No. 91742-6

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 PETITION FOR REVIEW

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A. INTRODUCTION

The City of Seattle ("City") cannot demonstrate how the Court of Appeals' decision failed properly to apply 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). The City does not claim the Court of Appeals opinion conflicts with *Fire Fighters*, but instead claims that it conflicts with previous decisions of the Court of Appeals.

The opinion that the City wants this Court to review does not *create* a conflict in the Court of Appeals, it *resolves* one. Acknowledging that some of its previous decisions conflicted with *Fire Fighters* and with each other, the Court of Appeals harmonized and resolved those conflicts, putting the matter to rest. The Court of Appeals correctly discerned that the reasoning of *Fire Fighters* controls and that the extensive hearing process before the Seattle Civil Service Commission was just as much an "action" for purposes of RCW 49.48.030 as any court proceeding.

This Court has already spoken and the Court of Appeals listened. Review is unnecessary.

B. STATEMENT OF THE CASE

The City's statement of the case is noteworthy both for what it says, and for what it does not contest.[1]

The City *nowhere* disputes the point made in Arnold's Court of Appeals briefing and in the Court of Appeals opinion that the parties here engaged in prehearing written discovery and depositions, and the hearing process was extensive, involving numerous witnesses and exhibits and over 8 days of hearings before the Hearing Examiner. Br. of Appellant at 3, 13-14; Reply Br. at 2. Indeed, the City called 11 witnesses in its case in chief before the Commission. Br. of Appellant at 3.[2] The Commission proceeding was a trial, just as if it had been conducted in court, as the Court of Appeals expressly recounted. Op. at 12. Discovery occurred. Witnesses were examined and cross-examined before an impartial hearing officer. Briefs were submitted. The hearing examiner wrote an expansive, detailed decision that is provided in the Appendix.

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[1] The Court of Appeals' discussion of the facts and procedure herein is appropriate, op. at 1-3, and, in its petition, the City does not contest the appellate court's salient facts.

[2] This fact alone essentially undercuts the City's claim that Arnold could have proceeded without counsel. Arnold is a lay person, not a lawyer. To expect her to cross-examine 11 witnesses, particularly where the City had the benefit of counsel, offers the true vision of the City's sense of fairness. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963) (importance of right to counsel under Sixth Amendment for accused). Arnold simply could not have succeeded but for the involvement of counsel. CSCR 2906-10. *See also*, CP 87-91 (declaration of Virginia Adams, co-party to the Commission proceedings).

Thus, the City concedes that Arnold's wage recovery occurred in an "action," and that the civil service hearing here bore all the characteristics of litigation in court, as described above. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (failure to argue issue in brief waives alleged error).

The City aggressively argued in the Court of Appeals that Arnold did not really succeed before the Commission's Hearing Examiner, casting aspersions on Arnold. Br. of Resp't at 2-3. The City's present argument in its petition is subtler, but it nonetheless seeks to downplay the fact that Arnold had to resist its aggressive effort to fire her. It mentions in an offhand fashion that she was "awarded back pay of less than $30,000 and related employee benefits." Pet. at 6. The Hearing Examiner's extensive ruling documents the intensity of the issues in the Commission's proceedings and just how the City is engaging in revisionist history.

Arnold was the manager of the contracts unit of the Aging and Disabilities Services Division of the City's Human Services Department. CSCR 2772, 2774-75. She was not a fiscal auditor. CSCR 2778. Her subordinate performed an inadequate financial audit in response to a whistleblower complaint. CSCR 2776-84. Arnold was not merely "demoted," as the City claims in its petition at 5; rather, *the City sought to*

fire her. CSCR 2784. Arnold hired counsel and requested a Loudermill[3] hearing. CSCR 2784. At that hearing, Arnold presented evidence that others in the Division were actually supervising the employee and that Arnold was on leave during a part of the investigation. *Id.* The Department's director then chose not to fire Arnold but to demote her from her management position to a non-managerial position, reducing her salary from $85,500 annually to $56,000. CSCR 2785-86.[4]

The Hearing Examiner restored Arnold to her management position, albeit with a two-week suspension. CSCR 2795. It is *undisputed* that the Hearing Examiner awarded Arnold back pay and related employee benefits. *Id.* Those employee benefits were not inconsequential to Arnold, financially or otherwise. The Hearing Examiner noted that Arnold's subordinate failed to report to her, CSCR 2789, 2794, and Arnold did not exhibit a pattern of misconduct or act with intent, CSCR 2794, but the Hearing Examiner faulted her only for not being more proactive in the investigation of the whisteblower complaint. CSCR 2789.

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[3] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985) (public employees may not be terminated without due process including a pretermination hearing).

[4] The Law Offices of Judith A. Lonnquist assisted Arnold in avoiding outright termination by the City. The fees incurred in securing that worthwhile result were necessary for Arnold's ultimate success in securing back wages.

The City also complains about tangential matters such as the amount of the fees Arnold incurred,[5] perhaps hoping to distract this Court's from its weak legal argument for review.

In sum, 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 relief that resulted in the restoration of her position with back pay and her lost employment-related benefits. The City was represented throughout the proceedings below by publicly-paid counsel. Arnold had to fight the City's fire with fire. The City's actions *forced her* to secure counsel and that counsel helped her to prevail.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

The City argues two grounds for a review – a split in the decisions of the Court of Appeals (RAP 13.4(b)(2)) and the contention this case involves an issue of substantial public importance that should be resolved by this Court (RAP 13.4(b)). Each will be addressed in turn.

(1) Review Is Not Merited under RAP 13.4(b)(2) Where the Court of Appeals Applied this Court's Controlling Ruling in *Fire Fighters* and Resolved any Lingering Conflicts within Its Own Decisions

[5] *E.g.*, Pet. at 6, 16. The actual amount of any fee award for the Seattle Civil Service Commission and trial court proceedings will abide the trial court's decision on the appropriate amount of recoverable fees and expenses. Op. at 13. There is some irony in the City's complaints about Arnold's fees when its conduct forced her to retain counsel and it has had numerous assistant city attorneys represent it in this case. It now involves a private law firm to prepare its petition to this Court, at further expense.

(a) Under *Fire Fighters*, the Proceedings at Issue Here Are an "Action" Under RCW 49.48.030

It is particularly telling that the City does not seek review under RAP 13.4(b)(1). Nor could it. The City *ignores* the important point that this Court in *Fire Fighters* ruled that (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.

As the City also acknowledges, the Court of Appeals specifically rested its opinion upon the *Fire Fighters* court's statutory interpretation. The nature of the proceeding does not control. Simply saying a proceeding is a court action or an administrative proceeding is not enough. Op. at 10. The issue is whether the proceeding was effectively "an exercise of a judicial function," that is, the equivalent of an action in court. Op. at 11; *Fire Fighters*, 146 Wn.2d at 41. The City has conceded that its Civil Service Commission proceeding here bore all the characteristics of an action for wages in court.

Rather than forthrightly addressing *Fire Fighters* and the Court of Appeals' analysis of it, the City instead contends in its petition that the Court of Appeals has interpreted RCW 49.48.030 inconsistently, and that

the question of whether the civil service proceeding at issue here is an "action" under RCW 49.48.030 is still an "open question." Pet. at 8-9.

This Court did indeed note that the facts of the *Fire Fighters* case involved arbitration, and declined to adopt a blanket rule that would apply to all other non-court proceedings regardless of their specific structure. *Fire Fighters,* 146 Wn.2d at 42 n.11. This Court was wise to refrain; a blanket rule would have meant that hundreds of different types of city, county, and state administrative and quasi-judicial proceedings of all stripes would have been subject to the rule regardless of whether they individually have the indicia of a judicial proceeding.

However, lower courts can, as the Court of Appeals did here, apply the core holding in *Fire Fighters* to the facts of a case without waiting for this Court individually to announce each type of city, county, or state action that qualifies under RCW 49.48.030. That core holding allows fees in non-court actions that bear all the earmarks of an action in court, *i.e.,* actions that constitute the exercise of a judicial-like function. 146 Wn.2d at 38. The City's argument here, that *this* Court must pronounce on the applicability of RCW 49.48.030 to each and every type of proceeding available in this State, is untenable and unnecessary.

Also, this Court has *twice* made clear that RCW 49.48.030 applies to 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); *Fire Fighters, supra* (recovery of back pay in collective bargaining arbitration proceedings). The Court of Appeals has done so as well in *McIntyre v. Washington State Patrol*, 135 Wn. App. 594, 141 P.3d 75 (2006) (WSP administrative disciplinary decision).

In *Fire Fighters*, this Court addressed the availability of attorney fees under RCW 49.48.030 for employees who recovered back pay in arbitration. 146 Wn.2d at 32. In a prior proceeding, an arbitrator had found that the *Fire Fighters* employees had been suspended without pay in violation of a collective bargaining agreement. *Id.* The arbitrator therefore awarded back pay for the period of the suspension. *Id.* The union that had represented the employees during the arbitration sought attorney fees in a separate superior court action under RCW 49.48.030, and the matter ultimately proceeded to this Court. This Court found that the union was entitled to attorney fees pursuant to the statute. *Id.*

This Court held in *Fire Fighters* that an arbitration is the functional equivalent of a court proceeding, an "action" under RCW 49.48.030. 146 Wn.2d at 37-39. This Court also noted that an "action" is more than a judicial proceeding, *id.* at 40, in concluding:

> It is clear that had this case been brought in superior court, attorney fees would have been available. Because RCW 49.48.030 is a remedial statute, which must be

> construed to effectuate its purpose, we find no reason to not interpret "action" to include arbitration proceedings. A restrict interpretation of "action" would preclude recovery of attorney fees in cases involving arbitration even though the employee is successful in recovering wages or salary owed. Thus, it would be inconsistent with the legislative policy in favor of payment of wages due employees. *See Schilling*, 136 Wn.2d at 157, 961 P.2d 371. Therefore, we hold that "action" as used in RCW 49.48.030 includes grievance arbitration proceedings in which wages or salary owed are recovered.

Id. at 41. By its terms, RCW 49.48.030, applies to *any* action in which back wages are recovered. That policy is certainly vindicated where like here, the proceeding is akin to litigation in the judicial setting.

Similarly, 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 imposed against him. A portion of the wage recovery at issue in that case was from a period of time when the employee was demoted to a lower-paying position in connection with a suspension. *Id.* *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. The City addresses *Hanson* only in footnotes. Pet. at 9 n.4; 11 at n.5.

Finally, in *McIntyre*, the trooper brought a separate action for fees after the successful judicial review of the Washington State Patrol

("WSP") administrative decision[6] 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.[7] 135 Wn. App. at 603-04.

(b) The Court of Appeals Here Did Not Create a Conflict With Its Other Opinions, It Acknowledged and Resolved any Apparent Conflict by Properly Applying *Fire Fighters*

The central argument advanced by the City is that the Court of Appeals decision here conflicts with three Court of Appeals decisions, ignoring the fact that *Fire Fighters*, a decision of this Court, controls. Pet. at 9-13.[8] The City claims that the decision here conflicts with *Cohn v. Dep't of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995); *Trachtenberg v. Wash. State Dep't of Corrections*, 122 Wn. App. 491, 93 P.3d 217,

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[6] In *McIntyre*, the State asserted that McIntyre could have recovered fees if she had brought a grievance proceeding against the WSP. A WSP grievance proceeding is an administrative proceeding very much akin to Arnold's Civil Service Commission proceeding.

[7] The City argues offhand in a footnote that if an employee obtains one dollar of added relief upon judicial review of an administrative decision, the employee recovers his or her fees under RCW 49.48.030, but if the employee incurs substantial fees and expenses to vindicate his or her rights to wages in a major administrative trial, the employee does not recover fees. Pet. at 13 n.6. Not only does the language of RCW 49.48.030 not support this result, this is hardly an incentive for an attorney to take a case to secure an employee's wage rights, the very purpose of the statute. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (statute's purpose is to provide incentives to aggrieved employees to assert their wage rights). The Court of Appeals properly rejected this argument, as no longer valid post-*Fire Fighters*, op. at 9-10, a point not mentioned in the City's petition.

[8] The City also cites *McIntyre*, pet. at 12-13, but, as noted *supra*, *McIntyre supports* Arnold's position.

review denied, 103 P.3d 801 (2004); and *Int'l Union of Police Ass'n, Local 748 v. Kitsap Cnty.*, 183 Wn. App. 794, 333 P.3d 524 (2014).

The City's petition fails to acknowledge that Court of Appeals here explicitly addressed those decisions in its opinion and resolved any apparent conflict by overruling all conflicting analysis in *Cohn, Int'l Union,*[9] and *Trachtenberg*. Op. at 6-11.

The Court of Appeals acknowledged that because of this Court's decision in *Fire Fighters,* the decisions in *Cohn* and *Trachtenberg* were unsustainable. In fact, it explicitly so stated:

> Discussing *Fire Fighters* in *Trachtenberg,* we said that the Supreme Court's disagreement with *Cohn's* reading of *Hanson* 'was not material to the issue we have here.' That was incorrect. ...[I]t was only by distinguishing *Hanson* that the *Cohn* court was able to hold that an administrative scheme with limited remedies precludes application of RCW 49.48.030. That distinction did not survive *Fire Fighters*, as noted above."

Op. at 10 (citation omitted). The Court of Appeals may not have used the term "overruled" in its opinion, but this explicit acknowledgement that *Cohn* and *Trachtenberg* conflicted with *Fire Fighters* eliminated any

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[9] The Court of Appeals made clear that *Int'l Union* was no longer sustainable in that it relied on analysis from *Cohn* that the Court was overruling. It also noted in its opinion at 8 n.2 that *Int'l Union* could also be sustained in light of *Arnold* on the same basis this Court distinguished an interest arbitration from a grievance arbitration – it was not an "action" in the sense this Court found in *Fire Fighters*. This Court has now specifically concluded that interest arbitration is not in the nature of an action. *Kitsap County Deputy Sheriffs' Guild v. Kitsap County,* ___ Wn.2d ___, ___ P.3d ___, 2015 WL 3643476 (2015).

alleged conflict and effectively overruled those cases on the issue the City raises here.

As the Court of Appeals concluded, after *Fire Fighters*, the proper analysis rests on two questions: (1) was the proceeding an "action" within the meaning of RCW 49.48.030, a proceeding that was the functional equivalent of a court proceeding? and (2) did the plaintiff recover wages due him/her? If so, fees could be recovered under the statute regardless of whether the agency had express statutory to award fees. Op. at 13.[10]

To the extent that the City believes *Cohn* and *Trachtenberg* are still intact, those cases ultimately create no conflict given the facts here. Both cases involved *state* civil service statutes that *specifically* address the remedies afforded state employees so that RCW 49.48.030 would not apply. In other words, the Legislature apparently decided not to apply its own legislative enactment, RCW 49.48.030, to certain proceedings.[11]

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[10] *McIntyre* expressly supports this analysis. Op. at 8 ("But this court now has in *McIntyre* a post-*Fire Fighters* decision concluding that remedies offered by an administrative agency are not 'self-limiting' and thus do not exclude the application of RCW 49.48.030.").

[11] The City's cited *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134, *review denied*, 177 Wn.2d 1018 (2013) in its Court of Appeals brief at 9. That case further supports Arnold's analysis. The Court of Appeals there was confronted with remedies available to whistleblowers under Seattle's whistleblower ordinance. Critically, state law specifically delegated the power to local governments to adopt their own local whistleblower ordinances. Unlike the state law on whistleblowers applicable to state employees that gave such employees a cause of action, state law was conspicuously silent as to any corresponding remedy for local government employees. *State law explicitly governed the issue.*

Neither *Cohn* nor *Trachtenberg* stands for the proposition a *local* government could, as the Legislature may, trump the application of state policy expressed in RCW 49.48.030.

The City makes the bold assertion in its petition at 1 that the Court of Appeals' opinion "is contrary to every other appellate decision to address [the availability of fees under RCW 49.48.030 in an administrative proceeding]." That assertion is simply false, ignoring *Hanson* and *McIntyre*. But the City's position is troubling for its deliberate refusal to come to grips with this Court's analysis of RCW 49.48.030 in *Fire Fighters*.[12]

Without any citation to language in RCW 49.48.030 itself, or any other state law, the City also seemingly contends that its local civil service can trump state law on the recovery of attorney fees where it wrongfully withheld Arnold's wages. Pet. at 1-2, 4-5, 13. It claims that the City's policy denying fees to a prevailing employee somehow overcomes the overarching public policy of RCW 49.48.030 set by the Legislature. It is wrong. The City offers no authority supporting its novel contention that

[12] The City's citation to stare decisis precedent, pet. at 13-14, is ultimately disingenuous. This Court definitely interpreted RCW 49.48.030 in *Fire Fighters*. Contrary Court of Appeals precedent must give way. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("A decision by this Court is binding on all lower courts in the state. When the Court of Appeals fails to follow directly controlling authority by this Court it errs.") (citations omitted).

local law can preempt state law.[13] It cannot cite *a single case* in which RCW 49.48.030 was rendered inapplicable by a local civil service ordinance.

Again, without citation to any authority, the City actually argued below that an employee like Arnold, effectively waives her right to fees under state law because she receives what the City characterizes as a "low cost and speedy civil service forum."[14] The Court of Appeals properly rejected that vastly incorrect characterization of the proceedings in Arnold's case. Op. at 7-8. The City does not directly make this argument in its petition but that is the thrust of its mischaracterization of its own civil service ordinance. Pet. at 1-2, 4-5, 13.

The City correctly notes that the powers of administrative agencies are derived from the laws creating them, pet. at 10, but that does not mean that a local government can, in the absence of direction from the Legislature, evade explicit state law. Contrary to the City's assertion, made yet again without authority, simply because the City's civil service

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[13] The City *ignores* article XI, § 11 of the Washington Constitution that provides for preemption of local police power ordinances that conflict with state (general) law. *See* Br. of Appellant at 17-18.

[14] Below, the City actually decried Arnold's decision to employ counsel at all. "Certainly, the matter could have proceeded with far less expense, use of resources and without legal counsel." Br. of Resp't at 6 n.5. *The City ignores the fact that it fired Arnold.* The City arrogantly believes that Arnold should simply have meekly accepted such punishment or litigated a complex matter on her own against the City represented by taxpayer-paid counsel.

ordinance chooses not to allow its employees to recover their fees and expenses, this does not mean that the City can thereby choose to evade the application of RCW 49.48.030.[15]

In sum, the present case involves the recovery of back pay equivalent to wages for purposes of RCW 49.48.030 just as 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. Similarly, Arnold succeeded in recovering wages that were owed to her because her demotion was not permitted by the City's personnel rules. Therefore, just as in *Fire Fighters*, Arnold established a wage recovery.

There is no split of authority in the Court of Appeals meriting this Court's review under RAP 13.4(b)(2). *Fire Fighters* controls. Arnold's civil service action, with all the procedural earmarks of a judicial action, was necessary to vindicate her rights and to make her whole. The civil

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[15] The City cites an old overruled decision as authority for its position. Pet. at 10. *Punton v. City of Seattle Pub. Safety Comm'n*, 32 Wn. App. 959, 650 P.2d 1138 (1982) does not help the City. The case did not arise under RCW 49.48.030 and long predated this Court's analysis in *Fire Fighters*.

service hearing here was the functional equivalent of a court action, given the procedures employed in Arnold's lengthy hearing before the Commission.

Simply put, the Court of Appeals correctly discerned that *Hanson, Fire Fighters,* and *McIntyre* control and any Court of Appeals opinion to the contrary is no longer good law. Op. at 6-11. Just as in those cases, Arnold recovered wages due her in an action for purposes of RCW 49.48.030. Review is not merited. RAP 13.4(b)(2).

(2) Review Is Not Appropriate under RAP 13.4(b)(4) Where This Court Has Already Decided the Applicable Public Policy in *Fire Fighters*

There is real irony in the City's contention that review is appropriate for public policy reasons. Pet. at 14-17. First, it *opposed* direct review sought by Arnold on grounds of RAP 4.2(a)(4), stating in its answer to the statement of grounds for direct review in cause number 88370-6 at 3:

> There is nothing about the Appellant's [Arnold's] claim here that suggests such broad application of the outcome or an issue that can be considered particularly urgent. There is no suggestion that there are hundreds of people in the state awaiting the opportunity to collect attorney's fees as a result of appeals to disciplinary action before a civil service commission.

Second, the Court of Appeals opinion, with its proper interpretation of *Fire Fighters*, fully comports with the public policy of

RCW 49.48.030, a remedial statute to be liberally construed. This Court has consistently recognized Washington's "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, the Court has also repeatedly 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.

Given RCW 49.48.030's 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 is eminently correct and better implements the public policy of RCW 49.48.030 than the crimped interpretation of the statute the City offers that constitutes a thinly-disguised invitation to overrule *Fire Fighters*.

The City would have this Court believe 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. 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. 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 this Court's reasoning in *Fire Fighters*.

The City's public policy argument on the alleged effect of the Court of Appeals opinion on civil service rings very hollow. It contends the decision will cause local governments to eschew civil service ordinances. That argument is, quite frankly, nonsense. Civil service ordinances *benefit local governments*, with or without the application of RCW 49.48.030 to administrative hearings. If local governments choose not to have civil service ordinances, the result will be that the forum for vindicating employee rights will be collective bargaining arbitration

proceedings or court actions, where this Court determined in *Fire Fighters* as to the former and in numerous cases as to the latter that RCW 49.48.030 applies in full force when an employee prevails and collects back pay.

The City implies that civil service administrative proceedings are somehow "better" for employees if the employee is unrepresented. Pet. at 14 ("voluntary civil service codes for personnel administration...benefit public employees"). The City's implication is but a variation on the theme that employees should meekly submit to the City's mistreatment of them. Such an assertion is belied by the facts here where 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. Local governments have counsel, paid for with 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.

The City even resorts to the desperate argument that *state* civil service policy on attorney fees in such proceedings will be adversely affected by the Court of Appeals opinion. Pet. at 16-17. That issue is not before the Court here and must be analyzed in light of *Fire Fighters*. Moreover, that argument is obtuse to a core fact: The City is not the Legislature. The Legislature enacted the overarching policy of RCW

49.48.030. It can choose to exempt state civil service proceedings from its reach. The City cannot choose to exempt itself from state policy, unless permitted to do so by the Legislature. The Legislature has not seen fit to exempt the City's civil service proceedings from RCW 49.48.030.

Contrary to the City's arguments, review is not required under RAP 13.4(b)(4). The Court of Appeals opinion correctly applied the larger public policy of RCW 49.48.030. It properly applied this Court's specific teachings from *Fire Fighters* on application of the statute to Arnold's "action," and liberally applied that statute to achieve its remedial purpose.

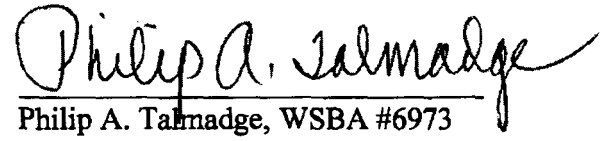
D. CONCLUSION

The City fails to document grounds under RAP 13.4(b) to merit review of the Court of Appeals decision, a decision that properly applied RCW 49.48.030 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 of back wages due her. That proceeding was an action under RCW 49.48.030, as interpreted in *Hanson*, *Fire Fighters*, and *McIntyre*.

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

DATED this 15th day of June, 2015.

Respectfully submitted,



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APPENDIX

RCW 49.48.030:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE
UNDER DELEGATION FROM CIVIL SERVICE COMMISSION

GEORGIANA ARNOLD and VIRGINIA ADAMS Appellants vs. HUMAN SERVICES DEPARTMENT Respondent	)	File: CSC 11-01-018

Introduction

Georgiana Arnold and Virginia Adams timely appealed discipline imposed by the Director of the Human Services Department. Pursuant to SMC 4.04.250L.7, the Civil Service Commission delegated the appeal to the City of Seattle Hearing Examiner for hearing and decision.

The appeal hearing was held on March 14, 16, and 19, April 2, 16, and 30, May 11, and June 1, 2012, before the undersigned Hearing Examiner (Examiner). Appellant Georgiana Arnold, was represented by Judith A. Lonnquist, attorney-at-law; Appellant Virginia Adams was represented by Katrin E. Frank, attorney-at-law; and the Human Services Department (Department) was represented by Erin Overbey, Assistant City Attorney. The record remained open until July 9, 2012 for filing of the parties' opening and responsive briefs.

Having considered the evidence in the record and the arguments of the parties, the Examiner enters the following findings of fact, conclusions and decision and order on the appeal.

Findings of Fact

Background

1. In 2010 and 2011, Appellants Georgiana Arnold and Virginia Adams were employed by the Aging and Disabilities Services Division (ADS) of the City's Human Services Department (HSD). Ms. Adams was employed as a Senior Grants and Contracts Specialist. Ms. Arnold was employed as a Services Development and Contracts Manager and was Appellant Adams's immediate supervisor.

2. HSD's mission is "to find and fund solutions for human needs so that low-income and vulnerable residents can live and thrive." Exhibit 37 (Workplace Expectations). HSD "fulfills this mission through its roles as leader, funder and provider." *Id.* As a funder,

HSD contracts with over 200 community-based organizations to provide programs and services to clients. *Id.* Its challenge is to fulfill its responsibilities "with the limited resources available to local government." *Id.*

3. HSD's Workplace Expectations are supplied to all employees, and the Appellants also received them.

4. Danette Smith is the Director of HSD. She considers herself a "change agent," noting that when she was hired, it was made clear by both the City Council and Mayor that there was some "transformative work" to be done in the Department, particularly with respect to contract administration and oversight.

5. In addition to being a division of the Human Services Department, ADS is the state-designated Area Agency on Aging (AAA) for Seattle-King County, sponsored by the City of Seattle, King County and the United Way of King County. In that capacity, ADS operates under the Area Plan on Aging, adopted by the AAA sponsors, and receives federal grant funds through the Washington State Department of Social and Health Services/Aging and Disabilities Services Administration (DSHS/ADSA). The City, through HSD, then contracts with other agencies for provision of services to various qualified populations. As the AAA, ADS is responsible for writing, negotiating and monitoring contracts for services to implement AAA programs and follows DSHS/ADSA policies and procedures for AAA-contracted services in addition to HSD policies and procedures.

6. Senior Services of King County (Senior Services) and HSD executed a Master Agency Services Agreement that covered the master contractual obligations of the two parties for all HSD services administered by Senior Services. Exhibit 2. The Agreement provides that Senior Services must verify that invoiced services have been performed, and that all costs must be "supported by properly executed payrolls, time records, invoices, vouchers, records of service delivery or other official documentation". Exhibit 2 at 1 and 2, §§210 & 220. Under the Agreement, HSD "shall have access at any time during normal business hours and as often as necessary to any bank account or Agency books, records, documents, accounts, files, reports, and other property and papers of the Agency related to the services to be provided under this Agreement for the purpose of making an audit, review, survey, examination, excerpt or transcript. Exhibit 2 at 7, §240.

7. One of the services administered by Senior Services was the Kinship Care Support Program (Kinship Care or Kinship Care Program). This program is need-based and provides information and support to adults who are providing care in their home for children who are not their biological or adopted children. It provides services that are required by the caregivers because children are in the home. The services are provided by independent vendors and may not exceed $1,500 per year per caregiver.

8. ADS asked the HSD auditor, Effren Agmata, to perform a general audit of the Kinship Care contract in 2009 and 2010. He worked part-time and was responsible for many

audits, so he was not able to get to the Kinship Care audit in 2009. An audit was scheduled in 2010, but Mr. Agnata was unable to make contact with the proper person at Senior Services. He deferred the Senior Services audit and moved on to others because he knew that Senior Services had received a recent external audit that was clean.

9. Despite his schedule, Mr. Agnata was available to assist others in ADS when approached about specific fiscal issues of concern and, if requested by the Director, would re-order his priorities.

Job Duties, Procedures and Workplace Expectations

10. HSD has a Contract Manual that serves as a reference guide for staff for "negotiating, writing, processing, and monitoring contracts for services." Exhibit 36 at 1. It includes guidelines that "describe the terms and practices developed to track and document activities that reflect good stewardship of city funds distributed to community service providers." Exhibit 36 at 29. The guidelines note that "[p]rogram specialists serve as the primary line of communication and contact for HSD with providers and are in the best position to identify potential problems and respond with guidance and assistance." Exhibit 36 *supra*. The guidelines "complement any monitoring or audit requirements set forth by HSD or other funds sources." Exhibit 36 *supra*.

11. The Contract Manual notes that "written documentation from desk monitoring activities and site visits provides evidence of a program's performance or nonperformance," and that non-performance "is reflected by a significant trend based on reports, visits, or by more serious unconfirmed concerns. Program specialists are expected to summarize all documentation and concerns to their immediate supervisor for advice." Exhibit 36 at 31.

12. The AAA Manual produced by the State of Washington also addresses contract monitoring in Chapter 6, §III. Exhibit 52. The AAA Manual's policies address monitoring that is done at regular intervals in accordance with the criteria set forth in the Manual. However, Policy 9 notes that "in addition to comprehensive and focused monitoring, AAAs may make informal monitoring visits to subcontractors as deemed appropriate and necessary." The remaining policies provide procedures for an exit interview following the monitoring, require a written report of the monitoring findings, and provide procedures for corrective actions "appropriate to the documented deficiencies found through monitoring or complaints." Exhibits 52 at 18.

13. As a Services Development and Contract Manager, Ms. Arnold managed the contracts unit of ADS, including supervising 12 full- and part-time professional staff. Some of her specific job duties included: "[i]n concert with ADS Fiscal Services and contracts staff, monitor contract expenditures and program quality;" "[e]nsure compliance with contract requirements and fiscal guidelines;" "[s]upervise the preparation, assessment and evaluation of contracts and agreements with subcontracted agencies;" "[p]lan, organize and facilitate program assistance and site visits;" "[p]rovide guidance

and direction to staff on contracts-related concerns, policy and practice, and operational issues;" "[d]irect the daily operations of the Contracts Unit;" and "[p]lan, organize, review and evaluate the work of Unit staff. Exhibit 24.[1]

14. As a Senior Grants and Contracts Specialist, Ms. Adams' job duties included negotiating and writing contracts and amendments, processing contract invoices, monitoring "the contract agency's performance by reviewing program reports, fiscal records and on-site assessments," and using "computer data systems to gather program information and to analyze provider performance and spending trends," among others. Exhibit 23.

15. Most of HSD's Workplace Expectations apply to all employees including:

- [C]onduct the Department's business and represent the City of Seattle to the citizens of Seattle in a manner that embodies integrity and cultivates the public's trust in City government.
- Understanding your job responsibilities and performing these effectively and efficiently as a full "contributor" to the mission of the Department; you are accountable for your job performance.
- Accepting delegated authority and responsibility for the work assigned to you.
- Performing all your job duties within the standards set for your position ....
- Being "proactive" instead of "reactive", addressing work issues or concerns before they escalate into problems.
- Making decisions within the scope of your responsibilities, following through as required and reporting appropriate information to other co-workers involved and higher supervisory personnel.

Exhibit 37. Additional Workplace Expectations for HSD supervisors include:

- Providing clear assignments and delegation to subordinates, ensuring that job instructions, City and Department rules, policies and procedures, and day-to-day operations are clearly understood and completed.
- Taking the lead in establishing overall goals and objectives in facilitating unit planning; clearly communicating the vision and final plan to all staff, management, and other organizations or community agencies as necessary.
- Clarifying responsibilities, procedures and performance expectations, orally and in writing.

Exhibit 37.

[1] Ms. Arnold's position title is incorrectly stated on this exhibit.

The Complaint

16. Ms. Adams assumed responsibility for oversight of the Program contract with Senior Services in January of 2010. In the fall of 2010, she was also overseeing 10 other contracts along with her other duties.

17. In November of 2010, Ms. Adams received a telephone message from Senior Services' employee Michael Lusk, who had just been laid off for what he was told was a short-term furlough due to a deficit in a program he did not work in.[2]

18. In preparation for the layoff, Mr. Lusk had started a two-week process of closing out his cases as he would normally do at the end of the year. He was puzzled about his layoff because he knew his program was well-funded. One of the databases he worked with was "Peer Place," which was also used for the Kinship Care Program. Peer Place includes information about each client, the requests made for services, case notes, invoices for payment of services, and the identification of the person working on the case.

19. As Mr. Lusk was working, he noticed an invoice for services to a client that he knew was deceased, having seen a notice about her passing on the Senior Services bulletin board. He noticed that the invoice was for home repair services and hauling, that a vendor had been paid for the services, and that the check had been picked up by Gregg Townsend, but there was no invoice for services in the system. Mr. Townsend was Mr. Lusk's supervisor and also the Program Manager for Kinship Care.

20. Mr. Lusk then developed a query to populate a spreadsheet with cases that included requests for home repair and hauling services at or near the $1,500 limit. He determined that the same vendor, A&F Quality Services, was involved in all the cases and that over 20 had no invoices associated with them. As his last day before layoff approached, Mr. Lusk printed out as many screen shots of the pages associated with these cases as he could. He contacted a colleague who had worked at Senior Services, but moved to ADS, and she told him to contact Ms. Adams with the information he had collected.

21. Ms. Adams and Mr. Lusk spoke on November 22, 2010 in a call that lasted approximately 15 to 20 minutes. He told her that "there was some fraud," or a misappropriation of funds from the Kinship Care Program.[3] He later stated to an investigator that he had told Ms. Adams that the checks to A&F Quality Services were for similar amounts just under the $1,500 limit, that he did not think the vendor was a legitimate business or had done the work, and that he suspected a relationship between

[2] Mr. Lusk is referred to throughout the record as "the Whistleblower" or "the Complainant". His identity was revealed when he appeared to testify. Because he made his complaint a few days after being furloughed, the Appellant disputes his status as a whistleblower. Resolution of that issue is not required for purposes of this decision, which refers to him throughout by name.

[3] Mr. Lusk was not sure which term he used. Testimony of Lusk, 3/16/12. Some notes taken by Ms. Adams use the term "'misappropriation' of funds" but also include the term "fraudulent signatures". Exhibit 18.

the vendor and Mr. Townsend, as it appeared that Mr. Townsend was opening the client matters in Poor Place, approving the invoices and picking up the checks. Exhibit 9 at 9.

22. Mr. Lusk had all of his documents in order to answer any question Ms. Adams might have, but she asked none. He offered to give her copies of his documents, but she refused, saying that she had access to Senior Services' documents. Mr. Lusk's documents show several entries for A&F Quality Services at or near the $1,500 limit. In many cases, the fields for client contact information are blank, the dates of service and dates of requests for service are very close in time, and in all of them, Mr. Townsend is shown as having the case assigned to him or as approving the transaction. Exhibit 16. Ms. Adams had prior knowledge that A&F Quality Services received a lot of business from Kinship Care and was not licensed.

23. The testimony is conflicting as to whether or not Mr. Lusk told Ms. Adams that he had been laid off. The Examiner finds it more probable than not that he either volunteered the information or told her in response to a question about it. ADS, including Ms. Adams, was aware of and concerned about the layoffs at Senior Services, and Ms. Adams had received a call from another Senior Services employee about them.

24. Ms. Adams told Mr. Lusk that she would talk with her supervisor and call him back. She also told him she was not sure she could guarantee his anonymity, although she ultimately tried to do so.

25. Mr. Lusk expected that there would be a "blind audit" of the Kinship Care Program, in which a contract monitor and auditor arrive for an unannounced site visit and ask for documents to be pulled immediately for their review. However, he also had the impression that Ms. Adams did not believe him and thought he was a just an unhappy employee. No one at ADS ever got back to Mr. Lusk.

The Complaint Investigation

26. Ms. Adams noted the Lusk complaint on her Complaint Log, Exhibit 17. She also started a timeline for the complaint that includes further notes of her conversation with Lusk. They state that it concerned "'misappropriation' of funds," concerns about invoices and notes missing, multiple payments to a particular vendor, a belief that there may have been "fraudulent signatures," checks being mailed to or picked up by a staff person, and services provided to a client who was deceased. Exhibit 18.

27. The general understanding of the term "misappropriation of funds" within ADS was that money was spent other than in accordance with its contracted purpose.

28. For the Contracts Unit in ADS, the end of the year is a very busy time. When the Lusk complaint came in, Ms. Arnold was completing staff evaluations, getting all of the following years' contracts completed in time to avoid a break in services, working on

several requests for proposals, reviewing many contract assessment reports, and dealing with a complaint that concerned the death of the client.

29. Ms. Adams reported the complaint to Ms. Arnold, telling her that it looked like a case of bad recordkeeping or mismanagement by Senior Services. There was no specific complaint policy for this type of complaint. They discussed the complaint with Selina Chow. Ms. Chow was the ADS Fiscal Director and Operations Manager and Ms. Arnold's supervisor. She was coordinating the annual assessment for all Senior Services contracts. It was decided that Ms. Adams and Robi Robbins, another Senior Grants and Contracts Specialist, would make a site visit to look into the complaint. Ms. Adams thereafter reported to Ms. Chow on the matter.

30. Ms. Chow was told the complainant stated that there were some irregularities in the Kinship Care Program at Senior Services that ADS should look into. Neither Ms. Arnold nor Ms. Chow was told the specifics of the complaint, nor did they hear the word "fraud" or "misappropriation of funds," and they were not told that Mr. Townsend was implicated.

31. Complaints about Kinship Care were not unusual, although they were normally about the services provided. In accordance with AAA policy, ADS' customary procedure is to notify the agency of a complaint and work with the agency to resolve it.

32. Ms. Adams and Ms. Arnold both testified to the effect that they were not fiscal auditors, and that they treated the Lusk complaint as a "regular" program complaint. Ms. Chow and Ms. Piering agreed with this characterization.

33. Ms. Adams drafted a letter dated November 30, 2010 to Senior Services for ADS Director Pam Piering's signature. The letter was addressed to Denise Klein, Senior Services Executive Director, with a copy to Mr. Townsend, and notified the recipients that ADS had received "a complaint against your agency for misappropriation of the Kinship Care Support Program Supplemental funds." Exhibit 19. The letter stated that ADS would follow-up on the complaint as part of its ongoing annual assessment of Senior Services contracts and would be sending Ms. Adams to review "documentation, invoices and appropriateness of the funds spent to support kinship caregivers". Exhibit 19.

34. At the time she drafted the November 30, 2010 letter, Ms. Adams knew that as the Kinship Care Program Manager, Mr. Townsend had administrator rights to the Peer Place database and could add to or change the information in it, but she did not think he would do so.

35. On her timeline, Ms. Adams noted that she planned to look at the Peer Place database for two months in 2009 and two months in 2010, "look at eligibility, verification of payment/payment process, client records, invoices, copies of checks etc." and "[l]ook at client surveys for 2009 and 2010; contact a few clients who may have [received]

services." Exhibit 18. Ms. Adams did not think to discuss the complaint with Efren Agmata, the HSD auditor, and no one in her management chain suggested she do so.

36. On December 14, 2010, Ms. Adams and Ms. Robins spent four hours at Senior Services reviewing Kinship Care records. They conducted a random audit of Kinship Care clients who had received services during the selected months, including services provided by A&F Quality Services, but they did not focus on A&F transactions. They looked at 15 specific transactions, which was a number that would satisfy AAA requirements. They determined that most documentation was sufficient, but that documentation for the A&F Quality Services invoices was not, as the invoices were for a lump sum amount, with no client name and no indication that client services had been performed. *See* Exhibit 62.

37. Ms. Adams and Ms. Robins questioned Mr. Townsend about several issues. When asked about the expenditures for the deceased client, he stated that they were for clothing for the grandchildren to attend the deceased client's funeral. They did not ask about the home repair and hauling services to the deceased person that were invoiced by A&F Quality Services and specifically noted by Mr. Lusk in his conversation with Ms. Adams. Concerning the fact that checks payable to A&F Quality Services were always just under the $1,300 limit, Mr. Townsend stated that the value of their work was much higher, and that they were often available on an emergency basis when other providers were not. In response to a question about his picking up the checks payable to A&F Quality Services, he admitted doing so but stated that each expenditure required two approvals. Denise Klein confirmed that Senior Services policies allowed Mr. Townsend to deliver checks to vendors when needed. When questioned about the need for additional information on the invoices, he stated that it was provided on a cover sheet that went to the finance department, but that if ADS would provide him with a form for information on the invoices, he would use it going forward. Mr. Townsend also noted that one of his employees was behind in entering backup documentation into the system, and that he had been entering it in the employee's name in an attempt to catch up on case notes and authorizations the employee had not completed.

38. Ms. Adams and Ms. Robins asked Senior Services to provide them with copies of canceled checks and the names, addresses and telephone numbers of A&F Quality Services clients to allow them to verify services performed. The documentation was slow in coming, but some did arrive and was reviewed by Ms. Adams. From what she had seen, Ms. Adams determined that it was not necessary to review client surveys or contact any clients of A&F Quality Services.

39. In accordance with AAA policy, Adams developed four "Required Actions" to be undertaken by Senior Services for the Kinship Care Program to improve documentation and vendor licensing. These were included as Attachment 3 to the Senior Services Multi-Contract Assessment Report for 2010 that was, sent to Senior Services on December 22, 2010. Exhibit 1 at pp. 22 of 23.

40. Ms. Adams reported to Ms. Arnold that they had not found any misappropriation of funds. Ms. Adams then drafted a letter to Denise Klein, Senior Services Executive Director, for Ms. Piering's signature, with a copy to Mr. Townsend. The January 25, 2011 letter acknowledged receipt of the canceled checks and concluded that ADS "did not find evidence of misappropriation of funds by your agency." The letter then set out the four "Required Actions" and noted that there would be a follow-up site visit in May of 2011 to confirm that they had been implemented. Exhibit 5. The follow-up date was later moved to March of 2011.

41. Neither Ms. Piering nor Ms. Chow reviewed Ms. Adams' investigation file. Both believed the investigation was in good hands, with knowledgeable, experienced staff who would follow procedures prescribed by the state. Ms. Piering discussed the investigation and "Required Actions" briefly with Ms. Adams before she signed the letter.

42. There is no evidence in the record of further misappropriation of funds in the Kinship Care Program after December of 2010.

43. In early January of 2011, Ms. Smith reorganized the Department and removed 3 of the 5 Division Directors. On January 6, Ms. Chow was assigned to oversee another section of HSD with just two days notice to ADS of her departure. These developments were unsettling for the Department, and particularly so for ADS, as some of Ms. Chow's duties could not be covered. Ms. Adams subsequently reported to ADS Director Piering on the Kinship Care complaint matter.

The State Auditor

44. In early January of 2011, the State Auditor's Office (Auditor) received a complaint that Senior Services was making payments through the Kinship Care Program to A&F Quality Services, which the complainant did not believe existed, and that the complainant believed the payments were fraudulent in nature and that Gregg Townsend was involved in the fraud. The Auditor decided to open an investigation into the monitoring done by the DSHS/ADSA employee responsible for the Kinship Care Program statewide. That employee set up a meeting for the Auditor with ADS employees.

45. At the March 1, 2011 meeting, the Auditor learned of the Lusk complaint to ADS and that ADS had already investigated and closed it. She determined that the two complaints were the same. The Auditor was surprised that Ms. Adams had told Mr. Townsend, the object of the complaint, about the allegations in the complaint. She reviewed Ms. Adams' file but found no report summarizing the investigation. She did find a copy of a canceled check, payable to A&F Quality Services, that was cashed at a Money Tree location. She considered this to be a "red flag" because Money Tree would charge a fee to cash a check whereas a bank would not. The Auditor also saw the Piering letter stating that ADS had "found no evidence of misappropriation of funds". She determined that further investigation was required, and Ms. Piering authorized her to direct ADS staff in the additional work.

46. The Auditor directed Ms. Adams to search the Peer Place database to identify the caregivers/clients associated with A&F Quality Services, gather their profile information, and contact them to determine whether the services were received.

47. Ms. Adams told the Auditor that she believed Lusk had ulterior motives in making his complaint because he was disgruntled about losing his job. When the Auditor pointed out problems with the ADS investigation and that more work needed to be done, she perceived from Ms. Adams' body language and sighs that Ms. Adams was annoyed and impatient with her, apparently believing that the matter had been properly handled and concluded.

48. When the Auditor became involved, Ms. Piering left a voice mail message for Ms. Smith, the HSD Director, about the prior complaint, the ADS investigation and the meeting with the Auditor. There was no response to message, but Ms. Piering discussed the matter in more detail at a regular meeting with Ms. Smith on March 14, 2011 and was told by Ms. Smith to keep her apprised of developments.

49. Ms. Adams began seeking client contact information from Senior Services and contacting clients but came up with disconnected telephone numbers and bad addresses. When she sought contact information for additional clients, it was slow in coming. On March 30, 2011, Ms. Piering told Ms. Klein the delayed responses were a problem that needed her attention. The following week, Ms. Klein contacted Ms. Piering to inform her that Mr. Townsend had been fired, it appeared client records had been fabricated, and Senior Services had no verification that any clients had received services from A&F Quality Services.

50. Ms. Adams and the Auditor also found no clients who had actually received the services invoiced by A&F Quality Services. The Auditor complimented Ms. Adams on her work on this part of the investigation.

51. The Auditor believed that Ms. Adams was well-intentioned in doing her initial investigation of the complaint but lacked the training and experience to know the right way to approach it. The Auditor did not know of Ms. Adams's experience with a prior investigation involving the Residential Home Care contract.

52. Ms. Adams and Ms. Arnold had conducted the Residential Home Care investigation together. Residential home care is a very high risk area, and detailed procedures for complaint investigation are prescribed by the State. Using those procedures, Ms. Arnold and his Adams had conducted a thorough, focused investigation, kept detailed notes, and prepared a summary report of their investigation. *See* Exhibit 51.

The HSD Audit and Internal Investigation

53. Ms. Piering met with Ms. Smith on April 8, 2011 to inform her of the developments at Senior Services. The meeting was also attended by Mr. Agmata. Ms. Smith was very upset and, among other things, wondered aloud what she would tell the mayor, asked how long Ms. Adams had had the Kinship Care contract, and talked of discipline for ADS employees. Testimony of Piering; Exhibit 47.

54. Later in April, Ms. Piering was removed from the investigation. Ms. Smith assigned Mr. Agmata to audit the Kinship Care Program and five other programs managed by Gregg Townsend. She assigned Cynthia Flowers, HSD's Human Resource Manager, to investigate the details of the complaint of misappropriation of funds and ADS' handling of it.

55. ADS staff assembled several notebooks of information for Mr. Agmata's review and promptly responded to his requests for additional information. Despite having drafted the letter to Senior Services concluding that ADS had found no misappropriation of funds, Ms. Adams stated in the responses to Mr. Agmata that the complaint investigation was on-going because of the expected follow-up on the four "Required Actions".

56. Ms. Flowers conducted interviews with Ms. Adams and Mr. Arnold. They told her they had followed standard policies and procedures. Ultimately, she was not able to obtain sufficient information to understand the complaint handling process and did not provide a report to Ms. Smith.

57. On May 11, 2011, Ms. Smith placed Ms. Piering on administrative leave "to avoid any appearance of impropriety during the course of the investigation," and notified staff of her action. Exhibit 14. Although the investigation was ongoing, Ms. Smith also sent out a press release announcing her action and providing details of the investigation. Exhibit 14.

58. Through the City Attorney's Office, Ms. Smith retained an employment attorney and investigator, Claire Gordon, to investigate ADS' handling of the Lusk complaint and issue a report. Exhibit 35.

59. Ms. Gordon interviewed the Appellants, Ms. Chow and Ms. Piering, Mr. Lusk, the Auditor, Mr. Agmata, and others. Exhibit 9 at 1. Ms. Gordon prepared witness statements for Ms. Piering, Ms. Chow, Ms. Arnold, Ms. Adams, and Ms. Robbins. Each was given a written summary of their remarks to review and edit, as necessary, and asked to sign the corrected statement. Exhibit 9 at 2. All signed except Ms. Robins, who later retired.

60. Mr. Agmata's report was issued on June 28, 2011. The audit spanned four years, 2008 through 2011. In addition to problems found in other programs, the audit determined that $90,791 was paid from Kinship Care funds to A&F Quality Services for

minor home repair and moving services that were not performed. The audit found significant internal control deficiencies in both Senior Services and HSD, across three of the six programs audited. Exhibit 3 at 4.

61. The Auditor later determined that approximately $90,000 of misappropriated funds were associated with A&F Quality Services in addition to other fraudulent transactions involving Mr. Townsend that totaled approximately $132,000.

62. RCW 43.09.185 requires local governments to report a known or suspected loss of "public funds, assets or other illegal activity" to the State Auditor's Office. The Auditor testified that this statute's requirements are often overlooked by local government, and that her office does not impose penalties for that. However, the Auditor included in her report a notation that the complaint about A&F Quality Services should have been reported to her office when it was received, and included a directive for HSD to comply with the statute in the future.

63. Ms. Cordon's report was issued on July 7, 2011. It concluded that the HSD/ADS investigation into the Lusk complaint was inadequate, incomplete and untimely, faulting Ms. Adams for refusing to review the documents Mr. Lusk offered her; contacting Mr. Townsend about the allegation of misappropriated funds, thereby giving him two weeks advance notice in which to generate the missing documentation (*compare* Exhibit 16 and Exhibit 62); conducting what she and Ms. Robins characterized as a "regular" program review, including a random review of only 15 kinship care clients, when they knew they were investigating an allegation of misappropriation of funds; accepting explanations from Mr. Townsend that were not credible; failing to question Mr. Townsend about his relationship to A&F Quality Services; failing to follow through on her own written plan that called for contacting clients; failing to investigate the allegation of fraudulent signatures noted in her documentation of the Lusk conversation; and failing to follow up on the "Required Actions" in accordance with the AAA manual, which required a much shorter time frame in cases of suspected misuse of funds. Exhibit 9 at 29-32.

64. The Cordon report concluded that all three ADS managers shared equal responsibility for the complaint investigation in that they exercised limited oversight of the investigation and failed to conduct a detailed inquiry into the nature of the complaint, thereby making it impossible for them to provide specific direction to Ms. Adams. The report also determined that they failed to conduct any meaningful evaluation of the results of the site assessment before sending the letter informing Senior Services that there was no evidence of a misappropriation of funds. Exhibit 9 at 24-29, 32.

65. The Cordon report also determined that ADS was "less than cooperative" in responding to Mr. Agmata and Ms. Flowers, and misleading in some of the responses they did provide. Exhibit 9 at 33-35. The report noted that in response to one of Agmata's questions, ADS responded that it could not confirm the identity of A&F Quality Services at the time of Ms. Adams' December 2010 site visit when, in fact, she clearly knew the contractor's identity at that time. The report also noted that: 1) ADS

represented that its investigation was ongoing despite the fact that the January 25, 2011 Piering letter to Senior Services reported that HSD/ADS had found no evidence of misappropriation of funds; 2) ADS conducted no further investigation until it was contacted by the Auditor in February of 2011; and 3) ADS' sole focus was on the four "Required Actions" that concerned only Senior Services' actions going forward. Exhibit 9 at 34.

Disciplinary Decisions and Appeals

66. Deputy Director Catherine Lester was hired in June of 2011. She began talking with Director Smith about discipline for ADS staff in approximately mid-June. In response to a conversation with Ms. Smith, Ms. Flowers, and HSD's legal counsel, Ms. Lester reviewed the Cordon and Agmata reports and consulted with Ms. Flowers in HR to determine prior Department discipline for comparable incidents. She did not review any of ADS staff's performance evaluations or discipline histories. She relied on Ms. Flowers to guide her through the Personnel Rules (PRs) and HSD's Workplace Expectations, which she did not personally review. Ms. Flowers had reviewed the job duties and expectations for both Ms. Adams and Ms. Arnold. Because of the erosion of public trust caused by ADS' handling of the Lusk complaint, Ms. Lester did not consider recommending anything short of termination for Ms. Piering, Ms. Chow, Ms. Arnold or Ms. Adams.

67. Ms. Lester's recommendation of termination for Ms. Adams was based on her conclusion that Ms. Adams' handling of the complaint and investigation constituted a knowing or intentional violation of workplace expectations under PR 1.3.4(15), and was also a lack of response to a complaint about a serious matter, i.e., a misappropriation of public funds, which Ms. Lester determined was an "offense of parallel gravity" under PR 1.3.4(18) (misstated as PR 1.3.4(17) in her written recommendation). Testimony of Lester; Exhibit 10.

68. Ms. Lester's recommendation of termination for Ms. Arnold was based on her conclusion that Ms. Arnold failed to provide leadership and supervision to her direct reports in response to a serious complaint. Again, Ms. Lester determined that this was a knowing or intentional violation of workplace expectations under PR 1.3.4(15), and also constituted a lack of care for the fiduciary responsibility involved in the approval of funds to a contracting agency, which Ms. Lester considered an "offense of parallel gravity" under PR 1.3.4(18) (misstated as PR 1.3.4(17) in her written recommendation). Testimony of Lester; Exhibit 15.

69. At Ms. Arnold's Loudermill hearing with Ms. Smith on August 15, 2011, Ms. Arnold and her attorney presented information on why she should not be terminated, including the facts that Ms. Chow was supervising Ms. Adam's investigation of the complaint until Ms. Piering assumed that task, and Ms. Arnold was on approved leave during part of the investigation. Exhibit 12.

70. At Ms. Adams' Loudermill hearing with Ms. Smith on August 25, 2011, Ms. Adams and her attorney presented information on why she should not be terminated, including the facts that she believed the complaint was like other third-party complaints she had received about agencies and did not understand that it was a complaint about fraud, and she correctly followed policies and procedures for third-party complaints. Exhibit 11. She also submitted numerous documents for Ms. Smith's consideration. *See* Exhibits 11, 61 and 63-65.

71. Ms. Smith considered the Cordon report, Ms. Lester's recommendation for termination, and the information presented by Ms. Arnold, as well as the fact that she had no disciplinary history and had positive performance reviews that showed she had the knowledge and skill to supervise properly. She considered the fact that Ms. Arnold acknowledged that communications within ADS and to the Director's office were insufficient. She noted that Ms. Arnold was not present for part of the investigation, but determined that even when a supervisor is on approved leave, he or she should assure that there is proper oversight of employees. Ms. Smith also considered the public perception of the complaint handling process significant because City employees have a responsibility to be good stewards of the public's money. Exhibit 12; Testimony of Smith.

72. With respect to comparable incidents of discipline, Ms. Smith looked primarily to a case in which discipline was imposed on another manager, listed as "19" in the discipline log, Exhibit 42. She felt this was most analogous to Ms. Arnold's situation. Employee 19" had poor management skills and had been counseled repeatedly over a period of two years for failure to hold her staff accountable for their performance, even in the face of direct feedback about violations of an ethics policy, and for failure to provide adequate coaching or direction. *See* Exhibit 58. This manager was temporarily reassigned to a position as a Planner II and agreed that the demotion should be made permanent in lieu of a disciplinary determination.

73. Ms. Smith also considered discipline imposed on a supervisor listed as "16" in the log. This supervisor had been previously coached on his supervisory skills, specifically his inability to implement management decisions and actions, work collaboratively with his supervisor, work effectively with staff, and translate performance expectations into performance goals. *See* Exhibit 66. Four years later he was terminated for a consistent failure to supervise his staff and enforce their adherence to program guidelines. Some of his employees were stealing funds for family members from an assistance program, and although he knew of the problem, he did nothing about it.

74. Ms. Smith determined that Ms. Arnold was a valuable employee but that her "judgment in this case" demonstrated that she should not be in a leadership role and responsible for oversight of contracts worth millions of dollars. Exhibit 12. Ms. Smith demoted Ms. Arnold from her management position, with an annual salary of approximately $85,500, to a Program Intake Representative in the Utility Discount

Program, with an annual salary of approximately $56,000. The demotion took effect September 1, 2011. Exhibit 12; Testimony of Arnold; Testimony of Smith.

75. With respect to Ms. Adams, Ms. Smith considered the Cordon report, the Agnata audit report, Ms. Lester's recommendation for termination, and the information and documents submitted by Ms. Adams. She noted her lack of disciplinary history and her positive performance reviews. She acknowledged that Ms. Adams was responsible for the Kinship Care contract only since January of 2010. However, Ms. Smith did not find credible Ms. Adams' claim that she did not understand the complaint was one of fraud or misappropriation of funds, and she determined that Ms. Adams had conducted an insufficient and focused investigation, refused documents from Lusk that would have provided focus to the investigation, and failed to follow her own action plan for the investigation. She also faulted Adams for failure to share the details of the complaint with anyone in her management chain or seek assistance or guidance on the investigation.[4] Exhibit 11; Testimony of Smith.

76. Concerning comparable incidents of discipline, Ms. Flowers found only one that she related to Ms. Smith. That was "Employee 13" on the log, the employee who was stealing funds from an assistance program by approving assistance for friends and family members on multiple occasions. This was determined to be a violation of the City's Ethics Code, among other things. Although this employee had no disciplinary history, she was terminated.

77. Ms. Smith concluded that Ms. Adams did not take the Lusk complaint seriously and apply the scrutiny expected from someone in her position, thereby failing to be a good steward of public funds. She determined to adopt the recommendation of termination, effective September 1, 2011. Exhibit 11; Testimony of Smith.

78. Ms. Adams and Ms. Arnold appealed their discipline to the Civil Service Commission (CSC), citing a violation of SMC 4.04.070.C and .D and Personnel Rule (PR) 1.3, and asserting that the disciplinary actions were not taken with justifiable cause. The CSC consolidated the cases for hearing.

Applicable Law

79. SMC 4.04.070.C provides that employees cannot be demoted, suspended or discharged except for cause. SMC 4.04.070.D states that employees have the right to fair and equal treatment.

80. "[A]n appointing authority ... may take the following disciplinary actions against an employee for misconduct or poor work performance: 1. A verbal warning ... 2. A

[4] Exhibit 11 also mentions losses as a result of inadequate documentation of gift cards and other expenditures. However, the parties stipulated that "Senior Services' use and alleged lack of adequate documentation of gift cards and other expenditures was a concern, but not the basis for the decision to terminate Virginia Adams." Stipulation dated March 12, 2012.

written reprimand ... 3. Suspension of up to 30 calendar days ... 4. Demotion ... 5. Discharge. PR 1.3.3.A.

81. Under PR 1.3.3.C, a regularly appointed employee may be suspended, demoted or discharged only for justifiable cause, which requires the following:

1. The employee was informed of or reasonably should have known the consequences of his or her conduct;
2. The rule, policy or procedure the employee has violated is reasonably related to the employing unit's safe and efficient operations;
3. A fair and objective investigation produced evidence of the employee's violation of the rule, policy or procedure;
4. The rule, policy or procedure and penalties for the violation thereof are applied consistently; and
5. The suspension or discharge is reasonably related to the seriousness of the employee's conduct and his or her previous disciplinary history.

82. The disciplinary action imposed "depends upon the seriousness of the employee's offense and such other considerations as the appointing authority ... deems relevant." However, a "knowing or intentional violation" of the Personnel Rules or a department's adopted policies, procedures and workplace expectations, constitutes a major disciplinary offense under PR 1.3.4.A.15, and "in the absence of mitigating circumstances," requires suspension, demotion or discharge. PR 1.3.3.B.

83. Major disciplinary offenses include the 17 specific offenses identified in PR 1.3.4.A and "[o]ther offenses of parallel gravity", PR 1.3.4.A.18.

84. "In determining the level of discipline to impose, the appointing authority ... shall consider factors that he or she deems relevant to the employee and his or her offense, including but not necessarily limited to:

1. The employee's employment history, including any previously imposed disciplinary actions;
2. The extent of injury, damage or destruction caused by the employee's offense;
3. The employee's intent; and
4. Whether the offense constituted a breach of fiduciary responsibility or of the public trust."

PR 1.3.4.B.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to delegation from the CSC under SMC 4.04.250.

2. The Department must show by a preponderance of the evidence that the decisions to demote Ms. Arnold and discharge Ms. Adams were each supported by justifiable cause. CSC Rule 5.31.

3. The Appellants assert that their offenses, if any, constituted poor work performance, not misconduct. They argue that misconduct can be disciplined, but work performance can be disciplined only if the employee is informed of performance deficiencies and given an opportunity and assistance to improve. That is not correct. The rule on performance management, PR 1.5, is written in terms of expectation ("should"), rather than mandate ("shall"). *See Taylor v. Seattle City Light*, CSC No. 10-07-005. For some types of poor performance, it would be appropriate to follow the course suggested in PR 1.5.6. But PR 1.3.3.A expressly allows an appointing authority to discipline for misconduct or poor work performance, up to and including discharge.

4. The Appellants' reliance on *Wajt. v. Chimacum School Dist.*, 9 Wn. App. 857, 516 P.2d 1099 (1973) is misplaced. The court in that case expressly relied on RCW 28A.72.030, which includes mandatory language applicable to discipline of public school teachers that is not included in the PRs.

5. The Appellants attack the credibility of the complainant, Mr. Lusk. They point to several inconsistencies between statements attributed to him in the Cordon Report and his testimony at hearing. They also note that he believes, albeit erroneously, that Ms. Adams revealed his identity to Senior Services. Nonetheless, the Examiner finds Mr. Lusk's testimony concerning the information he conveyed to Ms. Adams credible, as it was corroborated by the documents he originally offered Ms. Adams and later gave Ms. Cordon (Exhibit 16) and by Ms. Adams' notes about her conversation with him (Exhibit 18).

6. At hearing, each Appellant demonstrated an awareness of her job duties, as detailed above in Findings 13 and 14. Further, they both had received copies of the Department's Workplace Expectations that required, among other things, that they: 1) understand their job responsibilities and perform them effectively and efficiently, as full contributors to the Department's mission of using limited public resources to fund services for low-income and vulnerable populations; 2) follow through with their job duties as required and report appropriate information to co-workers and higher supervisory personnel; and 3) be proactive, addressing work issues or concerns before they escalate. They also knew from the Workplace Expectations that they would be held accountable for their work. Exhibit 37.

7. Further, the HSD Contracts Manual that applied to ADS provided that agency nonperformance of a contract "is reflected by a significant trend based on reports, visits, *or by more serious unconfirmed concerns*," and that program specialists, like Ms. Adams, were expected to "summarize all documentation and concerns to their immediate supervisor for advice". Exhibit 36 at 31 (emphasis added).

8. Despite the breadth of her job duties, Ms. Adams, and apparently her entire supervisory chain within ADS, appeared to operate within a rigid frame of reference defined solely by program monitoring and program complaints. It is true that they were not fiscal auditors. But the Lusk complaint was different, and Ms. Adams knew that it was different because there was no specific policy in place for handling it. The complaint was about fraud or misappropriation of funds in the Kinship Care Program; identified a specific vendor by name; identified the types of services, all just under the $1,500 limit, that were in question; noted that the checks were being picked up by a staff member; identified the person in Senior Services suspected of the fraud; and included an offer of written documentation in support.

9. Ms. Adams knew or reasonably should have known that the Lusk complaint was about fraudulent payments within the Kinship Care Program, not just mismanagement or bad recordkeeping. Her notes about the complaint, Exhibit 18, reflect this. She knew or reasonably should have known that the HSD Workplace Expectations and her job duties, which incorporate the requirements of the Contract Manual, required that she inform her supervisor of the details of the complaint and thoroughly investigate it, focusing on the vendor named in the complaint and following her plan of contacting clients.

10. From her work on the Residential Home Care complaint, it is clear that Ms. Adams had the experience required to do a thorough investigation. She also had the requisite tools and resources available to investigate the complaint. With the information provided by Mr. Lusk, an audit was not required to uncover the fraud. However, if Ms. Adams felt she needed assistance, she knew or reasonably should have known that the Workplace Expectations required her to proactively seek that assistance, either through her supervisory chain or directly from Mr. Agnata.

11. From the details of the complaint, the HSD Workplace Expectations, and her job duties, Ms. Adams knew or reasonably should have known that her failure to adequately advise her supervisor, thoroughly investigate the complaint, and seek any needed assistance, would constitute a breach of HSDs fiduciary responsibility for the public funds it administers and would have disciplinary consequences.

12. Although Ms. Arnold was busy with other responsibilities, she was still supervising Ms. Adams when HSD received the Lusk complaint. It is not disputed that Ms. Adams did not inform her of the details of the complaint. Nonetheless, Ms. Arnold knew or reasonably should have known that her job duties required that she provide guidance and direction to her staff on contracts-related concerns, review and evaluate her staff's work and, in concert with her staff, monitor contract expenditures. Further, she knew or reasonably should have known that the HSD Workplace Expectations required that she provide clear assignments to her subordinates, ensuring that tasks were clearly understood and completed. Ms. Arnold knew or reasonably should have known that to fulfill these requirements with respect to the Lusk complaint, she would need to question Ms. Adams about the details of the complaint in order to obtain the information necessary to guide her on investigating it.

13. Had Ms. Arnold asked a few questions about the complaint, she would have discovered that it was not a "regular complaint," but involved allegations of the misappropriation of funds, not simply for a service unauthorized under the Kinship Care Program, but to a fictitious vendor or one operating in concert with the Program Manager, Mr. Townsend. She would also have discovered that Ms. Adam's impression of the complainant as an unhappy employee might impact the weight she gave to the complaint and affect her investigation.

14. Further, Ms. Arnold knew or reasonably should have known that the HSD Workplace Expectations required her to clarify responsibilities. It does not appear from the record that she did so with her supervisor, Ms. Chow, as to their respective responsibilities in overseeing Ms. Adams' investigation of the complaint.

15. From the HSD Workplace Expectations and her job duties, Ms. Arnold knew or reasonably should have known that her failure to take action to acquire information about the Lusk complaint sufficient to guide Ms. Adams in thoroughly investigating it would constitute a breach of HSDs fiduciary responsibility for the public funds it administers, and would have disciplinary consequences.

16. The Appellants blamed Mr. Agmata for failing to conduct the general audit of Senior Services they had requested during 2009 and 2010. Although a general audit may have uncovered Mr. Townsend's fraudulent activity, the lack of an audit had no impact on the Appellants' handling of the Lusk complaint, which itself provided detailed information about that activity.

17. Ms. Adams' and Ms. Arnold's actions each constitute a major disciplinary offense under PR 1.3.4, in that they are a knowing violation of HSD's adopted workplace expectations (PR 1.3.4.A.15) and are also within the group of "[o]ther offenses of parallel gravity" to those listed in PR 1.3.4.A.1 through PR 1.3.4.A.17. PR 1.3.4.A.18. The Appellants contend that the offenses for which they were disciplined cannot be compared to those listed in PR 1.3.4.A.1 through PR 1.3.4.A.17, but the Examiner finds them of equal gravity to an unauthorized absence, which is listed as a major disciplinary offense under PR 1.3.4.A.12.

18. The requirement of PR 1.3.5.C.1, that an employee be informed or reasonably should have known of the consequences of her conduct, does not mean that the employee must have advance notice of the specific level of discipline that may result from conduct. It is sufficient that the employee reasonably should have known that the conduct would have disciplinary consequences.

19. The evidence shows that once Ms. Chow was informed of the complaint, Ms. Adams and Ms. Arnold both believed Ms. Chow was supervising Ms. Adams' investigation. When Ms. Chow was reassigned on January 6, 2011, Ms. Piering took over supervisory responsibility for the matter.

20. The job duties and workplace expectations violated are clearly related to HSD's safe and efficient operations. Thorough fiscal oversight of the funds administered by HSD via contracts with other agencies, particularly in the face of a complaint about fraudulent activity, is essential to HSD's mission of using public dollars to find and fund solutions for human needs in low-income and vulnerable populations.

21. The Appellants assert that the investigation into the offenses for which they were disciplined was biased. They contend that Ms. Smith was anxious to impose discipline and demonstrate accountability even before the audit or Cordon investigation were complete. It appears that, as a relatively new Department head hired to transform parts of the HSD operations, Ms. Smith was concerned about accountability and public image. However given the information available to her in April of 2011, it is logical that she would realize there was a potential for discipline. She verbalized what another department head might not. This does not translate into a decision to impose discipline before the investigation process concluded. The Department correctly notes that had she wanted to rush the process, she could have asked the City's Human Resources Department to conduct an investigation rather than seeking a report from an independent, outside investigator.

22. The Appellants draw a parallel between this case and *Anderson v. Seattle Center*, CSC No. 07-01-004. In *Anderson*, the Center Director investigated an alleged physical assault by his employee against a student of a school that was a Center lessee. In the course of his investigation, the Director spoke directly with the student and stated either that the employee would be fired, or that the "matter would be taken seriously". The Hearing Officer expressed concern about the bias reflected in this interaction and also found it problematic that the person collecting statements had an initial impression adverse to the employee. This case is distinguishable from *Anderson*. Here, the Director did not speak to the complainant, her expression of concern about accountability and the potential for discipline was made in a meeting with her direct reports, and she retained an outside investigator and reviewed the investigator's report, and the audit report, before deciding to impose discipline.

23. The Appellants claim that the Cordon investigation was not fair and objective because she made credibility determinations that were adverse to the Appellants, and excluded or failed to highlight evidence favorable to the Appellants. But determining witness credibility and weighing the evidence is a fundamental part of a fact finder's job.

24. Ms. Cordon decided whom she should talk with and ended up interviewing 17 people from HSD and DSHS/ADSA. She reviewed documents furnished by the HSD Director and auditor, ADS employees Fleming, Chow, Arnold, Adams, and Robins, the State Auditor, and a DSHS/ADSA employee. She prepared witness statements for review, gave the witnesses an opportunity to review the statements and make changes, and accepted all the changes. (She also retained her interview notes and later made them available to the Appellants and their counsel.) From the witness statements and her

document review, Ms Cordon made credibility determinations, weighed the evidence, and wrote her report. Nothing in the record indicates that she had any interest in the matter she was investigating or any prior knowledge of or contact with the Director, Appellants, or other HSD employees, or that she had formed an opinion before conducting the investigation. The Cordon investigation was fair and objective.

25. The Appellants imply that Ms. Flowers and/or Ms. Lester was responsible for the disciplinary decisions at issue in this case, but the evidence shows that Director Smith was the decisionmaker. Ms. Lester was new in her job and relied on the HR manager for HSD, Ms. Flowers, to guide her through the process of preparing recommendations for discipline. That is part of the job of an HR manager, as is gathering information on comparable disciplinary scenarios and discussing them with those responsible for making disciplinary recommendations or decisions. It is also common for department officials to consult with legal counsel.

26. Ms. Lester made the disciplinary recommendations, but Ms. Smith made her own review of the audit and the Cordon Report, the Appellants performance evaluations and disciplinary history, and all the information supplied to her during the Loudermill hearings. She accepted Ms. Lester's recommendation of termination for Ms. Adams, but rejected her recommendation for Ms. Arnold and demoted her instead. She also rejected the recommendation of termination for Ms. Chow.

27. The Appellants incorrectly assert that discipline was imposed on Ms. Adams for reasons not stated in Ms. Smith's disciplinary determination letter. They note that Ms. Smith testified that she had problems with Ms. Adams' work in addition to those stated in her letter. But the question is whether the reasons that were included in the letter were sufficient to warrant discipline, and they were in this case.

28. The Appellants claim that they were disciplined for offenses that others committed with impunity. They cite *Bangert v. Fleet and Facilities Dept.*, CSC No. 06-01-013, a case in which an employee was disciplined for repeated failure to leave his work area clean. The case is not on point. There was evidence there that other employees had left their work areas dirty but were not disciplined for it. In this case, there is no evidence in the record that any other employees have violated the Workplace Expectations and job duties at issue here by failing to inform their supervisor about the details of a complaint of fraudulent transactions, failing to conduct a thorough and focused investigation of such a complaint, failing to proactively seek assistance and guidance on the investigation, and failing to take action to acquire information from a subordinate about a complaint in order to guide her in investigating it.

29. The Appellants point to an audit of a different HSD division in which one of six subrecipients of funds failed to provide sufficiently detailed documentation to allow HSD to ensure that the funds were being spent on allowable activities and costs. *See* Exhibit 6. The Appellants argue that the same Workplace Expectations and job duties at issue in the Appellants' discipline should have been invoked to impose discipline on others in

response to that audit. But Ms. Smith indicated that action was taken in response to that audit; she simply did not recall the specifics of the discipline. Testimony of Smith.

30. The Appellants also claim that Ms. Flowers failed to release documents in conjunction with a grievance, and that the failure resulted in a requirement for payment of back pay to an employee, but that Ms. Flowers was not disciplined for her actions. Yet the testimony from the only witness with personal knowledge of the incident contradicts this claim.

31. Finally, the Appellants argued that Mr. Agnata engaged in misconduct without consequence when he failed to schedule an audit of Senior Services in 2009 and 2010. But the evidence shows that Mr. Agnata did attempt to schedule the audit in 2010, was not able to establish contact with the correct person at the agency, and determined to move on to other audits because Senior Services' most recent external audit was "unqualified," (clean) with the exception of one item that Senior Services was already addressing.

32. The record does not support the Appellants' claim that the applicable Workplace Expectations and job duties were enforced selectively.

33. With respect to the consistency of discipline imposed, the Appellants suggest that Ms. Smith was required to take into account disciplinary decisions made by other City departments. However, PR 1.3.3.B and PR 1.3.4.B reserve to the "appointing authority" discretion to determine the level of discipline imposed within her Department. Further, the CSC has rejected claims that discipline decisions in one department may be used to argue the appropriateness of discipline in another department. *See Ogunyemi v. Seattle City Light*, CSC No. 10-01-020; *Wong v. Fleets and Facilities Dept.*, CSC No. 06-01-007.

34. Testimony at hearing established that parts of the "Discipline Reason" and "Summary Details" columns of HSD's discipline log are misleading or simply wrong, making it necessary to determine instances of comparable discipline using both the log and testimony. For example, the log states that Ms. Piering committed an "Ethics Violation," but that is clearly not the case, as explained in the summary details. The "Discipline Reason" column is blank for Ms. Chow, who was suspended for two weeks, but the information under "Summary Details" gives no details from which one could determine the reason for the discipline. There are several other errors. *See* Exhibit 42, Testimony of Flowers; Testimony of Piering.

35. For Ms. Arnold, the discipline imposed was not consistent with that imposed for similar disciplinary offenses. The comparators used, "Employee 19" and "Employee 16," do not support the disciplinary decision. "Employee 19" had a continuing pattern of nonperformance as a manager over a period of two years during which she had been counseled repeatedly. She failed to take action to hold her staff accountable in the face of clear evidence of ethics violations. "Employee 16" had been previously coached on

numerous aspects of management in which he was deficient and was later terminated for consistent failure to supervise his staff, some of whom he knew were stealing funds from an assistance program. Prior to her actions related to the Lusk complaint, Ms. Arnold had no performance issues and no counseling on any part of her job performance. Her performance evaluations were excellent, and she had never received anything but positive feedback on her leadership, communication and strategic management. Exhibit 59.

36. As a result of using unsuitable comparators, HSD imposed discipline on Ms. Arnold that was not reasonably related to the seriousness of her conduct or previous disciplinary history. It is true that her offense was serious. It constituted a knowing violation of Workplace Expectations and a breach of fiduciary responsibility and the public trust, which is an offense of parallel gravity to other major disciplinary offenses. However, it did not represent a pattern of conduct, and it was not done with intent. Further, after consulting with Ms. Adams and Ms. Chow about the complaint, Ms. Arnold had no further involvement with the matter other than receiving periodic updates from others in ADS.

37. The best comparator in the case of Ms. Arnold is Ms. Chow, "Employee 24" on the log. She was supervising Ms. Adams for most of the investigation and received only a two-week suspension. Considering the need for consistency in the application of discipline as well as the seriousness of Ms. Arnold's conduct and her disciplinary history, she should also receive a two-week suspension.

38. Discipline was also not consistently applied in the case of Ms. Adams: "Employee 13", used as a comparator by HSD, intentionally provided her family and friends with funds intended for those in need. The Ethics and Elections Commission described the employee's conduct as "one of the most egregious acts of corruption seen by the Commission in recent years" and noted that it was probably criminal. Appellants' Closing Brief, Appendix G.

39. Ms. Adams' conduct involving the Lusk complaint did not approach intentional misuse of public funds. Further, she had no ongoing problem with her work. Ms. Adams' performance evaluations had been very good to excellent. Exhibit 23. She is described as a very competent contract specialist who has taken on some of the most difficult service areas, demonstrating strong leadership, follow through, and problem solving skills. Exhibit 61. As noted above, she had the knowledge and skills to properly investigate the Lusk complaint.

40. As a result of using an unsuitable comparator, HSD imposed discipline on Ms. Adams that was not reasonably related to the seriousness of her conduct or previous disciplinary history. Her offense was very serious. It, too, constituted a knowing violation of Workplace Expectations and a breach of fiduciary responsibility and the public trust, which is an offense of parallel gravity to other major disciplinary offenses. It did not represent a pattern of conduct, and it was not done with intent. However, Ms. Adams' insistence that the investigation into Senior Services was ongoing after January

of 2011, and her refusal to acknowledge to the Auditor or her Director that there were shortcomings in her performance, were intentional. The totality of her actions with respect to the Lusk complaint resulted in ADS failing to uncover embezzlement of approximately $97,000 in the Kinship Care Program. However, there is no evidence in the record of further embezzlement in the Kinship Care Program after Ms. Adams imposed the four "Required Actions" on Senior Services. The prior embezzlement was eventually discovered, and the damage is not permanent, as Senior Services must repay the lost funds.

41. The only meaningful comparators in the case of Ms. Adams are Ms. Chow and Ms. Arnold. Both were supervisors and should thus be held to a higher standard. But in this case, the person who had all the critical information about the complaint but neglected to inform her supervisors of it, and refused documents that would have provided her and them with a roadmap to properly investigate it, was Ms. Adams. Considering the need for consistency in the application of discipline as well as the significance of Ms. Adams' conduct and her disciplinary history, she should receive a 30-day suspension.

Decision and Order

HSD had just cause to discipline Ms. Arnold and Ms. Adams, but the discipline imposed did not meet the just cause requirements that discipline be applied consistently and be reasonably related to the seriousness of the employee's conduct and disciplinary history. It is therefore ORDERED that:

1. Ms. Arnold's demotion is **REVERSED** and shall be converted to a two-week suspension. She shall be reinstated to her former Services Development and Contracts Manager position and awarded back pay and related employee benefits.

2. Ms. Adams's termination is **REVERSED** and shall be converted to a 30-day suspension, the longest suspension that may be imposed under PR 1.3.3.A.3. She shall be reinstated to her former Senior Grants and Contracts Specialist position and awarded back pay and related employee benefits.

Entered this 24th day of July, 2012.

Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner is subject to review by the Civil Service Commission. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules 6.02 and 6.03.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGIANA ARNOLD, Appellant, v. CITY OF SEATTLE, d/b/a HUMAN SERVICES DEPARTMENT, Respondent.	No. 71445-7-I DIVISION ONE PUBLISHED OPINION FILED: March 23, 2015

BECKER, J. — RCW 49.48.030 provides for an award of reasonable attorney fees in any action in which a person successfully recovers judgment for wages or salary owed. A person may seek an award of attorney fees from the superior court under this statute upon winning an appeal to a city civil service commission that results in an order for back pay.

Appellant Georgiana Arnold was employed as a manager of services development and contracts with the Aging and Disabilities Services division of the city of Seattle's Human Services Department. In 2010, one of Arnold's subordinates failed to make an adequate inquiry into a whistleblower's complaint about fraud and misappropriation of funds in a program administered by a subcontractor. After a state audit uncovered embezzlement, Arnold's agency

conducted an internal investigation. The resulting report criticized Arnold and two other supervisors for lapses in their supervision.

The deputy director of the department recommended that Arnold be terminated. Arnold, whose performance evaluations had otherwise been excellent, hired counsel and requested a hearing. After the hearing, the director decided against termination and chose instead to demote Arnold from her management position with an annual salary of $85,500 to an entry-level position with an annual salary of approximately $56,000.

Through counsel, Arnold and her subordinate appealed to the Seattle Civil Service Commission. A hearing examiner conducted a lengthy hearing, in which three attorneys participated—one representing the City and one representing each employee. The issue with respect to Arnold was whether the demotion was for justifiable cause. The examiner concluded that demoting Arnold was not consistent with discipline imposed in comparable cases. For example, one of the other supervisors had received a two-week suspension but no demotion. The examiner's written decision reversed Arnold's demotion and converted it to a two-week suspension. The decision reinstated Arnold to her former position and awarded back pay and related employee benefits.

Arnold requested an award of attorney fees. The Seattle Municipal Code provides that an appellant "may be represented at a hearing before the Commission by a person of his/her own choosing *at his/her own expense*." SMC 4.04.260(E) (emphasis added). On this ground, the examiner denied Arnold's request for attorney fees, and the commission affirmed the examiner.

Arnold filed suit in superior court, claiming she was entitled to an award of attorney fees incurred for representation at the civil service hearing. The court granted the City's motion to dismiss the case on summary judgment. Arnold sought direct review in the Supreme Court. The Supreme Court transferred her appeal to this court.

Arnold's claim that she is entitled to an award of attorney fees is based on RCW 49.48.030, as construed by the Supreme Court in International Ass'n of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002). The statute provides as follows:

> In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

This attorney fee statute, first enacted in 1888, took its current form in 1971. It is a remedial statute construed liberally in favor of employees. Fire Fighters, 146 Wn.2d at 34-35. Part of a "comprehensive scheme to ensure payment of wages," the attorney fee statute provides employees both an incentive and a means to pursue their claims to unpaid wages or salary. Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157, 961 P.2d 371 (1998). "One of the primary purposes of remedial statutes like RCW 49.48.030 is to allow employees to pursue claims even though the amount of recovery may be small." Fire Fighters, 146 Wn.2d at 50; see also Schilling, 136 Wn.2d at 159. Public

employees are included within the fee provision. RCW 49.48.080; McIntyre v. State, 135 Wn. App. 594, 599, 141 P.3d 75 (2006).

Because the statute is interpreted liberally in favor of employees, the "action" in which the person is successful "in recovering judgment for wages or salary owed" is not restricted to lawsuits filed in a court. So in Fire Fighters, the Supreme Court held that a grievance arbitration proceeding was sufficiently judicial in nature to qualify as an "action" under RCW 49.48.030.

> Because RCW 49.48.030 is a remedial statute, which must be construed to effectuate its purpose, we find no reason to not interpret "action" to include arbitration proceedings. A restrictive interpretation of "action" would preclude recovery of attorney fees in cases involving arbitration even though the employee is successful in recovering wages or salary owed. Thus, it would be inconsistent with the legislative policy in favor of payment of wages due employees.

Fire Fighters, 146 Wn.2d at 41.

In Fire Fighters, the city of Everett had suspended two union members without pay. The union, represented by counsel, argued at a two-day arbitration hearing that the suspensions violated the collective bargaining agreement. The arbitrator agreed and ordered the city to set aside the suspensions and to award back pay. The city abided by the arbitrator's decision but refused to pay the union's attorney fees. The union brought suit in superior court and obtained an award of fees.

The city of Everett appealed and attempted to rely, in part, on Cohn v. Department of Corrections, 78 Wn. App. 63, 895 P.2d 857 (1995). Cohn upheld a superior court's decision to deny an award of attorney fees requested by a state employee whose reduction in pay was reversed by the Personnel Appeals

Board. The court observed that in chapter 41.64 RCW, the legislature intended to create a comprehensive scheme for aggrieved employees but did not list attorney fees as one of the "rights and benefits" available. Cohn, 78 Wn. App. at 67-69. Since the statutes governing the Board did not explicitly provide for attorney fees, the court determined that the Board lacked authority to award them. The central rationale of Cohn was that because the Board did not possess express or implied authority to award attorney fees, the reviewing court likewise lacked such authority, notwithstanding RCW 49.48.030. Cohn, 78 Wn. App. at 69-70. A related rationale was that the superior court itself did not increase the amount of back pay owed to the employee and therefore its decision simply affirming the Board's decision could not be a "judgment for wages or salary owed" within the meaning of RCW 49.48.030. Cohn, 78 Wn. App. at 70-71.

In Fire Fighters, the Supreme Court found Cohn distinguishable because it addressed an appeal from a government agency rather than an arbitration. The court determined that the superior court properly awarded attorney fees under RCW 49.48.030 for the union's successful recovery of wages in the arbitration. The award of fees was "for the arbitration proceeding and all superior and appellate court proceedings in this matter." Fire Fighters, 146 Wn.2d at 52.

The Supreme Court explicitly declined to address whether RCW 49.48.030 would apply to administrative or quasijudicial proceedings other than arbitration. Fire Fighters, 146 Wn.2d at 42 & n.11. Arnold's appeal presents that question. Arnold contends that applying the statute to cover the attorney fees

she incurred in her successful appeal to the civil service commission is a proper extension of Fire Fighters.

The City responds that Cohn is still good law. According to the City, the superior court's denial of an award of attorney fees to Arnold was justified by both of the Cohn rationales: the civil service code does not include payment of attorney fees among the remedies available to a successful appellant, and Arnold did not obtain a "judgment" in superior court for an increased amount of back pay.

The City points out that this court has followed Cohn even after Fire Fighters. For example, we followed Cohn in Trachtenberg v. Department of Corrections, 122 Wn. App. 491, 496, 93 P.3d 217, review denied, 103 P.3d 801 (2004). The appellant, a state employee, became entitled to an award of back pay as a result of his successful appeal to the state Personnel Appeals Board. He filed suit in superior court seeking an award of attorney fees under RCW 49.48.030. The superior court dismissed the suit following Cohn, and we affirmed, holding that RCW 49.48.030 "does not apply to state disciplinary appeals because the Board has limited authority and a Board appeal is not an action for a judgment for wages owed." Trachtenberg, 122 Wn. App. at 493. Noting that Fire Fighters did not "explicitly overrule" Cohn, we concluded that Cohn's central rationale remained intact: "attorney fees cannot be awarded under RCW 49.48.030 for an appeal of a disciplinary action to the Board because of the limited statutory authority granted to the Board." Trachtenberg, 122 Wn. App. at 495 & n.1.

The Cohn rationale was not followed by the next Court of Appeals case to address the issue, McIntyre v. State, 135 Wn. App. 594. In McIntyre, an employee of the Washington State Patrol was terminated upon the recommendation of a trial board within the agency. Her appeal to superior court under the Administrative Procedure Act, chapter 34.05 RCW, was unsuccessful, but further appeal to the Court of Appeals resulted in reinstatement and an award of back pay and lost benefits. The employee then brought suit in superior court under RCW 49.48.030 to recover the attorney fees she incurred in appealing her termination order. The superior court dismissed the suit, and the employee appealed. The State argued, based on Cohn and Trachtenberg, that the right to attorney fees under RCW 49.48.030 depends on whether attorney fees are among the remedies the administrative agency is statutorily authorized to grant. This argument did not prevail in the Court of Appeals. McIntyre, 135 Wn. App. at 602 ("State's argument that a single statutory remedy is self-limiting is not convincing"). The court reversed and remanded for an award of the fees requested after focusing its analysis on Fire Fighters as well as Hanson v. City of Tacoma, 105 Wn.2d 864, 719 P.2d 104 (1986).

Here, the City urges us to adhere to Cohn and Trachtenberg and hold that when a civil service employee recovers back pay under an administrative scheme that does not include attorney fees as a remedy, the employee may not institute a lawsuit solely to recover attorney fees under RCW 49.48.030. That limitation is acceptable, the City argues, because in exchange, the civil service

employee receives the right to a low cost and speedy civil service forum, a right not available to an at-will employee who must go to court to recover wages.

Arnold's successful effort before the commission to win reinstatement and back pay cannot fairly be described as low cost when the hearing went on for eight days and the City alone presented 11 witnesses. But more importantly, the City is simply wrong in its suggestion that RCW 49.48.030 protects only "at-will" employees. Even before Fire Fighters, the Supreme Court approved a superior court's decision to award attorney fees under RCW 49.48.030 to a successful civil service appellant. Hanson, 105 Wn.2d at 872. Similarly in McIntyre, the employee recovered back wages through an administrative appeal that would not have been available to an at-will employee, yet the court applied RCW 49.48.030. In short, the applicability of RCW 49.48.030 is not limited to at-will employees either by its own text or by case law.

Normally, we would expect to follow our own precedent in Trachtenberg. But this court now has in McIntyre a post-Fire Fighters decision concluding that remedies offered by an administrative agency are not "self-limiting" and thus do not exclude the application of RCW 49.48.030. In view of that conflict, we conclude it is appropriate to reexamine Trachtenberg,[1] which also requires reexamining Cohn.[2] Like the McIntyre court, we conclude our focus should be on

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[1] There was a petition for review in Trachtenberg, but it was denied as untimely.

[2] The City has cited as supplemental authority this court's recent decision in International Union of Police Ass'n, Local 748 v. Kitsap County, 183 Wn. App. 794, 333 P.3d 524 (2014). There, the issue of attorney fees under RCW 49.48.030 arose in connection with a union's complaint about an unfair labor practice. This court held that notwithstanding Fire Fighters, an unfair labor

the pertinent Supreme Court cases—Hanson and Fire Fighters—rather than on our own.

As discussed above, Hanson affirmed a superior court's award of attorney fees to a city employee who had obtained an award of back pay from the Tacoma Civil Service Board. To conclude that a superior court cannot make an award of fees under RCW 49.48.030 in an administrative appeal unless the agency itself is authorized to award attorney fees, the Cohn court had to distinguish Hanson. It did so by observing that in Hanson, the superior court's review of the administrative board's decision resulted in a wage recovery not granted in the administrative forum. Thus, according to Cohn, the superior court in Hanson did enter a "judgment for wages," while the superior court in Cohn did not. Cohn, 78 Wn. App. at 70-71.

The argument that a "judgment for wages" occurs only when at least some portion of the wage recovery is obtained in the superior court action is no longer viable after Fire Fighters, where the Supreme Court expressly disagreed with Cohn's reading of Hanson. Fire Fighters, 146 Wn.2d at 43. In Fire Fighters, the court refused to limit the recovery of attorney fees to the same "action" in which

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practice proceeding is not an action for a judgment for wages under RCW 49.48.030. The opinion describes as "dispositive" Cohn's reasoning that where an administrative agency does not have the authority to make an award of attorney fees, the superior court similarly lacks such authority. Local 748, 183 Wn. App. at 800-01. We need not address Local 748 separately to the extent that it represents a continuation of the Cohn approach, which we have fully discussed above. Possibly, the result in Local 748 is sustainable on an alternative ground if the unfair labor practice appeal can be distinguished in the same way that Fire Fighters distinguished interest arbitrations from grievance arbitrations. Fire Fighters, 146 Wn.2d at 47.

the wages were recovered. "As discussed above, the Hanson court made it clear that the *nature* of the proceeding did not affect the availability of attorney fees to an employee who is successful in recovering wages or salary owed." Fire Fighters, 146 Wn.2d at 43.

Discussing Fire Fighters in Trachtenberg, we said that the Supreme Court's disagreement with Cohn's reading of Hanson was "not material to the issues we have here." Trachtenberg, 122 Wn. App. at 495 & n.1. That was incorrect. As discussed above, it was only by distinguishing Hanson that the Cohn court was able to hold that an administrative scheme with limited remedies precludes application of RCW 49.48.030. That distinction did not survive Fire Fighters, as noted above. The "*nature* of the proceeding"—administrative appeal, arbitration, or superior court action—does not control the availability of an award of attorney fees. Fire Fighters, 146 Wn.2d at 43.

In Trachtenberg, we also said that an appeal to a civil service board cannot be an "action" for a "judgment for wages" within the meaning of RCW 49.48.030:

> Moreover, an appeal to the Board is not an "action" for a "judgment for wages." As noted above, a civil service employee may administratively "appeal" a disciplinary decision and may not bring an independent "action" to challenge the disciplinary decision. Additionally, the Board may enter only an "order" and not a "judgment." In Fire Fighters, the Supreme Court found "no reason to not interpret 'action' to include arbitration proceedings." Fire Fighters, 146 Wn.2d at 41. Arbitration proceedings are often substitutes for court proceedings. Administrative appeals, on the other hand, are not substitutes for independent court proceedings. Additionally, administrative agencies, like the Board, do not have authority to determine issues outside of their delegated functions. Tuerk v. Dep't of Licensing, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994). The legislature did not give a civil service employee the

> right to bring an independent action or suit to challenge a disciplinary decision and did not give the Board the authority to enter a judgment or award attorney fees. Because of the limitations placed on appeals to the Board, we conclude that the legislature did not intend RCW 49.48.030 to apply to disciplinary challenges before the Board. The Cohn court's reasoning on this issue is sound.

Trachtenberg, 122 Wn. App. at 496-97.

The fact that the decision of an administrative board such as a civil service commission is called an "order" rather than a "judgment" is an unsatisfactory basis on which to distinguish a civil service appeal from the grievance arbitration considered in Fire Fighters. Fire Fighters established that the meaning of the word "action" in RCW 49.48.030 is not restricted to a proceeding in a court of law. Fire Fighters, 146 Wn.2d at 38-41. The analysis turned instead on whether the arbitration was "an exercise of a judicial function." Fire Fighters, 146 Wn.2d at 38. The court found that "action" includes arbitration proceedings. Fire Fighters, 146 Wn.2d at 41. The court similarly had no difficulty in deeming the arbitration award equivalent to a "judgment" because it was the final determination of the rights of the parties in the "action." Fire Fighters, 146 Wn.2d at 36 n.8, quoting 49 C.J.S. JUDGMENTS § 2, at 51-52 (1997).

The City's brief in the present case maintains that a civil service appeal is not an "action" because it is not judicial in nature and the civil service commission's resolution of an appeal cannot be a "judgment" because it is not signed by a judge. The dissenters in Fire Fighters made the same argument about arbitration, but they did not carry the day. Fire Fighters, 146 Wn.2d at 52-54. The City simply does not address the Fire Fighters majority's lengthy

discussion of "action" and "judgment" that requires these terms to be interpreted functionally and liberally. Fire Fighters, 146 Wn.2d at 36-41. The same failing is evident in Trachtenberg. Arnold's appeal demonstrates that Trachtenberg is inconsistent with Hanson, Fire Fighters, McIntyre, and the long line of cases requiring that RCW 49.48.030 be given a liberal interpretation in keeping with its remedial purpose.

Just as the Fire Fighters court found no reason to interpret "action" as excluding arbitration proceedings, we find no reason to interpret it as excluding civil service appeals. Like an arbitration, such an appeal is judicial in nature. This conclusion is supported by the Rules of Practice and Procedure for the Seattle Civil Service Commission. Under rules 5.13 and 5.15 respectively, the parties had the right to cross-examine witnesses and present evidence. We hold that "action" as used in RCW 49.48.030 includes civil service appeals in which wages or salary owed are recovered. The decision of the commission awarding Arnold back pay was equivalent to a "judgment" as that term was interpreted in Fire Fighters.

The Fire Fighters court affirmed a superior court's decision to award attorney fees in an arbitration proceeding without inquiring whether the arbitrator had authority to award attorney fees. Similarly, we find no reason to hold that a superior court's authority to award attorney fees incurred in an administrative proceeding depends on whether the administrative agency had authority to award attorney fees.

Following Fire Fighters, we conclude it is irrelevant that the commission itself is not authorized to award attorney fees to an employee who recovers wages in a successful appeal. The authority for the award of fees is found in RCW 49.48.030. The superior court may exercise that authority in a separate suit brought by the employee solely for the purpose of vindicating the statutory right.

We grant Arnold's request to remand to superior court for an award of attorney fees under RCW 49.48.030 for the appeal to the commission and for all superior and appellate court proceedings in this matter. See Fire Fighters, 146 Wn.2d at 52.

The City claims the fees incurred by Arnold were unreasonable. We take no position on the amount of fees to which Arnold is entitled or the methodology by which they should be calculated. Such matters are left to the superior court to determine in further proceedings.

Reversed.

Becker, J.

WE CONCUR:

Cox, J.

DECLARATION OF SERVICE

On said day below I emailed a copy for service a true and accurate copy of Arnold's Answer to Petition for Review 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: June 15th, 2015, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

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Subject: RE: Georgiana Arnold v. City of Seattle Cause No. 91742-6

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Subject: Georgiana Arnold v. City of Seattle Cause No. 91742-6

Good Afternoon:

Attached please find Arnold's Answer to Petition for Review in Supreme Court Cause No. 91742-6 for today's filing. Thank you.

Sincerely,

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