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SUPREME COURT  
STATE OF WASHINGTON

2009 MAY -6 P 2:11

NO. 82842-3

BY RONALD R. CARPENTER

SUPREME COURT  
OF THE STATE OF WASHINGTON

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KEVIN DOLAN and a class of similarly  
situated individuals,

Respondents,

v.

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

Appellant.

MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

A. Identity of Moving Party

King County, the defendant below, asks for the relief designated in Part 2.

B. Decision

This Court should grant direct discretionary review pursuant to RAP 2.3(b)(4) of the trial court's written decision determining that the employees of the four private nonprofit public defender corporations in King County ("the class") are either public employees, or employees of de facto County agencies, and are therefore eligible for membership in the Public Employees' Retirement System ("PERS").<sup>1</sup> A copy of the trial court's written decision, the trial court's injunction, and the order certifying the case for review are in the Appendix.

C. Issue Presented for Review

The trial court here certified that its written decision on the class's PERS eligibility was an order involving substantial questions of controlling law about which there is substantial ground for a difference of opinion, and that immediate review of those questions may materially

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<sup>1</sup> King County has filed a statement of grounds for direct review with this motion articulating the reasons for direct review under RAP 4.2(a).

advance the ultimate termination of the litigation. The trial court's decision involves legal questions of first impression and, if allowed to stand, the court's determination that employees of private contractors for public defense services are eligible for PERS and will have untold fiscal impact on governments all across the state. King County asks this Court to grant review pursuant to RAP 2.3(b)(4) and to consider these issues on review:

1. Are the employees – both attorneys and nonattorneys – of four private nonprofit public defender organizations with which King County contracts employees of a public employer within the meaning of PERS statutes and interpretive regulations of the Department of Retirement Systems (“DRS”) such that the County is obligated to enroll those employees in PERS?

2. Are the employees of the four private nonprofit public defender corporations in King County estopped to claim (or does federal law preempt their claim) that they are public employees where they have chosen retirement benefits available only to private employees and have organized in labor organizations subject to NLRB jurisdiction and the NLRB does not have jurisdiction over public employees under 29 U.S.C. § 152(2)?

D. Statement of the Case

Kevin Dolan filed an action in the Pierce County Superior Court on behalf of the class seeking declaratory, injunctive and other relief, including a determination that members of the class should be treated as “public employees” for purposes of PERS, RCW 41.40 *et seq.*<sup>2</sup> The class also requested declaratory and injunctive relief requiring King County to identify members of the class of public employees “to the Department of Retirement Systems for the purpose of retirement benefits.” First Amended Complaint at ¶ 19. The class also sought a judgment that King County “make the required contributions on their behalf,” and that the trial court provide additional remedies regarding alleged “loss of tax benefits,” PERS Plan 3 “transfer payments,” and the “actuarial value of their pensions.” *Id.* at ¶¶ 19-20.

The County defended the complaint arguing *inter alia* that the class failed to establish the PERS eligibility of its members, and its claims were foreclosed by estoppel principles. Ans. to First Am. Compl. at 7-8. The County also argued that federal law preempted the claims because the employees of some of the public defender organizations were organized

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<sup>2</sup> The class is defined as “All W-2 employee of the King County public defender agencies and any former or predecessor King County public defender agencies who work or have worked for one of the King County public defender agencies within three years of the filing of this lawsuit.” First Amended Complaint at ¶ 3.

by unions subject to the jurisdiction of the National Labor Relations Board, and the NLRB did not have jurisdiction over unions organizing public employees. 29 U.S.C. § 152(2). *Id.* at 2, 7. The retirement benefits at issue were subject to collective bargaining, preempting their consideration pursuant to section 301 of the National Labor Relations Act. 29 U.S.C. § 185. The case was assigned to the Honorable John R. Hickman.

The class and King County each filed cross-motions for summary judgment on the claim that the class members are public employees. The parties submitted extensive declarations, deposition excerpts, and other exhibits. The trial court denied both motions. The parties filed a joint motion for reconsideration on the public employee issue, but the trial court denied it. The trial court, however, ordered a bench trial on the public employee issue. That trial was based on the very same factual record that had been submitted by the parties in connection with the cross-motions for summary judgment. The court conducted a trial in chambers based solely on that evidentiary record, without hearing testimony from any witnesses.

On February 9, 2009, the trial court issued a written decision determining that “for purposes of the PERS statute, in Washington State, that plaintiff Dolan, and the class members that he represents, should be considered public employees for purposes of coverage under

Washington's PERS statute." Decision at 8. In its twenty-four page decision, the court determined that King County's budget oversight of the private public defender corporations and funding of those organizations resulted in County control over the employees of those corporations so that the employees were public employers eligible for PERS membership. *Id.* at 8-17. The court also indicated that the defender corporations were de facto County agencies. *Id.* at 10-13. The court rejected the County's waiver/estoppel and federal preemption defenses. *Id.* at 6-8.

On March 11, 2009, King County filed a notice for discretionary review by this Court. This Court granted King County's motion for stay on the filing of the present motion because the class proposed lengthy findings of fact and conclusions of law to the trial court. The class ultimately noted the proposed findings and conclusions and an order granting an injunction for presentation to the trial court on April 17, 2009. During that hearing, both parties asked the court to certify under RAP 2.3(b)(4) the question of the class members' PERS eligibility. The trial court declined to enter the class's proposed findings and conclusions. It entered the order granting an injunction, and an order certifying the decision for discretionary review pursuant to RAP 2.3(b)(4). See Appendix.

E. Argument Why Review Should Be Accepted

RAP 2.3(b) sets forth the criteria governing the acceptance of discretionary review by this Court. RAP 2.3(b)(4) allows review where the parties stipulate to, or the trial court certifies, an issue for discretionary review by this Court. The rule states that review may be granted where:

The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4).

RAP 2.3(b)(4) is based on a similar provision in 28 U.S.C. § 1292(b). Karl B. Tegland, 2A *Washington Practice* at 166. The proponents of the rule, the WSBA's Court Rules Committee, articulated the rule's rationale as follows:

The committee contemplated that where the trial judge was willing to certify, or the parties to stipulate, that immediate review might "materially advance the ultimate termination of the litigation," this amendment would increase the likelihood of acceptance of review in circumstances that are effectively dispositive of the case.

*Id.*

There is no case law expressly interpreting RAP 2.3(b)(4), nor has this Court enunciated a test for when discretionary review is appropriate after certification has been granted. But King County has found no

published case in which an appellant court has declined to review an issue certified by the superior court.

Despite the limited analysis of RAP 2.3(b)(4), common threads appear in cases where Washington courts have granted review of a certified issue. In *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009), this Court accepted review of whether an amendment to the Washington Law Against Discrimination, RCW 49.60, applied retroactively to revive a claim. In *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004), the trial court certified the issue of the application of the statute of limitations to a sex discrimination claim based on a hostile work environment. In *Sherman v. Kissinger*, 146 Wn. App. 855, 195 P.3d 539 (2008), the court granted review of whether the medical malpractice statute applied to veterinarians and whether a motion to strike an affirmative defense was appropriately denied. 146 Wn. App. at 864-65. In *Emily Lane Homeowners Ass'n v. Colonial Development, L.L.C.*, 139 Wn. App. 315, 160 P.3d 1073 (2007), the court accepted certified review of a superior court order refusing to dismiss a claim based on a retroactive amendment to the Washington Limited Liability Companies Act. 139 Wn. App. at 317-18. The court noted that the amendment's retroactivity was a recurring issue. *Id.*

These cases involved disposition of major claims and/or defenses on partial summary judgment that could have proceeded to trial without discretionary review, but the nature and extent of the trial proceedings would have been markedly different. The cases also involved novel and compelling issues that had not previously been addressed by the courts, or had only recently been decided. Finally, the cases demonstrate that Washington appellate courts pay close attention to certified questions that are recurring, or have the potential to recur, in the courts, particularly when those questions relate to the public interest.

Here, the trial court made the requisite certification under RAP 2.3(b)(4). Whether the employees of the four independent public defender corporations are eligible for PERS either as employees of King County or as employees of de facto County agencies is the core question at stake in this case. The ultimate conclusion of this case rests on the immediate resolution of this central issue. Both parties *agreed* that the issue is central to the case and should be certified under RAP 2.3(b)(4).

Moreover, it is befitting that this Court should accept certification. This case presents issues of first impression. If the trial court's decision stands, as recounted in the County's statement of grounds for direct review, it has profound significance for governments all across Washington. Every level of government from the state, to counties, to

cities, and to special purpose districts, contracts with private organizations to provide a broad array of services. If the trial court's written decision remains in place, and the question of PERS eligibility for the employees of such private contractors revolve around the mere fact that the services are public in nature and are paid for with public funds, the potential for a *vast* expansion of PERS, at enormous cost to the taxpayers, looms very large.

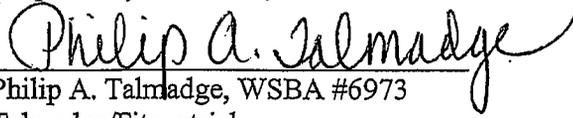
Finally, where RAP 2.3(b)(4), unlike RAP 2.3(b)(1-2) for example, does not require this Court to assess prudential concerns like the impact of the trial court's decision on future trial court proceedings, immediate review of the trial court's decision makes good sense from the standpoint of judicial economy. Complex issues pertaining to any remedy to be afforded the class remain to be resolved. This Court's decision on review could result in avoiding such a remedial phase at trial entirely, or clarifying its appropriate scope.

F. Conclusion

The trial court has requested this Court's guidance under RAP 2.3(b)(4). That reasonable request should be granted. This appeal involves controlling issues of statutory interpretation that, if addressed, will materially advance the outcome of this litigation. This Court should grant direct discretionary review pursuant to RAP 2.3(b)(4).

Dated this ~~6th~~ day of May, 2009.

Respectfully submitted,



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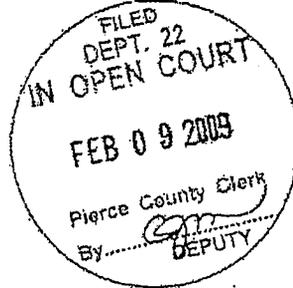
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# APPENDIX



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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KEVIN DOLAN,  
Plaintiff,  
vs.  
KING COUNTY,  
Defendant.

Cause No: 06-2-04511-6  
COURT'S WRITTEN  
DECISION

THIS MATTER having come before the above-entitled Court for argument on or about the 3<sup>rd</sup> day of November, 2008, and the 10<sup>th</sup> day of November, 2008. This case having come before the Court by way of stipulation of the parties as to allowing the Court to make its decision by way of opening and closing arguments, and the Court deciding the issues by way of stipulation as to the admission of evidence without the necessity of taking oral testimony and/or a trial. That on or about the 18<sup>th</sup> day of July, 2008, both the Plaintiff and Defendant brought cross motions for summary judgment which were denied by the Court leading to the agreement to present the body of the case in this stipulated format. The Plaintiff being



1 Association ("TDA"); 2) Associated Counsel for the Accused  
2 ("ACA"); 3) Northwest Defenders Association ("NDA"); and 4) The  
3 Society of Counsel Representing Accused Persons ("SCRAP").

4           The defender organizations were intended to be  
5 private, non-public entities. Each defender organization had  
6 its own articles of incorporation and by-laws. Each  
7 organization was governed by its own board of directors which  
8 included, for the most part, a wide variety of public service  
9 and private sector attorneys and individuals active in the  
10 community. Each defender organization having a separate  
11 contract with King County as to the services to be performed,  
12 depending on the nature of the case (subject matter), and the  
13 intended geographical area served by the defender organization.

14           In order to better manage the four (4) public defender  
15 agencies providing legal services and their respective  
16 contracts, the Office of the King County Public Defender ("OPD")  
17 was created. The director of the OPD was also the director of  
18 the OPD predecessor, the King County Office of the Public  
19 Defense. The Office of the Public Defender screens individuals  
20 for financial eligibility for appointed counsel and assigns the  
21 cases to one of King County's four (4) public defense agencies.  
22 Cases assigned by the Office of the Public Defender include  
23 felonies, district court misdemeanors, juvenile cases, and  
24  
25

1 involuntary treatment, to highlight the major categories. The  
2 Office of the Public Defender sets the percentage of each type  
3 of case that each of its contracted public defense agencies will  
4 receive and number of each type of case assigned to each of the  
5 individual agencies.

6           The funding for each of the four (4) public defense  
7 agencies is determined and negotiated with the county each year  
8 as part of the county's overall budget planning process. The  
9 budget and contract are negotiated on an annual basis. How the  
10 monies are managed within each one of the separate public  
11 defender agencies is determined by the management staff of the  
12 public defender agency and its respective board of  
13 trustees/directors. In short, each agency determines the  
14 salaries, benefits and payment of other overhead items within  
15 the public defender agency itself.

17           Within the terms of the contract with the public  
18 defender organizations and the OPD, there are a number of  
19 oversight provisions which allow and provide for control by the  
20 Office of Public Defender over each one of the four (4) public  
21 defender agencies. Those controls, or lack of control, are  
22 highlighted by each side in their respective cases.

23           The central issue to this case is whether those  
24 oversight/controls are so significant as to render the four (4)  
25

1 defender organizations as to the status of a public agency, or  
2 do defender organizations maintain enough independent control of  
3 their own destiny to qualify as an independent, non-profit 501  
4 (C) (3) corporations (i.e. independent contractors) and, thus,  
5 would not fall under the umbrella of public employee benefits.  
6 Specifically, coverage under the PERS Retirement System provided  
7 for under the State of Washington to public employees, under RCW  
8 41.40, et sequitur, the statute that governs the Washington  
9 State Public Employees Retirement System ("PERS").  
10

11           The Plaintiff argues that only those individuals who  
12 are employed by a public entity can be enrolled in PERS.  
13 Counsel argues, under a number of legal theories, that  
14 Plaintiff, and the class members, are public employees. The  
15 Defendant counters, by providing supporting evidence, to prove  
16 that the defender organizations' attorneys and staff, who  
17 compromise the class in this case, are employees of the four (4)  
18 defender organizations, not employees of King County. This  
19 introduction is only a thumbnail sketch of the factual history  
20 and claims as related by both the Plaintiff and Defendant which  
21 is stated in more detail in their respective briefs for the  
22 summary judgment motions and trial memoranda, which are  
23 incorporated hereto by reference.  
24  
25

1  
2 **II. LEGAL ANALYSIS**3 **A. Does the NLRB have "exclusive jurisdiction" over the public**  
4 **defenders' claim for PERS benefits?**

5 The first issue, which the Court must address, is the  
6 legal argument proffered by defense is the definition of public  
7 employee for purposes of coverage under the Washington State  
8 PERS statute. Should the Court defer to federal jurisdiction  
9 under the National Labor Relations Board since only this body  
10 can exercise jurisdiction over private employees? In addition,  
11 the defense argues that because the subject matter of this  
12 lawsuit involves a claim for work place benefits, this issue is  
13 also reserved for mandatory bargaining under the National Labor  
14 Relations Act and, thus, the Court is preempted under federal  
15 law. This is summarized in the defense briefing as being under  
16 the "Garmin Doctrine" and/or "Garmin Preemption".

17 The Plaintiff counters that the NLRB's jurisdiction is  
18 very limited and focuses on protecting labor's attempt at  
19 organizing and preventing interference with the collective  
20 bargaining process. The Plaintiff argues that the NLRB does not  
21 decide employee pension claims involving PERS and these issues  
22 are exclusively within the state court's jurisdiction.

23 This Court finds that whether or not a group of  
24 employees in a lawsuit against a county entity as to determine  
25

1 whether or not a group of employees are entitled to PERS  
2 benefits is subject to state court jurisdiction.

3           Based on the Court's review of the case law cited by  
4 each of the parties, the Court believes that the cases cited by  
5 Plaintiff's counsel is more accurate as to the facts of this  
6 particular case. This Court does not believe that the NLRB's  
7 jurisdiction preempts state court jurisdiction to decide whether  
8 or not a specific group of state employees should be considered  
9 public employees for purposes of receiving coverage under a  
10 state-provided pension plan (a/k/a PERS). At a minimum, under  
11 the case law cited, specifically *Commodore v. University*  
12 *Mechanical*, 120 Wn.2d 120, 125-33 (1992), this Court would have  
13 concurrent jurisdiction with any federal authority, but after  
14 the Court's review of the Plaintiff's claims and the Defendant's  
15 affirmative defenses, it believes that Washington State law must  
16 be applied to resolve the controversy.

18 B. Did the Plaintiffs waive their rights to a PERS pension by  
19 the acceptance of the non-public employee retirement  
20 benefit?

21           The defense argues that because a number of the public  
22 defender organizations provided different forms of retirement  
23 benefits, that there is a form of waiver, or estoppel, as to  
24 these same employees attempting to request coverage under the  
25 PERS statute. This Court could find no case law cited by the

1 defense which would provide that the employees of the public  
2 defender organizations, under the facts of this case, by  
3 accepting what was often periodic and unpredictable forms of  
4 retirement benefits, would constitute a waiver to obtain PERS  
5 benefits and the Court find such a policy to be contrary to  
6 Washington law.

7 **C. Under the facts of this case, should the Plaintiff, and the**  
8 **class of employees that he represents, be considered public**  
9 **employees for purposes of qualifying for benefits under the**  
10 **Washington State PERS statute?**

11  
12 For the reasons stated below, as well as the evidence  
13 submitted by both the Plaintiff and the Defendant, this Court  
14 finds that for purposes of the PERS statute, in Washington  
15 State, that the Plaintiff, and the class members that he  
16 represents, should be considered public employees for purposes  
17 of coverage under Washington's PERS statute.

18 **III. PRIVATE EMPLOYEE v. PUBLIC EMPLOYEE**

19 Both parties have provided an excellent recap as to  
20 history leading as to the formation of these four (4) public  
21 defender organizations in King County. It is clear from the  
22 history provided, that it was intent of the founders of these  
23 public defender organizations to present to the public a model  
24 which would provide the indigent defendants with attorneys that  
25

1 were not part of the same system that was attempting to  
2 prosecute and convict the defendants seeking assigned counsel.  
3 It is interesting to note that the public defenders themselves,  
4 as well as their management, often referred to their  
5 organization as "The Firm". Based on the affidavits and  
6 depositions which were reviewed by the Court in detail, it is  
7 clear that the attorneys and staff members considered themselves  
8 as defense attorneys who were not simply going through the  
9 motions as the typical stereotype often promoted by defendants  
10 who were represented by "public defenders". The fact that these  
11 defense attorneys, who had accepted this challenge, exercised a  
12 certain amount of autonomy in deciding how they ran their  
13 defender organizations helped promote a spirit of  
14 professionalism akin to a private law firm.

16           The defense, through their deposition testimony of a  
17 number of former and current defender top management,  
18 demonstrated that these defender organizations had significant  
19 independent control over the day-to-day operations of their non-  
20 profit corporations, as well as management of the funds that  
21 they received pursuant to their approved budgets from the  
22 county. All of the public defender organizations had a board of  
23 directors/trustees which exercised within an atmosphere of  
24 autonomy in providing direction and a mission statement for  
25

1 these public defender organizations. Decisions as to employee  
2 promotion within the organization, whether to participate in  
3 unionized collective bargaining, setting of vacation schedules,  
4 internal discipline, promotions, work assignments, budget  
5 control; in short, there was little to show that there was  
6 material interference by King County in the day-to-day  
7 operations of these defender organizations.

8  
9           However, in reviewing the functions and autonomy that  
10 these defender organizations had in comparison with the service  
11 model of a county public defender agency, King County's powers  
12 of control over key issues varied little. This is true even  
13 though the defender organizations had their own articles of  
14 incorporation, by-laws, and employee handbooks outlining the  
15 duties and obligations of the organization's staff and  
16 management.

17           There were numerous examples of the four (4) public  
18 defender organizations' autonomy, as highlighted in the  
19 depositions of the current and past agency directors,  
20 specifically Robert C. Boruchowitz, David Chapman, Anne Dailey,  
21 and Ilene Farley, all of whom provided many common examples of  
22 autonomy within their respective public defender organizations.  
23

24           The Court found the declaration of Ricardo Cruz, who  
25 from 1996 to 1999 was the director of King County's Office of

1 Human Resource Management, revealing with regard to the  
2 relationship between various county departments and the  
3 controlling executive or county counsel. Mr. Cruz, through his  
4 declaration, indicated that many of the "independent factors"  
5 that are exercised by the public defender organizations,  
6 including who to interview for a job, questions to ask potential  
7 hires, the decision of hiring and/or promoting, appointment of  
8 supervisors, decisions regarding internal structure,  
9 reorganization and assignment of work duties, were also in fact  
10 normal for recognized units of county government. He stated  
11 that because of the decentralization for personnel matters  
12 within King County government, the actual agency departments  
13 operate with little significant difference from the public  
14 defender organizations; including the fact that there is nothing  
15 unique about two of the public defender organizations having  
16 collective bargaining agreements. Evidently this is true of  
17 eighty-five percent (85%) of the county's work force according  
18 to Mr. Cruz.  
19

20           The defense has argued, through its depositions and  
21 exhibits, that these defender organizations are true independent  
22 contractors. The Court, in making its review of the evidence,  
23 looked beyond just the day-to-day operation. The evidence shows  
24 that the current contract structure really makes the public  
25

1 defender organizations the captured audience of the county.  
2 This Court does not find any indicia of an independent  
3 contractor for purposes of the litigation, especially in light  
4 of the fact that the only source of monetary revenue is King  
5 County. The defender organizations are prohibited from  
6 contracting with anyone else other than a public agency or  
7 municipal government. A true independent contractor would be  
8 able to contract for other sources of income (i.e., represent  
9 retained clients or provide services to the private clients on a  
10 sliding scale). Currently, they are prohibited from doing this  
11 outside the umbrella of the King County agency (OPD). An  
12 independent contractor would not need the advice and consent  
13 from the county as to where they could lease office space.  
14 There can be no arms-length bargaining, as a typical independent  
15 contractor, when the defender organization's entire existence  
16 depends on the county. Further, the testimony provided by  
17 organization directors shows an increase in control by the  
18 Office of Public Defender through King County, not a decrease.  
19 The Court views this as "control" rather than "oversight". The  
20 fact that a representative of the King County Public Defender's  
21 Office would attempt to insert a contractual clause that would  
22 in essence allow the county to terminate the defender contracts  
23 "without cause" confirms this trend. Only one party has the  
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25

1 negotiating power in this relationship and that is King County.  
2 The evidence shows that if King County ceases to fund a defender  
3 organization, there are no other options for the organization  
4 other than dissolution of the corporation. Control over day-to-  
5 day operations becomes secondary. These corporations, or  
6 "firms", serve at the leisure of the county, which is not  
7 inherently wrong. The model adopted by King County, in  
8 representing indigent clients in criminal cases, has been highly  
9 praised. Since the county funds most, if not all, of the key  
10 personnel in the county criminal justice system, is there a  
11 legitimate reason to treat these individuals (class members)  
12 different for purposes of critical benefits such as a PERS  
13 retirement? Does case law in Washington State support this  
14 distinction?  
15

#### 16 IV. BUDGET CONTROL

17 That process is really no different than any other  
18 public agency when it submits a budget to the executive  
19 authority and/or a controlling county council. When the Office  
20 of Public Defense through King County exercised its option to  
21 put Northwest Defender's Association (NDA) into receivership in  
22 2002, it surely exercised some legitimate oversight authority,  
23 but it also demonstrates that King County has the ability to  
24 terminate its services with one of the public defender  
25

1 organizations with little or no chance of the organization  
2 surviving independent of its contract with the county. Further  
3 the Office of Public Defender exercises tight monetary control  
4 over death penalty and murder cases. It has audited these  
5 public defender organizations to the point of wanting to review  
6 individual files and through its disbursements of cases to each  
7 defender organization can drastically affect the caseload and  
8 arguably money that a public defender organization would have to  
9 disburse.

10  
11 The evidence shows that the reservation of monetary  
12 control through the budget process, reservation of powers to  
13 audit and ultimately dismember a public defender organization,  
14 and its authority to disperse cases among the various public  
15 defender organizations is in essence so critical to the  
16 existence of the public defender's organizations that, in fact,  
17 they are what is termed in the corporate world, the "alter ego"  
18 of King County government.

19  
20 **V. INTENT OF COUNTY**

21 The Court has also viewed the evidence as to the  
22 intent of King County in treating the defender organizations'  
23 employees as to salary and benefits. Have they viewed them as  
24 independent contractors or have they treated them as equals as  
25 compared to agency employees? A major factor that the Court

1 took into consideration, as to the county's intent, was the pay  
2 scale that exists between the public defender organizations and  
3 the prosecuting attorney. The evidence reflects that in  
4 approximately 1989 the county, in order to equalize disparity in  
5 salary between the lawyers in the prosecuting attorney's office  
6 and their counter-parts in the defender organizations, they  
7 developed what has been known as the Kenny Scale. According to  
8 the deposition testimony, there is, in fact, an ordinance in  
9 place which provides that attorneys for the public defender  
10 organizations must be paid per the Kenney Scale. The Kenny  
11 Scale attempts to provide wage parity between the attorneys  
12 working for both the prosecutor and defense. The evidence also  
13 shows that the Kenney Scale is the method used by King County to  
14 develop their salary budget proposals for the public defender  
15 organizations. The public defender organizations and the OPD  
16 have used this system for the last 18 years.

18           The county's attempt to ensure salary parity between  
19 the two offices demonstrates a common purpose to treat the  
20 employees without distinction as to employer. That Kenny Scale,  
21 and/or ordinance, was not applied to the benefit packages (e.g.  
22 PERS retirement) that were provided to the prosecuting  
23 attorney's office and are not available to the public defender  
24 organizations. This Court does not view a self-directed 401 K  
25

1 plan available to the defender organizations on the same level  
2 as PERS retirement.

3           The defense has not met its burden in showing any  
4 legitimate reason as to why the benefit package should not be  
5 extended to the similarly situated employees of the public  
6 defender organizations if the county is truly concerned about  
7 the equalities of salary between the two organizations. The  
8 argument that the public defender organizations can manage their  
9 own monies as they see fit, including developing 401(k) plans or  
10 something similar, is illusory when you are not provided the  
11 funds to adequately establish a PERS program or, in the  
12 alternative, you must cut wages or benefits to achieve that  
13 goal.  
14

15                           **VI. SUMMARY**

16           The exercise of contractual control by case  
17 management, auditing, budgetary "take it or leave it"  
18 philosophy, and the not-so-subtle attempts to allow the county  
19 to terminate the contracts "at will" tend to negate the  
20 "independent contractor theory".

21           A model demonstrating a true independent contractor  
22 would be that of a private counsel who would take cases on an  
23 assigned basis or by way of panel assignment; who would have the  
24 ability, if it did not wish to contract with the county, to  
25

1 pursue other lines of income including representing clients on a  
2 privately retained basis and would not be restricted to  
3 providing services only to one governmental entity. The  
4 evidence also indicates that in 1999 the Office of Public  
5 Defender completed an internal study classifying the defender  
6 organizations non-attorney staff members. As a result of that  
7 study, the Office of Public Defender did recommend an increase  
8 in salary for defender staff as an effort to move toward parity  
9 with other similarly situated public employees and/or  
10 prosecutor's office staff. The Court believes that this also  
11 was an attempt to treat these employees as public employees and  
12 achieve parity.  
13

#### 14 VII. CASE LAW

15 It is important to see if either side has Washington  
16 case law to assist the Court. The Court does find direction in  
17 Clark vs. Tri-Cities Animal Care and Control Shelter, 144 Wn.  
18 App 185, 181 P.3<sup>rd</sup> 881 (2008). The trial court went through a  
19 similar exercise (public v. no public) in trying to determine  
20 whether or not the Tri-Cities Animal Care and Control Shelter  
21 (TCAC), which was a privately-run corporation that contracted  
22 with the Animal Control Authority (ACA) serving Richland, Pasco,  
23 and Kennewick, could be considered a public agency for purposes  
24 of the Washington State Public Disclosure Act.  
25

1           The Court of Appeals, Division III, in this decision  
2 reversed the finding of the trial court which held that the TCAC  
3 was not a public agency under the PDA. The appellate court in  
4 Clark vs. Tri-Cities Animal Care used the same criteria that was  
5 used in an earlier-decided Washington case cited as Telford vs.  
6 Thurston County Board of Commissioners, 95 Wn. App 149, 974 P.2<sup>nd</sup>  
7 886 (1999). The court in Telford adopted a four-factor  
8 "functional equivalent" balancing test to determine if an entity  
9 is to be regarded as a public agency.  
10

11           The balancing test is required in order to determine  
12 whether the public defender agencies are, in fact, the  
13 functional equivalent of a public agency by looking at Telford's  
14 four factors which include the following: 1) Whether the entity  
15 performs a governmental function; 2) The level of government  
16 funding; 3) The extent of government involvement or regulation,  
17 and, 4) Whether the entity was created by the government. The  
18 Court, based on its evaluation of these four factors, on balance  
19 it would suggest that the public defender organizations are, in  
20 fact, the functional equivalent of a local agency.  
21

#### 22                           VIII. BALANCING ANALYSIS

##### 23           1. Government Function

24           There is little dispute that the function of the  
25 public defender organizations is to perform services as a

1 governmental function. That is, the delivery of legal  
2 representation to indigent citizens accused of misdemeanor and  
3 felonies in Washington State. This is clearly a governmental  
4 function.

5 2. The Level of Governmental Funding

6 Again, this was a critical factor in the Court's  
7 analysis in that 100 percent of the budget for all four of these  
8 public defender organizations is funded by King County or  
9 another government entity. There is little or no grant money,  
10 there is little or no privately-funded representation or any  
11 other significant sources of income that would substitute for a  
12 King County government contract which in essence provides for  
13 the existence of these organizations and without said funding  
14 would simply disappear.

15 3. The Extent of Government Involvement or Regulation

16 Evidence shows the intent of forming these public  
17 defender organizations under a non-profit corporation model was  
18 to provide as much autonomy as possible for these defender  
19 organizations so that they could not be linked as part of any  
20 government system which would create the appearance that the  
21 public defender was just part of an overall club that was  
22 designed to put indigent defendants in jail. There is no  
23 question and this Court finds that these public defender  
24  
25

1 organizations exercised autonomy in regard to their day-to-day  
2 functioning. The Court finds, from the evidence, that this day-  
3 to-day independence is not significantly different from the  
4 operations of other agencies under the county umbrella. Both  
5 have autonomy on hiring, firing, promotions and other management  
6 decisions that must be made in government entities.

7  
8 The increasing authority exercised by the Office of  
9 Public Defender demonstrates that the county clearly maintains  
10 control over the existence and regulation of these public  
11 defender organizations simply by lack of bargaining power in the  
12 budget process. The retention of authority to screen and assign  
13 the various cases to the public defender organizations as well  
14 as the real lack of arm's length bargaining in regard to  
15 critical terms like benefit packages would demonstrate that  
16 their authority and autonomy is really no different than any  
17 other King County public agency.

18 4. Whether the Entity was Created by the Government

19  
20 Clearly, this entity was created as a result of a  
21 government study as to how to best fulfill the mission statement  
22 of providing quality legal representation to indigent defendants  
23 in criminal matters. In review of studies performed on the  
24 delivery system through these four public defender  
25 organizations, King County has consistently received high marks

1 with regard to the quality of service provided for by these four  
2 independent organizations. However, this does not distract from  
3 the fact that they were clearly created by the government to  
4 serve the government in providing indigent legal representation.  
5 Therefore, for these reasons, as well as the other reasons  
6 stated in the content of my written decision, the Court finds  
7 that the public defender organizations under this analysis, as  
8 well as the Clark analysis, is the equivalent of a public agency  
9 for purposes of the plaintiff's cause of action.

10  
11 The Court also is cognizant of the Oregon decision in  
12 State Public Employees Retirement Board v. City of Portland (684  
13 P.2d 609). This case is even more similar to the case at bar  
14 with regard to the issues that dealt with employee salaries and  
15 benefits. This Court agrees with the analysis provided in State  
16 Public Employees Retirement Board v. City of Portland in that it  
17 also believes that the public defender organizations "have an  
18 alter-ego relationship" with the county. The Court noted many of  
19 the same factors as indicated in the Telford criteria in that  
20 the purpose of the organization, as stated in the Articles of  
21 Incorporation, was to implement and provide city policy required  
22 that its internal rules and regulations be appealable to the  
23 city council, that PECEI can be dissolved by the city council and  
24 all of its directors are appointed by the city council. Given  
25

1 this degree of control, the Court held that PECI was an  
2 instrumentality of the city. The Court specifically rejected  
3 the city's argument that PECI should be considered separate  
4 because the city did not have control of the day-to-day  
5 operations of PECI. This Court finds enough similarities  
6 between the Oregon case and the case before the Bar to support  
7 this Court's decision.

8  
9 Although there were many other opinions and cases  
10 cited by both counsel, this Court adopts the balancing test as  
11 provided in Telford as the correct criteria in determining the  
12 private entity versus public agency issue.

13 **IX. DICTA**

14 Although not specifically argued by either side, this  
15 Court is certainly aware of its powers in that it sits as a  
16 Court of Law as well as equity. This Court does not believe  
17 that it is equitable to treat two classes of workers, who are  
18 basically performing the same function, as part of the criminal  
19 justice system as two different classes of employees for benefit  
20 purposes. King County government has already recognized that  
21 for purposes of pay, they should be recognized as equal co-  
22 workers. However, there is no real reason given as to why this  
23 should not extended to a benefit package other than the fact  
24 that the County simply refuses to fund such a proposal in its  
25

1 budgets. King County has obviously saved money by not providing  
2 for a similar benefit package, but simply the savings alone does  
3 not justify the inequitable treatment for benefit purposes.

4           If the goal of King County is to provide quality legal  
5 representation to indigent defendants, then it should also  
6 encourage qualified staff and attorney applicants to fill these  
7 positions with the same compensation and same incentives that  
8 the King County Prosecutor's Office uses in the recruitment of  
9 their employees. Indigent defendants, it would appear to this  
10 Court, have the same right to be represented by fully  
11 compensated attorneys as the State has for having the  
12 Prosecutor's Office represent the State's interest in the  
13 prosecution of criminal cases. Thus, this Court finds that  
14 there is an underlying issue of equal protection under the  
15 United States Constitution as it applies to indigent criminal  
16 defendants and their right to have quality legal representation  
17 on a par with staff for the King County Prosecutor's office.

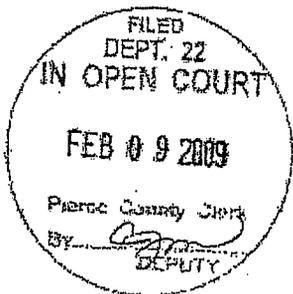
18  
19                           **X. CONCLUSION**

20           This Court finds, based on the evidence presented by  
21 the Plaintiff, that they have met their burden of proof as to  
22 the relief requested in showing that the Plaintiff and the class  
23 he represents should be enrolled in the PERS Retirement System.  
24 Therefore, the motion for injunctive relief pursuant to that  
25

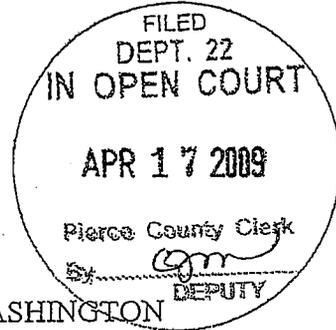
1 prayer for relief is granted. However, this Court has not  
 2 reviewed or seen any pleadings regarding the relief requested  
 3 per the Amended Complaint, which is much more detailed than the  
 4 original relief requested in the original Complaint. Now that  
 5 the Court has indicated its decision regarding the basic issue  
 6 of the class members being considered public employees for  
 7 purposes of the PERS statute, the Court believes that the  
 8 defense should have a right to specifically address the relief  
 9 requested by the Plaintiff since that was not argued at the time  
 10 of opening and/or closing statements. This obviously may  
 11 require additional briefing and oral argument. This Court is  
 12 aware that this decision will have a financial impact on King  
 13 County, and the fact that this decision will most likely be  
 14 reviewed by a higher court. This Court would certainly  
 15 entertain additional motions pending final review by an  
 16 appellate court.  
 17

18 DATED this 9 day of Feb, 2009.

[Signature]  
 JUDGE JOHN R. HICKMAN



The Honorable John R. Hickman  
Department 22  
Hearing: April 17, 2009 at 3:00 p.m.



SUPERIOR COURT OF THE STATE OF WASHINGTON  
PIERCE COUNTY

KEVIN DOLAN and a class of similarly situated  
individuals,

Plaintiffs,

v.

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

Defendant.

No. 06-2-04611-6

~~PROPOSED~~ ORDER  
GRANTING KING COUNTY'S  
MOTION FOR CERTIFICATION  
UNDER RAP 2.3(b)(4) AND FOR  
STAY PENDING APPEAL

King County has moved this Court: (1) for certification for immediate appellate review of the Court's February 9, 2009 Written Decision ("Decision") under RAP 2.3(b)(4); and (2) for a stay of the proceedings pending appeal.

The Court having reviewed the motion, memoranda, declarations and exhibits submitted in support and opposition to said motion, hereby FINDS:

1. On August 22, 2008, the Court ordered that a bench trial on the public employee issue be held on the factual record that had been submitted by the parties in connection with

[PROPOSED] ORDER GRANTING RAP 2.3(b)(4) CERTIFICATION AND  
STAY PENDING APPEAL - 1

DWT 12649364v3 0013593-000002

Davis Wright Tremaine LLP  
LAW OFFICES  
Suite 2200 • 1201 Third Avenue  
Seattle, Washington 98101-3045  
(206) 622-3150 • Fax: (206) 757-7700

1 their cross motions for summary judgment. The Court conducted trial in chambers based solely  
2 on that written documentary record, and without hearing testimony from any witnesses.

3 2. On February 9, 2009, this Court issued its Written Decision determining that  
4 "for purposes of the PERS statute, in Washington State, that plaintiff Dolan, and the class  
5 members that he represents, should be considered public employees for purposes of coverage  
6 under Washington's PERS statute."

7 3. The Court's February 9, 2009, Written Decision presents important questions of  
8 first impression that must be resolved by the appellate courts.

9 4. The issue decided in the Court's Written Decision – namely: Whether members  
10 of the plaintiff class are public employees for purposes of PERS -- involves significant legal  
11 questions and matters of public policy.

12 5. Until the appellate courts resolve this central issue, there is no need to reach the  
13 additional questions presented by plaintiff's other claims, including the scope and  
14 implementation of any proposed remedy.

15 RAP 2.3(b)(4) CERTIFICATION

16 6. The Court's February 9, 2009, Written Decision involves a controlling issue of  
17 law as to which there is substantial ground for a difference of opinion, and immediate review  
18 may materially advance the ultimate termination of the litigation. Immediate review by an  
19 appellate court will assist this Court in resolving this litigation.

20 STAY OF TRIAL COURT PROCEEDINGS

21 7. It is in the interest of conserving judicial, party, and public resources to stay  
22 further action in this Court pending the resolution of appellate proceedings,

23 *plaintiffs may submit proposed findings to support  
the court's February 9, 2009 decision and the  
court's permanent injunction.*

[PROPOSED] ORDER GRANTING RAP 2.3(b)(4) CERTIFICATION AND  
STAY PENDING APPEAL - 2

CONCLUSION

King County's motions for RAP 2.3(b)(4) certification of the Court's February 9, 2009 Decision, and for a stay of proceedings in this Court pending appeal, are hereby GRANTED.

It is so ORDERED.

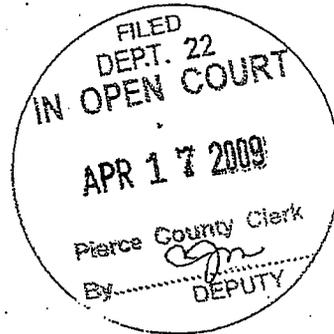
DONE this 17 day of April, 2009.

*[Signature]*  
The Honorable John R. Hickman

Presented by:

Davis Wright Tremaine LLP

By *[Signature]*  
Michael Reiss, WSBA #10707  
Roger Leishman, WSBA #19971  
Amy H. Pannoni, WSBA #31824

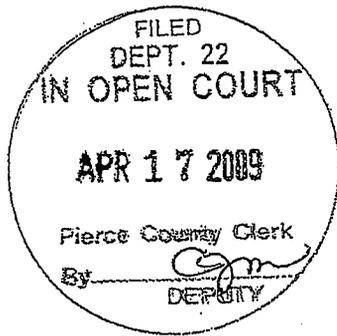


Talmadge Fitzpatrick Law Group, PLLC

By *[Signature]*  
Philip A. Talmadge, WSBA #06973

Attorneys for Defendant King County

[PROPOSED] ORDER GRANTING RAP 2.3(b)(4) CERTIFICATION AND STAY PENDING APPEAL - 3



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KEVIN DOLAN,  
Plaintiff(s),  
vs.  
KING COUNTY,  
Defendant(s)

Cause No: 06-2-04611-6  
ORDER GRANTING  
(OR) INJUNCTION

PERMANENT INJUNCTION

Based on the Court's ~~findings of fact and conclusions of law~~ *written decision of* and on its February 9, 2009 decision, the Court enters a permanent injunction requiring the County to enroll the currently employed class members and future employed class members in PERS. RCW 41.40.111(1). The parties are directed to cooperate in obtaining identities of the class members the County is required to enroll in PERS, and in obtaining the information that DRS needs for the County to enroll them and the class members need to choose among their options. The parties may need to obtain this information from King County's public defense agencies. The precise enrollment date is left for further resolution upon motions which may be brought by the parties. All other issues and matters are reserved; *and plaintiff may submit additional proposed findings of fact and conclusions of law to the injunction and*

DATED this 17 day of April, 2009.  
*The decision of the Court*

*[Signature]*  
JOHN R. HICKMAN  
SUPERIOR COURT JUDGE

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail and sent by email a true and accurate copy of the following documents: Motion for Discretionary Review and Statement of Grounds for Direct Review in Supreme Court Cause No. 82842-3 to the following:

Michael Reiss  
Roger A. Leishman  
Amy H. Pannoni  
Davis Wright Tremaine LLP  
1201 3<sup>rd</sup> Avenue, Suite 2200  
Seattle, WA 98101-3045

David F. Stobaugh  
Stephen K. Strong  
Lynn B. Prunhuber  
Bendich, Stobaugh & Strong  
701 5<sup>th</sup> Avenue, Suite 6550  
Seattle, WA 98104

Charles K. Wiggins  
Wiggins & Masters, P.L.L.C.  
241 Madison Avenue N.  
Bainbridge Island, WA 98110

Original sent by email for filing with:

Washington Supreme Court  
Clerk's Office

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: May 6, 2009, at Tukwila, Washington.

Christine

Christine Jones  
Talmadge/Fitzpatrick

DECLARATION

**OFFICE RECEPTIONIST, CLERK**

---

**From:** Christine Jones [christine@talmadgeg.com]  
**Sent:** Wednesday, May 06, 2009 2:12 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** davidfstobaugh@bs-s.com; charlie@appeal-law.com  
**Subject:** King County v. Dolan  
**Attachments:** Motion.pdf; Statement.pdf

Attached for filing in Supreme Court case number 82842-3 is King County's motion for discretionary review and statement of grounds for direct review.

Kevin Dolan v. King County

Hard copies in mail to parties. Thank you.

Christine.

Christine Jones  
Office Manager  
Talmadge/Fitzpatrick  
(206) 574-6661