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SUPREME COURT

OF THE STATE OF WASHINGTON

GEORGIANA ARNOLD, Appellant

v.

CITY OF SEATTLE d/b/a

HUMAN SERVICES DEPARTMENT, Respondent

BRIEF OF APPELLANT

Judith A. Lonnquist, WSBA #06421
Wendy L. Lilliedoll, WSBA #37743
Law Offices of Judith A. Lonnquist, P.S.
1218 3rd Avenue, Suite 1500
Seattle, WA 98101-3021
(206) 622-2086

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

Attorneys for Appellant Georgiana Arnold

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I. INTRODUCTION

Appellant Georgiana Arnold seeks direct review of an issue of paramount importance to Washington civil servants who successfully bring actions to recover wages owed to them and seek to recover their attorney fees incurred in such actions.[1] After winning her case before the Seattle Civil Service Commission ("CSC") and recovering wages owed to her, Arnold brought suit under RCW 49.48.030 to recover her attorney fees, relying primarily upon this Court's decision in *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002) (hereinafter "*Fire Fighters*"), a case allowing recovery of attorney fees where a fire fighter successfully recovered back wages in an arbitration proceeding and later filed a court action to recover attorney fees. Noting that this Court had reserved the issue of whether actions other than arbitrations, such as civil service proceedings, were "actions" within the meaning of RCW 49.48.030,[2] the trial court entered orders on cross

[1] Because the trial court's order of summary judgment was based exclusively on the interpretation of RCW 49.48.030, the trial court's decision presents a question of law and statutory interpretation which is reviewed *de novo*. *City of Pasco v. PERC*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

[2] This is yet another reason for this Court to review this case directly rather than remand it to the appellate court. That court would have to speculate as to this Court's reason for reserving the issue as to whether RCW 49.48.030 extends to proceedings other than arbitration whereas this Court presumably knows why it reserved that issue. Direct review thus better serves judicial efficiency and prevents the extra cost and delay to the litigants.

motions that denied Arnold's motion for summary judgment and granted the respondent City of Seattle's ("City") motion to dismiss.

II. ASSIGNMENTS OF ERROR

Assignment of Error:

The trial court erred in dismissing Arnold's action for attorney fees based on RCW 49.48.030 and *Fire Fighters*.

Issue Pertaining to Assignments of Error:

Are civil service proceedings "actions" within the meaning of RCW 49.48.030, given the strong public policy inherent in RCW 49.48.030 favoring awards of attorney fees to employees recovering wages owed, as articulated by this Court in *Fire Fighters*?

III. STATEMENT OF CASE

At all times relevant to this appeal, Georgiana Arnold was an employee of the City, working with Aging and Disability Services, a division of the Seattle Human Services Department ("HSD") CP 002. On September 1, 2011, Arnold was discharged from her manager position, and subsequently was demoted to an entry-level position with a substantial pay cut. *Id.* She filed a timely appeal to the CSC, which in turn assigned the case to a Hearing Examiner. *Id.*

Because the City was represented before the CSC by an attorney from the City Attorney's Office, Arnold felt that she too had to retain

counsel. CSCR 1-4.[3] The parties then engaged in written discovery and depositions, albeit limited in number by the Hearing Examiner. CSCR 92-93.

On November 1, 2011, the Hearing Examiner entered her Prehearing Order scheduling the hearing for January 17, 2012. CP 009. Inasmuch as the issue was whether Arnold's demotion was for justifiable cause, the City proceeded with its case first. *Id.*[4] It called 11 witnesses, and Ms. Arnold's counsel had the opportunity to cross-examine them. *Id.* At the end of the City's case, Arnold presented her case. *Id.* The Hearing Examiner made evidentiary rulings, although she was not bound by the superior court rules of evidence.[5] *Id.* Witnesses were sworn, exhibits introduced, and a recording was made of the proceedings. *Id.* The Hearing Examiner heard testimony on eight days over a three-month period, and requested simultaneous briefing by the parties. *Id.* On July 24, 2012, the Hearing Examiner issued her written decision reversing HSD's discipline of Arnold and ordering that she be reinstated to her former position and that she receive unpaid wages and benefits (CSCR 2772-2796). *See*

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[3] The term: "CSCR" with a number thereafter refers to the Civil Service Commission record of proceedings submitted to the trial court.

[4] This is the same procedure used in arbitration hearings to determine whether an employer had just cause for the challenged discipline. See: Elkouri & Elkouri, *How Arbitration Works,* 4th edition, BNA, Washington, D.C., p. 266.

[5] Similarly, arbitrators are not strictly bound by the rules of evidence. See: Elkouri & Elkouri, id. at 296.

Appendix. Arnold thereafter submitted her petition for an award of attorney fees along with supporting documentation (CSCR 2798-2702), but the Hearing Examiner denied a fee award. CP 094-095.

Arnold filed a timely petition for review with the CSC, supported by declarations from Arnold and Virginia Adams, another HSD employee involved in the Civil Service hearing. CSCR 2893-2900. On September 13, 2012, the CSC entered an order denying Arnold's fee petition (CSCR 2982-83). She then timely filed an action in the King County Superior Court, seeking an award of attorney fees pursuant to RCW 49.48.030.

Both parties filed dispositive cross-motions before the trial court. CP 008-020; 096-103. After considering applicable precedent, the trial court, the Honorable Catherine Shaffer, determined that in *Fire Fighters,* this Court had not expressly applied RCW 49.48.030 to civil service cases and thus denied an award of attorney fees, but held that the case involved "a fundamental and urgent issue of public import which requires prompt and ultimate determination." CP 094-095. Arnold's timely appeal to this Court followed. CP 194-197.

IV. SUMMARY OF ARGUMENT

RCW 49.48.030 is a remedial statute that applies broadly to all actions in which employees recover wages wrongfully withheld by their employer and entitles them to recover reasonable attorney fees and

expenses. Given this Court's determination in *Fire Fighters* that the arbitration of a grievance resulting in the reversal of a disciplinary action with an award of back wages was an "action," where, as here, a civil servant recovers back pay as a result of a civil service proceeding, the trial court should have awarded her fees and expenses, as mandated by RCW 49.48.030.

V. ARGUMENT

A. RCW 49.48.030 Is A Remedial Statute Intended To Apply Broadly to All Proceedings in Which Wages Are Recovered.

The Washington wage statute, RCW 49.48.030 provides that: "In any action in which any person is successful in recovering judgment for wages or salary owed to him [sic], reasonable attorney fees ... shall be assessed against said employer..." RCW 49.48.030 is a remedial statute that courts construe broadly and liberally in favor of persons recovering unpaid wages. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29; 35, 42 P.3d 1265 (2002); *Leitz v. Hansen Law Offices*, 166 Wn. App. 571, 595, 271 P.3d 899 (2012). Courts construing RCW 49.48.030 have expressly stated that awarding attorney fees under the remedial statute provides employees both an incentive and the means to assert their rights. *Fire Fighters* (*quoting Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994)); *see id.* at 150 (noting that by providing for

attorney fees, RCW 49.48.030 permits "employees to pursue claims even though the amount of recovery may be small").

In *Fire Fighters*, this Court addressed the availability of attorney fees under RCW 49.48.030 for employees who recovered back pay in arbitration. *Id.* 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 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.*

Similarly, in *Hanson v. City of Tacoma*, 105 Wn.2d 864, 867, 872, 719 P.2d 104 (1986), 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. 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.*

The present case involves the recovery of back pay equivalent to the wages at issue in *Fire Fighters* and *Hanson*. 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. Similarly, Arnold succeeded in recovering wages that were owed to her because her demotion was not permitted by the City of Seattle personnel rules. Further, *Hanson* confirms that back pay resulting from an unsupported demotion is equivalent to back pay recovery from a suspension for purposes of RCW 49.48.030. Therefore, just as in *Fire Fighters*, Arnold here has established wage recovery to support an action under RCW 49.48.030.

Nonetheless, the trial court declined to apply RCW 49.48.030, noting that this Court had reserved the question of whether the statute applied to proceedings other than arbitration *Fire Fighters*, 146 Wn.2d at 42, n. 11. In so doing, the trial court contravened the requirement of statutory interpretation that remedial legislation such as RCW 49.48.030 "be given a liberal construction; exemptions from its coverage 'are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation,'" *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012), *quoting Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000); *accord*: *Becerra et al. v. Expert*

Janitorial, LLC, ___ Wn. App. ___, 2013 Wash. App. LEXIS 2166 (9/16/13) at ¶20.

The trial court thus erred by narrowly construing the wage statute as exempting civil service proceedings from its attorney fee provisions. As shown below, civil service proceedings are not "situations which are plainly and unmistakably [in]consistent with the terms and spirit of the legislation." *Id.* The "terms" of RCW 49.48.080 repeatedly have been held to apply to a host of similar situations in which an employee recovers wages owed. *See, e.g.*, *Hanson v. City of Tacoma*, 105 Wn.2d 864, 867, 872, 719 P.2d 104 (1986) (civil service board); *McIntyre v. Washington State Patrol*, 135 Wn.App. 594, 141 P.3d 75 (2006) (trial board); *Hayes v. Trulock*, 51 Wn.App. 795, 735 P.2d 830 (1988), *rev. denied*, 111 Wn.2d 1015 (1988); *Fire Fighters, supra* (arbitration).

Courts have applied RCW 49.48.030 where a variety of types of financial remuneration was involved. *See e.g. Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991) (back pay); *Hayes*, *supra* (front pay); *Naches Valley Sch. Dist. JT3 v. Cruzen*, 54 Wn. App. 388, 390, 399, 775 P.2d 960 (1989) (sick leave); *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997), *review denied,* 135 Wn.2d 1003 (1998) (stipulated and contested commissions); *Fraser v. Edmonds Community College*, 136 Wn.App. 51, 147 P.3d 631 (2006) (breach of

promise damages). RCW 49.48.030 has also been held to apply to cases brought pursuant to diverse legal theories. *See e.g.*: *Hayes, supra* (wrongful discharge); *Hanson, supra* (violation of local ordinance); *Gaglidari, supra* (breach of contract); *Fraser, supra* (promissory estoppel). In sum, this case does not constitute a "situation which [is] plainly and unmistakably [in]consistent with the terms ... of the legislation." *Anfinson, supra.*

Nor could recovery Arnold's attorney fees be properly considered inconsistent with the "spirit" of RCW 49.48.030. As this Court said in *Fire Fighters*:

> We have previously 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). The Legislature "evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payments 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 v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994). Furthermore, remedial statutes "should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." *Ellerman*, 143 Wn.2d at 520. Therefore, the terms of RCW 49.48.030 must be interpreted to effectuate this purpose.

146 Wn.2d at 35.

In McIntyre, *supra at* 603-604, the State argued that "[b]ecause McIntyre's action stemmed from a statutory appeal, not an arbitration proceeding under the CBA, ... McIntyre is not entitled to attorney fees." The Court of Appeals properly rejected the State's argument because it "could discourage officers from bringing an action when there is a question of discipline that results in loss of wages or salary," contrary to the broad remedial purpose of RCW 49.48.030. The same rationale is applicable here.

If civil servants are denied recovery of attorney fees for successfully challenging wrongful discipline and thereby recovering wrongfully withheld wages, the public policy of RCW 49.48.030 would be undermined. Proper interpretation of this remedial statute demands reversal of the trial court herein.

B. The Civil Service Hearing at Issue in the Present Case Was Sufficiently Similar to a Court Proceeding or an Arbitration to Constitute an "Action" for Purposes of the Remedial RCW 49.48.030.

The statutory entitlement to fees for actions to recover wages is not limited to court proceedings, but extends to arbitrations and equivalent procedures resulting in factual findings and legal conclusions. For example, in *Hitter v. Bellevue School District No. 405*, 66 Wn. App. 391, 396, 832 P.2d 130, *review denied*, 120 Wn.2d 1013 (1992), the Court of Appeals said: "We find nothing in RCW 49.48 indicating that an

arbitration proceeding is not an 'action' or that an arbitration award is not a 'judgment'." *Accord*, *Hayes*, *supra*; *Fire Fighters Local 46, supra* (arbitration); *Hanson*, *supra* (civil service proceedings).

In *Fire Fighters*, this Court explained its basis for defining "action" broadly to include arbitrations. First, RCW 49.48.030 is a remedial statute that "must be construed to effectuate its purpose." *Fire Fighters*, 146 Wn.2d at 34. It then described that the purpose of the statute is to support the recovery of wages or salary owed to employees and to require the payment of attorney fees in the event that an employee succeeds in recovering wages. *Id.* at 35 (describing Washington's "long and proud history of being a pioneer in the protection of employee rights"). The Court noted that, absent the award of attorney fees available under RCW 49.48.030, employees effectively would be precluded from remedying the non-payment of wages in small amounts. *Id.* at 50.[6]

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[6] As a practical matter, low- and middle-wage employees would generally be unable to remedy even substantial wrongful withholding because even if the ultimate recovery would outweigh the fees and costs associated with such a claim, the up-front costs often would be too great. That was certainly true here. Arnold is a single woman, close to retirement age, with limited resources. (CSCR 2907). Arnold believed that she could not have prevailed without an attorney representing her. Indeed, she believes it highly unlikely that any civil service employee could vindicate rights without counsel. As she noted in her declaration:

> City employees appealing to the [CSC] are not attorneys, have no legal training, and are generally unfamiliar with how to litigate a civil service appeal. Yet apparently each is expected to go into battle alone against City attorneys who have long experience before the Commission. Without an attorney to represent the civil service employee, the decks are stacked against the employee. This is especially true since the civil service employer has the

In the course of interpreting the statutory term "action" to encompass arbitrations, the *Fire Fighters* Court highlighted certain characteristics shared by judicial and arbitration proceedings. The Court noted that arbitrations are subject to requirements of due process, equivalent to a "traditional judicial action." *Id.* at 38. Critically, "arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts." *Id.* (quoting *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995) and *N. State Constr. Co. v. Banchero*, 63 Wn.2d 245, 249-50, 386 P.2d 396 (1963) (per curiam)). The fact that arbitrators are subject to different standards of "judicial conduct and efficiency" than judicial officers did not prevent this Court from concluding that the overall process was "in the nature of a judicial inquiry" and fell within the notion of an "action" for purposes of RCW 49.48.030. *Id.* (quoting *Banchero*, 63 Wn.2d at 248). In each instance, the factors that supported interpreting "action" to include arbitrations mandate the same conclusion here.

> advantage of City resources and attorneys. Without counsel, the scales of justice are skewed against the civil service employee.

(*Id.*).

C. Policy Reasons Require That the Issue Left Open in Fire Fighters Should Now Be Resolved in Favor of the Wronged Employee

Both the remedial nature of RCW 49.48.030 and the practical similarities between the arbitration process at issue in *Fire Fighters* and the civil service proceeding at issue here support a determination that the present proceeding is an "action" under RCW 49.48.030. Although this Court expressly left open the question of whether "action" reached other administrative and quasi-judicial proceedings in *Fire Fighters*, the holding and reasoning of that case applies with equal force in the present context. *See Id.* at 42 n. 11. Like arbitration, the present civil service hearing was "a substitute for judicial action." *See*: *Id.* at 38; *See also*, *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 152-153, 634 P.2d 296 (1981) (citing *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131-132, 426 P.2d 828 (1967)).

The CSC hearing in this case entailed 8 days of testimony from 15 witnesses, including traditional direct and cross-examination. (CSCR 1593-94, 1597, 1600, 1605-06, 1613-14, 1616, 1623-24, 2772). The proceedings were preserved through an audio transcript. Leading up to the hearing, the parties conducted discovery and exchanged witness and exhibit lists. (*See, e.g.*: CSCR 909 - 914). The City's hearing exhibits totaled more than 1,000 pages. (CSCR 1631-2771).The Hearing Examiner

also received and ruled on motions. (*See, e.g.*: CSCR 23-24, 900-908). For example, prior to the trial, she issued an order that analyzed the contours of attorney-client privilege under Washington law and assessed whether and under what circumstances Arnold could call a particular witness. (CSCR 1191-1195).

Hearing examiners, like arbitrators "become the judges of both the law and the facts." *See Fire Fighters*, 146 Wn.2d at 38; *see also Boyd*, 127 Wn.2d at 263 (quoting *Banchero*, 63 Wn.2d at 249-50). In the present case, at the conclusion of the hearing, the Hearing Examiner considered extensive written briefing from both parties in lieu of oral closing arguments. She then issued a twenty-five page order, which included eighty-one numbered paragraphs entitled "findings of fact" and an additional forty-one paragraphs of conclusions, followed by a "Decision and Order" requiring the City to reinstate Arnold to her position and to compensate her with back pay. (CSCR 2772-2796). In short, the civil service proceeding at issue here was "in the nature of a judicial inquiry" equivalent to the arbitration considered in *Fire Fighters. See* 146 Wn.2d at 38; *see also Banchero*, 63 Wn.2d at 248.

Further, the policy considerations raised in *Fire Fighters* apply equally in the present context of a civil service proceeding; *i.e.* "A restrictive interpretation of 'action' [precluding] recovery of attorney fees

... would be inconsistent with the legislative policy in favor of payment of wages due employees." 146 Wn.2d at 41. In sum, this court should now make clear that the civil service hearing herein is akin to a judicial proceeding to which RCW 49.48.030 would apply.

D. Nothing in Existing Case Law Derogates From the Conclusion That RCW 49.48.030 Applies Broadly to Actions to Recover Wages, Such As That Herein.

The application of RCW 49.48.030 has been limited in only two appellate decisions relied upon herein by the City: *Cohn v. Department of Corrections*, 78 Wn. App 63, 895 P.2d 857 (1995), and *Trachtenberg v. Washington State Department of Corrections*, 122 Wn. App. 491, 93 P. 3d 217 (2004), *review denied*, 103 P.3d 801 (2004). As indicated below, each of these cases is distinguishable and contrary to compelling legal precedent as set forth in *Fire Fighters* and *Hanson*.

In *Cohn*, a state employee who had recovered back pay from the state Personnel Appeals Board ("PAB") requested recovery of his attorney fees. The PAB denied the request. Ultimately, the Court of Appeals ruled that since the PAB had no authority to award fees and since the appellate court was reviewing only an administrative appeal, its powers were limited to those granted to the administrative agency. Seven years later, in *Fire Fighters*, this Court expressly rejected the reasoning in *Cohn*, saying:

> We disagree with *Cohn*'s reading of *Hanson*. 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. . . . Attorney fees . . . need not be awarded in the same action as that in which wages or salary owed are recovered.

146 Wn.2d. at 43. Thus *Fire Fighters* rejected the argument that RCW 49.48.030 does not authorize a separate action for attorney fees and held that RCW 49.48.030 authorizes the courts to award attorney fees in such actions.[7]

The *Trachtenberg* case is also distinguishable. In *Trachtenberg*, the court was faced with the challenge of harmonizing two apparently conflicting state statutes: RCW 41.06 (State Civil Service) and RCW 49.48.030 (fees for wage recovery). The *Trachtenberg* court held that because the Legislature had created a comprehensive statutory scheme for resolving civil service disputes without mentioning attorney fees, it could not have intended that RCW 49.48.030 apply. 122 Wn. App. at 496. Where a court is construing two state statutes, its mandate is to "read [them] together to ... achieve a harmonious total statutory scheme ...

[7] *Cohn* is also distinguishable because it relies on specific language of another state statute, RCW 41.64, which limits the remedial authority of the PAB. Consequently, the court was faced with having to harmonize two statutes of equal stature. Here, the argued inconsistency is between a city ordinance and a state law – a situation in which the state statute controls. *See: Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P. 2d. 292 (1960).

which maintains the integrity of the respective statutes." *City of Ellensburg v. State,* 118 Wn.2d 709, 713, 826 P.2d. 1081 (1992).

But no such "harmonious interpretation" need be undertaken here. A city council cannot exclude CSC hearings from the reach of RCW 49.48.030. State law controls. Wash. Const., article I, §29; article XI, §11. Such an act by a city would be *ultra vires.* A city simply has no authority to remove a state-given right or remedy such as that extended to all Washington employees by RCW 49.48.030.

The *Trachtenberg* case is also distinguishable because whereas *Trachtenberg* involved a conflict between two state statutes, the instant case involves a potential conflict between a state statute and a municipal ordinance. Article XI, §11 of the Washington Constitution limits the authority of subordinate governmental entities to enact ordinances only to the extent they are "not in conflict with the general laws." In the event of a conflict between an ordinance and a state law (*i.e.* where the ordinance permits what a state statute prohibits, or vice versa), state law prevails. *Bellingham v. Schampera,* 57 Wn.2d 106, 111, 356 P.2d 292 (1960); *City of Spokane v. Portch*, 92 Wn.2d 342, 346, 596 P.2d 1044 (1979). In the *Portch* case, this Court said that Article XI, §11 is "a direct delegation of the police power as ample within its limits as that possessed by the Legislature itself [and] requires no legislative sanction for its exercise so

long as the subject matter is local, and the regulation is reasonable and *consistent with the general laws*." Here, to the extent that the City's civil service ordinance precludes relief expressly granted by state statute, it is in "conflict" with RCW 49.48.030 and without effect.

E. Arnold Is Entitled To Fees Before This Court

Having successfully established her right to recover wages that the City wrongfully withheld, Arnold is entitled to recover reasonable attorney's fees incurred in the civil service hearing and subsequent appeals to both the trial court and this Court. *Fire Fighters*, *supra* at 51-52; *McIntyre*, *supra* at 605. Arnold is entitled to an award of fees on appeal. RAP 18.1(a).

VI. CONCLUSION

Simply stated, after *Fire Fighters*, and given the extensive procedures before the Hearing Examiner, it cannot be said that such a proceeding was not an "action" within the meaning of RCW 49.48.030. The trial court's decision effectively deprives civil servants wrongfully disciplined by a municipal authority of the full protection of the wage statute.

Arnold respectfully requests that this Court hold that a city civil service proceeding is an "action" within the meaning of RCW 49.48.030 and that a civil servant who is successful in recovering unpaid wages in

such a proceeding is entitled to an award of her reasonable attorney fees and expenses.

This Court should reverse the trial court's order of dismissal and remand this case to the King County Superior Court for the entry of an award of attorney fees consistent with RCW 49.48.030. Costs on appeal, including attorney fees, should also be awarded to Arnold.

Dated this 1st day of October, 2013.

Respectfully submitted,

Judith A. Lonnquist, WSBA #06421
Wendy L. Lilliedoll, WSBA #37743
Law Offices of Judith A. Lonnquist, P.S.
1218 3rd Avenue, Suite 1500
Seattle, WA 98101-3021
(206) 622-2086

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

Attorneys for Georgiana Arnold

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

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

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 2, §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. Agmata 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. Agmata 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

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[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 Appellants dispute 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 Peer 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 $1,500 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's 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 Ms. 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 Cordon, to investigate ADS' handling of the Lusk complaint and issue a report. Exhibit 35.

59. Ms. Cordon interviewed the Appellants, Ms. Chow and Ms. Piering, Mr. Lusk, the Auditor, Mr. Agmata, and others. Exhibit 9 at 1. Ms. Cordon 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 was 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 Agmata 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 <u>or</u> poor work performance, up to and including discharge.

4. The Appellants' reliance on *Wojt. 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. Agmata.

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 1.3.3.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 Piering, 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 <u>were</u> 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. Agmata 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. Agmata 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.

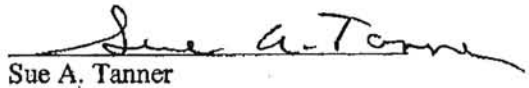
Decision and Order

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.

DECLARATION OF SERVICE

On said day below I caused to be served, via email and legal messenger, a true and accurate copy of the Opening Brief in Supreme Court Cause No. 88730-6 to the following:

Philip Talmadge
Talmadge Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA, WA 98188
phil@tal-fitzlaw.com

Peter S. Holmes, Seattle City Attorney
Erin Overbey, Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Avenue, 4th floor
Seattle, WA 98124-4769
erin.overbey@seattle.gov

Also emailed to: dc.bryan@seattle.gov , kim.fabel@seattle.gov and danielle.tovar@seattle.gov

Original filed:

Washington Supreme Court
Clerk's Office
415 12th Street W.
Olympia, WA 98504-0929

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: October 1, 2013, at Seattle, Washington.

Linsey M. Teppner
Law Offices of Judith A. Lonnquist, P.S.