

# *On Whose Authority?*

## Recent Court Cases Regarding Commission Authority and Recovery of Attorney Fees

September 11, 2015

34<sup>th</sup> Annual Civil Service Conference

Yakima Convention Center

*Gregory J. Wong*

*Pacifica Law Group LLP*



# *Arnold v. City of Seattle*

186 Wn. App. 653, 345 P.3d 1285 (2015)

**The Takeaway:** An employee who recovers back wages in a civil service proceeding is entitled to attorney fees, regardless of a civil service commission's lack of authority to award fees



# *Arnold v. City of Seattle*

- **The Facts:**
  - Arnold was a manager in Seattle's Aging and Disabilities Services division
  - Subordinate failed to adequately investigate a whistle blower complaint; state audit uncovered embezzlement
  - Deputy director of department initially recommended termination, but after a hearing chose to demote Arnold from her management position
  - Arnold appealed to the Civil Service Commission and was represented
  - Hearing Examiner found that Arnold had engaged in serious misconduct constituting a "major disciplinary offense" and that the City had just cause to impose discipline
  - But, the Examiner concluded the demoting Arnold was not consistent with discipline imposed in comparable cases and converted the discipline to a two-week suspension
  - The Examiner, Civil Service Commission and trial court denied Arnold's request for attorney fees for her administrative appeal

# *Arnold v. City of Seattle*

- The Existing Law:
  - Seattle Municipal Code 4.04.260(E):
    - “An employee may be represented at a hearing before the Commission by a person of his/her own choosing **at his/her own expense.**”
  - 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....”

# *Arnold v. City of Seattle*

- **The Existing Law:**
  - *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29 (2002)
    - A grievance arbitration is a legal “action” for purposes of the RCW and therefore an attorney fee award was proper
    - Explicitly declines to address whether the RCW applies to administrative and quasi-judicial proceedings other than arbitration
  - *Trachtenberg v. Wash. State Dept. of Corrections*, 122 Wn. App. 491 (2004):
    - Attorney fees under the RCW are not available in a civil service appeal to the State Personnel Appeals Board because the Board does not have the authority to award them in the first place and because a Board appeal is not an “action”
    - Unlike the grievance arbitration in *Fire Fighters*, administrative appeals are not substitutes for independent court actions
    - Reaffirmed holding in *Cohn v. Dept. of Corrections*, 78 Wn. App. 63 (1995), a pre-*Fire Fighters* case that held attorney fees are not available where a personnel appeals board lacks authority to award fees

# *Arnold v. City of Seattle*

- *Int'l Union of Police Ass'n, Local 748 v. Kitsap County*, 183 Wn. App. 794 (2014):
  - Relies on *Cohn* and *Trachtenberg* to hold that attorney fees under the RCW are not available in a Public Employees Collective Bargaining Act unfair labor practice proceeding before the Public Employment Relations Committee
  - Same rationale: PERC does not have the authority to award them in the first place and a PECBA unfair labor practice proceeding is not an “action”
- Based on this authority, the Examiner, Civil Service Commission and trial court denied Arnold’s request for attorney fees for her Civil Service Commission appeal

# *Arnold v. City of Seattle*

- The Court of Appeals reversed and held:

An employee who recovers back wages in a civil service proceeding is entitled to attorney fees, regardless of a civil service commission's lack of authority to award fees

- How the Court got there:

- “Normally, we would expect to follow our own precedent...”

- But the Court did not

- Relied instead on two cases, one of which involved an employee who all parties agreed was exempt from the civil service scheme, a ground on which that court distinguished *Cohn* and *Trachtenberg*
- The other of which was from 1986 and did not analyze whether the RCW applies to administrative proceedings where there is no authority to award attorney fees

# *Arnold v. City of Seattle*

- How the Court got there:
  - Court reverses *Cohn, Trachtenberg* and *Int'l Union of Police* (without applying the appropriate standard and without saying as much)
  - We hold that “action” as used in RCW 49.48.030 includes civil service appeals in which wages or salary owed are recovered.”
    - Court finds that civil service appeals are “judicial in nature”
    - Court states that this is the key inquiry; whether the body has authority to award fees is “irrelevant”
    - Awards all fees incurred in the appeal to the Commission and in the superior and appellate courts

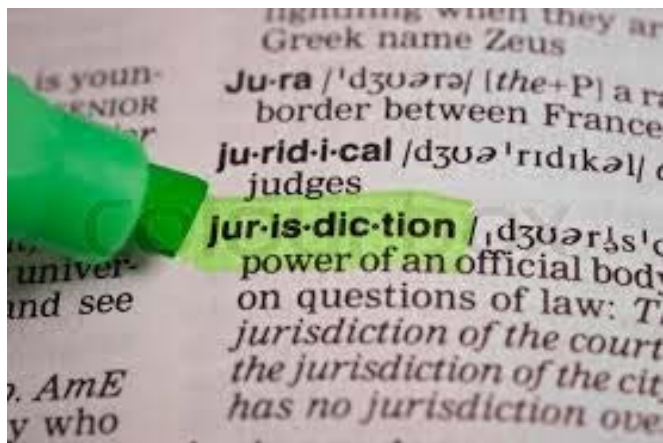


# *Arnold v. City of Seattle*

- **Status:**
  - **Petition for review is pending before the Washington Supreme Court**
  - **State of Washington has filed an amicus brief in support of the petition as this holding will affect every civil service proceeding**

# *City of Medina v. Skinner*

184 Wn. App. 449, 336 P.3d 1172 (2014)



**The Takeaway:** Commission authority is limited only to those acts explicitly authorized by statute. A civil service commission lacks authority to retain jurisdiction over a matter and award damages or other remedies, including awarding back pay, when it modifies discipline.

# *City of Medina v. Skinner*

- The Facts:
  - A long and tortured procedural history
  - City of Medina Police Department terminated Skinner
  - Civil Service Commission found the City acted in good faith and with just cause when it imposed discipline
  - But, no cause to terminate—modified discipline to two months suspension without pay and demotion
  - Commission also ordered Skinner was entitled to back pay based on his demoted position from when his suspension would have ended
  - Commission retained jurisdiction to hold a hearing on evidence related to implementation of the remedy and jurisdiction over the matter until resolution

# *City of Medina v. Skinner*

- **The Existing Law:**
  - RCW 41.12.090: “[I]f [the Commission] shall find that the removal, suspension, or demotion was made for political or religious reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person...which reinstatement shall, if the commission so provides in its discretion, be retroactive, and entitle such person to pay or compensation from the time of such removal, suspension, demotion or discharge. [I]n lieu of affirming the removal, suspension, demotion or discharge may modify the order of removal, suspension, demotion or discharge by directing a suspension, without pay, for a given period, and subsequent restoration to duty, or demotion in classification, grade, or pay....””

# *City of Medina v. Skinner*

- The Existing Law:
  - *City of Yakima v. Yakima Police & Fire Civil Service Comm'n*, 29 Wn. App. 756 (1981)
    - The Yakima Police & Fire Civil Service Commission has broad jurisdiction to investigate issues within the purposes of the civil service laws
    - Rejected the trial court's writ of prohibition on Commission reviewing a letter of reprimand in a personnel file
    - “By limiting [the Commission's] review authority to strictly matters of removal, suspension, demotion, or discharge, we remove from the Commission the ability to substantially accomplish that which the legislature mandated by state civil service law, i.e., a system based upon merit principles to govern discipline of civil service employees.”
  - *Pool v. City of Omak*, 36 Wn. App. 844 (1984)
    - Interpreted RCW language liberally, holding that Commission has authority to impose harsher penalty than that given by the police chief
    - Imposition of a stricter penalty is not arbitrary and capricious

# City of Medina v. Skinner

- The Court of Appeals in *Skinner* holds Commission authority is limited only to those acts explicitly authorized by statute. A civil service commission lacks authority to retain jurisdiction over a matter and award damages or other remedies, including awarding back pay, when it modifies discipline.
- How the Court got there:
  - The Court read the RCW very narrowly
  - “The statute provides the Commission with the authority to affirm, modify, or reverse discipline. It does not expressly authorize the Commission to award damages or other remedies.”
  - “Once the Commission asserted authority to control the determination of Skinner’s remedy and damages flowing from the City’s conduct, it exceeded the authority provided to it under RCW 41.12.090.”
  - “If the City does not honor its employment compensation obligations to Skinner, his remedy is in court, not before the Commission.”
  - Note: this approach contradicts the Court’s approach to a separate issue, whether the Commission could retroactively reinstate Skinner to a date prior to its order. The Court found no problem with this, stating: “Nothing in the statute prohibits retroactive restoration to duty...the Commission exercises statutory discretion to set the date for reinstatement.”

# *City of Medina v. Skinner*

- **Status**

- The Supreme Court denied a petition for review on June 3, 2015
- No other cases have cited to *Skinner* yet

# Wrap Up

- Questions
- Comments
- Follow-up
  
- Contact Information:  
Greg Wong  
Pacifica Law Group  
206.245.1700  
[Greg.Wong@pacificalawgroup.com](mailto:Greg.Wong@pacificalawgroup.com)



# *On Whose Authority?*

## Recent Court Cases Regarding Commission Authority and Recovery of Attorney Fees

September 11, 2015

34<sup>th</sup> Annual Civil Service Conference

Yakima Convention Center

*Gregory J. Wong*

*Pacifica Law Group LLP*





## Greg Wong

Partner

Greg Wong serves as legal counsel to a diverse group of public, private, and not-for-profit clients. Greg specializes in complex issues, often ones that impact people's lives in the Pacific Northwest. As a litigator and appellate attorney, he has been successful in the trial courts, courts of appeal, and Supreme Court.

Greg also provides strategic advice in numerous areas, including municipal law, Washington's Public Records and Open Public Meetings Acts, education policy and laws, elections and initiative issues, constitutional law, legislation and public policy, and private-public partnerships. Among other matters, he has represented public entities as general and litigation counsel, assisted the City of Seattle with its universal preschool program, successfully challenged the constitutionality of the "two-thirds" initiative, drafted and litigated several ballot measures, and advised collective impact coalitions involving public entities and non-profits working together to improve educational outcomes.

Greg is passionate about *pro bono* services and civic engagement. He is President of the Schools First Coalition and headed the successful 2013 Seattle School District levies campaign, for which he received the Seattle Council PTSA's Golden Acorn Award. Greg is a Seattle City Council appointee to the City of Seattle Families and Education Levy Oversight and Planning Committees (where he served as co-chair of the successful 2011 levy renewal campaign), a Board Member of the Washington Budget & Policy Center. Previously, he served as president of his children's PTA and a Board Member of the Municipal League of King County, and a former Board Member of the Municipal League. Before becoming an attorney, Greg taught eighth grade science in the Mississippi Delta.