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No. 82842-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN DOLAN and a class of similarly
situated individuals,

Respondents,

v.

KING COUNTY, a political subdivision
of the State of Washington,

Appellant.

KING COUNTY'S ANSWER TO THE AMICUS BRIEF
OF THE STATE OF WASHINGTON

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
A. INTRODUCTION	1
B. ARGUMENT	1
C. CONCLUSION.....	6

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Mader v. Health Care Authority, 149 Wn.2d 458,
70 P.3d 931 (2003).....2

Other Cases

Hernandez v. Triple Ell Transport, Inc., 175 P.3d 199 (Idaho 2007).....4

Statutes

RCW 10.101.0301, 3
RCW 36.01.0101
RCW 41.40.010(4)(a) *passim*
RCW 41.40.010(12).....1
RCW 41.40.010(13)(a)1
RCW 41.40.010(22).....1, 2, 3, 7

Codes, Rules and Regulations

49 C.F.R. § 376.12(c)(4).....4
RAP 10.2(g)1
WAC 415-02-110.....1, 2
WAC 415-02-110(1).....2
WAC 415-02-110(2).....2, 3

Other Authorities

King County Charter article 2, § 220.20.....5

A. INTRODUCTION

The petitioner King County has received the amicus brief of the State of Washington. In accordance with this Court's direction in its letter of October 8, 2010, King County hereby submits its answer to the amicus brief. RAP 10.2(g).

B. ARGUMENT

The State's amicus brief confirms the argument advanced by King County in its briefing to this Court. First, the trial court's ruling fails to take into consideration the specific language of RCW 41.40.010(4)(a) and RCW 41.40.010(22)¹ defining PERS-eligible employers and employees. The trial court's ruling paid little attention to the specific requirements of RCW 41.40.010(22) and WAC 415-02-110 requiring that King County exercise control over the actual performance of work by the attorneys and staffs of the four public defender corporations.

King County has general authority to enter into contracts to provide public services. RCW 36.01.010. It has specific authority to contract public defender services to private entities. RCW 10.101.030. As recounted in the State's brief at 4, contracting is common in state

¹ RCW 41.40.010(a) has been recodified at RCW 41.40.010(13)(a) and RCW 41.40.010(22) has been recodified at RCW 41.40.010(12). King County retains the old references herein for the sake of consistency.

government. As noted in King County's briefing, local governments in Washington routinely contract for the provision of services.

But RCW 41.40.010(22) and WAC 415-02-110 clearly indicate that the employees of independent contractors are not PERS-eligible. As WAC 415-02-110(1) succinctly states: "An independent contractor is not eligible for active membership in any state-administered retirement system." The only exception to this rule is where the PERS-employer directs the worker and exercises "control over the performance of the work." RCW 41.40.010(22).

The trial court here did not specifically address in its findings the criteria of control over work performance articulated in case law or in WAC 415-02-110(2). King County did not direct or otherwise exercise control over the day-to-day provision of public defense services by the staffs of the four independent nonprofit corporations. The County does not tell the corporations' attorneys how to defend their clients or the corporations' staffs how to provide case support in defending clients.² Instead, the trial court confused budgetary oversight and contract compliance by the County with the requisite control under RCW

² As noted in the trial court's findings and in the County's briefing, the County does not hire, train, supervise, discipline, or terminate the attorneys and staff of the four corporations. Nor does it set their hours, their specific compensation, or their specific benefits package. As this Court held in *Mader v. Health Care Authority*, 149 Wn.2d 458, 476-77, 70 P.3d 931 (2003), the trial court should have examined the "actual work circumstances" of the corporations' staffs in deciding PERS eligibility.

41.40.010(22) and WAC 415-02-110(2) over the staff of the four corporations.

Second, much of what was required in the contracts between King County and the public defender corporations is required by state law. RCW 10.101.030 states that each county or city addressing public defense services *shall* adopt standards for such services if provided by contractors, which *shall* include:

Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.

The statute also directs that the standards of the Washington State Bar Association for public defense services are a "guideline" to local legislative bodies in adopting standards. Standard One of those standards relating to compensation states that in order to "attract and retain qualified personnel, compensation and benefit levels should be comparable to those attorneys and staff in prosecutorial offices in the area."

The requirement that corporations comply with standards involving the quality of public defense services, training of staff, and the

expenditures of monies, to name just a few, were required by state law and, as such, cannot be figured into the issue of control. Case law in other settings makes clear that compliance with government-imposed contract standards does not transform an independent contractor into an employee. *See, e.g.*, 49 C.F.R. § 376.12(c)(4) (federal requirement that independent contractor leasing a truck to a trucking carrier be subject to complete responsibility of the carrier and that the carrier maintain exclusive possession, control and use of equipment of the independent contractor during the duration of a lease did not change an independent contractor into an employee); *Hernandez v. Triple Ell Transport, Inc.*, 175 P.3d 199, 205 (Idaho 2007) (adherence to federal law was not evidence of a motor carrier's control over an independent contractor).

Third, as the State's brief notes at 2, 3, the trial court did not address RCW 41.40.010(4)(a) in its findings. That statute indicates that the public defender corporations are not governmental entities to which PERS applies. The State correctly observes that state and local governments are justifiably careful about deciding if a person is truly a PERS-eligible government employee subject to traditional civil service processes, or simply a contractor not subject to civil service or PERS. State br. at 2, 4-5. Indeed, the very fact that the County contracted with independent nonprofit corporations, a format the public defenders

themselves wanted to maximize their independence from the County, demonstrates that neither King County nor the corporations intended to make the public defenders and/or their staffs County employees.

The four corporations are not PERS “employers.” For the same reason the State is careful about deciding whether to establish an employment relationship with workers, it, and governments like King County, are equally careful about creating government agencies that are PERS-eligible employers under RCW 41.40.010(4)(a). *Nothing* in the contracts between the County and the four corporations discloses an intent to make those corporations County agencies or “alter egos.” Certainly no formal designation of the corporations as County agencies ever took place by ordinance, as the King County Charter article 2, § 220.20 commands. In fact, the corporations and their leaders have expressly disclaimed any employer/employee relationship, championing their independence from the County.

The trial court’s core determination that if the contracts involved a public purpose and public funds, then the employees of the four public defender corporations are PERS-eligible, is essentially unworkable. By confusing private employment with public employment, the trial court’s ruling could cause the State to lose the beneficial tax status of PERS. State br. at 6-8.

Moreover, apart from the unintended consequence for the IRS of the trial court's low bar test for a PERS employer that ignores the specific statutory language of RCW 41.40.010(4)(a), the trial court's test will create PERS employer status for virtually any government contractor. There is no principled limitation on the sweeping test formulated here by the trial court. A contractor working on county roads is executing a public purpose, paid for by public moneys. A nonprofit group care facility for mentally ill persons is similarly executing a public purpose, paid for by public funds. Neither contractor is a PERS employer, but may be, if the trial court's test holds.

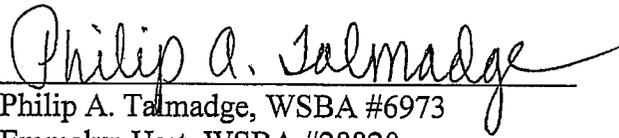
C. CONCLUSION

The trial court's ruling in this case is unsupported by the statutes or regulations pertaining to PERS eligibility. The class hopes to divert this Court's attention from the specific language of the statutes and regulations at issue here. The trial court's ruling carries enormous potential financial liability for government at every level in the State of Washington, governments that increasingly contract with private entities to provide public services. If the trial court's ruling is allowed to stand, a wide array of employees of independent contractors with government could become PERS-eligible. This would bust the budgets of local and state government.

This Court should reverse the trial court's judgment and remand the case with directions to the trial court to enter a judgment holding that the class members are not PERS employees under RCW 41.40.010(22) and that the corporations are not PERS employers under RCW 41.40.010(4)(a). Costs on appeal should be awarded to King County.

DATED this 18th day of October, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the US mail a true and accurate copy of the following document: King County's Answer to the Amicus Brief of the State of Washington in Supreme Court Cause No. 82842-3 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 18, 2010, at Tukwila, Washington.



Christine Jones
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DECLARATION

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