

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.

Co-counsel for Petitioner

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**RESPONDENT'S POST-HEARING BRIEF
OPPOSING AWARD OF FEES OR COSTS**

In a document dated March 15, 2009, Petitioner renews her unprecedented claim for attorney fees in this long-moot administrative appeal. This claim is the sole reason this file has remained open since September 2007, when Respondent advised the Court that her underlying claim for Medicaid benefits had become moot. Despite the Court's encouraging the parties to reach an agreement,¹ and despite the Court's suggestions regarding the parameters of any relief it might award, Petitioner's counsel has apparently² re-submitted all of the fees and costs that she, her staff, and her predecessor originally identified, as an undivided and unanalyzed whole.

If an attorney wants to claim "reasonable" attorney fees, it follows that he or she should engage in a logical analysis. The discussion should break down the tasks performed and time spent, and establish that his or her efforts actually led toward the result. In this case, Petitioner accomplished her goal no later than July 27, 2007, when Respondent's counsel emailed Petitioner's counsel with an offer of remand.³ She nonetheless submits time for reimbursement with regard to efforts after that date. Respondent offers a more detailed analysis.

I. The record establishes that Petitioner erroneously attempted to appeal a non-decision. In addition, she did not object to the Administrative Law Judge's statement that the "excess assets" in the Trust were not before him. Accordingly, the time the Trust's attorneys spent through the date of the ALJ's decision is not compensable.

In its August 29, 2008 supplemental brief, Respondent argued that Petitioner's effort to appeal an internal DHS memorandum regarding the Trust, before DHS had, in fact, made a decision, was not Respondent's error. Likewise, Petitioner's attorneys at that time did not object

¹ This took place during a conference call on February 6, 2009.

² The March 15, 2009 brief includes bills from [redacted] and her firm, but omits those from Trust counsel [redacted]. But the brief attaches two copies of [redacted] affidavit to the effect that she normally charges \$250/hour for Medicaid-related services. Brief, 3/15/09, Ex. C. For the purpose of this submission, Respondent assumes that Petitioner still hopes to be reimbursed for [redacted] efforts.

³ Petitioner's 3/15/09 Brief, Ex A.

to the ALJ's conducting the hearing based solely on a procedural question, i.e., whether Petitioner had timely filed verification of her assets.⁴ Petitioner did **not** argue that, under DIIS policy, she was not required to verify her assets. Having thus waived her objections, Petitioner cannot complain that the ALJ should have *sua sponte* addressed an argument she never made. Since the Court's review of the administrative decision is based solely on the record,⁵ Petitioner's waiver of objections should preclude any award of attorney fees allegedly incurred before the ALJ entered his decision.

This conclusion is reinforced by the Court's recognition during the February 6, 2009 conference call that, under the Administrative Procedures Act (APA) chapter on attorneys' fees and costs, the ALJ – not the Court itself – must decide in the first instance whether DHS's position was "frivolous" during the period leading up to the ALJ's hearing decision. Because Petitioner did not first request attorney fees from the ALJ in accordance with the APA, the issue whether fees and costs should be awarded **for this period of time** is not before the Court.

II. When Petitioner filed her Petition for Review, raising for the first time the question whether the Trust was subject to verification, Respondent acted with reasonable speed to address this issue – even though it was not preserved on the administrative record – and to offer a resolution.

Until she filed her Petition for Review, Petitioner did not contend that DHS erred simply because it asked that she verify her Trust's assets.⁶ She has identified no point in the administrative record where she stated such a position. If her claim was that DHS or the ALJ **should have known** that this was her position – or **should have** treated her differently than they did based on then-current policy – then the APA, Chapter 8, requires that this claim first be put

⁴ Brief, 8/29/08, at 2-3.

⁵ MCL 24.304(3).

⁶ It should be recalled that Petitioner failed to report the existence of the Trust for several years.

to the "presiding officer," i.e., the ALJ himself.⁷ Since Petitioner did not submit this claim to the ALJ, either during the administrative hearing or through a separate petition for fees and costs under Chapter 8, this claim is not before the Court at this time.

Petitioner filed her brief on appeal on or about July 13, 2007. **Within two weeks,**⁸ Respondent contacted her to suggest that the matter be remanded to DHS for the purpose of examining the Trust itself. Petitioner refused to do so. When Respondent thus had to file its brief in August 2007, it defended the technical basis for the ALJ's decision, based on the administrative record. But Respondent's brief went on to explain how the ALJ **might have** viewed the Trust itself, if the Trust had been before him.

Throughout the 18 months that this fee dispute has persisted, Petitioner has consistently criticized the ALJ, because he addressed the question before him, rather than the newly-coined issue whether she was required to submit verification in the first place. Because this alleged "vexatiousness" predates the Petition for Review, Petitioner's remedy would be the APA, Chapter 8, **not** MCR 7.105(N), which by its terms only addresses the period **after** she filed her Petition for Review.⁹

(N) Vexatious Proceedings; Consequences.

(1) The court may, on its own motion or on the motion of any party, dismiss a petition for review, assess punitive damages, or take other disciplinary action when it determines that an appeal or any proceedings **in the appeal** were vexatious for any of the reasons set forth in MCR 7.101(P)(1).

The "reasons set forth in MCR 7.101(P)(1)" are:

⁷ MCL 24.323(1).

⁸ Petitioner's Brief, 3/15/09, Ex A.

⁹ MCR 7.105(N)(emphasis added).

(P) Vexatious Proceedings.

(1) The circuit court may, on its own initiative or the motion of a party, dismiss an appeal, assess actual and punitive damages, or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because

(a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

While Petitioner complains about the ALJ, up to the time he entered his decision, Petitioner cannot in good faith claim that Respondent's position – after the date she filed the Petition for Review – grossly lacked in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the Court. On the contrary, once Petitioner filed her appeal, Respondent worked quickly to resolve its merits.

With regard to the period of time after she filed this appeal, Petitioner's only "beef" with Respondent is that it did not immediately acquiesce in her position that she was entitled to attorney fees and costs.¹⁰ But given the mootness of her underlying claim for Medicaid benefits as of September 2007, Respondent's good-faith position was: (A) the APA provisions did not apply in this Court; (B) MCR 2.625 did not apply based on the case law; and (C) Respondent's post-Petition for Review conduct did not implicate MCR 7.105(N) or 7.101(P). In fact, Petitioner wants to tar Respondent's post-appeal conduct with the brush of (her version of) the ALJ's pre-decision conduct. Yet, based on the record before the Court, Petitioner has not

¹⁰ In Respondent's 8/13/07 Brief, it challenged Petitioner's request for attorney fees. Petitioner's 8/27/07 Reply Brief responded to this challenge with an inappropriate supplementation of the administrative record.

explained just how her desire to punish the ALJ can be implemented. The Court should deny Petitioner's request for attorneys' fees and costs.

III. Petitioner has not established that she should be reimbursed for any of the hours her attorneys spent. Nor has she established that those hours should be reimbursed for all of the attorneys involved at the rates that her current counsel claims.

While Respondent maintains that no award of attorneys' fees or costs is appropriate, it believes that – if the Court were to enter an award – its total would be far less than Petitioner seeks. If Petitioner were to prevail in an APA-based motion for attorneys' fees and costs, the APA states: "An attorney ... fee shall not be awarded at a rate of more than \$75.00 per hour unless the presiding officer determines that special circumstances existed justifying a higher rate."¹¹ Petitioner has not argued, nor do her affidavits suggest, that such "special circumstances" exist. Since the Legislature states that attorneys who pursue administrative appeals are typically entitled to no more than \$75/hour, the Court should not award Petitioner any more than this hourly rate.

During the February 6, 2009 conference call, the Court suggested that the State Bar of Michigan's "economics of laws practice survey results" might provide guidance. In the Bar's 2007 survey, practitioners specializing in elder law typically make \$115,000/year. Attached. Assuming such an attorney worked 2000 hours in a year, this would amount to \$57.50/hour. If one tripled this amount to recognize office overhead,¹² the typical full-time elder law attorney would be making \$172.50/hour, more than \$100/hour less than requests.

Since Petitioner's current brief does not include the bills from Petitioner's first attorney, it is not clear whether she still seeks reimbursement of that attorney's fees. But as Respondent

¹¹ MCL 24.323(5)(b).

¹² Given that Petitioner is trying to bill Respondent separately for such overhead items as UPS overnight charges, and internal staff discussions, allowing triple this rate for overhead is more than generous.

noted in its August 29, 2008 brief, the 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 second attorney.¹³

The bills that Petitioner's attorneys submitted to the _____ Trust for payment also included 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. The office's involvement with an "SS drug card" was likewise unrelated to this appeal.¹⁴ Finally, this appeal was apparently a "training" project for a then-new attorney.¹⁵ Even if it were appropriate to bill some of her "learning" time in addition to her supervising attorney's time, Petitioner has offered no proof that this beginning attorney's hourly rate was appropriate.

Based on these observations, if the Court were to award fees and costs, DHS urges that it award nothing 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"¹⁶ that DHS filed in this Court. Instead, her claims of impropriety focused entirely on the ALJ's conduct of the hearing and his decision.

If the Court enters any award in this appeal, DHS urges it to trim 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 of¹⁷ her 6.4 hours plus a portion of her trainee's time for a total

¹³ The first attorney consulted the second; *see*,

her bill dated 10/31/06 for 10/9/06.

¹⁴ July 30, 2007 bill for 6/19/07.

¹⁵ _____ left this law firm later in 2007. The State Bar Directory still shows her living at home in Oak Park.

¹⁶ MCR 7.101(P)(1)(b).

¹⁷ All time that senior counsel spent after DHS offered a remand should be disregarded.