

Issue: Termination based on arbitrary and capricious performance evaluations;
Hearing Date: 06/13/05; Decision Issued: 06/16/05; Agency: ODU; AHO:
David J. Latham, Esq.; Case No. 8033, 8083; **Addendum Decision: Hearing
Decision addressing attorney's fees issued 07/05/05.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8033 & 8083

Hearing Date: June 13, 2005
Decision Issued: June 16, 2005

PROCEDURAL ISSUES

Grievant filed two grievances, one of which the agency qualified for hearing and one of which the agency declined to qualify. Grievant requested that the Department of Employment Dispute Resolution (EDR) qualify the latter grievance for hearing. The EDR Director ruled that the grievance qualifies for a hearing and that consolidation of both grievances for hearing was appropriate.¹

Among grievant's requests for relief, she asked to receive: a rating of Contributor on her annual performance evaluation, a transfer to another department, and a salary increase. A hearing officer does not have authority to direct a specific rating on a performance evaluation, transfer an employee, or award a salary increase.² Therefore, the hearing officer is without authority to direct these forms of relief requested by grievant. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

¹ Agency Exhibit 1. *Compliance and Qualification Ruling of Director* Number 2005-957, March 24, 2005.

² § 5.9(b)3, 4, 5 & 8. *EDR Grievance Procedure Manual*, August 30, 2004. See also Section VI.C.2, *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEARANCES

Grievant
Attorney for Grievant
Assistant Chief of Police
Two Attorneys for Agency
Three witnesses for Agency

ISSUES

Was grievant's annual performance evaluation arbitrary and capricious?
Was grievant's three-month performance reevaluation arbitrary and capricious?
Did grievant's removal from state employment comply with policy?

FINDINGS OF FACT

The grievant filed a timely grievance from her annual performance evaluation which rated her overall as "Below Contributor."³ She filed a second timely grievance from her three-month re-evaluation which also rated her overall as "Below Contributor" and which resulted in her removal from employment effective February 28, 2005.⁴ Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified one grievance for a hearing and EDR qualified the other grievance. Old Dominion University (Hereinafter referred to as "agency") has employed grievant for three years as an Administrative and Program Specialist. Grievant's primary function is budget management for a department of 170 employees. She is required to provide detailed budget input, anticipate funding changes, track budget progress, identify differences between planned budget and actual expenditures, and identify anticipated surpluses or shortfalls.⁵ This function is currently estimated to require 60 percent of her time.⁶

Performance evaluations should reflect performance for the entire performance cycle (normally one year).⁷ If a new supervisor has been assigned during the performance cycle, the new supervisor should review the performance plan, make necessary modifications, and make his or her own assessment along

³ Agency Exhibit 2. Performance Evaluation, signed October 20, 2004.

⁴ Agency Exhibit 4. Performance Evaluation, signed February 14, 2005.

⁵ Agency Exhibit 2. *Ibid.*

⁶ NOTE: The grievant's Employee Work Profile Work Descriptions for 2002 and 2003 assign the time allocation figure of 50 percent to the Budget Management core responsibility. The agency changed the figure to 60 percent for the 2004 evaluation without notifying grievant and without obtaining her signature on a revised Performance Plan, as required by DHRM Policy 1.40.

⁷ Department of Human Resource Management (DHRM) Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

with the former supervisor's assessment prior to determining the employee's overall evaluation at the end of the performance cycle.⁸

Grievant's first performance evaluation in 2002 rated her "Contributor" both in each core responsibility and for the overall rating.⁹ In 2003, she again received a rating of "Contributor" for each core responsibility and for the overall rating.¹⁰

In February 2004, the assistant chief asked grievant to type a budget projection memo based on handwritten salary figures he gave to grievant.¹¹ The police officer salary figures included the base salary plus a benefit rate add-on of 31.10 percent. The memorandum was subsequently given by management to the vice-president who relied on the numbers to budget for new police officer positions. Sometime after grievant had prepared the memorandum, the state changed the benefit add-on rate to 32.75 percent.¹² This resulted in a shortfall in the amount budgeted for the new officers. The chief and assistant chief knew of the change but did not adjust the dollar amounts in the memorandum that had been prepared in February. The agency prepared a written counseling memorandum but it was not given to grievant.¹³

The department in which grievant works implemented a new budgeting and payroll reporting process effective July 1, 2004.¹⁴ Employees were trained in June for the new system. The department had been utilizing the agency's BANNER software program as its primary accounting tool. Because BANNER reports were generally received about two or three weeks after the fact, the department made a decision to also utilize Quicken® software in order to obtain current financial data. Implementation of this program also required that data and reports from both programs be reconciled to assure that both programs ultimately generated the same results. On July 2, 2004, grievant requested additional training on the Quicken® software program.¹⁵ Grievant was told not to implement the new reports until August 1, 2004 because the reports required some "tweaking" and were not deemed ready for use until that time.

Grievant's supervisor (office manager) retired on July 30, 2004. Grievant's new supervisor came into the department on July 12, 2004, worked with the outgoing supervisor until the end of July, and then took over all responsibilities on August 1, 2004. The new supervisor had never previously supervised classified employees or completed classified performance evaluations. The retiring supervisor did not prepare a written assessment of

⁸ *Ibid.*

⁹ Grievant Exhibit 1. Performance Evaluation, signed October 16, 2002.

¹⁰ Grievant Exhibit 2. Performance Evaluation, signed October 20, 2003.

¹¹ Grievant Exhibit 5. Assistant chief's handwritten salary figures.

¹² Grievant Exhibit 5. Memorandum from grievant to supervisor, July 8, 2004.

¹³ Agency Exhibit 9. Draft counseling memorandum that was not signed. Grievant denied receiving such a memorandum and the agency failed to rebut her denial.

¹⁴ Grievant Exhibit 3. Memorandum from assistant chief to office staff, June 28, 2004.

¹⁵ Grievant Exhibit 4. Memorandum from grievant to supervisor, July 2, 2004.

grievant's performance for the nine months she had supervised grievant during the 2004 performance cycle. When the new supervisor wrote grievant's annual performance evaluation in October 2004, she did not solicit input from the previous supervisor. The new supervisor wrote her evaluation based primarily on her observations during the three months from mid-July through mid-October 2004. She received some input from the Assistant Chief of Police (the office manager's supervisor).

In June 2004, grievant's supervisor met with staff for training on the Quicken® software program. Grievant questioned the new program, asserting that transferring data from the agency's BANNER program to Quicken® might allow unauthorized persons to have access to salary data. The supervisor explained why this would not be a problem. Grievant continued to be resistant contending that only the BANNER program should be used and that she would not let anyone use her computer.¹⁶

In August, grievant's new supervisor gave grievant a notice of substandard performance for an incident that had occurred in July 2004.¹⁷ In August, grievant again requested help in the form of weekly meetings with her supervisor and the assistant chief.¹⁸ The supervisor agreed to such weekly meetings, although the assistant chief would participate in the meetings only once monthly.¹⁹ By mid-August, the supervisor had met with grievant on at least five occasions to explain how the reports should be submitted.²⁰ The new supervisor gave grievant an interim performance evaluation in mid-August noting that grievant was not completing three new reports correctly.²¹ The following day, the supervisor expressed frustration to the assistant chief noting that she had answered the same questions repeatedly for grievant and was not going to answer them again.²² In late August, the assistant chief detailed in a memo to grievant problems she continued to have with her reports.²³ Implementation of the Quicken® postings and report generation added about two to three hours per day to grievant's workload.²⁴

In September 2004, the assistant chief pointed out in a memorandum to grievant five specific problems in the budget reports grievant had been submitting.²⁵ Grievant requested overtime to help her catch up other work that

¹⁶ Agency Exhibit 10. Performance Observation Report, June 18, 2004.

¹⁷ Agency Exhibit 11. *Notice of Improvement Needed/Substandard Performance*, August 5, 2004. [NOTE: Although the *Notice* indicates that grievant refused to sign the document on August 5, 2004, two subsequent memoranda indicate that the *Notice* was actually presented to grievant on August 11, 2004.

¹⁸ Grievant Exhibit 8. Memorandum from grievant to assistant chief, August 6, 2004.

¹⁹ Grievant Exhibit 8. E-mail from supervisor to grievant, August 9, 2004.

²⁰ Agency Exhibit 11. Memoranda from supervisor to chief, August 13, 2004.

²¹ Grievant Exhibit 10. *Interim Evaluation Form*, August 11, 2004.

²² Grievant Exhibit 11. Note from supervisor to assistant chief, August 12, 2004.

²³ Grievant Exhibit 12.

²⁴ Testimony of the assistant chief.

²⁵ Agency Exhibit 14. Memorandum from assistant chief to grievant, September 9, 2004.

had fallen behind; the supervisor denied the request.²⁶ Subsequent to this memorandum, the grievant corrected only the first identified problem. In October 2004, grievant was counseled for failing to follow the assistant chief's instruction regarding preparation of three budget reports.²⁷

In October 2004, the supervisor evaluated grievant's overall performance as "Below Contributor" and rated her "Below Contributor" on the three (of five) core responsibilities that comprise 90 percent of her job functions.²⁸ She was given a substandard rating in budget management because, inter alia, the department incurred an annual shortfall for the FY2004 (July 1-June 30) budget of \$99,000 (out of a \$3,000,000 budget). The agency asserted that grievant did not advise department management in advance. However, in February 2004, grievant had notified the assistant chief in writing that she anticipated a deficit of \$50,000 or above for the fiscal year.²⁹ She was given a substandard rating in the personnel management responsibility because she had not timely turned in wage reports for two students. This was not documented during the performance cycle as a problem. During the same cycle, grievant's supervisor had failed to timely turn in wage reports for five students; there is no evidence that the supervisor was negatively evaluated for this failure.

On November 3, 2004, grievant was given an employee development plan that required her to reorganize her work area, create checklists or timelines for projects, and develop follow-up procedures. During the next three months, grievant attempted to reorganize her work area, although the assistant chief felt that grievant could have done a better job of reorganization.³⁰ Grievant formulated calendar checklist schedules for herself and gave her supervisor several memoranda with schedules and follow-up procedures.³¹ When the assistant chief received these calendar checklists, he dismissed them because he expected them to be in a different format; however, he never told grievant what format he wanted.

On February 14, 2005, the supervisor re-evaluated grievant, rating her "Below Contributor" overall, and on all but one of the five core responsibilities.³² It was observed that grievant's budget reports continued to have errors. The other deficiencies noted in the earlier evaluation are reported as continuing during the re-evaluation period.

²⁶ Grievant Exhibit 13. E-mails from grievant to supervisor and, from supervisor to grievant, September 15, 2004.

²⁷ Agency Exhibit 17. The assistant chief had initially issued a Group I Written Notice for this offense. Grievant filed a grievance and, during the resolution step process, the Written Notice was rescinded and the counseling was documented in writing.

²⁸ Agency Exhibit 2. Performance Evaluation, October 20, 2004.

²⁹ Grievant Exhibit 5. Memorandum from grievant to assistant chief, February 9, 2004.

³⁰ Grievant's supervisor testified that grievant did not reorganize her work area but the assistant chief affirmed that grievant did make an effort to do so.

³¹ Grievant Exhibit 15.

³² Agency Exhibit 4. Performance Evaluation, February 14, 2004.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions and dismissals for unsatisfactory performance, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.³³

Agency decision to terminate employment

Grievant asserted in her grievance that the agency improperly removed her from employment under the Standards of Conduct policy. However, contrary to grievant's assertion, there is no evidence to show that grievant's removal was effected pursuant to DHRM Policy 1.60 (Standards of Conduct). Rather the evidence reflects that the agency removed her pursuant to DHRM Policy 1.40 (Performance Planning and Evaluation). Policy 1.40 permits an agency to exercise one of three options when an employee receives a re-evaluation of "Below Contributor"; it may demote, transfer or terminate the employment of the employee. Accordingly, the agency was in compliance with Policy 1.40 by deciding to use the removal option; it was not required to demote or transfer if it

³³ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

reasonably determined that termination of employment was the best option to fulfill agency needs.

Annual performance evaluation

However, the seminal issues in this case are whether the annual performance evaluation was arbitrary and capricious and, whether the agency misapplied or unfairly applied applicable policy. The Grievance Procedure Manual defines “arbitrary and capricious” as “in disregard of the facts or without a reasoned basis.”³⁴

In this case, the evidence is preponderant that grievant’s supervisor wrote an evaluation that was based almost entirely on grievant’s performance for only the last three months of the performance cycle (mid-July through mid-October 2004). Grievant’s performance evaluation reviewer (assistant police chief) agreed that grievant’s performance for 2002 and 2003 was satisfactory overall. During the first nine months of the 2004 performance cycle, grievant was never told that her performance was anything other than satisfactory. The prior supervisor did not counsel grievant or in any other way document the file to show that grievant was not performing satisfactorily from October 2003 through July 2004. The new supervisor did not obtain from the outgoing supervisor an evaluation of grievant’s performance during the first nine months of the cycle.

Therefore, the new supervisor had no reasoned basis to be able to determine grievant’s performance during that period. In the absence of any evidence to the contrary, it must be presumed that grievant’s performance for the first nine months of the cycle was at least satisfactory. Thus, even if, *arguendo*, grievant’s performance in the last three months of the cycle was Below Contributor, while the first nine months were satisfactory, there is no reasoned basis in the evidence to conclude that the *overall* rating for the full 12-month performance cycle should be Below Contributor. The overall rating for the year must include a fair assessment of actual performance for the entire period; it cannot be based only on the last three months of the cycle.

Other issues

Grievant maintains that the coworkers who testified against her, her supervisor, and the assistant chief have all been untruthful in their testimony. She asserts that her reports were accurate, notwithstanding testimony from her supervisor and the assistant chief that the reports frequently had errors. Moreover, the agency has presented some evidence that documents errors occurring from August through October 2004. Because there is no evidence to support a conspiracy theory, grievant’s denial of *any* performance problems is not credible.

³⁴ § 9, *Grievance Procedure Manual*, effective August 30, 2004.

On the other hand, grievant's supervisor's testimony that grievant had not reorganized her work area was rebutted by the assistant police chief. The supervisor also suggested that half of grievant's workload had been assigned to other employees. However, the evidence reflects that, while some duties were reassigned, the amount was significantly less than 50 percent and probably closer to 15-20 percent. The supervisor did not revise grievant's Performance Plan during the year to reflect any changes in duties or the changes in percentages of time assigned to core responsibilities. The supervisor claimed to have documentary evidence of counseling to grievant on issues such as not answering the telephone, however no such evidence was offered by the agency at the hearing. Thus, the credibility of the supervisor is tainted by the exaggeration of information that reflects unfavorably on grievant.

Although the assistant chief suggests that some aspects of grievant's performance were unsatisfactory prior to July 2004, he admitted that grievant would not have had any reason to know that because neither her supervisor nor anyone else had told her that her performance was not satisfactory. Moreover, there is no evidence of unsatisfactory performance between October 2003 and July 2004 that would warrant a "Below Contributor" rating for those nine months of the performance cycle.³⁵ The agency alleged that grievant was responsible for the budget deficit that occurred in fiscal year 2004 but failed to present any documentation to support the allegation. Further, although grievant notified the agency of a significant deficit as early as February 2004, she was not told that she caused it or was to be held accountable until October 2004. There is no documentation to show that grievant was counseled, disciplined, or otherwise told that her work was unsatisfactory during the first nine months of the performance cycle.

It must be observed that beginning in July 2004, grievant had to adjust to a new supervisor who had previously neither supervised classified employees nor prepared performance evaluations. In addition, grievant was given new responsibilities with the addition of a computer software accounting program; this resulted in two to three hours of new work per day. Both of these significant changes may have accounted for the errors that the new supervisor observed beginning in August 2004. It may well be that grievant's performance did become unsatisfactory beginning in August 2004. The agency has produced limited documentation to rebut grievant's sworn testimony that her work was accurate. When an employee's work becomes unsatisfactory, it is required that supervisors assist employees in understanding the expectations.³⁶

³⁵ Agency Exhibit 8 documents what appears to be a mistake when grievant erroneously stated that a check had not been received when, in fact, it had been received several months earlier.

³⁶ Section III.B, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993. Such corrective action may require, in cases like this, documenting in writing how the errors occurred and showing the employee how the work is expected to be completed correctly. Written documentation of counseling should be maintained by the supervisor for use in preparing future performance evaluations or as evidence to support disciplinary action.

DECISION

Case # 8033 - The annual performance evaluation issued on October 20, 2004 is held to be arbitrary and capricious, and an unfair application of policy. Therefore, it is hereby ORDERED that the evaluation be expunged from grievant's record and the evaluation process repeated. The new evaluation must contain a *reasoned* basis related to established expectations for the *entire 12 months* of the 2004 performance cycle.

Case # 8083 – Because the annual performance evaluation for the 2004 performance cycle was arbitrary and capricious, and an unfair application of policy, the three-month re-evaluation is null and void. Accordingly, the removal of grievant from state employment is also null and void. Therefore, it is hereby ORDERED that grievant be reinstated to her former position, or if occupied, to an objectively similar position. Grievant is awarded full back pay, from which interim earnings (including unemployment compensation) must be deducted. Grievant's full benefits and seniority are restored.

Grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the agency.³⁷ Grievant's attorney is herewith informed of her obligation to timely submit a fee petition to the Hearing Officer for review.³⁸

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director

³⁷ Va. Code § 2.2-3005.1.A & B.

³⁸ See Section VI.D, *Rules for Conducting Grievance Hearings*, effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorneys' fees.

Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.³⁹ You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴⁰

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

David J. Latham, Esq.
Hearing Officer

³⁹ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

⁴⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case Nos: 8033 & 8083

Hearing Date:	June 13, 2005
Decision Issued:	June 16, 2005
Addendum Issued:	July 5, 2005

APPLICABLE LAW AND PROCEDURE

The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁴¹ For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁴²

DISCUSSION

Following issuance of the hearing officer's decision ordering reinstatement of the grievant, grievant timely submitted a petition for attorney's fees and costs. Grievant's petition includes attorneys' fees for services rendered by her attorney prior to the May 4, 2005 qualification of her grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.⁴³ The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute

⁴¹ Va. Code § 2.2-3005.1.A.

⁴² § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. Section VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

⁴³ Va. Code § 2.2-3004.A. See also §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

provides that an agency is required to bear only the expense for the hearing officer and other associated *hearing* expenses including grievant's attorneys' fees.⁴⁴ Attorney fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process. Therefore, grievant's attorney fees for services performed prior to May 4, 2005 are not included in the award.

AWARD

The petition for fees for services rendered prior to May 4, 2005 is denied. The grievant is awarded attorney fees incurred from May 10, 2005 through June 13, 2005 in the amount of \$2,550.00 (21.25 hours x \$120.00 per hour).⁴⁵

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

David J. Latham, Esq.
Hearing Officer

⁴⁴ Va. Code § 2.2-3005.1.B.

⁴⁵ Section VI.D. EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004, limits attorney fee reimbursement to \$120.00 per hour.