A LEAVE-WORTHY ISSUE

Finally, the Third Department's concern about the rare cases where crime victims need assistance to complete the application forms implicates the *rationality* of the challenged regulation, not the Office's *authority* to promulgate it. Whether the categorical rule at issue here is rational is itself a leave-worthy question. Although the Appellate Division observed that other Office regulations contemplated case-by-case evaluations of fee awards, the Office was empowered to modify its own regulatory scheme based on its experience adjudicating applications for fee awards. Because the Office accounts for the rare

cases where assistance is needed in completing the forms through the victim assistance programs, it was rational to exclude fees for this stage of the process.

Contrary to the Appellate Division's reasoning, nothing in this Court's precedents suggests that categorical rules are per se irrational. Although this Court has invalidated across-the-board reductions in reimbursement when there was no rational basis for them, *see New York Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 167-168 (1991), it has upheld categorical reimbursement limitations when they are supported by the agency's expertise and experience. *See Matter of Sigety v. Ingraham*, 29 N.Y.2d 110, 114 (1971) (50% standard was rational based on Commissioner's experience that efficiently run nursing homes will have costs below that standard).

Like the Commissioner in *Matter of Sigety v. Ingraham*, here the Office has, based on its expertise and experience, "simply announced in advance that certain . . . costs will be rejected as unreasonable." 29 N.Y.2d at 115; *accord Matter of Old Republic Life Ins. Co. v. Wikler*, 9 N.Y.2d 524, 531 (1961) (upholding Insurance Superintendent's rate standards that declared in advance that certain rates are unreasonable). Requiring the Office to review every fee application on a

case-by-case basis to determine whether the costs incurred at the application stage were reasonable would needlessly sap the agency's limited resources and create the risk of inconsistent decisions. At the very least, further review by this Court on these issues of statewide importance is warranted.

CONCLUSION

Leave to appeal should be granted.

Dated: Albany, New York
May 30, 2019

Respectfully submitted,

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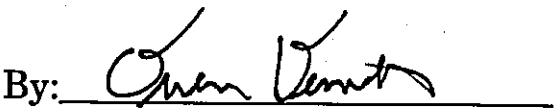
Attorney for Appellants

By: 
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STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of
WENCESLAO JUAREZ, SERAFIN RODRIQUEZ, MICHELLE SORIANO, DANIEL VELEZ and GORDON, JACKSON & SIMON, ESQS.,

Petitioners/Plaintiffs,

DECISION, ORDER & JUDGMENT

-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/Defendants.

Index No. 7770-16

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Hon. Richard M. Platkin, A.J.S.C.

This combined CPLR article 78 proceeding/declaratory judgment action was brought by four crime victims who filed claims with respondent New York State Office of Victim Services ("OVS") as well as the law firm that represented them in connection with their claims. Petitioners challenge amended regulations adopted by OVS in January 2016 that limit awards of attorneys' fees incurred by crime victims in pursuing benefits under Article 22 of the Executive Law. Petitioners also challenge OVS's administrative practice of imposing caps on awards for essential personal property and attorneys' fees. OVS opposes the petition/complaint through an answer and cross-moves for summary judgment dismissing the petition/complaint in its entirety.

BACKGROUND

A. Statutory and Regulatory Background

Article 22 of the Executive Law ("Article 22") was enacted by the Legislature to provide compensation to innocent crime victims "as a matter of grace" (Executive Law § 620). OVS is an office in the executive department established to administer this compensation program, fund services for crime victims and advocate for the benefit of crime victims (*see id.* § 622; Watson Aff., ¶ 3).

Crime victims are permitted to file a claim with OVS for out-of-pocket losses, including "the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review not to exceed [$1,000]" (Executive Law § 626 [1]). OVS is responsible for promulgating rules governing the determination of claims, and these rules must ensure that crime victims receive notice of their right to be represented by counsel and their potential eligibility for an award of attorneys' fees (*see id.* § 627 [1] [a]). In addition, Article 22 charges OVS with the duty to "adopt, promulgate, amend and rescind suitable . . . rules for the

approval of attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review . . . , and rules for the authorization of qualified persons to assist claimants in the preparation of claims for presentation to [OVS]" (*id.* § 623 [3]).

Prior to the adoption of the regulations challenged herein, the agency's regulations governing representation of claimants by an attorney provided, in pertinent part:

> Parties have the right to be represented before [OVS], at all stages of a claim, by an attorney-at-law duly licensed to practice in the State of New York and/or before the Appellate Division upon judicial review of [OVS's] final determination. [OVS] shall provide written notification to an applying claimant and/or victim of their right to representation by counsel, as well as their potential eligibility for an award of attorney's fees pursuant to [Executive Law 626 § (1)]
>
> * * *
>
> Reasonable attorney's fees must be approved by [OVS] which may require a written statement of services rendered. Whenever an award is made to a claimant who is represented by an attorney, [OVS] *shall* approve a reasonable fee commensurate with the services rendered, up to $1,000. Fees may be disallowed in cases when [OVS] finds that a claim was submitted without legal or factual basis and/or the claim or action is without merit and frivolous

(9 NYCRR former 525.9 [a], [c] [emphasis added]).

Effective January 13, 2016, OVS amended 9 NYCRR 525.9 (a) to provide that "only those [attorneys'] fees incurred by a claimant during: (1) the administrative review for reconsideration of [initial agency] decision . . . and/or (2) the judicial review of the final decision of [OVS] . . . may be considered for reimbursement by [OVS]" (*see also* 9 NYCRR 525.3 [h]). The amended regulations further provide that such an award of attorneys' fees "*may* be approved by [OVS]" upon "successful" administrative or judicial review (9 NYCRR 525.9 [c] [emphasis added]).

The stated purpose of the regulatory amendments was to better reflect the Legislature's intent in authorizing an award of attorneys' fees to crime victims:

> By enacting . . . Executive Law [§] 626 (1), the Legislature sought to ensure that [OVS] could reimburse out-of-pocket losses including the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review of a final determination of [OVS]. The current regulations surrounding this provision, however, far exceed the scope of the law. Under current regulations, one could assert that attorneys' fees include any assistance during the course of a claim – from assisting victims and/or claimants in completing and submitting the OVS claim applications themselves, to making phone calls to check on the status of a claim on a claimant's behalf. Reading the plain language of the law, these are not reasonable expenses and not what the Legislature intended.
>
> Additionally, the OVS funds 228 local Victim Assistance Programs (VAPs) across New York State, distributing in excess of $35 million to these programs to assist and advocate on . . . behalf of victims and claimants. Among the requiring duties of these VAPs, they are to assist victims and/or claimants in completing and submitting OVS applications and assist claimants through the claim process with [OVS]

(Verified Pet. & Compl., Ex. 18; *see* Watson Aff., ¶¶ 7-8).

Article 22 also provides reimbursement for a crime victim's loss of essential personal property ("EPP"), which is defined as "articles of personal property necessary and essential to the health, welfare or safety of the victim" (Executive Law § 621 [8]). Awards for EPP losses "shall be limited to [$500], except that all cash losses of [EPP] shall be limited to [$100]" (*Id.* § 631 [9]).

OVS, through its general counsel, maintains that it has been the agency's "longstanding practice . . . to place" what it describes as "reasonable caps on individual items of EPP when multiple items are requested for reimbursement," a practice that is said to "allow[] a claimant to replace multiple EPP items that are necessary and essential" within the $500 aggregate cap

(Watson Aff., ¶ 17). OVS also has determined "that it is unreasonable to think that a person would incur attorney fees in an amount greater than the value of that which is recovered" (*id.*, ¶ 25). For this reason, the agency has adopted a policy of capping attorneys' fee awards at an amount equal to the claimants' EPP recovery.

B. Factual and Procedural Background

Petitioners Wenceslao Juarez, Serafin Rodriquez,[1] Michelle Soriano and Daniel Velez are crime victims who applied for awards with OVS or its predecessor, the Crime Victims Board ("Board").[2] Petitioner Gordon, Jackson & Simon, Esqs. ("the Gordon firm") represented each of the individual petitioners.

Juarez filed a claim with the Board on March 26, 2010. On July 19, 2016, OVS received Juarez's request to reopen his claim for consideration of EPP. The items listed on his EPP Verification Form totaled $651, most of which consisted of clothing and also included a watch. In an amended decision dated August 12, 2016, OVS reimbursed Juarez $315 for his EPP losses. In so doing, OVS applied per-item caps to individual items of EPP. OVS subsequently received a statement of itemized attorneys' fees from the Gordon firm in the amount of $937. In an amended decision dated September 8, 2016, OVS reimbursed Juarez, via payment to the Gordon firm, an additional $315 for counsel fees.

Rodriquez filed his claim with the Board on November 7, 2001. In a decision dated July 26, 2002, prior to his representation by the Gordon firm, the Board awarded Rodriquez $295 for EPP items. On July 19, 2016, OVS received Rodriquez's request to reopen his claim for consideration of EPP. The items listed on his EPP Verification Form, mainly clothing and a

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[1] This petitioner's last name is spelled as "Rodriguez" in his certain of the papers.

[2] OVS succeeded the Board in June 2010 (*see* L 2010, ch 56, pt A-1, § 7, eff. June 22, 2010).

watch, totaled $1,380. In an amended decision dated October 27, 2016, OVS reimbursed Rodriquez an additional $205 for EPP losses. OVS also received a statement of itemized attorneys' fees from the Gordon firm in the amount of $1,437 and, in the same decision, awarded Rodriquez the sum of $205 in counsel fees.

Soriano filed her claim with OVS on June 17, 2016 with the assistance of the Gordon firm and listed EPP losses totaling $625, which included clothing worth $125 and a dining set valued at $500. In a decision dated June 29, 2016, OVS provided full reimbursement for the clothing, but denied reimbursement for the dining set because that loss was not reported to the police. Soriano's application was reviewed under the amended provisions of 9 NYGRR part 525, and OVS therefore refused to award her claimed attorneys' fees of $1,250.

Velez filed his claim with OVS on March 28, 2016. He initially listed EPP items on his application as "cash/touth," totaling $7,000. The items listed on his EPP Verification Form totaled $495, and in a decision dated October 18, 2016, OVS awarded Velez $365, which reflected the imposition of per-item caps on his claimed EPP losses. As with Soriano's application, Velez was not awarded attorneys' fees.

On December 22, 2016, petitioners commenced this hybrid CPLR article 78 proceeding/declaratory judgment action challenging: (1) the amended regulations that limit the availability of attorneys' fees; (2) the denial of Soriano and Velez's applications for counsel fees; (3) the capping of non-cash EPP awards on a per-item basis; and (4) the capping of Juarez and Rodriquez's counsel fees awards at an amount equal to their EPP awards. The individual petitioners also asserted a claim based on 42 USC § 1983, alleging that OVS unconstitutionally interfered with their right to counsel.

By Decision & Order dated June 2, 2017, this Court partially granted respondents' pre-answer motion to dismiss the petition to the extent of: (1) determining that Juarez and Rodriquez lacked standing to challenge the amended regulations governing awards of attorneys' fees, and Rodriquez and Soriano lacked standing to challenge OVS's imposition of a per-item cap on individual items of EPP; (2) dismissing the Gordon firm as a petitioner for lack of standing; and (3) dismissing the claims alleging interference with the individual petitioners' right to counsel for failure to state a cause of action.

ANALYSIS

In considering petitioners' claims, the Court is mindful that Article 22 "constitutes a limited departure from the common law and should be strictly construed" (*Matter of Gryziec v Zweibel*, 74 AD2d 9, 14 [4th Dept 1980, Hancock, Jr., J.]; *see Matter of Rigaud v Crime Victims Compensation Bd.*, 94 AD2d 602, 603 [1st Dept 1983]). "There is no legal right to be awarded the aid but rather, it is granted explicitly 'as a matter of grace'" (*Matter of Rigaud*, 94 AD2d at 603, quoting Executive Law § 620; *see Matter of Starkman v Fischetti*, 252 AD2d 845, 847 [3d Dept 1998], *lv denied* 92 NY2d 815 [1998]; *Matter of Meditrust Fin. Servs. Corp. v New York Crime Victims Bd.*, 226 AD2d 881, 882-883 [3d Dept 1996]).

A. Regulations Limiting Awards of Attorneys' Fees

Petitioners assert that the amended regulations, which formed the basis of the denial of Rodriquez and Soriano's claims for attorneys' fees, must be annulled because they are in conflict with Article 22. In particular, petitioners allege that the amended regulations conflict with Executive Law § 626 (1), which states that "[o]ut-of-pocket loss . . . *shall* . . . include . . . the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review not to exceed [$1,000]" (emphasis added).

The first cause of action alleges that, because the amended regulations limit awards to attorneys' fees incurred in the successful representation of claimants on applications for administrative reconsideration or judicial review and make such awards discretionary in nature, the rules are contrary to the plain language and legislative intent of Article 22. The second cause of action alleges that the denial of Soriano and Velez's applications for reimbursement of attorneys' fees pursuant to the new regulations is arbitrary, capricious and *ultra vires*. OVS responds that the amendments to 9 NYCRR 525.3 and 525.9 constitute an appropriate exercise of the agency's express authority under Article 22 to adopt rules governing the approval of reasonable attorneys' fees for representation before OVS.

The standard of judicial review of an administrative regulation is limited to assessing "whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious" (*Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995]). "An administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise," and "the party seeking to nullify such a regulation has the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence" (*id.*; *see Matter of West Vil. Comm. v Zagata*, 242 AD2d 91, 96 [3d Dept 1998]). "To meet this 'limiting' standard, petitioners must show that the [subject regulations] are 'so lacking in reason' that they are 'essentially arbitrary'" (*Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 226-227 [2017], quoting *Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]).

OVS "possesses the powers expressly conferred by [Article 22], as well as those required by necessary implication" (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 608 [2015], quoting *Matter of City of New York v State of N.Y. Comm. on Cable*

Tel., 47 NY2d 89, 92 [1979]). "To that end, an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose" (*Matter of Acevedo*, 29 NY3d at 221, citing *Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]). An agency may not, however, adopt rules that are contrary to the clear language of the statute or its underlying purpose (*see Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991]; *Matter of Regan v Crime Victims Compensation Bd.*, 57 NY2d 190, 195-196 [1982]).

In adopting Article 22, the Legislature authorized OVS to compensate crime victims for their out-of-pocket losses, but only for those losses "reasonably incurred" as a result of the crime, including "the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision" (Executive Law § 626 [1]). Further, in addition to the customary authority of an administrative agency "[t]o adopt . . . suitable rules and regulations to carry out the provisions and purposes of [the laws it is charged with administering]," the Legislature expressly granted OVS the authority to make "rules for the approval of attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision" (*id.* § 623 [3]). The Court is satisfied that OVS's broad authority to adopt rules governing the approval of attorneys' fees for representation before the agency, together with the agency's duty to award only reasonable reimbursement to crime victims, provides a sufficient statutory predicate for excluding attorneys' fees incurred in the preparation and submission of claims as, in the judgment and discretion of OVS, "not reasonable expenses" (Verified Pet. & Compl., Ex. 18).

Moreover, the same subdivision that directs OVS to adopt "rules for the approval of attorneys' fees for representation before the office and/or before the [A]ppellate [D]ivision upon

judicial review" also requires the agency to adopt "rules for the authorization of qualified persons to assist claimants in the preparation of claims for presentation to the office" (Executive Law § 623 [3]). Thus, the statutory scheme itself recognizes a distinction between "representation before the office" and "assist[ing] claimants in the preparation of claims," thereby lending support to the agency's decision to exclude the latter when reimbursing the former.

Based on the foregoing, the Court is unpersuaded by petitioners' contention that the provisions of the amended regulations limiting compensable attorneys' fees to those incurred on applications for administrative review and judicial review are contrary to the clear language of Article 22 or its purpose (*cf. Matter of Regan*, 57 NY2d at 195-196). Thus, petitioners have failed to establish that OVS exceeded the scope of its rule-making authority by limiting reimbursement for attorneys' fees to those incurred by the claimant during administrative and/or judicial review.

Nor have petitioners established that the amended regulations are arbitrary or irrational insofar as they exclude from reimbursement attorneys' fees incurred in the preparation and submission of claims "as not reasonable expenses." In adopting the amended regulations, OVS specifically cited its funding of 228 local Victim Assistance Programs ("VAPs") across New York State, by which more than $35 million is distributed to assist crime victims in, among other things, completing and submitting OVS applications and navigating through the agency's claim process (Verified Pet. & Compl., Ex. 18). Thus, as the executive agency charged with administering Article 22, OVS reasonably could determine that it was an unnecessary use of the limited State funds available for the compensation of crime victims to provide reimbursement to private attorneys for providing essentially the same services made available to claimants at no cost through the State-funded VAPs.

Having concluded that petitioners have failed to demonstrate any infirmity in the provisions of the amended regulations limiting reimbursement of attorney's fees to those incurred on applications for administrative review and judicial review, the second cause of action, alleging the improper denial of Soriano and Velez's applications for reimbursement of attorneys' fees must be dismissed. Further, as none of the petitioners was affected by provisions in the amended regulations that limit reimbursement of attorneys' fees to successful applications for administrative or judicial review or that may permit the agency to deny an award of attorneys' fees even on such successful applications, the Court concludes that petitioners lack standing to assert the remaining challenges to the amended regulations (*see Matter of Acevedo*, 29 NY3d at 218 ["each petitioner has standing only to challenge those aspects of the (r)egulations that are triggered by his or her application"]).

B. Administrative Caps on Awards

Petitioners also challenge OVS's admitted longstanding practices of imposing per-item caps on EPP awards and capping attorneys' fees at the amounts awarded for EPP losses. Petitioners argue that the challenged practices conflict with the plain text of Executive Law § 631 (9), which caps the entire EPP award at $500 and cash losses at $100, and Executive Law § 626 (1), which caps an award of attorneys' fees at $1,000, respectively. Petitioners also argue that the agency's practices constitute rules under the State Administrative Procedure Act ("SAPA") and, as such, must be promulgated in accordance with the SAPA process in order to be given effect. OVS responds that the challenged practices do not conflict with the governing statutes, and petitioners have failed to show that the practices are anything other than interpretations of preexisting statutes and rules.

1. Ultra Vires

As an initial matter, the Court rejects petitioners' contention that the agency's imposition of per-item caps on EPP is inconsistent with Executive Law § 631 (9), which imposes an aggregate cap of $500 on EPP award and a $100 cap on cash awards. There is nothing in the cited statute or elsewhere in Article 22 that expressly prohibits OVS from imposing a per-item cap on non-cash items of EPP, and the Court does not believe that the Legislature's establishment of an overall cap on EPP awards or a cap on cash losses was intended to preclude the agency from exercising its broad regulatory discretion to adopt caps for particular categories of EPP. Moreover, Executive Law § 631 (9) does not require OVS to award the full $500 available for EPP or prohibit it from reimbursing claimants for losses on a basis other than replacement cost. In fact, in defining EPP as items of personal property that are "necessary and essential to the health, welfare or safety of the victim" (Executive Law § 621 [8]), the Legislature plainly contemplated the exercise of judgment and discretion by the executive branch agency.

And there certainly is nothing arbitrary, irrational or unreasonable about capping reimbursement for such items at reasonable levels, consistent with the Legislature's purpose in reimbursing crime victims for the loss of personal property that is necessary and essential to their health, welfare or safety.[3] Further, as articulated by agency's counsel, the imposition of per-item caps reduces the burdens on crime victims by eliminating any requirement that they submit purchase receipts and by allowing their claims to be determined in an expedited fashion.

The Court reaches a different conclusion, however, with respect to OVS's practice of capping awards of counsel fees at an amount equal to the claimant's EPP recovery. Executive

[3] For example, items of clothing may well constitute essential personal property, but the agency reasonably could determine that a claimant who loses a $500 pair of pants does not require $500 replacement pants in order to meet his or her "necessary and essential" needs (*see* Watson Aff., ¶ 16)

Law § 626 (1) expressly establishes an overall cap of $1,000 on such awards, and 9 NYCRR 525.9 (d) sets forth a list of six, non-exclusive factors that *shall* be considered by OVS "in determining the reasonableness of a fee [request]," of which only one looks to "the amount involved and the results obtained" (*id.* [d] [3]). OVS has failed to articulate any coherent basis for reconciling the challenged policy with the terms of the governing statute and the regulations previously adopted by the agency. Nor has OVS established a rational basis for its determination that "it is unreasonable to think that a person would incur attorney fees in an amount greater than the value of which is recovered" (Watson Aff., ¶ 25). While parties to administrative proceedings and litigation rarely set out *a priori* to incur counsel fees in an amount greater than their expected recovery, OVS's determination ignores the fact a claimant's ultimate recovery is unknown until the agency or court renders its final determination.[4]

Accordingly, the Court concludes that OVS's practice of capping attorneys' fee awards at the level of EPP awards is *ultra vires*.[5] As a result, petitioners are entitled to judgment on their fourth cause of action, and OVS's determination to cap the attorneys' fees awarded to Juarez and Rodriquez at the level of their EPP losses must be annulled and remitted to the agency for redetermination.

2. SAPA

Petitioners further contend that OVS's imposition of per-item caps on EPP constitutes a rule for purposes of SAPA's requirements of public notice and comment (*see* SAPA § 102 [2] [a] [i]; *see also* NY Const, art IV, § 8). A rule is defined as "the whole or part of each agency

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[4] This is particularly so with respect to EPP awards, since it appears that the agency's award constitutes the claimant's first notice of the per-item caps imposed by the agency.

[5] In view of this conclusion, the Court need not consider petitioners' remaining challenges to this practice.

statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to an agency or the procedure or practice requirements of any agency" (SAPA § 102 [2] [a] [i]). Excluded from this definition are "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (*id.* § 102 [2] [b] [iv]). Although "there is no clear bright line between a 'rule' or 'regulation' and an interpretative policy" (*Cubas v Martinez*, 8 NY3d 611, 621 [2007]), "[b]lanket requirements and fixed standards that are to be generally applied in the future, regardless of individual circumstances, are rules subject to the [SAPA]'s rule-making procedures" (*Matter of Homestead Funding Corp. v State of N.Y. Banking Dept.*, 95 AD3d 1410, 1412 [3d Dept 2012]; *see Matter of SLS Residential, Inc. v New York State Off. of Mental Health*, 67 AD3d 813, 816 [2d Dept 2009], *lv denied* 14 NY3d 713 [2010]).

Applying these principles, the Court concludes that the challenged agency practice of imposing per-item caps on EPP constitutes a rule within the meaning of SAPA. By OVS's own admission, the caps on individual items of EPP are "rigid, numerical polic[ies] invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors" (*Matter of Schwartfigure v Hartnett*, 83 NY2d 296, 301-302 [1994]; *see Matter of Kahrmann v Crime Victims Bd.*, 14 Misc 3d 545, 549-550 [Sup Ct, Albany County 2006]), and the challenged practice has not been shown to be of the type that "vest[s agency personnel] with significant discretion, and allow[s] for flexibility in the imposition of [the caps]," notwithstanding the "specif[ic] numerical formulas" relied upon by OVS (*Matter of New York City Tr. Auth. v New York State Dept. of Labor*, 88 NY2d 225, 229-230 [1996]).

Further, the challenged practice directly dictates the substantive outcome arrived at by the agency, thereby distinguishing this case from *Cubas*, where the policy at issue merely established

a "procedure for the agency to follow in deciding who meets a predetermined test" (8 NY3d at 621). Nor is this a case like *Matter of Cavetti v Proud* (139 AD3d 1054 [2d Dept 2016], *lv denied* 28 NY3d 912 [2017]), wherein the administrative agency's implementation of certain standardized allowances for purposes of calculating social services benefits was made pursuant to a comprehensive regulatory scheme that contemplated the agency's establishment of such allowances and periodic adjustments thereto (*see id.* at 1057-1058; *see also Matter of Organization to Assure Servs. for Exceptional Students v Ambach*, 56 NY2d 518, 521 [1982] [annual tuition rates]; *Matter of Eden Park Health Servs. v Axelrod*, 114 AD2d 721, 722-723 [3d Dept 1985] [annual Medicaid reimbursement rates]). Here, in contrast, there is no statutory or regulatory predicate for OVS to impose per-item caps on EPP or to periodically establish and revise a schedule of maximum allowable amounts for particular classes of items.

In response to petitioners' *prima facie* showing that the agency is applying a fixed standard to EPP claimants without regard to individual circumstances, OVS argues that it merely is interpreting preexisting statues and rules. In particular, OVS asserts that it has "interpreted the statutorily imposed caps on EPP in such a manner that a claimant can replace multiple EPP items that are necessary and essential without the restriction of the $500 cap" (Respondents' Brief, p. 20; *see* Watson Aff., ¶ 17). However, there is no statutory or regulatory predicate for the imposition of a per-item cap on EPP awards, and OVS's practice of determining EPP claims by reference to a schedule of per-item caps goes well beyond merely interpreting or explaining the general policies or rules of the agency (*cf. Matter of Stewart v NYC Tr. Auth.*, 115 AD3d 1046, 1047 [3d Dept 2014]; *Matter of Board of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v State of New York*, 110 AD3d 1231, 1233-1234 [3d Dept 2014], *lv denied* 22 NY3d 861 [2014]).

Based on the foregoing, the Court concludes that OVS's practice of capping individual EPP losses at specific, predetermined amounts constitutes a rule for SAPA purposes, rendering such policy invalid as not having been properly promulgated (*see Matter of Schwartfigure*, 83 NY2d at 302; *cf. Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept. of State*, 130 AD3d 1190, 1195 [3d Dept 2015]). Accordingly, OVS's determination to impose per-item EPP caps on Juarez and Velez must be annulled (*see Matter of Kahrmann*, 14 Misc 3d at 550).

Finally, the petition/complaint seeks permanent injunctive and mandamus relief. Such remedies are not available where, as here, petitioners have an adequate remedy at law (*see Kane v Walsh*, 295 NY 198, 206 [1946]; *Dyno v Rose*, 260 AD2d 694, 699 [3d Dept 1999]; *Grogan v Saint Bonaventure Univ.*, 91 AD2d 855, 855 [4th Dept 1982]; *cf. Forest Close Assn., Inc. v Richards*, 45 AD3d 527, 529 [2d Dept 2007]).

CONCLUSION

Based on the foregoing, it is

ADJUDGED that the petition is granted to the extent of declaring invalid respondents' practices of (i) determining EPP claims by reference to a schedule of per-item caps and (ii) capping attorneys' fees at amounts equal to EPP awards, in accordance with the foregoing, and the petition is denied in all other respects; and it is further

ADJUDGED and **DECLARED** that the January 13, 2016 amendments to 9 NYCRR 525.3 and 525.9, insofar as applicable herein, constitute an appropriate and lawful exercise of OVS's authority under Article 22 of the Executive Law to adopt rules governing the approval of reasonable attorneys' fees for representation before the agency; and it is further

ORDERED that respondents' motion for summary judgment dismissing the petition is granted in part and denied in part, in accordance with the foregoing; and finally it is

ORDERED that the matter is remitted to respondent New York State Office of Victim services for further proceedings in accordance with this decision.

This Decision, Order & Judgment is being transmitted to the counsel for petitioners/plaintiffs; all other papers are being transmitted to the Albany County Clerk for filing. The signing of this Decision, Order & Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

Dated: Albany, New York
December 14, 2017

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

1. Notice of Petition, dated December 22, 2016; Verified Petition and Complaint, dated December 22, 2016, with attached exhibits; Affidavit of Bryan Gordon, sworn to December 21, 2016, with attached exhibits; Memorandum of Law in Support of Petitioners'/Plaintiffs' Verified Petition and Complaint, dated December 22, 2016;

2. Notice of Cross-Motion, dated July 10, 2017; Answer, dated July 5, 2017, with attached exhibits; Affidavit of John Watson, sworn to July 5, 2017; Affirmation of Denise P. Buckley, Esq., dated July 10, 2017; Memorandum of Law in Support of Respondents-Defendants' Answer and Cross Motion Seeking to Dismiss the Verified Petition and Complaint, dated July 10, 2017;

3. Memorandum of Law in Opposition to Respondents-Defendants' Motion for Summary Judgment and in Further Support of Petitioners-Plaintiffs' Verified Petition and Complaint, dated July 24, 2017; and

4. Memorandum of Law in Reply to Petitioners-Plaintiffs' Opposition to Respondents-Defendants' Answer and Cross Motion for Summary Judgment.

BSF | BOIES SCHILLER FLEXNER

February 13, 2019

16-215835

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VIA U.S. MAIL AND EMAIL
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Re: *Juarez et al. v. New York State Office of Victim Services et al.*
No. 526699

Dear Owen:

In connection with the above-captioned matter, enclosed please find a copy of the Appellate Division, Third Judicial Department's Opinion and Order, which was decided and entered on January 31, 2019.

Sincerely,

George F. Carpinello

Encl.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 31, 2019 526699

In the Matter of WENCESLAO JUAREZ et al.,
Appellants,
v
OPINION AND ORDER

NEW YORK STATE OFFICE OF VICTIM SERVICES et al.,
Respondents.

Calendar Date: December 13, 2018

Before: Garry, P.J., Egan Jr., Devine, Aarons and Pritzker, JJ.

Boies Schiller Flexner LLP, Albany (Mark Singer of counsel), for appellants.

Letitia James, Attorney General, Albany (Owen Demuth of counsel), for respondents.

Garry P.J.

Appeal from a judgment of the Supreme Court (Platkin, J.), entered December 20, 2017 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, among other things, partially granted respondents' motion for summary judgment dismissing the petition/complaint.

Petitioners Wenceslao Juarez, Serafin Rodriquez, Michelle Soriano and Daniel Velez are crime victims who were represented by petitioner Gordon, Jackson & Simon, Esqs. (hereinafter the

law firm) in applications to respondent Office of Victim Services (hereinafter OVS) for compensation awards pursuant to Executive Law article 22. Specifically, in May 2016, the law firm represented Soriano in a claim for losses of emergency personal property (hereinafter EPP). OVS made an EPP award and denied Soriano's request for counsel fees. Soriano applied for reconsideration of the counsel fee denial, and OVS affirmed its prior decision.[1] In March 2016, the law firm represented Velez in a claim for EPP losses. OVS made an EPP award, but declined to award counsel fees. The law firm also represented Juarez and Rodriquez in claims for EPP losses and counsel fees.

In December 2016, the individual petitioners and the law firm commenced this hybrid action and proceeding to challenge amended regulations adopted by OVS in January 2016. In pertinent part, these regulations limit awards of counsel fees to those incurred in the representation of clients in applications for administrative reconsideration or judicial review (see 9 NYCRR 525.9 [a], [c]).[2] Respondents filed a pre-answer motion to dismiss the petition/complaint. In June 2017, Supreme Court granted the motion in part, finding, as pertinent here, that the law firm lacked standing as it was not a crime victim within the scope of protection of Executive Law article 22. The court further found that Soriano and Velez had standing to challenge the amended counsel fee regulations, but that Juarez and Rodriquez did not, as their applications were not determined pursuant to the amendments. The court dismissed claims in the petition/complaint to that extent. No appeal was taken from these determinations.

Thereafter, respondents filed an answer and moved for summary judgment dismissing the petition/complaint in its

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[1] Soriano did not make a separate application for counsel fees incurred in applying for reconsideration.

[2] The petition/complaint also challenged administrative practices by which OVS imposed per item caps on EPP awards and capped counsel fee awards in the same amount as EPP awards. In December 2017, Supreme Court found that these practices were invalid and granted the petition/complaint to that extent.

entirety. In December 2017, Supreme Court partially granted respondents' motion. As relevant here, the court found that OVS did not exceed the scope of its rule-making authority by limiting counsel fee awards to those incurred during requests for administrative reconsideration and judicial review, that it was not arbitrary or irrational to exclude reimbursement for counsel fees incurred in the initial preparation of claims and that no petitioner had standing to challenge certain other provisions in the amended regulations. The court issued a judgment declaring that, to the extent of these determinations, the amended counsel fee regulations were an appropriate and lawful exercise of OVS's statutory authority, and granted summary judgment dismissing the claims in the petition/complaint that challenged the denial of counsel fees pursuant to the amended regulations. Petitioners appeal.

The Legislature's purpose in enacting Executive Law article 22 was to recognize and address the need to provide crime victims with financial assistance "as a matter of grace" (Executive Law § 620). The legislation empowers OVS to award compensation to victims for "[o]ut-of-pocket loss," which is defined to mean "unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which [a victim's] claim is based," including "the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review not to exceed [$1,000]" (Executive Law § 626 [1]; see Executive Law § 629 [1]).

Executive Law § 623 (3) authorizes OVS to adopt regulations for the approval of counsel fee requests. Pursuant to that authority, OVS adopted regulations that formerly provided that crime victims making claims for compensation had the right to be represented by counsel "at all stages of a claim" (9 NYCRR 525.9 former [a]). The regulations previously further provided that "[w]henever an award is made to a claimant who is represented by an attorney, [OVS] shall approve a reasonable fee commensurate with the services rendered, up to $1,000" (9 NYCRR 525.9 former [c] [emphasis added]; see

Executive Law § 626 [1]). The January 2016 amendments challenged here no longer provide that victims have a right to representation by counsel, stating instead that "victim[s] may choose to be represented . . . at any stage of a claim" (9 NYCRR 525.9 [a] [emphasis added]). They further provide that awards for counsel fees "may be considered" only for fees incurred in successful administrative reconsideration reviews and judicial review (9 NYCRR 525.9 [a]; see 9 NYCRR 525.3 [h]; 525.9 [c]). The amendments eliminated the requirement that reasonable counsel fees "shall" be paid when an award is made to a claimant represented by counsel, as well as a provision that had previously allowed OVS to disallow counsel fee claims upon its determination "that a claim was submitted without legal or factual basis and/or the claim or action is without merit and frivolous" (9 NYCRR 525.9 former [c]). The new regulation instead provides that "[OVS] may approve a reasonable fee commensurate with the services rendered, up to $1,000" (9 NYCRR 525.9 [c] [emphasis added]; see 9 NYCRR 525.9 [a]).

In a regulatory impact statement, OVS asserted that it made the amendments because the former regulations "far exceed[ed] the scope of [Executive Law § 626 (1)]," permitting claimants to "assert that attorneys' fees include any assistance during the course of a claim – from assisting victims and/or claimants in completing and submitting the OVS claim applications themselves, to making phone calls to check on the status of a claim on a claimant's behalf. Reading the plain language of the law, these are not reasonable expenses and not what the Legislature intended." OVS also noted that it distributes more than $35 million to fund 228 Victim Assistance Programs (hereinafter VAPs) located throughout the state for the purpose of providing assistance to crime victims in making claims for compensation.

Turning first to Supreme Court's determination that OVS did not exceed its statutory authority, an administrative agency possesses "those powers expressly conferred by its authorizing statute, as well as those required by necessary implication" (Matter of City of New York v State of N.Y. Commn. on Cable Tel., 47 NY2d 89, 92 [1979]; accord Matter of Acevedo v New York

State Dept. of Motor Vehs., 29 NY3d 202, 221 [2017]). Where, as here, the Legislature has directed an agency to enact regulations that further the statutory scheme, "[the] agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib., 2 NY3d 249, 254 [2004]; accord Matter of County of Westchester v Board of Trustees of State Univ. of N.Y., 32 AD3d 653, 655 [2006], mod 9 NY3d 833 [2007]). We need not defer to OVS's statutory interpretation, as the question whether the amendments in the counsel fee regulations are consistent with the language and purposes of Executive Law article 22 is "one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" (Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 [1980]; see Matter of Till v Apex Rehabilitation, 144 AD3d 1231, 1234 [2016], lv denied 29 NY3d 909 [2017]).

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 [A]ppellate [D]ivision upon judicial review" (emphasis added). Our primary purpose in interpreting this provision "is to discern the will of the Legislature and, as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (Matter of Lawrence Teachers' Assn., NYSUT, AFT, NEA, AFL-CIO v New York State Pub. Empl. Relations Bd., 152 AD3d 171, 173 [2017] [internal quotation marks, brackets and citation omitted], lv denied 30 NY3d 904 [2017]). Applying these principles, we find 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. Neither this statutory language nor the similar language of Executive Law § 623 (3) — that authorizes OVS to promulgate regulations for the approval of counsel fees "for representation before [OVS] and/or before

the [A]ppellate [D]ivision" – distinguishes among the stages of a victim's representation before OVS, nor does the statutory text suggest that OVS may do so. 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.[3] "[A]n administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute" (Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg, 78 NY2d 194, 204 [1991]).

Moreover, nothing in the statement of legislative purpose for Executive Law article 22 – providing that "many innocent persons suffer personal physical injury or death as a result of criminal acts," that "[s]uch persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance" and that "there is a need for government financial assistance for such victims of crime" – suggests any legislative intent to limit the amount of "aid, care and support" available under the legislation based merely upon the stage of a claim's progress (Executive Law § 620). The general provision that aid is available "as a matter of grace" does not contradict the specific statutory language that mandates the inclusion of reasonable counsel fees in awards for out-of-pocket loss (Executive Law § 620; see Executive Law § 626 [1]).

We further note that Executive Law § 627 (1) directs OVS to determine victims' claims for compensation in accordance with

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[3] We disagree with Supreme Court that the statutory provision authorizing OVS to adopt "rules for the authorization of qualified persons to assist claimants in the preparation of claims for presentation to [OVS]" indicates a legislative intent to distinguish between "representation before [OVS]" and "assist[ing] claimants in the preparation of claims" for the purpose of counsel fee awards (Executive Law § 623 [3]). This provision authorizes OVS to develop regulations for programs that assist victims, such as VAPs (see 9 NYCRR 525.22); nothing in its language indicates that it was intended to address OVS's authority to award counsel fees.

for a move, and itemized estimates from two moving and storage companies, as well as a counsel fee invoice for approximately five hours of representation comprising conferences and communications made to assemble the supporting documents and gain information about the underlying crimes and circumstances, as well as drafting the application.

Counsel's application was successful; OVS made an emergency award of approximately $1,400 to the victim for moving and storage expenses, in addition to a later award for EPP losses. However, OVS denied the request for counsel fees under the amended regulations solely because they were not incurred during an administrative appeal or judicial review, with no consideration of such apparently pertinent regulatory factors as the skill, time and labor required, the time limitations imposed by the circumstances or the results obtained (see 9 NYCRR 525.9 [d]). To deny this counsel fee application simply because it was made at the outset of the victim's claim is not consistent with the broad purpose of Executive Law article 22 to provide financial assistance to needy crime victims, nor with the statutory language directing the inclusion of reasonable counsel fees in awards for out-of-pocket loss. Moreover, foreclosing victims who need emergency benefits from obtaining the assistance of counsel -- or requiring them to pay their own counsel fees for such assistance -- is inconsistent with the legislation's stated objective to protect such victims from "undue hardship" (Executive Law § 630 [1]). Instead, 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.

We reject respondents' contention that the amendments were proper as crime victims do not need the assistance of counsel during the early stages of a claim due to the availability of VAPs throughout the state. The substantial investment made by OVS in funding and developing VAPs lies within the agency's statutory authority, and has likely resulted in significant benefits to many victims. Nevertheless, OVS's internal

decisions on how to allocate its resources for assisting 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 public policy determinations" (Rent Stabilization Assn. of N.Y. City v Higgins, 83 NY2d 156, 169 [1993], cert denied 512 US 1213 [1994]; accord Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib., 2 NY3d at 254; Matter of County of Westchester v Board of Trustees of State Univ. of N.Y., 32 AD3d at 655).

The provisions in the amended regulations that limit counsel fee awards for crime victims to administrative appeals and judicial review are inconsistent with the language and purposes of Executive Law article 22 and in excess of the authority of OVS (see Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg, 78 NY2d at 203-204; Matter of New York Constr. Materials Assn., Inc. v New York State Dept. of Envtl. Conservation, 83 AD3d 1323, 1328-1329 [2011]; Matter of Colonial Life Ins. Co. of Am. v Curiale, 205 AD2d 58, 64 [1994]). Accordingly, the amended regulations must be annulled to that extent and the matter remitted to OVS for reconsideration of the counsel fee applications by Soriano and Velez under the factors set out in 9 NYCRR 525.9 (d). Petitioners' contention that the challenged amendments are arbitrary and capricious is rendered academic by this determination.

Finally, Supreme Court properly determined that no petitioner has standing to challenge provisions in the amended counsel fee regulations that limit counsel fee awards to successful applications and that may permit OVS to deny counsel fee awards even when an application is successful. A showing of an injury-in-fact is required to establish standing, and a

petitioner who challenges regulations "has standing only to challenge those aspects of the [r]egulations that are triggered by his or her application" (Matter of Acevedo v New York State Dept. of Motor Vehs., 29 NY3d at 218; see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772-773 [1991]). Here, the record reveals that counsel fees were denied to Soriano and Velez based upon the regulatory provisions that limited counsel fee awards to those incurred in administrative appeals or upon judicial review. Neither award was denied based upon a lack of success in the underlying application or as a matter of discretion, and the counsel fee applications by Juarez and Rodriquez were not decided under the amended regulations. As petitioners suffered no direct harm as a result of these amendments, they lack standing to challenge them (see Matter of Acevedo v New York State Dept. of Motor Vehs., 29 NY3d at 218-219; Matter of Ellison v Stanford, 147 AD3d 1122, 1123 [2017], lv denied 29 NY3d 908 [2017]).

Egan, Jr., Devine, Aarons and Pritzker, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as granted respondents' motion for summary judgment dismissing (1) that part of the petition/complaint as sought a declaration that 9 NYCRR 525.9 as amended improperly limits counsel fee awards by respondent Office of Victim Services to those incurred in administrative appeals and/or judicial review, and (2) that part of the petition/complaint as sought to annul the amended regulations to that extent; motion denied to said extent, said amendments to 9 NYCRR 525.9 annulled and matter remitted to said respondent for reconsideration of the applications for counsel fee awards as more fully set forth herein; and, as so modified, affirmed.

ENTER:

Robert D Mayberger

Robert D. Mayberger
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

IN THE MATTER OF THE APPLICATION OF

WENCESLAO JUAREZ, SERAFIN RODRIQUEZ, MICHELLE SORIANO, DANIEL VELEZ, and GORDON, JACKSON & SIMON, ESQS.,

Appellants,

—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.

A.D. Index No. 526699
Albany County Index No. 16-770

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order on Motion for Permission to Appeal in this action, dated April 25, 2019, and entered in the Office of the Clerk of the Court of the Appellate Division, Third Judicial Department on April 25, 2019.

Dated: April 26, 2019

BOIES SCHILLER FLEXNER LLP

By: _____

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Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 25, 2019 526699

In the Matter of WENCESLAO JUAREZ et al.,

Appellants,

v

NEW YORK STATE OFFICE OF VICTIM SERVICES et al.,

Respondents.

DECISION AND ORDER ON MOTION

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Garry, P.J., Aarons and Pritzker, JJ., concur.

Egan Jr. and Devine, JJ., dissent.

ENTER:

Robert D. Mayberger
Clerk of the Court

First Class Mail

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