

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

In the Matter of

§

No.

Petitioner,

HON. JAMES R. GIDDINGS

v

MICHIGAN DEPARTMENT OF HUMAN
SERVICES and JAY W. SEXTON,
Administrative Law Judge,

Respondents.

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**RESPONDENT'S SUPPLEMENTAL BRIEF
OPPOSING AWARD OF FEES OR COSTS**

After hearing oral argument on August 15, 2008, the Court allowed Respondent to file a supplemental brief to address Petitioner's theories for seeking attorney fees, as laid out in her Reply Brief. In that brief, she misstated facts and relied on documents that were not in the administrative record. Thus, *e.g.*, her "supplemental statement of facts,"¹ was inaccurate in stating that the Trust attorney filed her October 2006 request for hearing "to dispute the conclusion that a review of the Trust's assets was necessary." The request for hearing does not mention this point.² And although Petitioner was correct in noting that a "verification checklist" did not appear in the record,³ she did sign an "Authorization to Release Information" on September 15, 2006 that stated "I need a record of all the items and their value that are contained in the ... r Trust."⁴ Petitioner admitted that she did not supply this information.⁵ Finally, any extra-record arguments and documents are not properly before the Court.⁶

¹ Reply, 8/27/07, at 1.

² Administrative Record [R], Tab 2, p 22.

³ Reply, 8/27/07, at 2.

⁴ R, Tab 2, p 31. The absence of a "verification" form from the record is thus immaterial.

⁵ Reply, 8/27/07, at 2 ("the only information that was able and required to give to the Department was a copy of the Trust itself.") Yet, she provided no evidence that this was the only information she was able to supply, and no authority for the claim that this was the only information she was required to supply.

⁶ MCL 24.304(3).

I. Petitioner's position has shifted since she filed her appeal in October 2006. Contrary to her stance today, DHS local office and the Administrative Law Judge cannot be faulted because they only addressed questions put to them at the time.

In seeking an award of attorney fees in a moot⁷ administrative appeal, Petitioner obfuscates the facts, the chronology of events and the arguments. Part of this confusion arises because two law firms represented her, advancing distinct positions:

Attorney _____ drafted the Trust.⁸ Her law firm represented _____ at the February 15, 2007 administrative hearing. Clearly unfamiliar with the administrative appeals process, this law firm:

- on October 11, 2006, purported to appeal an internal and preliminary memorandum dated September 18, 2006 that discussed the Trust;
- never addressed DHS's stated basis for its action: Petitioner's failure to document the Trust's assets and payments; and
- instead based her arguments solely on her reading of the Trust under DHS policy.

Attorney _____:

- did not appear before the ALJ and did not submit the Trust to him;
- instead, appeared two months later, when she filed the Petition for Review of the ALJ's decision on April 27, 2007; and
- expanded the appeal into a broad-based assault on the ALJ, faulting him for the first attorney's failure to create a record.

In October 2006, Petitioner requested an administrative hearing. This was premature in that DHS had not yet reached a decision about her continued Medicaid eligibility. At that time, DHS still awaited information to decide whether the 2003 Trust impacted Petitioner's continued

⁷ "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). A year ago, DHS withdrew the negative action that Petitioner appealed. Since this Court "may affirm, reverse or modify the decision or order or remand the case for further proceedings." MCL 24.306(2). Since Petitioner already got relief on the merits, and did not seek fees or costs on the administrative record, there is nothing more for this Court to order. The appeal is moot.

⁸ R, Tab 2, p 44.

eligibility.⁹ As a result, the administrative hearing only addressed the issue on which DHS took action, *i.e.*, her failure to timely provide this information. Even though Petitioner ostensibly requested a hearing on an "adverse action" (a preliminary memo) different from the action DHS took (failure to supply information), DHS did not terminate her Medicaid coverage.¹⁰

Petitioner's second attorney's April 27, 2007 Petition for Review raised **for the first time** a claim that she was not required to verify information about the Trust.¹¹ On or about June 18, 2007, DHS filed the record and transcript. On July 27, 2007, DHS counsel advised Petitioner's counsel that DHS was prepared to remand the matter to the local DHS office to see if Medicaid coverage could be approved with no break. Petitioner's counsel refused to dismiss the appeal without payment of fees and costs. Nonetheless, in September 2007,¹² DHS told the Court it had reversed its adverse action, thereby mooting the appeal.

II. There is no legal or factual basis for Petitioner's claim for attorney fees and costs.

Once DHS reinstated Petitioner's Medicaid coverage a year ago, there was no legitimate reason for her not to dismiss the Petition for Review. Her insistence on pursuing attorney fees and costs is unprecedented, particularly when the Court did not need to rule on the merits.

And in fact Petitioner has offered no applicable legal authority for her request. She tries to avoid "[t]he general rule in Michigan [that] **prohibits an award of attorney fees as an element of costs or damages absent express authorization by statute or court rule.**"¹³ Toward this end, she cites several court rules, MCR 2.625, 7.101(O), 7.101(P), and 7.105(N), and Chapter 8

⁹ See, "Authorization to Release Information," dated 9/13/06, which Petitioner signed two days later. R, Tab 2, p 31. The worker explained: "I need a record of all the items and their value that are contained in the Trust ... [in order to determine] continued eligibility."

¹⁰ See, 1979 AC, R 400.904(5).

¹¹ Petition for Review, 4/27/07, ¶ 5.

¹² "Suggestion of Mootness," 9/10/07. Petitioner does not dispute that the appeal is moot.

¹³ *Abston v Aetna Casualty & Surety Co*, 131 Mich App 26, 30-31; 346 NW2d 63 (1983) (emphasis added; citations omitted).

of the Administrative Procedures Act [APA], MCL 24.321-.328.¹⁴ She ignores the fact that, while the APA fees provision might extend to cover costs or fees incurred during the period from the first agency action through the final appeal, the Court Rules only apply to costs or fees incurred in connection with the Circuit Court appeal itself. But, because none of these authorizes an award of attorney fees in the situation presented here, her request should be denied.

- A. The APA does not authorize an award of fees in matters that are resolved, and explicitly excludes an award in a welfare appeal such as this one.

The APA allows an adversely-affected party to seek an award of attorney fees and costs – at a maximum rate of \$75/hour¹⁵ – under limited circumstances:

(1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:

(a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.

(b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.

(c) The agency's legal position was devoid of arguable legal merit.

In a request for costs and fees under the APA, the decision-maker is the "presiding officer." Contrary to Petitioner's belief, this term does **not** include the Court.¹⁶ Instead, it is "an agency,"¹⁷ one or more members of the agency, a person designated by statute to conduct a contested case, or a hearing officer designated and authorized by the agency to conduct a

¹⁴ Respondent should note that Chapter 8 was added to the 1969 APA *via* 1984 PA 196.

¹⁵ MCL 24.323(5)(b).

¹⁶ *See*, Resp Brief, 8/13/07, p 13.

¹⁷ Because the APA's definition of "agency" excludes judicial agencies, MCL 24.203(2), and "court" is separately defined, MCL 24.203(5), Petitioner cannot reasonably contend that the Legislature intended that a court can also be an agency's presiding officer.

contested case."¹⁸ Thus, Petitioner should seek APA relief from the presiding officer (ALJ) who heard her appeal. Either party could then appeal an adverse ALJ ruling to this Court.

Even if she were to submit this request to an ALJ, however, Petitioner would need to meet the APA's threshold, *i.e.*, that she prevailed in a contested case. The APA explains that the term "contested case" "**does not include a case that is settled.**"¹⁹ When DHS resolved this matter for Petitioner a year ago, it ceased to be a contested case. Because it was resolved, it follows that she did not prevail. The Chapter 8 fees provisions do not apply.

In addition, one of the five explicit exceptions to the APA's Chapter 8 fees provisions removes this appeal from the Chapter altogether: "(e) Department of social services public assistance hearings under section 9 of the social welfare act, Act No. 280 of the Public Acts of 1939, being section 400.9 of the Michigan Compiled Laws."²⁰ Since the ALJ's Hearing Decision states that the hearing was conducted "pursuant to MCL 400.9 and MCL 400.37,"²¹ this appeal falls squarely within this exception. Chapter 8 of the APA does not apply to **any** public assistance appeal.

At oral argument, Petitioner tried to avoid this conclusion by suggesting that this exception only applied to the former Department of Social Services, not to the present Department of Human Services. This alleged distinction cannot withstand scrutiny. In the 2004 Executive Order that gave the Department its current name,²² the Governor explained that the

¹⁸ MCL 24.322(4).

¹⁹ MCL 24.322(1) (emphasis added).

²⁰ MCR 24.315(3)(e).

²¹ Hearing Decision, 3/21/07, at 1. Petitioner waived any argument that the hearing was not conducted under these statutes because she (a) requested a hearing under MCL 400.9 (R, Tab 2, p 22); (b) failed to object to any aspect of the ALJ's conduct of the hearing; and (c) in particular, failed in her Petition for Review to identify error in the ALJ's stated statutory basis.

²² EO 2004-38. Exhibit A.

Department of Social Services became the Family Independence Agency as a result of 1995 PA 223, and then (as a result of her Order) become the Department of Human Services. Only the agency's name changed; its place in the Michigan Compiled Laws remained the same.

More importantly, Petitioner's reading of this exception would make MCL 24.315(3)(e) a nullity.²³ In her view, because there is no "department of social services," this subparagraph would **never** come into play. Because Petitioner cannot circumvent the APA exception in MCL 24.315(3)(e) on this basis, she is barred from seeking attorney fees and costs under the APA.

B. MCR 2.625 does not apply in administrative appeals; nor does it authorize costs or fees when "prohibited by statute."

At another point in her brief, Petitioner acknowledges that the Court of Appeals has held that MCR 2.625 does not apply in administrative appeals.²⁴ Yet, she argues that she can recover fees and costs under this Court Rule. Because she has offered no legal basis for her position, the Court should reject this theory.

If the Court continues to consider Petitioner's claim under MCR 2.625, this Rule allows an award of costs "unless prohibited by statute."²⁵ But in MCL 24.315(3)(e), the Legislature concluded that Chapter 8 attorney fees are not available in public assistance appeals. Finally, because the matter was resolved before the Court needed to address the merits, the definition of "contested case" removed this matter from Petitioner's APA-based claim for fees.

²³ *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992) (courts are "instructed to avoid any construction that would render a statute, or any part of it, surplusage or nugatory.")

²⁴ Reply Brief, 8/27/07, at 7, citing *Commonwealth Power Co v Dept of Natural Resources*, unpublished Michigan Court of Appeals, Nos 204399, 210844 (3/21/04), *Slip op* at 3. Although Petitioner did not comply with MCR 7.215(C)(1), DHS includes a copy of this decision with this brief. Exhibit B.

²⁵ MCR 2.625(A)(1).

When Petitioner filed her Reply Brief, she knew that DHS was about to reinstate her Medicaid coverage,²⁶ but apparently thought this Court could still reverse the ALJ's decision.²⁷ While MCR 2.625 allows an award of attorney fees if DHS's position were "frivolous" within the meaning of MCL 600.2591, Petitioner again trips over the "prevailing party" hurdle. That is, MCL 600.2591 states: "(b) 'Prevailing party' means a party who wins on the entire record." By its terms, this statute does not apply to matters where the Court does not reach the merits: a matter that became moot was not a win.²⁸ To this effect, the Court of Appeals observed that it would be inappropriate to apply this section when a matter has been resolved²⁹:

We will not construe MCL 600.2591; MSA 27A.2591 in a manner that has a chilling effect on advocacy or prevents the filing of all but the most clear-cut cases. Nor will we construe the statute in a manner that prevents a party from bringing a difficult case or asserting a novel defense, or penalizes a party whose claim initially appears viable but later becomes unpersuasive. Moreover, an attorney or party should not be dissuaded from disposing of an initially sound case which becomes less meritorious as it develops because they fear the penalty of attorney fees and costs under this statute.

Because DHS reinstated Petitioner's coverage without the Court's intervention, she was not a "prevailing party."³⁰ She cannot rely on MCL 600.2591 or MCR 2.625 as bases for her claims.

C. MCR 7.101 and 7.105 do not authorize the award of costs or fees in this appeal.

When Petitioner attempts to establish that DHS's position was "vexatious" within the meaning of MCR 7.101(O), (P) and 7.105(N), she again misstates the record. First, she claims

²⁶ Reply Brief, 8/27/07, Attachment A.

²⁷ Reply Brief, 8/27/07, at 8. Petitioner did not offer a rationale for this belief. Under the APA, "[t]he court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings." MCL 24.306(2). Once DHS reinstated Petitioner's Medicaid, **none** of these actions was appropriate.

²⁸ See, MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language.")

²⁹ *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991).

³⁰ MCR 2.625(B) clearly envisions the Court's entering a judgment or order that rules on the merits.

that, "[i]nstead of properly adjudicating the issue before him, ALJ Sexton instead [*sic*] adjudicated a separate issue without giving adequate notice of, and thereby an opportunity to address, the new issue on the record."³¹

This mischaracterizes what actually occurred. During the hearing, ALJ Sexton learned that DHS sent Petitioner a checklist (Form 3503) on October 5, 2006, seeking "a list of the items of value being held by the Trust and the income flow that the Trust was providing her."³² The DHS worker testified that DHS did not take a negative action until October 16, 2006, but then did so for the reason that Petitioner "failed to provide the information that was requested on the 3503."³³ But because Petitioner had meanwhile "appealed" an internal memorandum regarding the Trust, DHS immediately deleted the negative action.³⁴ At the end of the hearing, the ALJ confirmed that the basis for the negative action was that DHS "did not receive the information requested on DHS-3503 or [inaudible] 10/5."³⁵

Petitioner's attorney attended the administrative hearing³⁶ and did not object to DHS's or the ALJ's identification of the issue or claim any "lack of notice." For Petitioner to suggest that said counsel was gagged so as to be "unable to preserve any objections"³⁷ is mere hyperbole.

³¹ Reply Brief, 8/27/07, at 3.

³² Tr, 2/15/07, at 18.

³³ Tr, 2/15/07, at 19.

³⁴ Tr, 2/15/07, at 19.

³⁵ Tr, 2/15/07, at 33.

³⁶ Petitioner makes another statement that is belied by the record: "[N]either [redacted] nor her attorney were [*sic*] able to be present for the hearing." Reply Brief, 8/27/07, p 4. But the attorney who appeared for Petitioner, [redacted], was her attorney. She was associated with the Trust counsel's law firm. See, MCR 2.117(3)(b). (According to that firm's website, she graduated law school in 2004, and so was hardly a novice at the 2007 hearing.) She acknowledged that she was Petitioner's counsel and explained that Petitioner did not attend because she understood "that that was going to be unnecessary today." 2/15/07 Tr at 7. Hence, contrary to the Reply Brief, there was no evidence that Petitioner or her attorney was **unable** to attend.

³⁷ Reply Brief, 8/27/07, at 3.

She did not offer to show that she had supplied the information that DHS requested, through Form 3503 or otherwise. Thus, Petitioner waived any objection she could have made while the ALJ could still address it. Her baseless arguments are not properly before this Court,³⁸ and cannot support her claim that DHS's defense of her appeal was "vexatious."

Petitioner then makes a second misstatement of the record: "From the beginning has argued that the assets and income of the Trust were not subject to verification."³⁹ But Petitioner did **not** advance this argument with DHS in October 2006. She did **not** raise the point during the February 2007 hearing before the ALJ. Instead, she laid out this position for the first time on April 27, 2007, when her second attorney appeared and filed the Petition for Review. ALJ Sexton cannot be faulted for not addressing this point⁴⁰ during the hearing two months earlier.

Petitioner also misstates the holding of the case she cites in connection with MCR 7.101(O).⁴¹ The Court in *Smith*⁴² did **not** rule that MCR 7.101 authorized an award for "any inconvenience or costs." Instead, it concluded that a circuit court's dismissal of an agency appeal – due to the appellant's filing its brief one month too late – was too drastic a sanction. It found that, absent a showing of prejudice to the appellee, "any inconveniences or costs which defendant incurred could have been corrected by other, less harsh remedies. MCR 7.101(O); MCR [2.625(I)]."⁴³ In context, *Smith* is not *carte blanche* authority to award costs for any

³⁸ *Jackson City Bank & Trust Co v Blair*, 333 Mich 399, 405; 53 NW2d 493 (1952) (citations omitted).

³⁹ Reply Brief, 8/27/07, at 8.

⁴⁰ Petitioner is wrong in her reading of policy. The PEM [Program Eligibility Manual] required the worker to "[v]erify the value of a trust's principal if any portion is countable unless countable assets exceed the asset limit based on the client's statement of value." Item 401, at 14. Since Petitioner did tell the worker the Trust's value, the worker needed to get more information.

⁴¹ Reply Brief, 8/27/07, at 7.

⁴² *Smith v Merrill Lynch Pierce Fenner & Smith*, 155 Mich App 230; 399 NW2d 481 (1986).

⁴³ *Smith*, 155 Mich App at 234.

"inconvenience" that might result from an administrative decision and appeal. It was instead that Court's direction to that circuit court: rather than dismiss the appeal for the delay in filing the brief, order appellant to reimburse appellee for the inconvenience it suffered due to the delay.

In order to comply with MCR 7.105(C)(2), an APA appeal usually alleges a constitutional, legal, or procedural error.⁴⁴ As a result, if the circuit court reverses an agency decision, it usually does so on one of these bases. But neither MCR 7.101 nor 7.105 suggests that an administrative appeal becomes "vexatious" every time a circuit court overturns an agency's decision based on a legal or procedural error. Instead, there must be something truly egregious or exceptional⁴⁵ in the ALJ's decision to warrant such a finding.

Yet, notwithstanding Petitioner's effluence of hindsight and revisionism, it was not unreasonable for DHS to defend her appeal in the context of its stated grounds for closing Petitioner's case in October 2006. As the Court of Appeals recognized⁴⁶:

In this case, the court's failure to focus its inquiry on what Mr. Malizia **reasonably believed at the time he commenced the case** is of critical importance. The statutory scheme is designed to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense, not to discipline those whose cases are complex or face an "uphill fight." The ultimate outcome of the case does not necessarily determine the issue of frivolousness.

Given the chronology of events, there is no factual basis for Petitioner's claim for fees and costs. In September 2006, Petitioner told her DHS worker that she was the beneficiary of a 2003 Trust. (Despite an ongoing requirement that she reveal the existence of any assets or income, Petitioner

⁴⁴ MCL 24.306.

⁴⁵ MCR 7.101(P) uses phrases such as "without any reasonable basis," "grossly lacking in the requirements of propriety," and "grossly disregarded the requirements of a fair presentation of the issues to the court."

⁴⁶ *Louya, supra*, 190 Mich App at 163-164 (emphasis added).

did not mention this Trust in her 2003, 2004 or 2005 applications.⁴⁷) Thus, as of October 5, 2006, it was not unreasonable⁴⁸ for the DHS worker to request additional information about the Trust before deciding whether it impacted Petitioner's Medicaid case.

On the other hand, it was unreasonable for Petitioner's less-experienced Trust counsel to "appeal" the internal DHS analyst's preliminary memorandum regarding the Trust. When Petitioner forced the issue by submitting a premature request for hearing, it was not unreasonable for the DHS worker to enter a negative action and then immediately to stay its impact.

It was clear throughout the administrative hearing that the ALJ would decide the propriety of the negative action that DHS took – closure due to Petitioner's failure to provide documentation – rather than the impact of the Trust. Yet, Petitioner's counsel⁴⁹ did not object or otherwise make a record. Absent such objection, it was not unreasonable for the ALJ to decide only the issue he told Petitioner he would decide.⁵⁰

⁴⁷ Tr, 2/15/07, at 28.

⁴⁸ Petitioner attempts to excuse her non-disclosure of the Trust for three years by claiming, "[b]ecause the SNT [special needs trust] is not a countable asset under the Department's guidelines, Petitioner did not report her Trust benefits to DHS on her MA-P applications for 2003, 2004, or 2005." Petition for Review, ¶ 5. There are two problems with this excuse. First, she did not offer evidence at the administrative hearing to suggest that this was her *ex post facto* rationale. Second, she offers no legal support for her suggestion that she did not need to report non-countable assets. On the contrary, she was expected to inform DHS about all of her assets so that its worker – not Petitioner or her counsel – can decide what is and is not countable.

⁴⁹ Petitioner's pretense that . . . was not her attorney, Reply Brief at 4, is absurd: "The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court ordered conference or trial." MCR 2.117(B)(3)(b).

⁵⁰ In fact, given that DHS's negative action was based on Petitioner's failure to verify, not whether the Trust could be counted, it would have been unfair to the DHS worker if the ALJ had reached the latter issue without notifying the worker that he intended to do so.

In April 2007, when Petitioner's second counsel appeared, the issue evolved. Even though the ALJ was justified in restricting his review to the question raised in the negative action – whether Petitioner provided the requested information timely – counsel for DHS tried to resolve the appeal with Petitioner's new counsel. And, despite that counsel's refusal to resolve the matter, DHS re-examined the Trust, concluded that it was not countable in totaling Petitioner's assets, and reinstated Petitioner's Medicaid eligibility, mooting the appeal.

At no point in the past two years could DHS or the ALJ reasonably be faulted for not addressing issues that were not then part of Petitioner's appeal. And even if DHS might have reexamined the Trust earlier, its failure to do so did not rise to the level of being "vexatious" or "frivolous," particularly when viewed in the context of Petitioner's counsel's numerous missteps. To the contrary, this was a mundane welfare appeal that DHS resolved reasonably quickly without Court intervention. There is no factual basis for an award of fees or costs.

D. If the Court concludes that Petitioner established a basis for her claim for fees and costs, the amounts she seeks are grossly overstated and should be reduced.

DHS does not believe that Petitioner has established a legal basis for her claim for attorney fees and costs. If the Court nonetheless concludes that, under the facts presented, one or more of her theories justifies an award, that award should be a small fraction of what she seeks. While the APA recognizes that costs may be incurred from the initial agency action throughout the period there was a "contested case,"⁵¹ all of the Court rules are restricted to actions the parties took during the Circuit Court appeal.

Petitioner's first attorney was clearly not experienced with the administrative appeals process. Rather than undertake the task herself, she should have promptly referred it to the

⁵¹ MCL 24.323(1) ("costs and fees incurred by the party in connection with that contested case.") But fees are limited to \$75/hour. MCL 24.323(5)(b).

second attorney.⁵² And when Petitioner sent the Court the bills that her attorneys submitted to the trust for payment, she failed to edit them to excise tasks that were clearly not related to this appeal. For instance, in the May 14, 2007 bill, she included items on April 20 relating to getting a prescription filled. Completion of an "SSA" form was likewise unrelated to this appeal.⁵³ Finally, this appeal was apparently a "training" project for a then-new attorney.⁵⁴ It was unfair to bill her "learning" time in addition to her supervising attorney's time.

Based on these observations, if the Court were to award fees and costs, DHS urges it not to award anything to the first law firm, whose involvement in the appeal added nothing to the result. With regard to the second law firm, Petitioner has identified nothing "grossly lacking in propriety"⁵⁵ that DHS filed in this Court. Instead, her claims of impropriety focused entirely on the ALJ's conduct of the hearing and his decision.

Applying these observations, DHS suggests trimming each of the second attorney's post-ALJ decision bills. Thus, the May 2007 bill should be limited to the senior attorney's 1.95 hours, the June 2007 bill to her 1.75 hours, the July 2007 bill to her 3.75 hours, and the August 2007 bill to most of⁵⁶ her 6.4 hours plus a portion of her trainee's time for a total of 13 hours.⁵⁷ This would total 20.45 hours. And because the Legislature has identified the reasonable rate for attorneys engaged in administrative appeals at \$75/hour,⁵⁸ DHS urges the Court to limit any award to this hourly rate.

⁵² The first attorney consulted the second; *see*, bill dated 10/31/06 for 10/9/06.

⁵³ July 30, 2007 Bill for 6/19/07.

⁵⁴ law firm later in 2007.

⁵⁵ MCR 7.101(P)(1)(b).

⁵⁶ Time senior counsel spent after DHS offered a remand should be deducted.

⁵⁷ The proposed reduction is also based on the fact that, after DHS offered the remand, Petitioner's attorney should not be trying to bill DHS.

⁵⁸ MCL 24.323(5)(b).

DHS finally notes that charges for "overnight delivery"⁵⁹ reflect poor time management on the law firm's part. When a document has been timely prepared, normal first-class mail suffices. Any award should exclude such costs.

⁵⁹ See, e.g., 8/20/07 bill for "UPS overnight delivery" items in June and July.

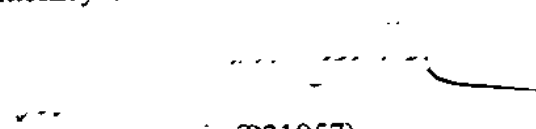
Relief Sought

Petitioner seeks to recover costs and attorney fees with regard to an administrative appeal. DHS originally took action because Petitioner failed for three years to tell her worker that she was the beneficiary of a Trust, and then did not give the worker the requested information by the stated deadline. This was a proper basis to close Petitioner's case. So, absent objection from her counsel, the administrative hearing went forward on this issue. DHS agreed to resolve the issue soon after she filed her Petition for Review.

Petitioner overreaches in her effort to seek reimbursement of attorney fees and costs. The APA excludes such an award in public assistance appeals. MCR 2.625 does not apply to agency appeals and, if it did, would be limited by the APA's exclusion. And for all of the hyperbole, there is nothing in DHS's position that warrants the label "vexatious." DHS therefore asks the Court to deny Petitioner's request for fees and costs, and to dismiss the Petition for Review.

Respectfully submitted,

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Dated: August 29, 2008