

NO. 82842-3

SUPREME COURT OF THE STATE OF WASHINGTON

KEVIN DOLAN,

Respondent,

v.

KING COUNTY,

Petitioner.

**AMICUS CURIAE MEMORANDUM OF THE ATTORNEY
GENERAL IN SUPPORT OF MOTION FOR DIRECT REVIEW**

ROBERT M. MCKENNA
Attorney General

James K. Pharris
Deputy Solicitor General
WSBA No 5313
PO Box 40100
Olympia, WA 98504-0100
(360) 664-3027

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I. INTRODUCTION AND STATEMENT OF FACTS

For the reasons stated herein, the Attorney General supports the Motion of Defendant/Appellant King County for direct review in this Court of the orders of the Superior Court granting judgment in favor of Plaintiffs/Respondents Dolan, et al.

This is a class action brought by the employees of four nonprofit organizations that contract to perform public defender services for King County. The employees claim that they are public employees eligible for membership in the Public Employees' Retirement System (PERS), RCW 41.40. King County's position is that the nonprofit organizations are independent contractors and that the employees of the organizations are not employees of King County for purposes of RCW 41.40.

The Superior Court for Pierce County has granted summary judgment in favor of the employees, finding that they are County employees at least for purposes of participation in the PERS retirement system. The County seeks direct review of the Superior Court's orders.

II. INTEREST OF AMICUS CURIAE

As part of his constitutional and statutory duties, the Attorney General advises and represents state officers and agencies. One of those agencies is the Department of Retirement Systems (DRS), created in RCW 41.50, which administers PERS and several other retirement systems.

RCW 41.40.010(2). DRS has a strong interest in the consistency and predictability of the standards for determining who is eligible for membership in PERS, along with related questions such as determining the proper level of contributions, the legal responsibility for making contributions, and assuring the federal tax qualified status of the public pension systems. DRS has adopted WAC 415-02-120 (attached as Appendix A to this memorandum) clarifying how to determine employee status for purposes of PERS membership.

The Attorney General also represents numerous other state officers and agencies. In addition to hiring full- and part-time employees, agencies commonly contract with individuals, corporations, and organizations to provide various types of services. These contracts vary widely as to the nature of the work to be performed, the length of the contract, and the level of funding. If receipt of significant public funding is sufficient to qualify contractors and/or their employees for PERS membership, as the trial court opinion suggests, numerous claims for membership could be filed resulting in confusion, additional litigation, and potentially significant expense to the State.

The Attorney General also advises the Legislature and the Governor in developing and administering the State budget. A significant expansion of the eligibility for PERS membership, including financial

responsibility of agencies for current and future contributions to PERS, would seriously impact budget planning for individual agencies and for the State in general.

III. ISSUE PRESENTED

When a county or other public agency contracts with a nonprofit corporation to provide services to the county, and the nonprofit corporation derive all or nearly all its income from the contract with the public agency, do the employees of the nonprofit corporation thereby become "employees" of the public agency for purposes of eligibility to participate in PERS?

IV. ARGUMENT IN SUPPORT OF DIRECT REVIEW

This case involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.

The operation of the state's public pension systems is legally, politically, and economically of great importance to state and local government. It is of great significance, of course, to the thousands of public employees (some currently working, some retired) who are members of the pension systems, and this Court has held that pension rights, in general, are contractual-like in nature, and cannot be impaired, even by the legislature. *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). When an employee becomes a member of a pension

system, the State employer, the local government employer, and the Department of Retirement Systems assume responsibilities—determining employee eligibility for PERS membership, determining employees' earned service credit, receiving and investing employer and employee contributions, determining when a member is entitled to withdraw contributions or to receive pension benefits—that are financially significant and long-lasting.

Membership in the Public Employees' Retirement System (PERS) is defined to mean "any employee included in the membership of the retirement system, as provided for in RCW 41.40.023." RCW 41.40.010(5).¹ RCW 41.40.023 provides that "membership in the retirement system shall consist of all *regularly compensated employees* and appointive and elective officials of employers" with exceptions listed in that statute. (Italics added.) The exceptions describe categories of *employees* who are for various reasons exempted from PERS membership. RCW 41.40.023(1) through (21). It is clear, however, that to qualify for PERS membership, a person must first be an employee of a public agency that qualifies as an "employer" (RCW 41.40.010(4)). Persons who

¹ PERS is not, of course, the only retirement system operated by the State. Very similar issues are presented by the laws establishing the Law Enforcement Officers' and Firefighters' Retirement System (RCW 41.26), the Washington State Teachers' Retirement System (RCW 41.32), the Washington School Employees' Retirement System (RCW 41.35), the Washington Public Safety Employees' Retirement System (RCW 41.37), and the Washington State Patrol Retirement System (RCW 43.43).

perform services for an “employer” but are not “employees” do not qualify for PERS membership.

A related issue presented by this case concerns who is an “employer” for purposes of PERS. RCW 41.40.010(4)(a) and (b) define the term “employer” to include branches, departments, agencies, commissions, boards, and offices of the state and political subdivisions and municipal corporations of the state. The statute nowhere suggests that a nonprofit (or other) corporation is an “employer” because the corporation’s employees are performing services for a state or local government body. If a corporation does not meet the definition of an “employer,” it is complicated at best to reason through to the conclusion that the corporation’s employees are “employees” of some public body for purposes of PERS.

DRS has clarified these points by adopting a rule on “determination of employee status.” WAC 415-02-110 (Appendix A). The rule provides that “an independent contractor is not eligible for active membership in any state-administered retirement system.” WAC 415-02-110(1). Subsection (2) of the rule describes how DRS determines who is an employee and who is an independent contractor, applying a number of factors. The rules provide that “generally, a worker is an employee if the employing individual or entity has the right to control and direct the work

of the worker, *not only as to the result to be accomplished, but also as to the means or methods by which the result is accomplished.*” WAC 415-02-110(2)(a) (italics added).

As noted above, it is a common practice for public agencies, both state and local, to contract for various services. The statutes and rule just discussed assist in deciding whether any of these service contracts actually create an employment relationship between the agency and the contractor (or the contractor’s employees), entitling the contractor’s employees to membership in a retirement system. As the rule states, the key question is typically whether the public agency controls and directs the day-to-day work of the contractor, including the means or methods by which work is accomplished. WAC 415-02-110 lists a number of specific factors designed to test this issue.

In this case, the trial court appears to have discounted the various factors set forth in WAC 415-02-110, concluding essentially that when an organization performs services for a public entity, and the organization receives most or all of its funding through public contracts, then the organization’s employees thereby are public employees for purposes of PERS membership. This reading would significantly broaden the membership of PERS to include various persons performing services for a public agency. It would also raise dozens of new issues concerning the

amount of public funding sufficient to constitute "budget control" over a contractor; the length of time a contractor or a contractor's employee must perform services on a public contract to qualify for PERS membership; the proper calculation of dates of service, financial responsibility (past and present) for employer and employee contributions, and the level of benefits earned; federal tax qualification concerns; and numerous related issues. Meanwhile, similar questions could arise with respect to the other pension systems operated by the State and by local governments.

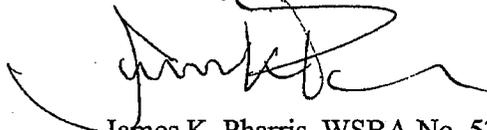
Given the importance and the complexity of the issues raised, the Attorney General supports the motion of King County for direct review in this Court. A ruling from the Court of Appeals would be unlikely to resolve the issues to the satisfaction of all parties, and would only delay the final determination for months or even years. This is an issue that merits a final determination by this Court.

V. CONCLUSION

For the reasons stated above, the Court should grant King County's motion for direct review of the superior court ruling, pursuant to RAP 4.2.

RESPECTFULLY SUBMITTED this 17th day of June, 2009.

ROBERT M. MCKENNA
Attorney General



James K. Pharris, WSBA No. 5313
Deputy Solicitor General

Office of the Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
360-753-6200