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STATE OF WASHINGTON

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Washington State Supreme Court

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GEORGIANA ARNOLD,

Appellant,

v.

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

Respondent.

DEC - 8 2015

Ronald R. Carpenter  
Clerk

by h

AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON

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ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. IDENTITY AND INTEREST OF AMICUS CURIAE .....2

III. ISSUE OF INTEREST TO AMICUS .....3

IV. ARGUMENT .....3

A. RCW 49.48.030 Does Not Apply Because An  
Administrative Process for Appealing Discipline of  
Public Employees Is Not The Same As An Action For  
Wages Or Salary Owed.....3

B. RCW 49.48.030 Should Not Be Extended Beyond This  
Courts decision in *Int'l Ass'n of Firefighters Local 46 v.  
City of Everett* .....6

C. Even if This Court Upholds the *Arnold* Decision, The  
Court Should Not Apply Its Decision to PRB Appeals .....10

V. CONCLUSION .....13

## TABLE OF AUTHORITIES

### Cases

<i>Arnold v. City of Seattle</i> , 186 Wn. App. 653, 345 P.3d 1285 (2015).....	passim
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995).....	4
<i>Cohn v. Department of Corrections</i> , 78 Wn. App. 63, 895 P.2d 857 (1995).....	7, 8, 9
<i>Hanson v. City of Tacoma</i> , 105 Wn.2d 864, 719 P.2d 104 (1986).....	5, 9
<i>International Association of Fire Fighters, Local 46 (IAFF) v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	1, 3, 4, 6
<i>McIntyre v. State</i> , 135 Wn. App. 594, 141 P.3d 75 (2006).....	8
<i>Moses Lake v. Int'l Assn. of Firefighters, Local 2052</i> , 68 Wn. App. 742, 847 P.2d 16, <i>review denied</i> , 121 Wn.2d 1026, 854 P.2d 1085 (1993) .....	5
<i>Trachtenberg v. Department of Corrections</i> , 122 Wn. App. 491, 93 P.3d 217 (2004).....	7, 9, 10, 11, 13
<i>Wark v. Wash. Nat'l Guard</i> , 87 Wn.2d 864, 557 P.2d 844 (1976).....	11

### Statutes

RCW 43.43.090 .....	8
RCW 43.43.100 .....	8
RCW 41.56 .....	12

RCW 41.80 .....	12
RCW 34.05 .....	8
RCW 41.06 .....	2, 4, 6, 12
RCW 41.06.010 .....	6
RCW 41.06.070 .....	8
RCW 41.06.170 .....	4, 8, 10, 11, 12
RCW 41.06.170(2).....	4
RCW 41.06.220 .....	passim
RCW 41.56.450 .....	5
RCW 43.43.070 .....	8
RCW 49.48.030 .....	passim
WAC 357-52.....	11
WAC 357-52-005.....	11
WAC 357-52-100.....	11

**Other Authorities**

SMC 4.04.260(A).....	4
SMC 4.04 .....	4
SMC 4.04.250(L)(5) .....	4
SMC 4.04.260 .....	4
SMC 4.04.260(E) .....	9

## I. INTRODUCTION

This case arises out of the City of Seattle's civil service process wherein discipline of city employees who are not represented by unions may be appealed to the Civil Service Commission (Commission). This process is similar to the state civil service disciplinary appeal process before the Personnel Resources Board (PRB) for state employees who are not represented by a union. In either system, an employee may be entitled to reimbursement of back wages, ancillary to discipline being overturned or modified. In the opinion issued below, *Arnold v. City of Seattle*, 186 Wn. App. 653, 345 P.3d 1285 (2015), Division I of the Court of Appeals held that an employee who prevails after a disciplinary appeal is entitled to an award of attorney's fees under RCW 49.48.030, even when the civil service rules do not provide for attorney's fees to be awarded. In doing so, the Court of Appeals misread the statute and incorrectly extended *International Association of Fire Fighters, Local 46 (IAFF) v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002).

The State agrees with the arguments and analysis of the City's Supplemental Brief. In addition, the State provides further argument that RCW 49.48.030 is not appropriately extended to civil service disciplinary appeals. Disciplinary appeals are not an action for wages or salary owed.

Instead, back wages are merely a byproduct of a successful challenge to discipline.

Finally, even if the Court affirms the *Arnold* opinion, the Court should limit its holding to the case before it can explicitly recognize that claims under the State's civil service process under Chapter 41.06 RCW would entail a different analysis. Specifically, that analysis would require harmonization with statutes governing the PRB. The PRB has specific statutory authority to act, but not to order attorney's fees. The specific statutory remedies set forth in RCW 41.06.220 would control over the more general statute, RCW 49.48.030.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

The State of Washington as an employer is subject to the jurisdiction of the PRB in matters related to state employees who are not represented by labor organizations pursuant to RCW 41.06. The State has a substantial interest in proper application of the state civil services laws under Chapter 41.06 RCW, as enacted by the Legislature. Additionally, the State has an interest in protecting public funds from being issued for attorney's fees in conflict with the Legislature's comprehensive scheme for recovery. The State wishes to advise this Court of its interest in and position on the issues in this matter.

### III. ISSUE OF INTEREST TO AMICUS

RCW 49.48.030 authorizes attorney's fees in an action where an employee obtains a "judgment for wages or salary owed." Does this statute authorize recovery of fees where a public employee successfully challenges a disciplinary decision via a civil service process that does not authorize fees, and an ancillary result is that the employee receives reimbursement of some back wages?

### IV. ARGUMENT

#### **A. RCW 49.48.030 Does Not Apply Because An Administrative Process for Appealing Discipline of Public Employees Is Not The Same As An Action For Wages Or Salary Owed**

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 or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." An "action" for purposes of this statute includes any judicial proceeding. *IAFF*, 146 Wn.2d at 34. In some cases, out-of-court proceedings may have a judicial nature and thus qualify as "actions" under the statute. *Id.* at 40. For example, an arbitration may be a judicial function where the arbitrator has "broad authority" to be "the judge[] of both the law and the

facts.” *Id.* at 38 (quoting *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995)).

Neither Seattle Municipal Code (SMC) Chapter 4.04, nor the PRB enacting statutes in Chapter 41.06 RCW grants the decision-maker such broad authority. Instead, each delineates a specific administrative process that is limited to reviewing the discipline of public employees. RCW 41.06.170(2); SMC 4.04.250(L)(5), .260(A). In both civil service systems, the administrative agency acts to determine whether employee discipline is justified. *See* RCW 41.06.170; SMC 4.04.260. The civil service agencies enjoy only the authority specifically delegated by statute or code; both may hear disciplinary appeals and violations of the civil service rules. *Id.*

Furthermore, such disciplinary appeals cannot be said to be an action “for” wages. Back pay is only one of several “employee rights and benefits” awarded as a byproduct of a successful challenge to the discipline imposed; monetary recovery is ancillary to the primary purpose of the PRB proceeding and an appeal to the City’s Civil Service Commission. *See* RCW 41.06.220; SMC 4.04.250(L)(5). For example, the PRB statute specifies that an employee who is “fully reinstated after appeal” is “guaranteed all employee rights and benefits,” which may include back wages. RCW 41.06.220. The primary purpose of these civil

service appeals is to vindicate employee rights in cases where discipline is determined not to have been appropriate.

Where the judicial nature of a grievance arbitration is lacking, as in the case of an interest arbitration, RCW 49.48.030 has been found not applicable. *Moses Lake v. Int'l Assn. of Firefighters, Local 2052*, 68 Wn. App. 742, 748-49, 847 P.2d 16, review denied, 121 Wn.2d 1026, 854 P.2d 1085 (1993). In *Moses Lake*, the court held that attorney's fees were not available even though the court order enforcing the arbitrator's award resulted in a salary increase for the employees, citing the purpose of RCW 41.56.450. *Moses Lake*, 68 Wn. App. at 748-49. The court found that the wage component was "corollary, rather than central, to the Legislature's purpose of providing judicial review of the arbitration process." *Id.* at 748. The same is true of disciplinary appeals.<sup>1</sup>

Treating a challenge of discipline imposed as a judicial action for wages or salary owed would undermine the purpose of enacted legislation designed to address civil service disciplinary appeals. Civil service rules are put into place to provide some protection of employees' jobs through a

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<sup>1</sup> This Court in *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986) does not hold otherwise.

requirement for “just cause” discipline.<sup>2</sup> Without these civil service rules, employees not represented by a union would simply be at-will employees with only a cause of action in courts for discipline if such discipline was for an illegal purpose. The trade off for such job security is only allowing the remedies authorized by the enacting authority for the civil service process; thus, in both the City of Seattle and the state, no attorney’s fees are to be awarded. To award attorneys’ fees in such circumstances would be to remove the incentive for employers of resolving disciplinary matters outside of court, where attorney’s fees may be ordered.

**B. RCW 49.48.030 Should Not Be Extended Beyond This Courts decision in *Int’l Ass’n of Firefighters Local 46 v. City of Everett***

In *IAFF*, this Court held that RCW 49.48.030 applied to appeals of grievance arbitrations that resulted in orders of backpay, but specifically distinguished appeals from a government agency and declined to address whether the statute would apply under those circumstances. *IAFF*, 146 Wn.2d at 42 n. 11; *Arnold* 186 Wn. App. at 658-59. This Court should not now expand RCW 49.48.030 to apply to such hearings. The statutory language of RCW 49.48.030 has already been stretched to its limit and

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<sup>2</sup> The general purpose of Chapter 41.06 RCW, the state civil service law, is to establish for the state a system of personnel administration based on merit principles and scientific methods governing all facets of state civil service, including the removal and discipline of civil service employees. RCW 41.06.010.

should not be further extended to allow for recovery of attorney's fees in civil service administrative disciplinary appeals.

Until recently, the Courts of Appeals have respected this Court's and the Legislature's decision not to add administrative orders to the purview of the attorney's fees statute. In *Trachtenberg v. Department of Corrections*, 122 Wn. App. 491, 493, 93 P.3d 217 (2004) (abrogated by *Arnold*, 186 Wn. App. at 662-64), a public employee appealed his dismissal to the Personnel Appeals Board (PAB).<sup>3</sup> After the PAB reinstated *Trachtenberg* with back pay, he filed suit in superior court for attorney's fees pursuant to RCW 49.48.030. *Trachtenberg*, 122 Wn. App. at 493. In affirming the superior court order denying his request, the Court of Appeals held that administrative proceedings are not "actions" for purposes of attorney fee awards under RCW 49.48.030. *Trachtenberg*, 122 Wn. App. at 496. Further, because the PAB did not have authority to award attorney's fees or enter a judgment for wages or salary owed, the Court concluded that the Legislature did not intend for attorney fees to be awarded in such appeals, and RCW 49.48.030 could not support an attorney fee award. *Trachtenberg*, 122 Wn. App. at 496-97.

Similarly, in *Cohn v. Department of Corrections*, 78 Wn. App. 63, 69, 895 P.2d 857 (1995), a hearings examiner reversed the discipline of a

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<sup>3</sup> The PAB was the predecessor of the PRB before implementation of the Public Service Reform Act in 2006. See former RCW 41 Chapter 64 (repealed 2002).

public employee and reinstated *Cohn*. The hearings examiner denied *Cohn's* request for attorney's fees. The PAB upheld the hearings examiner's findings, and affirmed the denial of attorney's fees on the basis that it had no statutory authority to award attorney's fees. *Cohn*, 78 Wn. App. at 69-70.

In interpreting RCW 49.48.030, the *Cohn* court refused to expand the scope of the statute. The court found that attorney's fees are not permitted with respect to PAB proceedings because they are not mentioned in the PAB's enabling statute. *Cohn*, 78 Wn. App. at 64; see also RCW 41.06.170, .220 (describing rights on appeal to the successor to the PRB, which is the successor to the PAB).

The Court of Appeals, in awarding attorney's fees for Ms. Arnold, erroneously relied on *McIntyre v. State*, 135 Wn. App. 594, 141 P.3d 75 (2006). Unlike Ms. Arnold, a civil service employee, *McIntyre* was a Washington State Patrol Officer, who was specifically excluded from the civil service rules. RCW 41.06.070. Therefore, *McIntyre's* disciplinary appeal was provided for under State Patrol statutes. See RCW 43.43.070, .090, and .100. Unlike the PRB and the SMC, the appeal of the discipline for *McIntyre* was through the Administrative Procedure Act under Chapter 34.05 RCW.

Additionally, the Court of Appeals' reliance on *Hanson v. City of Tacoma*, 105 Wn.2d 864, 719 P.2d 104 (1986) is misplaced. *Hanson* is easily distinguishable from both *Cohn* and *Trachtenberg*, as *Hanson* filed a writ to enforce the civil service law of the City of Tacoma, to obtain the back wages the commission stated were owed, and once at court, increased the amount of wages awarded from 8 days of back pay to 35 days of back pay. *Id.* at 866-67.<sup>4</sup> *Hanson* did not challenge the merit of the discipline imposed. *Id.* at 866. The Court held that *Hanson* recovered wages for a greater number of days lost because of his suspension, thus, modifying the Civil Service Board's ruling, and meeting the requirements for RCW 49.48.030. *Hanson*, 105 Wn.2d at 872. Thus, the Court did not address or decide the question presented here: whether an employee can file an action in superior court not to receive wages, but solely to receive attorney's fees related to the disciplinary appeal, in which he received wages.

In the present case, the Seattle Municipal Code specifically states that the employee may be represented at the Commission, at his/her own expense. SMC 4.04.260(E). Because the enabling authority does not authorize attorney's fees, attorney's fee should be denied.

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<sup>4</sup> Both *Hanson* and the City filed writs which were consolidated. The City claimed that the civil service rules were not applicable to the case and therefore there were no wages owed. *Hanson*, 105 Wn.2d at 866-67.

**C. Even if This Court Upholds the *Arnold* Decision, The Court Should Not Apply Its Decision to PRB Appeals**

Even if this Court does find that RCW 49.48.030 is applicable to the City of Seattle's civil service process, the Court should reverse the *Arnold* Court's abrogation of *Trachtenberg*, explicitly limit its holding to the facts before it, and note that it is not addressing appeals through the PRB. Unlike the present case, analysis of this issue in the context of PRB appeals would require construction of more than one state statute: RCW 49.48.030 and the statutes creating the PRB. The State has not had the opportunity to litigate the issue of whether attorney's fees are appropriate in PRB appeals under RCW 41.06.170, and the record is not sufficient for this Court to determine whether state employee disciplinary appeals are subject to RCW 49.48.030.

Moreover, the statutory language addressing the PRB, rules of statutory construction and policy all provide good reason to conclude that RCW 49.48.030 is not applicable to PRB appeals. The laws authorizing the PRB specifically list the remedies available to a state civil service employee who is successful in his or her PRB appeal. Those remedies include "all employee rights and benefits, including back pay, sick leave, vacation accrual, retirement and OASDI credits." RCW 41.06.220. Had the Legislature intended attorney's fees to be available as a remedy, such

fees would have been included in this list. *See Trachtenberg*, 122 Wn. App. at 496 (noting that attorney fees are absent from enumerated remedies available in appeal before PAB).

And contrary to *Arnold's* assertion, the Attorney General does not concede that the PRB is functionally equivalent to a court trial. The rules for PRB proceedings clearly state that appeal hearings are informal and the technical rules of evidence do not apply. *See generally* WAC 357-52-100. Additionally, the PRB rules allow for waiver of procedural rules when a party is not represented by an attorney. WAC 357-52-005.<sup>5</sup>

Rules of statutory construction also show that RCW 49.48.030 is not applicable to PRB proceedings. It is well established that a specific statute will prevail over a general statute, unless it appears that the Legislature intended to make the general act controlling. *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 557 P.2d 844 (1976). Here, RCW 41.06.170 is a specific statute that describes a specific kind of proceeding: an appeal to the PRB. As noted, RCW 41.06.220 authorizes specific remedies for successful appeal to the PRB. In contrast, RCW 49.48.030 applies generally to all actions in which judgments are rendered. There is no evidence that the Legislature intended to make RCW 49.48.030

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<sup>5</sup> WAC 357-52-005 states: In order to prevent hardship, delay, or for other good cause, the board may waive any of the procedural rules contained in WAC 357-52 for any party not represented by legal counsel.

controlling. If the Legislature had intended for general remedies to be available in a PRB appeal, there would have been no need to enumerate what “benefits” a successful petitioner may be awarded. RCW 41.06.220, which enumerates the remedies available on a successful disciplinary appeal, must control over the general statute RCW 49.48.030.

Finally, sound policy shows that RCW 49.48.030 is not applicable to PRB appeals. State law gives state civil service employees who are not covered by a collective bargaining agreement (CBA) the right to appeal disciplinary actions taken against them to the PRB: RCW 41.06.170. Allowing these employees to receive attorney’s fees following a successful appeal would provide them with a significant, unwarranted benefit that is not available to any other state employee, as all other employees are either exempt or covered by a CBA. *See* Chapters 41.56, 41.80, 41.06 RCW. The CBA’s make each party responsible for their own attorney’s fees.<sup>6</sup> Awarding attorney’s fees in such cases could also have a chilling effect on employers’ ability to discipline employees. This is true because in imposing any employee discipline, the State would face the possibility of paying large sums in attorney’s fees. Furthermore, allowing attorneys representing state civil service employees to be awarded fees in PRB appeals is simply an imprudent use of limited state resources and the

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<sup>6</sup> State CBA’s are located at <http://www.ofm.wa.gov/labor/agreements/15-17/default.asp> (last visited 11/25/2015)

opposite of what the public wanted in filing the initiative for a civil service system.<sup>7</sup>

At a bare minimum, these statutory and policy considerations show that the analysis of whether RCW 49.48.030 is applicable to appeals to the PRB could be far different from that here. Accordingly, the Court should reverse those portions of *Arnold* that abrogated *Trachtenberg*, and explicitly limit its decision to the case before it.

## V. CONCLUSION

This Court should reverse the Court of Appeals in this matter as RCW 49.48.030 should not be extended to civil service disciplinary appeals. The decision makers have only the authority granted to them by the enacting law for civil service appeals. Both the City of Seattle and the state enacting authority limit the authority respectively of the Commission and the PRB to disciplinary appeals and violation of the civil service rules.

Additionally, disciplinary appeals are a challenge to the discipline imposed, and not an action for wages. Back pay is awarded, upon successful challenge to discipline, and is merely ancillary to the disciplinary appeal.

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<sup>7</sup> Initiative's stated purpose was for ". . . greater governmental fiscal responsibility through limitations on expenditures and taxation." See Initiative 207 at 1, <https://www.sos.wa.gov/elections/initiatives/text/i207.pdf> (Accessed July 24, 2015); 1961 Voters Pamphlet: Initiative 207 <https://www.sos.wa.gov/legacyproject/pdf/OH942.pdf> (Accessed July 24, 2015).

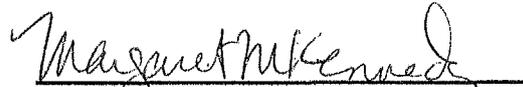
Even if this Court does find that RCW 49.48.030 is applicable to the City of Seattle's civil service process, the Court should limit its holding to the case before it, and explicitly state that a different analysis under State statutes may obtain a different result.

RESPECTFULLY SUBMITTED this *25th* day of November, 2015.

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Dear Clerk:

Attached to this email for filing is the States Amicus Curiae Brief. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

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