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No. 91742-6

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SUPREME COURT
OF THE STATE OF WASHINGTON

GEORGIANA ARNOLD,

Respondent,

v.

CITY OF SEATTLE, d/b/a
HUMAN SERVICES DEPARTMENT,

Petitioner.

ARNOLD'S ANSWER TO AMICUS ATTORNEY GENERAL MEMORANDUM

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A. INTRODUCTION

Apparently believing that the Court of Appeals opinion will mandate the award of attorney fees under RCW 49.48.030 to state employees who recover back wages in state civil service proceedings, the Attorney General filed an amicus memorandum supporting the City of Seattle's ("City") position on review. But nothing in the Attorney General's memorandum should persuade this Court that review is merited under RAP 13.4(b).

The Court of Appeals properly applied this Court's ruling in *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), harmonizing and ultimately resolving a conflict in that court's opinions after *Fire Fighters*. The Court of Appeals correctly discerned that this Court's reasoning in *Fire Fighters* controls and that the extensive hearing process before the Seattle Civil Service Commission ("Commission") in this case was just as much an "action" for purposes of RCW 49.48.030 as any court proceeding.

The Court of Appeals decision, contrary to the Attorney General's claim, will not so adversely affect state civil service proceedings before the Personnel Resources Board ("PRB") as he now claims.

B. STATEMENT OF THE CASE

The Attorney General, like the City, does not dispute two key factual points here. First, the administrative process before the Commission was the functional equivalent of a court "action." The parties there engaged in prehearing written discovery and depositions, there was a lengthy hearing process with eleven witnesses and exhibits in over 8 days of hearings before the hearing examiner, and the hearing examiner wrote an expansive, detailed decision that Arnold has separately provided to this Court in her answer to the City's petition for review. In sum, it was an "action." Op. at 12.

Additionally, it is undisputed by the City or the Attorney General that Arnold recovered back wages. Arnold's employment with the City was at risk, as was her reputation. She successfully withstood the City's effort to oust her from her management position and received substantive relief: she was restored to her position with back pay and her lost employment-related benefits.

Thus, the necessary predicates to the recovery of fees under RCW 49.48.030 after *Fire Fighters* were met here, as the Attorney General effectively concedes.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

(1) The Attorney General's Argument Ignores that the Court of Appeals Opinion Is Narrowly Drawn

The Attorney General largely parrots the City's erroneous argument that the Court of Appeals opinion will result in awards of attorney fees in all RCW 41.06 state civil service proceedings to employees who successfully recover back wages. The Attorney General decries such a result as "imprudent" (AG memo. at 4), ignoring the powerful public policy impetus behind fee awards under RCW 49.48.030.[1]

Moreover, the Attorney General also claims, without any proof, that state agencies will somehow be "discouraged from taking necessary disciplinary actions" by the risk of fees under RCW 49.48.030 (AG memo. at 4), and that such fee awards will represent a "financial burden" to the taxpayers and are "contrary to public policy," again, notwithstanding the powerful public policy of RCW 49.48.030 he ignores. AG memo. at 7. The Attorney General seemingly argues that state employees subject to discipline should happily be unrepresented in complex, trial-like proceedings in which their livelihood and reputation is at stake so that his

[1] Washington has a "long and proud history of being a pioneer in the protection of employee rights. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Moreover, this Court has acknowledged that the Legislature "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payment of wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998) (referencing RCW 49.48.030). "[A]ttorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights...." *Hume*, 124 Wn.2d at 673. With respect to RCW 49.48.030 specifically, this Court stated in *Fire Fighters*: "In light of the liberal construction doctrine, Washington courts have interpreted RCW 49.48.030 broadly." 146 Wn.2d at 35.

office can freely employ any number of publicly-paid AAGs before the PRB to accomplish agency employers' disciplinary objectives (AG memo. at 4, 5 referencing "unrepresented" employees). *See also,* Br. of Resp't at 6 n.5 (City decried Arnold's decision to employ counsel despite the fact it initially fired her).

The Attorney General's argument *ignores* the reality that the Court of Appeals' opinion does not apply to *all* or even most civil service proceedings regarding wages. It applies *only* when that proceeding is equivalent to an "action," and back wages are recovered by the affected employee. Op. at 4, 8, 11-13.[2]

The Attorney General is also apparently untroubled by the effect of trial-like disciplinary proceedings on working men and women in public service in our state and is perfectly content with exploiting the unfair advantage of his office, with its publicly-paid attorneys, taking on such unrepresented employees in administrative proceedings that are tantamount to actions in court.

(2) The Attorney General Ignores *Fire Fighters*

[2] The Attorney General cannot point to a provision in RCW 41.06 that affirmatively bars an award of attorney fees, nor did the Legislature amend RCW 49.48.030 post-*Fire Fighters* to restrict the scope of its application based on the principles articulated by this Court in that decision. The overreaching liberal and remedial scope of RCW 49.48.030 was not limited in any way.

The central reason why review should be denied here is that this Court's decision in *Fire Fighters* controls, and the Court of Appeals followed the precepts laid out there for recovery of fees under RCW 49.48.030. This Court there stated: (1) RCW 49.48.030 is a remedial statute to be liberally construed in favor of persons like Arnold who have recovered unpaid wages, and (2) ruled the statute applies to any "action" akin to a judicial proceeding where a party recovers wages or salary owing. *Fire Fighters,* 146 Wn.2d at 41. Applying *Fire Fighters*, the Court of Appeals held the civil service proceeding here was an action and Arnold recovered wages, so fees must be awarded under RCW 49.48.030's remedial provisions, liberally construed. Op. at 13.[3]

This Court has *twice* made clear that RCW 49.48.030 applies to administrative disciplinary proceedings like the one at issue here. *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986) (judicial review of a civil service suspension) (not cited by the Attorney General);[4] *Fire Fighters, supra* (recovery of back pay in collective bargaining arbitration proceedings). The Court of Appeals has done so as well in *McIntyre v.*

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[3] It is important to recall that the Attorney General has not denied that the Commission proceedings were functionally equivalent to an action in court or that Arnold recovered back wages.

[4] In *Hanson*, this Court affirmed an award of attorney fees under RCW 49.48.030 to an employee who was suspended for more than the thirty days allowed under the City of Tacoma civil service rules and successfully challenged the discipline

Washington State Patrol, 135 Wn. App. 594, 141 P.3d 75 (2006) (WSP administrative disciplinary decision).[5]

The Court of Appeals addressed its decisions in *Cohn v. Dep't of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995) and *Trachtenberg v. Wash. State Dep't of Corrections*, 122 Wn. App. 491, 93 P.3d 217, *review denied,* 103 P.3d 801 (2004) in light of *Fire Fighters* and resolved any apparent conflict in such decisions with this Court's decision in *Fire Fighters* by overruling any analysis in those decisions conflicting with *Fire Fighters*. Op. at 6-11. After this Court's decision in *Fire Fighters, Cohn* and *Trachtenberg* were unsustainable. Op. at 10.

However, if *Cohn* and *Trachtenberg* are still good law after *Fire Fighters,* those cases do not compel a different result than that provided by the Court of Appeals. Both cases involved *state* civil service statutes that *specifically* address the remedies afforded state employees.[6] In other words, the Legislature may decide not to apply its own legislative

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imposed against him. *Hanson* plainly concluded that judicial review of Tacoma's Civil Service Board's decision was an "action" under RCW 49.48.030. 105 Wn.2d at 872.

[5] The trooper there brought a separate action for fees after the successful judicial review of the Washington State Patrol administrative decision to terminate her employment. Division II rejected the notion that any fee recovery by a person recovering back wages depends upon the nature of the action. *McIntyre,* 135 Wn. App. at 603-04.

[6] It is noteworthy that in *McIntyre*, the applicable State Patrol statutes did not address remedies. For that reason, the Court of Appeals correctly determined that the public policy of RCW 49.48.030, as determined by this Court in *Fire Fighters*, must control. Op. at 7.

enactment, RCW 49.48.030, to certain types of proceedings. That is not true for local governments who must respect state law as expressed in RCW 49.48.030; local civil service ordinances cannot exempt themselves from remedial state law, thereby trumping the application of state policy expressed in RCW 49.48.030.

The present case fully comports with RCW 49.48.030 discussed in *Fire Fighters*, *Hanson*, and *McIntyre*. The *Fire Fighters* and *Hanson* employees sought to recover pay withheld during a suspension that was unsupported by their collective bargaining agreement and/or applicable civil service rules, respectively. Further, *Hanson* confirms that, for purposes of RCW 49.48.030, back pay resulting from an unsupported demotion is equivalent to back pay recovery from a suspension. Arnold succeeded in recovering back wages that were owed to her in an action within the meaning of RCW 49.48.030. *Fire Fighters* controls.

Finally, the Attorney General's contention that review is merited here on public policy grounds simply ignores RCW 49.48.030 and *Fire Fighters*. RCW 49.48.030 expresses a powerful remedial purpose of encouraging employers to pay wages to employees and allowing employees to secure legal representation to vindicate their wage rights when employers ignore Washington's wage policy; the Court of Appeals opinion better implements that public policy than the Attorney General's

or the City's exceedingly narrow interpretation of the statute. Governmental employers like the City or the Attorney General do not like this Court's *Fire Fighters* decision nor its broad interpretation of the remedial policy of RCW 49.48.030. They want to subvert it.

Like the City, the Attorney General contends that the Court of Appeals opinion is a departure from the broad public policy basis supporting fee awards under RCW 49.48.030 and that it "disrupted settled expectations regarding attorney fees incurred in the state and civil service context." Pet. at 14; AG memo. at 4. Nothing could be farther from the truth. The Court of Appeals opinion *upholds* the policy of RCW 49.48.030. The City's arbitrary action *forced* Arnold to employ counsel to vindicate her rights and she recovered back wages due from the City. The City's argument would leave local civil servants at the mercy of municipalities who have taxpayer-paid counsel.[7] RCW 49.48.030, a broadly remedial statute, was intended to provide an incentive to counsel to take wage cases, as Arnold's counsel did here. The Court of Appeals understood and faithfully applied this Court's reasoning in *Fire Fighters*.

The Attorney General's public policy argument on the alleged effect of the Court of Appeals opinion on civil service is unsupported. State agencies will not fail to discipline employees. They will still

discipline employees meriting discipline, but those public agencies will also be cognizant of the rights of employees to contest such actions and will likely take appropriate care to ensure that such discipline is proper and not excessive when litigated in proceedings tantamount to court proceedings.[8]

The Attorney General, like the City, implies that civil service administrative proceedings are somehow "better" for employees if the employee is unrepresented. Pet. at 14; AG memo. at 4-5. This is but an argument that employees should cede their rights and meekly submit to public agency employer mistreatment. Here, Arnold had to fight the City's aggressive efforts to harm her livelihood and her reputation, and she prevailed. The playing field, though, is hardly level. State agencies have AAGs, paid by public dollars, readily at their disposal. Employees do not. When they must vindicate their wage rights, public employees have to obtain representation in the private market. RCW 49.48.030 appropriately levels the playing field to ensure that when a public employee vindicates his or her wage rights in an action tantamount to a court proceeding, they, like the public agency employers, have counsel at their disposal.

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[7] The Attorney General's argument would also be true for state employees.

[8] It is worth noting that the City's initial decision was to fire Arnold. She was ultimately disciplined, albeit on a far less drastic basis. She stopped the City's

D. CONCLUSION

The Attorney General's arguments in his memorandum fail to demonstrate how the City has met RAP 13.4(b) so as to require review of the Court of Appeals decision, a decision that properly applied RCW 49.48.030 after *Fire Fighters*, *Hanson*, and *McIntyre* to Arnold's civil service proceeding that shared all the same attributes of an action in court and that resulted in her recovery of a year's worth of back wages due her.

This Court should deny review and award fees and costs to Arnold pursuant to RAP 18.1(j).

DATED this 2d day of September, 2015.

Respectfully submitted,

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disciplinary overreach only by employing counsel and vindicating her rights in a court-like proceeding.

DECLARATION OF SERVICE

On said day below I emailed a copy for service a true and accurate copy of Arnold's Answer to Amicus Attorney General Memorandum in Supreme Court Cause No. 91742-6 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 2nd, 2015, at Seattle, Washington.

Roya Kolahi, Legal Assistant
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Good Afternoon:

Attached please find Arnold's Answer to Amicus Attorney General Memorandum in Supreme Court Cause No. 91742-6 for today's filing. Thank you.

Sincerely,

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