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STATE OF WASHINGTON

No. 71445-7-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

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

v.

GEORGIANA ARNOLD,
Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' decision in this case, that attorney fees under RCW 49.48.030 are available in administrative proceedings where the administrative body lacks the authority to award fees, is contrary to every other appellate court decision to address the issue. *See Cohn v. Dep't of Corr.*, 78 Wn. App. 63, 67-70, 895 P.2d 857 (1995); *Trachtenberg v. Dep't of Corr.*, 122 Wn. App. 491, 496-97, 93 P.3d 217 (2004); *Int'l Union of Police Ass'n, Local 748 v. Kitsap Cnty.*, 183 Wn. App. 794, 800-02, 333 P.3d 524 (2014); *see also McIntyre v. State*, 135 Wn. App. 594, 601, 141 P.3d 75 (2006).

Here, Petitioner City of Seattle ("City") has voluntarily adopted a civil service code governing personnel administration that provides that employees may be represented in employment disputes before the Civil Service Commission ("Commission") "at [their] own expense." SMC 4.04.260(E) (emphasis added). The City's code thus specifically precludes the Commission from awarding fees incurred at the administrative level. Contrary to this plain language and in direct conflict with the above-cited case law, the Court of Appeals here held that Respondent Georgiana Arnold was entitled to her attorney fees incurred during a civil service administrative proceeding before the Commission under RCW 49.48.030. This opinion is in conflict with multiple other

court of appeals decisions rendering review appropriate under RAP 13.4(b)(2).

Further, review is warranted under RAP 13.4(b)(4) because this case involves issues of substantial public interest that should be determined by this Court. The City, like many other governments, voluntarily provides a civil service scheme for its employees as a way to ensure employees are hired, promoted, and discharged based on merit as well as to provide expedited relief and a simplified procedure to resolve grievances, without limiting an employee's ultimate recourse to the courts.¹ In establishing its civil service system, the City determined that employees are represented in administrative proceedings at their "own expense," thus limiting the public cost of administering this scheme. The Court of Appeals decision here eviscerates this important and explicit limitation and imposes significant additional costs on the City. In doing so, the Court of Appeals creates a disincentive for municipal governments to continue to provide voluntary civil service schemes. And the decision's effect is not limited to municipal governments. Indeed, the state itself will now be liable for fee awards under the state civil service scheme. The Court of Appeals' decision in this case will thus affect multiple

¹ References to the City's voluntary civil service scheme in this Petition do not include City fire and police employees, for whom the City is required to establish civil service systems under state law. *See* Ch. 41.08 RCW and Ch. 41.12 RCW.

governments and their employees and impose significant unanticipated public costs. Review of this important issue is appropriate.

II. IDENTITY OF PETITIONER

Petitioner is the City of Seattle, d/b/a Human Services Department, defendant in the trial court and respondent in the Court of Appeals.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued its published decision in *Arnold v. City of Seattle*, No. 71445-7-I, on March 23, 2015 (“Decision”). A copy of the Decision is attached as Appendix A. The Court of Appeals denied the City’s timely motion for reconsideration on April 24, 2015. A copy of the order denying reconsideration is attached as Appendix B.

IV. ISSUES PRESENTED FOR REVIEW

1. Multiple Court of Appeals decisions hold that attorney fees incurred in an administrative proceeding are not recoverable under RCW 49.48.030 where the administrative body does not have authority to award attorney fees. Should this Court grant review under RAP 13.4(b)(2) where the Court of Appeals decision here directly conflicts with those decisions?
2. The City voluntarily provides a civil service administrative procedure for the benefit of its employees and specifically states that attorney fees are not available in civil service proceedings. Should this Court grant review under RAP 13.4(b)(4) where the Court of Appeals decision here

eviscerates the City's explicit limitation on attorney fees, creates a disincentive for cities to provide voluntary civil service procedures, and imposes a new liability for attorney fees on the state civil service scheme?

V. STATEMENT OF THE CASE

A. The City's voluntary civil service code.

The City has voluntarily adopted a civil service code governing personnel administration and establishing an expedited, informal process for resolving employee grievances. With certain exceptions not relevant here, all City employees are members of the civil service. Seattle City Charter, art. XVI, sec. 3. The purpose of the City's civil service code is to establish comprehensive "uniform procedures for recruitment, selection, development, and maintenance of an effective and responsible work force". *Id.*, sec. 1. The City's personnel administration system is "based upon merit principles as enumerated in the [City Charter]". SMC 4.04.020.

The City through its civil service code provisions has established a specific procedure for appealing employment decisions. The Commission is authorized by code to "hear appeals involving the administration of the personnel system." SMC 4.04.250(L)(3). Employees may appeal their "demotion, suspension, [or] termination of employment" provided they have exhausted applicable grievance remedies under the code. SMC

4.04.260(A). Employees have the right to cross examine witnesses and produce evidence at hearings. SMC 4.04.260(G). Employees may also “be represented at a hearing before the Commission by a person of his/her choosing at his/her own expense.” SMC 4.04.260(E) (emphasis added). The civil service code requires the Commission to conduct hearings on a “timely basis” and render decisions within 90 days. SMC 4.04.260(H).

B. Arnold’s appeal to the Commission.

During the relevant time period, Arnold was a City employee within the City’s Human Services Department governed by the City’s civil service code. *See* Clerks’ Papers (“CP”) 33-36. In September 2011, Arnold was demoted from her manager position, which resulted in a pay cut.² CP 2. The basis for this personnel action was Arnold’s inadequate supervision of an investigation into whistleblower claims of fraudulent payments and/or misappropriation of funds initially reported to Arnold’s subordinate. *See* CP 113-37. Arnold appealed her demotion to the Commission, which assigned her case to a Hearing Examiner. CP 113. Arnold decided to hire counsel to represent her throughout the civil service proceedings. CP 21-23, 33-36, 113, 143.

² In the event of employee misconduct, City personnel rules provide for various degrees of discipline ranging from a verbal warning to termination. CP 127-28; *see also* SMC 4.04.230 (outlining City’s progressive discipline system).

In July 2012, the Hearing Examiner determined that Arnold had engaged in serious misconduct constituting a “major disciplinary offense” and that the City had just cause to impose discipline. CP 131, 135-36. The Hearing Examiner concluded, however, that the City failed to establish just cause to demote Arnold. CP 136. The Hearing Examiner lessened Arnold’s discipline from a demotion to a two-week suspension without pay. CP 131, 136. The Hearing Examiner also awarded back pay of less than \$30,000 and related employee benefits. CP 48, 136. In October 2012, the City paid in full the back wages to which Arnold was entitled. CP 2.

C. Arnold’s attorney fee request is denied by the Commission and the superior court.

After the Hearing Examiner’s decision, Arnold filed a petition for an award of attorney fees and costs pursuant to RCW 49.48.030, which provides for an award of reasonable attorney fees “[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her”. CP 144. Arnold sought almost \$350,000 in attorney fees for the administrative proceeding. CP 21. The Hearing Examiner denied the petition, concluding that—under the plain language of the civil service code—the Commission lacked authority to award attorney fees and costs incurred in a civil service appeal. CP 144. Arnold appealed to the

Commission, which affirmed the Hearing Examiner on the ground that no statutory authority exists in the civil service code permitting the Commission to award attorney fees. CP 144.

Arnold then filed in King County Superior Court an appeal of the Commission's denial of attorney fees and a complaint for attorney fees under RCW 49.48.030. CP 1-3. The parties filed dispositive cross motions. The City sought dismissal based on the pleadings and Arnold sought summary judgment claiming she was entitled to attorney fees incurred for representation at her civil service hearing.³ CP 8-39, 96-109. The superior court denied Arnold's motion for summary judgment and granted the City's motion to dismiss her request for attorney fees. CP 192-93.

D. The Court of Appeals' Decision.

The Court of Appeals reversed the superior court in a published decision. The Court interpreted RCW 49.48.030 to provide for attorney fees incurred in civil service appeals despite the explicit language in the civil service code to the contrary. Decision at 11-12. In doing so, the Court dismissed multiple prior decisions of the Court of Appeals that held

³ At oral argument, Arnold withdrew her appeal to the Hearing Examiner's final decision and informed the court that she would proceed only on her wage claim under RCW 49.48.030. Record of Proceedings (Mar. 23, 2013) at 3:13-21. At the time she filed her summary judgment motion, Arnold's fee request had grown to nearly \$400,000 encompassing amounts incurred in the administrative proceedings and superior court action. CP 20.

the opposite. *See Cohn*, 78 Wn. App. at 67-70; *Trachtenberg*, 122 Wn. App. at 496-97; *Int'l Union*, 183 Wn. App. at 800-02; *see also McIntyre*, 135 Wn. App. at 601. Indeed, the Court of Appeals disregarded *stare decisis* and overturned its own prior decisions without determining that those decisions were “demonstrably incorrect or harmful” per the applicable standard. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett* (“*Fire Fighters*”), 146 Wn.2d 29, 37 n.9, 42 P.3d 1265 (2002) (internal quotations and citation omitted); *see also State v. Berlin*, 133 Wn.2d 541, 547, 947 P.2d 700 (1997) (“Stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”). The Court denied the City’s timely motion for reconsideration. *See App. B.*

VI. ARGUMENT

This Court should grant review because the Court of Appeals’ Decision conflicts with prior decisions of the Court of Appeals and raises an issue of substantial public interest. RAP 13.4 (b). Moreover, in *Fire Fighters* this Court explicitly left open the question presented here: “Because the issue in this case deals exclusively with attorney fees for an arbitration proceeding, we decline at this time to address whether RCW 49.48.030 would apply to other types of administrative or quasijudicial

proceedings.”⁴ *Fire Fighters*, 146 Wn.2d at 42 n.11 (emphasis added).

Review of the Court of Appeals’ Decision thus presents an opportunity for this Court to resolve the open question.

A. The Decision is in conflict with other decisions of the Court of Appeals regarding RCW 49.48.030’s application to civil service proceedings.

The Court of Appeals’ holding that RCW 49.48.030 applies to the civil service proceedings at issue here conflicts with numerous prior Court of Appeals decisions. Indeed, previous cases with fact patterns remarkably similar to this case explicitly hold that civil service employees cannot recover fees incurred in administrative proceedings that do not include attorney fees as a remedy under RCW 49.48.030.

First, in *Cohn*, the Court of Appeals addressed a public employee’s right to fees under the state civil service scheme. There, the Department of Corrections disciplined one of its employees by cutting his pay by ten percent for six months. *Cohn*, 78 Wn. App. at 65. The employee successfully challenged his pay cut at the administrative level and a hearing officer reversed the disciplinary action and reinstated his pay and

⁴ The *Fire Fighters* Court reserved the issue even though a prior decision, *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986), affirmed a trial court’s award of attorney fees to a civil service employee under RCW 49.48.030. The *Hanson* Court focused on whether the claimant’s “wage claim was inconsistent with the grounds for certiorari” and affirmed an award of fees based on the superior court’s review and award of back wages. *Hanson*, 105 Wn.2d at 872-73. *Hanson* did not discuss the civil service scheme or address fees incurred at the administrative level. Thus, it did not address the issue presented here and left open in *Fire Fighters*.

benefits. *Id.* On remand from the Personnel Appeals Board (the state's equivalent of a city civil service commission), the employee requested attorney fees pursuant to RCW 49.48.030. *Id.* The hearing examiner denied the request, and the Board affirmed, concluding it had no statutory authority to award such fees. *Id.* The employee then appealed to the superior court, which dismissed his request for fees. *Id.*

Division Two of the Court of Appeals addressed “whether the Board has authority to award attorney fees” under RCW 49.48.030. *Id.* at 66. While noting that courts generally construe RCW 49.48.030 liberally as a remedial statute, the Court found “persuasive reasons exist to prohibit the judicial expansion of the scope of the statute to permit the Board the power to award attorney fees.” *Id.* at 67. Specifically, the Court noted that administrative agencies have only the powers expressly granted or necessarily implied from statutory grants of authority, and that the state's civil service laws granted no power to award attorney fees. *Id.* Because the Board lacked authority to award attorney fees, the superior court also lacked such authority. *Id.* at 69-70; *see also Punton v. City of Seattle Public Safety Comm'n*, 32 Wn. App. 959, 970, 650 P.2d 1138 (1982), *review denied*, 98 Wn.2d 1014 (1983), *overruled on other grounds by Danielson v. City of Seattle*, 108 Wn.2d 788, 742 P.2d 717 (1987)

(superior court lacked authority to award attorney fees under 42 U.S.C. § 1988 where administrative body lacked such authority).

In *Fire Fighters*, this Court discussed without disapproval *Cohn*'s central holding that a superior court has no authority to award fees under RCW 49.48.030 where the administrative agency had no such authority. The court distinguished *Cohn* on grounds that it involved an appeal from a government agency rather than an arbitration proceeding. *Fire Fighters*, 146 Wn.2d at 42-43. Thus, the *Fire Fighters* court explicitly chose not to overrule *Cohn*.⁵

Second, Division One of the Court of Appeals reached a result similar to *Cohn* in *Trachtenberg*. There, a state civil service employee was initially terminated but was reinstated to a demoted position after he appealed to the Personnel Appeals Board. *Trachtenberg*, 122 Wn. App. at 493. As a result, he was entitled to back pay. *Id.* The employee filed suit in superior court seeking attorney fees incurred in his successful Board appeal. *Id.*

The Court of Appeals found *Cohn* controlling and affirmed. The Court noted that attorney fees were absent from the list of enumerated remedies in the civil service statute and, thus, the legislature did not grant

⁵ While the *Fire Fighters* court disagreed with *Cohn*'s reading of *Hanson* pertaining to whether fees must be recovered in the "same action" as the action in which wages or salary owed are awarded, the Court did not disapprove of *Cohn*'s conclusions regarding authority to award fees in the first place. *Fire Fighters*, 146 Wn.2d at 42-43.

the Board the authority to award attorney fees. *Id.* at 496-97. The Court concluded, “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.” *Id.* at 497.

Third, in *International Union*, Division One cited with approval both *Cohn* and *Trachtenberg* in holding that the superior court erred in awarding attorney fees incurred in an unfair labor practices proceeding before the Public Employment Relations Commission, where the Commission’s authority to award fees was limited to extraordinary circumstances and the parties agreed no such circumstances were present. *Int’l Union*, 183 Wn. App. at 798-802. The *International Union* court relied on both *Cohn* and *Trachtenberg* to hold that the commission at issue lacked authority to award fees under the facts presented, and therefore the superior court also lacked such authority. *Id.* at 802.

Finally, in *McIntyre*, Division Two of the Court of Appeals remained consistent in its treatment of civil service proceedings. *McIntyre* involved an employee who was exempt from the state civil service law. *McIntyre*, 135 Wn. App. at 601-02. The Court distinguished *Cohn* and *Trachtenberg* on the ground that both cases were determined under the state civil service law, a context in which the claimant is only entitled to certain enumerated remedies. *Id.* at 601. Thus, the holding in *McIntyre*

treated civil service appeals as outside the RCW 49.48.030 scheme, consistent with *Cohn* and *Trachtenberg*.⁶ Notably, nothing in *McIntyre* prohibits statutorily-limited fee remedies for claimants in administrative proceedings.

The Court of Appeals decisions discussed above establish a general rule governing applicability of RCW 49.48.030 to administrative proceedings: superior courts lack authority under RCW 49.48.030 to award attorney fees incurred in administrative proceedings where the administrative agency lacked such authority.

Here, not only are attorney fees not one of the enumerated remedies the Commission may award, but the civil service code explicitly provides to the contrary and mandates that claimants may be represented “at [their] own expense.” SMC 4.04.260(E). The Court of Appeals’ Decision ignores this plain language and conflicts with the well-established rule. Indeed, the Court’s Decision turns the rule on its head. *See* Decision at 12 (“[W]e 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.”).

⁶ Further, the *McIntyre* court distinguished *Cohn* and *Trachtenberg* because the trial court awarded the claimant in *McIntyre* a greater wage amount than awarded in the administrative hearings. *McIntyre*, 135 Wn. App. at 602. Here, like in *Cohn* and *Trachtenberg*, Arnold did not receive a greater wage amount from the trial court.

In doing so, the Court of Appeals ignored the principle of *stare decisis* and apparently overruled prior decisions without applying the proper standard—namely, without showing that the rule established by those prior decisions was demonstrably incorrect or harmful. *See Berlin*, 133 Wn.2d at 547 (“Stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”); *Fire Fighters*, 146 Wn.2d at 37 n.9 (same). The conflict regarding the relevance of administrative agency authority for an award of attorney fees under RCW 49.48.030 warrants review under RAP 13.4(b)(2).

B. Review is warranted because the Decision raises an issue of substantial public importance.

The Decision also raises an issue of substantial public importance because (1) it creates a disincentive for cities to establish voluntary civil service codes for personnel administration that benefit public employees and (2) it disrupts settled expectations regarding attorney fees incurred in the state civil service context.

The City established its civil service code voluntarily under its broad constitutional and statutory powers. *See Seattle City Charter*, art. XVI; *see also SMC Chapter 4.04*. In establishing its civil service code, the City has gone above and beyond the mandatory civil service laws that apply to city firefighters and police under RCW Chapters 41.08 and

41.12.⁷ This Court has stated that the reason for civil service systems governing police and fire department employees is to protect those employees from arbitrary or discriminatory actions of their employers in hiring, promotions, discipline, and discharge and to ensure that the public is protected by qualified police and fire personnel. *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wn.2d 655, 665, 818 P.2d 1076 (1991). Indeed, the fundamental purpose of civil service laws in general is to require officials to hire, promote, and discharge employees based on merit rather than political affiliation, religion, favoritism, or race. *Id.* at 664. In sum, “elimination of the arbitrary employment procedures of the spoils system enables state, county, and municipal governments to render more efficient services to the public.” *Herriott v. City of Seattle*, 81 Wn.2d 48, 61, 500 P.2d 101 (1972).

The same public policy considerations discussed in *City of Yakima* and *Herriott* are expressed in the City’s charter establishing its civil service system. *See* Seattle City Charter, art. XVI, sec. 1 (purpose of civil service code is to establish comprehensive “uniform procedures for recruitment, selection, development, and maintenance of an effective and

⁷ The state civil service law does not provide for attorney fees. *See* RCW 41.06.220 (employees reinstated after appeal entitled to back pay, sick leave, vacation accrual, retirement and OASDI credits). Nor do the mandatory state statutes governing civil service provisions for city firefighters and police officers provide for attorney fees. *See* RCW 41.08.090 (city firefighters entitled to hearing and opportunity to appear in person or by counsel, but no fee provision); RCW 41.12.090 (same for city police).

responsible work force”); *see also* SMC 4.04.020 (City’s personnel administration system is “based upon merit principles as enumerated in the [City Charter]”). The City voluntarily has decided that most City employees should benefit from this system. But just as the state has opted not to provide attorney fees as a remedy in state civil service proceedings, the City has determined in establishing its civil service system not to grant the Commission authority to award such fees.

The Decision opens municipal governments to liability for often-substantial fee awards where none previously existed. Indeed, here Arnold sought almost \$350,000 in attorney fees for the administrative process. CP 21. Awarding attorney fees in circumstances such as these creates a disincentive for cities to voluntarily adopt civil service codes. Rather than face potential high attorney fees, cities may limit the number or type of employees who may access the civil service system, resulting in greater barriers to employees having their grievances heard. Review should be granted to address this issue of substantial importance.

Moreover, not only does the Decision make municipalities liable for attorney fees incurred in civil service proceedings, it makes the state itself so liable. By overruling *Cohn* and *Trachtenberg* (both of which addressed fees incurred in state civil service proceedings), the Decision imposes attorney fee liability on the state despite the lack of statutory

provision for such fees and contrary to settled expectations following *Cohn and Trachtenberg*. This too is an issue of substantial importance warranting review.

VII. CONCLUSION

The Decision makes the City liable for substantial attorney fees incurred in administrative proceedings despite the City's determination in establishing its civil service system not to grant the Commission authority to award such fees. Indeed, the Decision will make any similarly situated municipality—in addition to the state itself—so liable regardless of whether fees are statutorily authorized. The Decision conflicts with numerous decisions of the Court of Appeals and presents an issue of substantial public importance. Review is appropriate under RAP 13.4(b)(2) and RAP 13.4(b)(4). The City respectfully requests that the Court grant review.

RESPECTFULLY SUBMITTED this 26th day of May, 2015.

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GEORGIANA ARNOLD,)
) No. 71445-7-1
 Appellant,)
) DIVISION ONE
 v.)
)
 CITY OF SEATTLE, d/b/a HUMAN) PUBLISHED OPINION
 SERVICES DEPARTMENT,)
) FILED: March 23, 2015
 Respondent.)
 _____)

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

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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.

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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

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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

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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

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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

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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

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

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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

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.

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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

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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.

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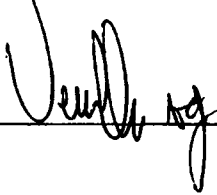
Following Fire Fighters, we conclude it is irrelevant that the commission itself is not authorized to award attorney fees to an employee who recovers wages in a successful appeal. The authority for the award of fees is found in RCW 49.48.030. The superior court may exercise that authority in a separate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

WE CONCUR:



Becker, J.

Cox, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GEORGIANA ARNOLD,)	
)	No. 71445-7-1
Appellant,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	
CITY OF SEATTLE, d/b/a HUMAN)	
SERVICES DEPARTMENT,)	
)	
Respondent.)	

Respondent, City of Seattle, has filed a motion for reconsideration of the opinion filed on March 23, 2015, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration of the opinion filed on March 23, 2015, is denied.

DATED this 24th day of April, 2015.

FOR THE COURT:

Becker, J.
Judge

FILED
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STATE OF WASHINGTON
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