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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GEORGIANA ARNOLD,

Appellant,

vs.

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

Respondent,

CORRECTED **RESPONDENT'S BRIEF**

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CITY OF SEATTLE ORDINANCES

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I. INTRODUCTION

Washington recognizes the importance of giving employees a meaningful way to collect any wages they are owed. If they must sue their employer to get wages, the employer can expect to pay the cost of the attorney who helps recover their pay. But some employees have the ability to recover wages owed without ever setting foot in a courthouse, paying a filing fee, or hiring an attorney. Civil servants, working for government employers, can seek relief in an administrative forum, which can order relief such as reinstatement and back pay when a civil servant challenges discipline that imposes a financial impact. Ms. Arnold is a civil servant who successfully lessened her discipline, by challenging her demotion at the City's Civil Service Commission. She chose to retain an attorney and her attorney generated a bill in excess of $300,000. And when she made these choices, the City's code warned that if she got an attorney, it would be "at her own expense".

Ms. Arnold's request to invalidate the City's code precluding an award of attorney's fees for civil service representation should be denied. The state code she offers as authority does not apply. Her civil service hearing was not "an action" resulting in a judgment for wages, as RCW 49.48.030 requires. The City paid her everything it owed her before she filed her "action" in superior court, and her complaint seeks no additional

wages. The only issue in her lawsuit is whether she can receive a remedy in superior court that is prohibited by the City's code governing civil service remedies. The trial court ruled consistently with every case considering this very request. Arnold does not provide any authority requiring a different result. Her request for fees should be denied based on the municipal code, RCW 49.48.030, and the cases that limit fee awards to those employees who actually recover some wages in their civil lawsuit.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

2.1 City Code provides City employees the right to challenge discipline in an administrative hearing, with the assistance of an attorney, "at his or her own expense". Ms. Arnold hired an attorney who generated fees in excess of $300,000 to recover a $30,000 benefit. Does the City's civil service code allow her to shift this expense to the City?

2.2 State code only requires payment of attorney's fees in an "action" resulting in recovery of a judgment for wages in excess of the amount the employer concedes owing. Ms. Arnold agrees that, after an administrative hearing, the civil service commission reduced her discipline to a lengthy suspension and the City paid all back pay wages, before she filed her lawsuit for attorney's fees. Can she get attorney's fees without a judgment for wages from superior court, when the City complied with the administrative order to pay her back pay before she filed her complaint?

III. COUNTER STATEMENT OF THE CASE:

Ms. Arnold was demoted for her part in a botched investigation into whistleblower claims of fraud reported to her subordinate, Ms. Adams. CP 113-137. Under Ms. Arnold's supervision, Ms. Adams

conducted an anemic investigation of a complaint that an agency contracting with the City's Human Services Department was paying fraudulent invoices. *Id.* HSD's Director fired Ms. Adams and demoted Ms. Arnold and both appealed to the City's Civil Service Commission. *Id.* Ms. Arnold filed her appeal through her attorney.[1] The code governing civil service appeals at the City of Seattle provides that civil service appellants "may be represented at a hearing before the Commission by a person of his/her own choosing *at his/her own expense*". SMC 4.04.260(E) (emphasis added). The civil service rules allow both the appellant and the responding department to proceed without attorneys.

At the conclusion of the hearing, the Hearing Examiner agreed that both Adams and Arnold engaged in serious misconduct. CP 130-136. City personnel rules allow for various degrees of discipline, ranging from an oral warning to termination. CP 127-28. The Hearing examiner concluded Arnold's lack of oversight was a major disciplinary offense but lessened Ms. Arnold's discipline from a demotion to a two-week suspension, without pay. CP 131, 136. After calculating the difference in pay, the City paid Ms. Arnold back pay ordered by the Commission. CP 2, ¶ 10.

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[1] Although the appeal is referred to at CP 158, it is not attached to that declaration or included in the Clerk's Papers designated to date. The City seeks to supplement this three-page document to complete the record. For benefit of Arnold's counsel, this document is pp. 1-3, of the Civil Service Record, certified to Superior Court.

Arnold agrees she received her wages before filing her complaint in superior court, based in part on RCW 49.48.030. *Id.* The difference in annual salary recovered by Arnold is $29,000. CP 126-27.

After the Hearing Examiner denied Arnold's request for attorney's fees, Arnold filed an appeal and complaint in Superior Court. *Id.* The parties filed cross motions. The City sought dismissal based on the pleadings and Arnold sought summary judgment claiming she was entitled to attorney's fees incurred for representation at her civil service hearing. CP 8-39, 96-109. At oral argument Arnold withdrew her appeal to the Hearing Examiner's final decision, informing the court that she would proceed only on her wage claim under RCW 49.48.030. RP 3:13-21.

Her attorney managed to generate over $300,000 in attorney's fees in an administrative hearing, even though another attorney representing Ms. Adams also appeared and conducted substantial parts of the hearing examination, cross examination and discovery. CP 21, 75-86. The City's motion to dismiss Arnold's request for attorney's fees was granted. CP 192-93. Ms. Arnold's motion for summary judgment awarding fees was denied. CP 196-97.

IV. ARGUMENT

A. Ms. Arnold was provided an administrative forum to recover any wages due for unsupported discipline and she is limited to the remedies provided in the civil service code.

Unlike many employees, Ms. Arnold has the right to challenge her disciplinary demotion in a forum that does not require her to incur any expense. She was able to appeal with a simple three-page form, without a filing fee.[2] She was provided the right to get relevant discovery, to be paid for some of her time at her hearing, to compel attendance of witnesses and to cross examine all witnesses offered by the City in support of its disciplinary decision. SMC 4.04.250; SMC 4.20.225; City Charter, Art. XVI. The City's Civil Service Commission may affirm, reverse, modify, or remand the department's disciplinary decision. Civil Service Rule 5.32(B).[3] None of these rights requires the representation of an attorney, but appellants may be represented by counsel "at his/her own expense". SMC 4.04.260. This limitation should be enforced because employees with civil service rights are able to recover wages without resort to a civil lawsuit and without the cost of an attorney.[4]

In fact, the employment relationship between government employer and civil servant creates the expectation a civil servant will seek wages in the administrative forum before proceeding to superior court.

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[2] *See* note 1, *supra*.

[3] Civil Service Rules are published at http://www.seattle.gov/csc/rules.htm.

[4] Arnold's belief that she could not prevail without an attorney is without foundation and speculative. The City only utilized its legal counsel because Arnold filed her appeal to discipline through an attorney. CP 158.

Reninger v. State, 79 Wn. App. 623, 632 (1995) ("the Legislature intended that a civil service employee utilize [civil service remedies] before gaining access to the superior court for additional remedies"), *aff'd on other grounds*, 134 Wn.2d 437 (1998); *Riccobono v. Pierce County*, 92 Wn. App. 254, 263-264 (1998) (A civil servant must exhaust administrative remedies before proceeding to superior court). The exhaustion requirement makes perfect sense because it avoids the delay and expense of civil litigation, while providing a forum for relief that "at will" employees lack. "At will" employees go to court to recover wages because they have no other choice.

In return for a low cost and speedy civil service forum[5], there are limitations on remedies. State employees are entitled to a representative of their choice in civil service proceedings, but provided a limited list of remedies. *See* RCW 41.06.170 (right to appeal discipline through authorized representative); RCW 41.06.220 (remedies include back pay, sick leave, vacation accrual, retirement and OASDI credits). Likewise, City employees have the same right to appeal discipline, but remedies are not specifically

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[5] The appellant conducted extensive discovery, wasted time drafting unnecessary motions, and generally drove up the costs of the hearing while losing nearly every argument she presented, including the claim that her poor performance was not misconduct and could not be disciplined. CP 157-59, 113-137. The hearing examiner partially adopted her claim that the level of discipline was too severe. CP 130-137. Certainly, the matter could have proceeded with far less expense, use of resources and without legal counsel. It was Arnold's notice of appearance through legal counsel that caused the City to appear through its legal counsel. CP 158, ¶ 3.

identified in the code. SMC 4.04.250(L)(5). Instead, the Commission is provide authority to "issue such remedial orders as it deems appropriate", but specifically precluded from awarding payment for legal representation. *Id.*; SMC 4.04.260. Washington courts enforce the limitation of remedies in cases like this one: a civil servant who files a lawsuit purely to collect attorney's fees they cannot get under the civil service code.

In *Cohn v. Department of Corrections*, 78 Wn. App. 63, 69 (1995) the court held:

> Because an attorney fee award for a successful administrative appeal is not listed as one of the 'rights and benefits' specifically afforded to an aggrieved employee in RCW 41.06.220(2) [the State civil service code], attorney fees—like interest on back pay[6]—cannot be recoverable in an administrative appeal of state agency disciplinary action. Thus, not only does the Board lack authority to award attorney fees, but a fully reinstated state employee does not appear to possess the right to receive attorney fees after a successful administrative appeal.

Later, in *Trachtenberg v. Washington State Dept. of Corrections*, 122 Wn. App. 491, 493-497, *review denied*, 103 P.3d 801 (2004), the court denied a request for attorney's fees from a state employee who successfully reduced his termination to a demotion before the State's Personnel Appeals Board. Trachtenberg was entitled to back pay from the Board, but the Board denied his request for attorney's fees because state civil service

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[6] Arnold also sought interest on wages in her superior court complaint, despite the fact there is no provision for interest in the City's civil service code. CP 3, Count II.

code does not provide authority to award that remedy. *Trachtenberg v. Washington State Dept. of Corrections*, 122 Wn. App. 492. The Court of Appeals affirmed the denial of attorney's fees, noting the difference between an employee who must file suit to collect his wages and a civil servant who is challenging a disciplinary decision. *Id.* at 496-98. The case for denying Ms. Arnold's claim for attorney's fees is even stronger than for state civil servants because the City's statutory scheme affirmatively rejects the award of attorney's fees. SMC 4.04.260.

The powers of an administrative agency are derived from statutory authority expressly granted or necessarily implied." *State ex rel. Evergreen Freedom Foundation v. Wash. Educ. Assoc.,* 140 Wn.2d 615, 634 (2000). Administrative agencies do not possess "inherent authority." *Assoc. of Wash. Business v. Dep't of Revenue*, 155 Wn.2d 430, 445 (2005). "[W]here implied authority to grant or impose a particular remedy is not clearly set forth in the statutory language or its broad implication, the courts of this state have been reluctant to find such authority on the part of an agency." *Skagit Surveyors and Engineers v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998). Because Seattle's Municipal Code prohibits payment of attorney's fees in civil service appeals, neither the Commission nor this Court has authority to award this remedy.

A code-based legal right may be limited to the remedies provided in the enabling code. *Woodbury v. City of Seattle,* 172 Wn. App. 747, *rev. denied*, 177 Wn.2d 1018 (2013) (enforcing the City's code provisions limiting whistleblowers to an administrative forum and precluding claims for emotional distress damages). Arnold's suggestion that RCW 49.48.030 somehow trumps the City's code presumes a conflict that does not exist. It is true that Washington's wage claim statute is broadly interpreted with an eye toward guaranteeing anyone denied their wages a means of obtaining counsel to enforce those rights. Again, this is a necessary interpretation for the protection of "at will" employees, who lack the safety net inherent in the City's civil service system.

As further explained below, our appellate courts have harmonized rights conferred in civil service codes with RCW 49.48.030. Employees who obtain all relief in the administrative forum, and none from superior court, may not institute a lawsuit solely to recover attorney's fees. *See Trachtenberg*, 493-97. But civil servants who obtain *additional* relief in superior court, such as reversal of disciplinary action, meet the criterion in RCW 49.48.030. They have a *judgment* for wages, from a court, in a civil action and receive attorney's fees from the court issuing the judgment.

McIntyre v. State, 135 Wn. App. 594, 600-601 (2006); *Hanson v. City of Tacoma*, 105 Wn.2d 864, 872 (1986).[7]

The City's code precluding attorney's fees is also consistent with the notion that application of RCW 49.48.030 can be limited by contract. "An employer could still avoid an award of attorney fees by specifically providing in the collective bargaining agreement that each side pay their own fees and costs". *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 49 (2002). If contracting parties can agree not to apply RCW 49.48.030, then a public employer providing a speedy and inexpensive forum to dispute discipline can prohibit recovery of attorney's fees in its code defining civil service rights. The relationship between municipal employer and civil servant is also of a contractual nature. *Riccobono v. Pierce County*, 92 Wn. App. 264, n.25. The City's limitation of remedies should be enforced. Applying the plain language in the City's code, and considering all related authority, results in denial of Arnold's attorney's fees.

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[7] The court decided that grievants in a labor arbitration could recover attorney's fees in a superior court action without overruling *Hanson* or *Cohn. International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29 (2002). Two years later, the Court declined review of the same issue–twice–in the context of an action filed after a civil service appeal in *Trachtenberg v. Washington State Dept. of Corrections*, 122 Wn. App. 491, 492, *review denied*, 103 P.3d 801 (2004) (once on petition for direct review and again following a decision by the Court of Appeals). Presumably the Court already appreciates the distinction that Arnold chooses to ignore.

B. Arnold may not recover attorney's fees because she was fully compensated for back pay before filing her lawsuit and state code does not allow her to file suit seeking only attorney's fees.

Arnold's authority for her fees is almost entirely based on her contention that the language in RCW 49.48.030 and *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29 (2002), require this result. RCW 49.48.030 has several elements: 1. the employee recovers a judgment for wages; 2. in an action; and 3. the amount awarded in the judgment is greater than what the employer concedes owing. In *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, the union sought recovery of attorney's fees following an arbitration that resulted in back pay to the grievant. In finding that the union could recover fees, the Court distinguished the *Cohn* decision, which denied attorney's fees:

> Because *Cohn* addressed an appeal from a government agency, not an arbitration proceeding, it is distinguishable. In holding that the Board and the superior court had no authority to award attorney fees, *Cohn* was primarily relying on the statutory authority granted to the Board in chapter 41.64 RCW and Title 358 WAC. These statutes and rules apply to proceedings before the Board and not to labor arbitration proceedings.

IAFF Local 46, at 42-43. Despite this significant difference, Arnold relies heavily on *Firefighters* to argue that a civil service hearing is both "an action" and that its order lessening discipline is a "judgment for wages", in

order to invoke the attorney's fees provision in RCW 49.48.030. She is wrong.

First, the Commission lacks authority to issue *a judgment*, because only a court has the authority to so. *See Larsen v. Farmers Ins. Co.*, 80 Wn. App. 259, 265–66 (1996). While certainly important to a civil servant, the Commission's ruling does not meet the accepted definition of a judgment. "A judgment is the final determination of the rights of the parties in the action." CR 54(a)(1). This definition has persisted, by statute and court rule, since territorial days. *Reif v. LaFollette*, 19 Wn.2d 366, 369 (1943). Although a judgment "need not be in any particular form," a judgment must be in writing and *signed by the judge*. CR 54(a)(1); *State ex rel. Lynch v. Pettijohn*, 34 Wn.2d 437, 446 (1949). Here, the final order denying fees is approved by the Commission's Executive Director, on behalf of the Commission, none of whom is identified as a judge. CP 143-44.

Nor is her civil service appeal equivalent to a court "action". Arnold is correct in asserting that *Firefighters* applies a legal dictionary definition for "action" and concludes that the language in RCW 49.48.030 does not prevent the classification of arbitration as "an action". *IAFF Local 46* at 41. When extending the meaning of "action" to include arbitration, the court justified its expansion based on the judicial nature of arbitration. *Id.* at 41-42. But the Supreme Court also holds that arbitration "has been deemed a

substitute for judicial action. It is a procedure designed to reach settlement of controversies, by extra-judicial means, before they reach a point at which one must resort to judicial action". *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 153 (1981), citing *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 131–32 (1967).

Certainly, civil service hearings are extra-judicial, involve the narrow issues of just cause discipline and are a required *prerequisite* to a judicial proceeding. *Riccobono v. Pierce County*, 92 Wn. App. 263-264. The distinct and limited civil service forum is not properly defined as an "action". Nor has Arnold established a judgment for wages. For both reasons, her request for attorney's fees should be denied.

Appellate courts continue to distinguish between a civil servant who receives full compensation in the administrative proceeding and a civil servant who receives additional wages from the court action. The distinction is consistent with the limitation in RCW 49.48.030 that precludes a fee award when the employee fails to recover more than the employer concedes owing in the civil wage claim. Arnold relies on *McIntyre v. State*, 135 Wn. App. 594 (2006), to support her fee request. But *McIntyre* carefully explains why the result is different than in *Cohn* and *Trachtenberg*, in which appellants were denied attorney fees following disciplinary appeals. Cohn, like Arnold, did not receive any wages from his appeal to superior court,

and therefore did not get attorney's fees under RCW 49.30.030. *McIntyre* at 601. McIntyre achieved reinstatement *through the court*, and therefore the court awarded relief including back pay. *Id.* at 604 ("We plainly awarded relief that the WSP did not grant. Under the rationale of *Hanson*, attorney fees should have been awarded because we modified the WSP's ruling by ordering full reinstatement, which included wages").

Similarly, in *Hanson v. City of Tacoma*, 105 Wn.2d 864, 872 (1986), the court awarded attorney's fees because Hanson recovered wages for a greater number of days *in a court action* appealing the underlying discipline and therefore satisfied the standard under RCW 49.48.030. The distinction that emerges when all these cases are considered together is that when wages are awarded by the court, such as in *Hanson* and *McIntyre*, fees were awarded. In cases where the relief is granted by an administrative tribunal, like a civil service commission, the fee request was denied, as in the *Cohn* and *Trachtenberg* opinions. Ms. Arnold's claim is controlled by *Trachtenberg*. She makes no attempt at challenging her two-week suspension to get additional wages from the court. In fact, she is not even appealing the underlying ruling. Her simple wage claim must fail for all the forgoing reasons.

V. CONCLUSION

The City has no quarrel with the general statements of law offered by Arnold, but they do not support the relief she seeks. Careful review of the code, appellate decisions, and the facts of Arnold's case lead to one conclusion: Arnold is not entitled to her exorbitant attorney's fees. RCW 49.48.030 offers important rights that many employees could not enforce any other way. Arnold's remedies are limited to those authorized by City code. She knew or should have known at the outset of her representation that she would be responsible for this expense. The City respectfully requests the trial court be affirmed and Arnold's request for attorney's fees be denied.

DATED this 31st day of October, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that, on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated:

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s/ Kim Fabel

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Attached for filing in *Arnold v. City of Seattle*, No. 88370-6, is Respondent's *CORRECTED* Brief. The brief has been corrected as follows:

Page 3, citation to "AR" added on line 5
Page 3, footnote 1 amended to explain citation to "AR"

The City will not be designating any additional documents for the record.

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