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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.

REPLY BRIEF OF APPELLANT ARNOLD

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, WA 98188
(206) 574-6661
Attorneys for Appellant Arnold

ORIGINAL

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A. INTRODUCTION

The City of Seattle ("City") has failed to offer any rational reason why this Court's decision in *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), applying the attorney fee provision of Washington's wage recovery statute, RCW 49.48.030 to arbitrations, should not be applied to a civil service proceeding in which Georgiana Arnold successfully recovered back wages due her.

Instead, the City harps on tangential matters such as the amount of the fees Arnold incurred[1] and its assertion that Arnold did not really prevail in the administrative proceedings before the Seattle Civil Service Commission ("CSC") (even though she recovered back wages) in the hope of distracting this Court's attention from the paucity of legal reasoning supporting the City's position.

Simply put, the extensive hearing process before the CSC was just as much an "action" for purposes of RCW 49.48.030 as was an arbitration in *Fire Fighters* or litigation in court. Counsel was necessary for Arnold in the CSC to vindicate her right to back wages where the legal issues at

[1] *See, e.g.,* br. of resp't at 1, 2, 4. The actual amount of any fee award for the CSC and trial court proceedings will abide the trial court's decision on the appropriate amount of recoverable fees and expenses.

stake were vital to her and the procedures involved were akin to those employed in an arbitration proceeding or in court.

Finally, the notion advanced by the City that its local municipal code can trump state law in RCW 49.48.030 is patently baseless.

B. STATEMENT OF THE CASE

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

With respect to the latter point, the City *nowhere* disputes the point made in Arnold's opening brief that the parties here engaged in prehearing written discovery and depositions, and the hearing process was extensive, involving numerous witnesses and exhibits and over 8 days of hearings before the Hearing Examiner. Br. of Appellant at 3, 13-14. Indeed, the City called 11 witnesses in its case in chief. *Id.* at 3.[2] The CSC proceeding was a trial, just as if it had been conducted in a district or superior court.

With regard to the City's factual assertions in its statement of the case, the City wants this Court to believe that it actually prevailed before

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

the CSC, casting aspersions on Arnold. Br. of Resp't at 2-3. This Court need only read the Hearing Examiner's extensive ruling to understand how the City is engaging in revisionist history.

Arnold was the manager of the contracts unit of the Aging and Disabilities Services Division of the City's Human Services Department. CSCR 2772, 2774-75. She was not a fiscal auditor. CSCR 2778. A subordinate performed an inadequate financial audit when prompted by a whistleblower. CSCR 2776-84. Arnold was not merely "demoted," as the City claims in its brief at 2; rather, *the City sought to fire her*. CSCR 2784. Arnold hired counsel and requested a Loudermill[3] hearing. CSCR 2784. At that hearing, Arnold presented evidence that others in the Division were actually supervising the employee and that Arnold was on leave during a part of the investigation. *Id.* The Department's director then chose not to fire Arnold but to demote her from her management position to a non-managerial position, reducing her salary from $85,500 annually to $56,000. CSCR 2785-86.

The Hearing Examiner restored Arnold to her management position, albeit with a two-week suspension. CSCR 2795. The Hearing Examiner awarded her back pay and related employee benefits. *Id.* The

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

Hearing Examiner noted that Arnold's subordinate failed to report to her, CSCR 2789, 2794, and Arnold did not exhibit a pattern of misconduct or act with intent, CSCR 2794, but the Hearing Examiner faulted her only for not being more proactive in the investigation of the whisteblower complaint. CSCR 2789.

In sum, Arnold's employment with the City was at risk, as was her reputation. She successfully withstood the City's effort to oust her and received relief that resulted in the restoration of her management position with back pay and her lost employment-related benefits.

C. SUMMARY OF ARGUMENT

The City cannot evade this Court's decision in *Fire Fighters*. RCW 49.48.030 is a broadly remedial statute that allows employees to recover attorney fees in *any* actions wherein they recover wages due to them. Just as the arbitration of a grievance in *Fire Fighters*, a judicial review of a civil service board decision in *Hanson*, and a State Patrol administrative disciplinary hearing in *McIntyre* were "actions" under the statute, the civil service administrative hearing process here was an "action" for purposes of RCW 49.48.030.

The City's civil service code does not trump the state law public policy expressed in RCW 49.48.030.

D. ARGUMENT[4]

The City *ignores* the important point that RCW 49.48.030 is a remedial statute to be liberally construed in favor of persons like Arnold who have recovered unpaid wages. *Fire Fighters*, 146 Wn.2d at 35. It applies to *any* action where a party recovers wages or salary owing. Similarly, the City *ignores* the public policy behind the statute articulated by Arnold in her opening brief at 5-10. By failing to respond to that articulation of the public policy behind the statute, the City *concedes* the argument. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005). *See also, Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (failure to argue issue in brief waives any alleged error).

The City addresses Arnold's contention that a civil service proceeding is an "action" for purposes of RCW 49.48.030 only in passing. Br. of Resp't at 12-13. This Court has twice made clear that RCW 49.48.030 applies to non-court proceedings; *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986) (judicial review of a civil service suspension); *Fire Fighters, supra* (recovery of back pay in collective bargain arbitration proceedings). *See also, McIntyre v. Washington State*

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[4] The City nowhere disputes Arnold's contention that this Court must review the trial court's decision de novo. Br. of Appellant at 1 n.1.

Patrol, 135 Wn. App. 594, 141 P.3d 75 (2006) (WSP administrative disciplinary decision).

Indeed, the City does not dispute Arnold's contention that the civil service hearing here bore all the characteristics of litigation in court, br. of appellant at 10-12, again thereby *conceding* the point. *Ward, supra.*

Instead of confronting Arnold's arguments directly, the City instead offers two meritless contentions for avoiding application of RCW 49.48.030 here.

(1) Arnold Is Not Limited to Remedies Provided by the City's Code

Without any citation to language in RCW 49.48.030 itself, or any other state law, the City contends that its local civil service can trump state law on the recovery of attorney fees where it wrongfully withheld Arnold's wages. Br. of Resp't at 4-10. The authorities offered by the City to support its novel contention that local law can preempt state law did not support its position.[5] In fact, the City cannot cite a single case in which RCW 49.48.030 was rendered inapplicable by a local civil service ordinance.

The cases cited by the City fall into two general categories. One line of cases stands for the unremarkable proposition that a public

employee must exhaust civil service before proceeding to superior court. Br. of Resp't at 5-6. But *nothing* in those cases provides that exhaustion of administration remedies renders the attorney fee policy of RCW 49.48.030 a nullity.

Again, without citation to any authority, the City baldly asserts that an employee like Arnold, in effect, waives her right to fees under state law because she receives "a low cost and speedy civil service forum." Br. of Resp't at 6.[6] That assertion is theoretically supported by the second line of cases cited by the City pertaining to state employees where the Legislature has addressed both civil services proceedings for state employees and the possible recovery of fees. Br. of Resp't at 6-8. But the Court of Appeals cases cited by the City have been called into question by this Court's decision in *Fire Fighters*. As noted in Arnold's opening brief at 15-18, those cases, *Cohn v. Dep't of Corrections*, 78 Wn. App. 63, 895 P.2d 857 (1995) and *Trachtenberg v. Wash. State Dep't of Corrections*, 122 Wn. App. 491, 93 P.3d 217, *review denied,* 103 P.3d 801 (2004) are readily

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

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

distinguishable. *Cohn* is effectively overruled by *Fire Fighters*. *Trachtenberg's* core holding is that state civil service statutes are self-contained as to the remedies afforded state employees so that RCW 49.48.030 would not apply. It did not speak to the issue of whether a local government in enacting a civil service law could trump the application of RCW 49.48.030.

The City correctly notes that the powers of administrative agencies are derived from the laws creating them, br. of resp't at 8, but that does not mean that a local government can, in the absence of direction from the Legislature, evade explicit state law. Contrary to the City's assertion, made yet again without authority, simply because the City's civil service ordinance chooses not to allow its employees to recover their fees and expenses, this does not mean that the City can thereby choose to evade the application of RCW 49.48.030.

The City's citation of *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134, *review denied,* 177 Wn.2d 1018 (2013) in its brief at 9, does not support the City's position, and in fact, supports Arnold's analysis. The Court of Appeals there was confronted with remedies available to whistleblowers under Seattle's whistleblower ordinance. Critically, state law specifically delegated the power to local governments to adopt their own local whistleblower ordinances. Unlike the state law on

whistleblowers applicable to state employees that gave such employees a cause of action, state law was conspicuously silent as to any corresponding remedy for local government employees. *State law explicitly governed the issue.*

Finally, the City's contention that this Court's decision in *Fire Fighters* authorizes the avoidance of a fee award because the parties in a collective bargaining agreement have agreed not to provide for a fee award is unavailing to the City. Br. of Resp't at 10. No City employee, including Arnold, has *ever* agreed to forego the application of RCW 49.48.030, contrary to the implication of the City in its brief.

The City fails to appropriately distinguish *Hanson, Fire Fighters,* or *McIntyre*. Br. of Resp't at 9-10. *Hanson* plainly concluded that judicial review of Tacoma's Civil Service Board's decision was an "action" under RCW 49.48.030. 105 Wn.2d at 872. Contrary to the City's present argument that fees could only be recovered if an employee like Arnold obtained relief in court, there is no indication that the trial court's fee award under the statute there was confined to the superior court proceedings. *Id.* at 867. In *McIntyre*, the trooper brought a separate action for fees after the successful judicial review of the WSP administrative decision to terminate her employment. Division II rejected

the application of a rationale advanced by the City that any fee recovery by a person recovering back wages depends upon the nature of the action:

> The State maintains that one of the conclusions from *Fire Fighters* is that attorney fees can be obtained under *RCW 49.48.030* if an action stemmed from an arbitration proceeding. Because McIntyre's action stemmed from a statutory appeal, not an arbitration proceeding under the CBA, the State argues that McIntyre is not entitled to attorney fees. The State also emphasizes that McIntyre could have recovered attorney fees if she had brought a grievance proceeding against the WSP.[7]
>
> But the State's rationale could discourage officers from bringing an action when there is a question of discipline that results in loss of wages or salary. Using the State's rationale, if an officer prevailed in bringing an action under the statutes and rules, she would have to pay for counsel. On the other hand, if an officer prevailed in bringing a grievance under the CBA, she would not have to pay for counsel. And we agree with McIntyre that an officer is not entitled to any attorney fees unless she is successful in proving that the discipline was improper; thus, in any case, the employee does not receive a windfall of benefits.

135 Wn. App. at 603-04.

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

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[7] This argument by the State is noteworthy. A WSP grievance proceeding is an administrative proceeding very much akin to Arnold's CSC proceeding.

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

Id. at 41. Contrary to the City's argument, an "action" under RCW 49.48.030 is not confined to a judicially-related procedure. Obviously, arbitration is extra-judicial. RCW 49.48.030, by its terms, applies to *any* action in which back wages are recovered. That policy is certainly vindicated where like here, the proceeding is akin to litigation in the judicial setting.[8]

The civil service hearing here, too, was the functional equivalent of a court action, given the procedures employed in Arnold's lengthy

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[8] The City's position undercuts the very purpose of RCW 49.48.030 to vindicate employee rights to wages. The City seemingly argues that if an employee obtains one dollar of added relief upon judicial review of an administrative decision, the employee recovers his or her fees under RCW 49.48.030, but if the employee incurs substantial fees and expenses to vindicate his or her rights to wages in a major administrative trial, the employee does not recover fees. Not only does the language of RCW 49.48.030 not support this result, this is hardly an incentive for an attorney to take a case to secure an employee's wage rights, the very purpose of the statute. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (statute's purpose is to provide incentives to aggrieved employees to assert their wage rights).

hearing.[9] The City has not contested the intensity nor the scope of the hearings in which Arnold prevailed. The civil service hearing was an "action" under RCW 49.48.030.

Simply stated, the City fails to properly distinguish *Fire Fighters*, *Hanson*, or *McIntyre*. Arnold's civil service action, with all the procedural earmarks of a judicial action, was necessary to vindicate her rights and to make her whole. The City's argument leaves local civil servants at the mercy of municipalities who have taxpayer-paid counsel. RCW 49.48.030, a broadly remedial statute, was intended to provide an incentive to counsel to take wage cases. Arnold's interpretation of the statute better effectuates that result.

(2) Arnold May Seek Attorney Fees in this Action

The City's second contention is that Arnold may not seek recovery of fees in this proceeding because she was "fully compensated" for back pay in the civil service proceedings. Br. of Resp't at 11-14. The City's position is completely baseless. She was obviously not "fully compensated" where she had to hire counsel to help her vindicate her wage rights.

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[9] The City asserts later in its brief at 13 that civil service proceedings are merely a prerequisite to a judicial proceeding, citing *Riccobono v. Pierce County*, 92 Wn. App. 254, 263-64, 966 P.2d 227 (1998) for that proposition. The City's assertion is absurd. The Hearing Examiner's decision here was fully enforceable. The citation in

The City's argument is largely a repetition of its previous arguments, but with the addition of the assertion that the Civil Service Commission could not issue a "judgment." This Court in *Fire Fighters* rejected a similar argument that an arbitrator could not issue a judgment. 146 Wn.2d at 36 n.8. In fact, the Hearing Examiner's ruling here had the effect of a judgment ordering Arnold's reinstatement and the City's payment to her of back wages and related employee benefits. CSRC 2795.

Arnold secured back wages due her in an action and was entitled to fees in this proceeding under RCW 49.48.030.

E. CONCLUSION

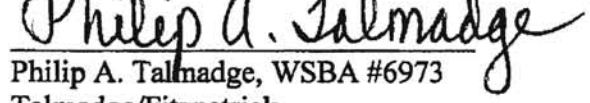
Nothing offered by the City in its brief should dissuade this Court from applying RCW 49.48.030 to Arnold's civil service proceeding in which she recovered a year of back wages due her. That proceeding was an action under RCW 49.48.030, as interpreted in *Hanson*, *Fire Fighters*, and *McIntyre*.

This Court should reverse the trial court's dismissal order and remand the case to the trial court for an award of fees pursuant to RCW 49.48.030. Costs on appeal including reasonable attorney fees, should be awarded to Arnold.

Riccobono to which the City points only references the need to exhaust administrative remedies prior to judicial review. *Id.* at 263-64.

DATED this 25th day of November, 2013.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98199
(206) 574-6661

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
Attorneys for Appellant
Georgiana Arnold

APPENDIX

RCW 49.48.030:

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

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. mail a true and accurate copy of: Reply Brief of Appellant Arnold in Supreme Court Cause No. 88730-6 to the following:

Judith Lonnquist
Wendy Lilliedoll
Law Offices of Judith A. Lonnquist, P.S.
1218 3rd Avenue, Suite 1500
Seattle, WA 98101-3021

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

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

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Christine

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Christine.

Christine Jones
Office Manager
Talmadge/Fitzpatrick
(206) 574-6661

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