

NO. 82842-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

[Pierce County Superior Court No. 06-2-04611-6]

KEVIN DOLAN, *et al.*,

Respondents,

v.

KING COUNTY,

Appellant.

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**RESPONDENTS' BRIEF**

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## INTRODUCTION

King County public defenders perform work to fulfill a mandated County function – providing indigents criminal defense – just as public defenders in other counties do. But in King County, unlike other Washington counties that recognize their public defenders as county employees, they are not considered county employees. In King County they are considered employees of nonprofit corporations. Public defenders in Pierce County, in contrast, are county employees in the Department of Assigned Counsel. The public defenders in King County and Pierce County all perform the same professional legal work under the same level of county supervision, but the Pierce County public defenders are in PERS, while the King County defenders are not, due solely to King County incorporating its public defense agencies as nonprofit corporations.

King County contended below that the public defense agencies are not “public entities” for purposes of PERS because there is no “legislative act” to officially declare them public agencies. And the County argues this point, not with any authority, but almost entirely by pointing to various forms, procedures, and paperwork relating to the nonprofit corporation form of organization.

The Superior Court rejected the County’s arguments based on corporate form because, under the PERS statute, employees of a nonprofit corporation are enrolled in PERS when as a *factual* matter the corporation

is an “arm and agency” of a PERS employer. The Department of Retirement Systems (DRS) has a long-standing interpretation of the PERS statute on this precise point that was adopted by the Legislature in 1997. Laws of 1997, Ch. 254, §§1(2), 10 (amending RCW 41.40.010(22)); AGO 1955-57, No. 267. See discussion pp. 14-17 *infra*.

The public defenders also have an employment relationship with King County because the County has or exercises sufficient control over the terms and conditions of their employment. Under PERS, the public defenders need not establish that the County is their *only* employer because, even if the nonprofit corporations were truly separate employers, the County is a “joint employer” where, as here, it has control over pay and benefits (and a great deal more).

Under either way of looking at the employment relationship, *i.e.*, looking at the public defense agencies as arms and agencies of King County or looking at the County’s control over the public defenders’ terms and conditions of employment, the focus is on *facts* showing control. Substance prevails over form. Contract documents, articles, bylaws, tax forms, and other documents and procedures that exist due to corporate status do not establish “independent contractor” status when the underlying facts show otherwise.

The Superior Court conducted a trial on these issues. It concluded, based on a very large volume of testimony and documents, that the “public defense agencies are the functional equivalents (alter egos) of King

County and each is an arm and agency of King County” and that “King County is an employer of the plaintiffs and the [public defenders] are County employees for purposes of PERS.” App. 37, CL 3 and 4.<sup>1</sup>

The Supreme Court Commissioner granted discretionary review under RAP 2.3(b)(4) because the County raised a “controlling question of law.” Commissioner’s Ruling p. 3. The Commissioner explained that the controlling legal question is whether employees of a nonprofit corporation could be eligible for PERS if the nonprofit corporation were in effect an arm and agency of a PERS employer. *Id.* The Commissioner noted that the Attorney General had issued an opinion to that effect, AGO 1955-57, No. 267, but said this Court had not addressed the issue.<sup>2</sup>

### ISSUES

1. Are King County’s public defense agencies arms and agencies of the County due to their integration into the County in many respects and its extensive control, as the Superior Court found?
2. Even if the agencies were independent, are the public defenders employees of King County for purposes of PERS because of the County’s extensive control over their terms and conditions of employment, as the Superior Court found?

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<sup>1</sup> CL refers to Conclusions of Law. App. 37 refers to the Appendix page 37. See n. 6 on p. 9 *infra*.

<sup>2</sup> *But see Good v. Associated Students*, 86 Wn.2d 94, 97, 542 P.2d 762 (1972), where in another context this Court expressly adopted the opinion in AGO 1955-57, No. 267. See p. 16 n. 14 *infra*.

## COUNTERSTATEMENT OF THE CASE

### *The County's Selection of Facts*

King County states that “the basic facts in this case are largely undisputed.” Br. 6. But then the County’s very lengthy statement of facts (Br. 6-32) ignores the Superior Court’s findings of fact and the enormous amount of evidence at trial supporting the decision and findings.

The County’s statement of facts instead focuses on the same paperwork it relied on below to show that the agencies have the usual formal features of nonprofit corporations – articles, bylaws, boards of directors, tax forms, etc. The County describes the “facts” as if the formal paperwork and procedures, by themselves, establish that the public defenders are not County employees for purposes of PERS. Br. 6-32, 45-54. Applying the long-standing common law principles incorporated into PERS, however, the Superior Court found that the corporate form and the related procedures and paperwork are not binding and they prove only that the agencies are organized as nonprofit corporations, not that they are truly independent. App. 19-20, Finding of Fact (FF) 54. Based on overwhelming evidence in the record, the trial court found that the public defenders are County employees for PERS purposes because they are arms and agencies of King County and the County has very extensive control over them. App. 3-37. Accordingly, plaintiff Dolan and the class submit this Counterstatement of Facts.

### *Counterstatement of Facts*

Kevin Dolan is a King County public defender. CP 98. He brought this action against King County on behalf of the lawyers and staff of the County's public defense agencies.<sup>3</sup>

In Washington, public employers, including counties, have a duty to enroll employees in the Public Employees Retirement System (PERS) and to share pension contributions with them. CP 139. In Pierce County the public defenders and others in the courtroom with them – the judges, the deputy prosecutors, the court reporters, the bailiffs, the court clerks, the jail guards, and the probation officers – are all members of PERS. CP 98. In contrast, in King County, all the people in these positions are PERS members **except public defenders**. The sole reason for the difference is that Pierce County pays the public defenders directly as employees, while King County funnels the funds with which it pays the public defenders through captive nonprofit corporations that the County formally defines as “agencies” in its contracts. App. 27-28, FF 73, 77.

King County's four public defense agencies are thoroughly integrated into the County, and they are treated by the County the same as other County agencies. App. 9-10, 27-28, FF 17-18, 23-24, 69, 73, 75. The public defense agencies are organized as nonprofit corporations only

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<sup>3</sup> The County's four public defense agencies are: The Defender Association (TDA); Associated Counsel for the Accused (ACA); Society of Counsel Representing Accused Persons (SCRAP); and Northwest Defenders' Association (NDA). App. 3, FF 1.

because, by ordinance, King County requires them to be nonprofit corporations with the limited purpose of providing indigent defense. App. 4-5, 21-22, FF 4-7, 57. The agencies were all effectively created and funded by the government to perform the government function of providing indigent criminal defense. App. 4-5, FF 3-7.

The parties stipulated and the trial court ordered that the case would be addressed in three phases – class certification, liability, and relief. CP 7118. The parties agreed that a class should be certified. CP 128-29. Discovery followed.<sup>4</sup>

The trial court asked the parties to address liability first with motions for summary judgment, and if not decided by motion, the case would be tried. CP 7118. The parties filed cross-motions for summary judgment. CP 536-621; 2491-2535.<sup>5</sup> The trial court denied summary

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<sup>4</sup> King County conducted extensive discovery, taking lengthy depositions of the directors of the public defense agencies (David Chapman, ACA, Floris Mikkelsen, TDA, Eileen Farley, NDA, and Anne Daly, SCRAP) and former TDA Director, Robert Boruchowitz. It also took depositions of four board members and some staff members and it took depositions of the plaintiff, Kevin Dolan, and Jeff Robinson, the County-selected receiver in its case against NDA to remove its management and board.

<sup>5</sup> The County “submitted the un-excerpted deposition transcripts of 11 witnesses and all of their deposition exhibits.” CP 6469. It also submitted short declarations from David Hocraffer, the King County Public Defender since 2006, his assistant Russell Goedde, John Darrah, the initial director of TDA, and Leonard Biermann, who testified about federal contracting. King County did not submit any evidence from anyone else. The plaintiff class submitted lengthy declarations from some of the same witnesses, *i.e.*, Robert Boruchowitz, who was the head of TDA for 28 years, from 1978 through 2006; David Chapman, head of ACA from 1999; Anne Daly, head of SCRAP from 1999; and Eileen Farley, head of NDA from 2002. The class also submitted declarations from plaintiff Kevin Dolan, Ricardo Cruz, former Director of the King County Office of Human Resource Management, and Raymond Thoenig, who has worked in public defense for Pierce County since 1988. The declarations are supported by many County documents that are exhibits to the declarations.

judgment because “there are a number of issues of material fact with regard to the nature and degree of the relationship between King County and the plaintiff.” CP 6465.

The parties filed a “joint motion for reconsideration or in the alternative for trial on the summary judgment record.” CP 6478. A trial on the record allows the Superior Court to weigh the evidence, which is not possible on summary judgment. The parties explained why the trial court should try the case on the existing record (CP 6478-79):

The parties agree that the case should be decided on the merits either by summary judgment or alternatively, ... by a trial on the existing summary judgment record. The parties agree that there is no right to jury trial in this case.... Consequently, the *fact-finder in this case will be the Court*, not a jury. The parties agree that a trial with live testimony is not necessary here because there is no issue of credibility. The parties agree that the existing summary judgment record is a sufficient record for the Court to try this case and render a decision. *Both parties would like the Court to render a final decision on liability.* [Emphasis added.]

The County reiterated in its brief “there is no need for these witnesses to repeat their testimony ‘live’ at trial.” CP 6469.

The Court agreed to try the case on the existing record (CP 6499):

Court will proceed to try this matter on the record now before it, as of 8/22/08. Trial to Court, not jury; no live testimony unless ordered by Court. On or before Sept. 30, 2008, counsel for parties will submit witness and exhibit lists and prioritize evidence on which they seek to rely. Following that Court will set case for trial, including opening statements, closing arguments following Court’s review of evidence, and Findings of Fact (proposed) and Conclusions of Law (proposed) if so ordered.

### *Superior Court Trial*

The public defenders asserted two separate, but overlapping reasons for being enrolled in PERS based on King County's control over the agencies and the public defenders: (1) the public defense agencies are arms and agencies of King County and/or are the functional equivalents thereof, thereby making King County the public defenders' employer for purposes of PERS; (2) even if the agencies were actually independent, and not each an arm and agency of King County, for the purposes of PERS the County is still the public defenders' employer, or at least their joint employer, because of the extensive control it exercises over the public defenders' terms and conditions of employment. CP 2695-96.

King County maintained that the public defense agencies are separate "independent" nonprofit corporations based on their organizational documents. It argued the public defenders cannot participate in PERS without a "legislative act" expressly stating the corporations are PERS employers. CP 6539, 6555-58. The County contended that the public defense agencies are "independent contractors" because they were organized as nonprofits with articles of incorporation, bylaws, and boards of directors and because the agencies file IRS reports. CP 6554.

Judge Hickman heard lengthy opening statements and closing arguments during November 2008. He then took the case under submission to read the parties' evidence, consisting of over 6,000 pages of testimony and exhibits. App. 2.

### *Trial Court Decision*

After reviewing the evidence for nearly three months, Judge Hickman issued a 24-page memorandum decision. CP 6647-70. After further briefing and argument, he entered findings of fact and conclusions of law under CR 52(a)(1) to “set forth the material facts on which its February 9, 2009 decision and permanent injunction are based.” App. 3.<sup>6</sup>

Judge Hickman found that the public defense agencies perform a “government function for King County[,]” the “agencies were effectively created by the government to serve the government[,]” and the “agencies receive all or nearly all of their funding from King County.” App. 3-5, FF 1-8. He further found that King County controlled the agencies in many ways that are inconsistent with the notion that the agencies are “independent.” For example, Judge Hickman found the County has functionally integrated the public defense agencies into the County so that they are treated the same as other County agencies, the County ensures

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<sup>6</sup> The plaintiff class prepared proposed findings of fact and conclusions of law as required by CR 52(a)(1) and 65(d). CP 6710-65. Plaintiffs also prepared an annotated version of the proposed findings listing the evidence supporting each finding. CP 6875-6926. The County argued that findings were “unnecessary.” CP 6842, 6864, 6871, 6992-93. It also opposed plaintiffs’ first proposed finding as too detailed. CP 6865-66. Judge Hickman asked the class to prepare a shorter version (CP 6437), which it did. CP 6963-88. He crossed out some of the proposed findings, while at the same time he issued an order stating that the fact that the proposed findings were crossed out does not mean they were “untrue,” but rather that they were “not a key factor” in the trial court’s written decision. CP 7085. The class submitted an annotated version of the proposed findings listing the evidence supporting each finding so that the trial court and the appellate court would know precisely the evidence supporting each finding. CP 7040-7065. The annotated findings are an appendix to this brief. RAP 10.3(a)(8). The annotated findings have been updated with the CP citations and have been retyped to reflect the changes the trial court made. RAP 10.4(c).

that the agencies' sole (or virtually sole) source of revenue is from the County and the agencies therefore lack any ability to bargain over essential terms, the County places many restrictions on the agencies that would not be placed on true independent contractors, and any "independence" the agencies have over administrative and personnel matters is the same "independence" found in recognized County agencies. App. 3-34, FF 9-99.

Judge Hickman concluded based on the parties' extensive evidence that (App. 37, FF 100):

King County exercises extensive control over its public defense agencies. It treats them as if they are County agencies or subagencies and the County acts like an employer and treats the plaintiffs as employees. The County is an employer of plaintiffs and plaintiffs are County employees for the purpose of PERS. King County's activities constitute control, not oversight.

Based on the extensive findings, Judge Hickman decided that as a matter of law "[t]he public defense agencies are the functional equivalents (alter egos) of King County and each is an arm and agency of King County." App. 37, CL 3. He also decided that "King County is an employer of the plaintiffs and the plaintiffs are County employees for the purposes of PERS." App. 38, CL 4.

#### **STANDARD OF REVIEW**

The United States Supreme Court explained why an appellate court gives deference to factual findings made by a trial court, regardless of whether the trial was on the record or had live testimony, in *Anderson v.*

*City of Bessemer*, 470 U.S. 564, 574 (1985):

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judges' efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" *Wainswright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard – with its deference to the trier of fact – is the rule, not the exception.

Washington courts have applied the substantial evidence standard of review to findings made at trials without live testimony although more narrowly than the federal courts.<sup>7</sup> And here the reasons for using the substantial evidence standard are very strong.

After Judge Hickman denied summary judgment because he could not weigh the evidence under CR 56 (CP 6465-66), the parties agreed to a trial on the record precisely so that he could *weigh* the voluminous evidence as the "fact-finder" and "render a final decision on liability."

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<sup>7</sup> This Court and the Court of Appeals have applied the substantial evidence standard to findings made without live testimony. *Physicians Ins. Ex. v. Fisons Corp.*, 122 Wn.2d 299, 345, 858 P.2d 1059 (1993); *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003); *In re Marriage of Stern*, 68 Wn.App. 922, 928-29, 846 P.2d 1387 (1993); *Williams v. Athlete Field, Inc.*, 142 Wn.App. 753, 756-66, 139 P.3d 426 (2006).

CP 6478-79. Indeed, King County told Judge Hickman that “there is no need for these witnesses to repeat their testimony ‘live’ at trial.” CP 6469. The parties wanted the trial court to try the case by reviewing and weighing the numerous depositions, declarations, and exhibits in the record. Judge Hickman spent over three months doing so. He reviewed over 6,000 pages of testimony and exhibits to produce his 24-page memorandum decision and his 26 pages of formal findings, as required by CR 52(a)(1). These findings pertain to the crucial factual issues of control and independence that are considered in determining whether one is an independent contractor. *Hollingberry v. Dunn*, 68 Wn.2d 75, 80, 411 P.2d 431 (1966); WAC 415-02-110. Because Judge Hickman reviewed a massive amount of testimony and documents, weighed the evidence, and decided the facts, the substantial evidence standard should apply here.

King County contends that the Court should review “*de novo*” the trial court’s findings because the trial was based on a written record without live testimony. Br. 33, citing *PAWS v. UW*, 125 Wn.2d 243-252, 884 P.2d 592 (1994), a public records act case where the statute specifically requires “*de novo* review.”<sup>8</sup> There is no statutory requirement concerning the review here. In this case, the trial court had to weigh a large amount of documentary evidence and “conflicts [had to be] resolved,” making the substantial evidence standard apply here. *Rideout*,

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<sup>8</sup> The County also cites *State v. Neff*, 163 Wn.2d 453, 181 P.3d 819 (2008), which applied the substantial evidence test. *Id.* at 462.

*supra*, 150 Wn.2d at 351.<sup>9</sup> And, as in *Rideout*, *id.* at 352, the County could have requested “live” testimony, but it expressly refrained. CP 6469. The Court should thus determine whether the findings are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 59 Wn.2d 570, 575, 343 P.2d 183 (1959).

Whatever the standard of review, the County must establish that the findings are erroneous. *Estate of Lint*, 135 Wn.2d 518, 531-33, 957 P.2d 75 (1998). Otherwise, there would be no point to CR 52(a)(1), which requires findings. *Groff v. DLI*, 65 Wn.2d 35, 40-41, 395 P.2d 633 (1984); *Federal Signal v. Safety Factors*, 125 Wn.2d 413, 422, 444-45, 886 P.2d 172 (1994); *Marriage of Stern*, *supra*, 68 Wn.App. at 928-29.

### ARGUMENT

**I. THE SUPERIOR COURT CORRECTLY FOUND THAT THE PUBLIC DEFENSE AGENCIES ARE ARMS AND AGENCIES OF KING COUNTY, WHICH IS A PERS EMPLOYER.**

**A. *The Superior Court Correctly Applied PERS and Rejected King County’s “Legislative Act” Argument – for Which the County Has No Authority – Because the Public Defenders Must Be Enrolled In PERS if the Public Defense Agencies Are Effectively Arms and Agencies of the County.***

The trial court determined that “[t]he public defense agencies are functional equivalents (alter egos) of King County and each is an arm and

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<sup>9</sup> *Cf. State v. Rowe*, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980), where the Court reviewed the findings de novo when they were based on two short documents, a stipulation and the prosecutor’s standards, which the Court could easily review.

agency of King County.” App. 37, CL 3. Without citation to any authority the County contends that the trial court erred because it “has not passed an ordinance or taken legislative action that would establish the corporations as County executive departments.” Br. 47; see also p. 58. And, also without citing to any authority, the County contends the actual substance of the arrangement is irrelevant and all that matters under PERS is the agencies’ corporate form.<sup>10</sup> Br. 14-32, 41, 45-47, 49, 52-58.

The Superior Court did not err in rejecting the County’s corporate-form-is-everything approach. It correctly applied long-standing principles that were incorporated into PERS by the Legislature. In Laws of 1997, Ch. 254, §1(2), the Legislature expressly adopted both the “long-standing common law of the State of Washington” and the “long-standing department of retirement systems’ interpretation of the appropriate standards to be used in determining employee status.” The PERS statute, RCW 41.40.010(22), was thus amended to incorporate the fact-based common law test for determining whether a worker is an “employee” under PERS (Laws of 1997, Ch. 254, §10):

“Employee” or “employed” means a person who is providing services for compensation to an employer, unless the person is free from the employer’s direction and control over the performance of

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<sup>10</sup> The County says the Superior Court held the public defense agencies are “de facto public agencies.” Br. 45. Neither the public defenders nor the Superior Court ever used the term “de facto County agencies,” a phrase that is not part of the standards and terminology of PERS. The County misstates the decision apparently in order to refer to some irrelevant case law concerning “de facto officers.” Br. 45, 55. Those cases have nothing to do with PERS.

work. *The department shall adopt rules and interpret this subsection consistent with common law.* (Emphasis added.)

DRS's WAC 415-02-110(2)(c) follows common law, stating that contract documents showing an intent to have an independent contractor relationship *are not controlling*.<sup>11</sup> It is the substance of the arrangement, not the forms and labels, that controls.<sup>12</sup>

The pertinent DRS interpretation is indeed "long-standing," as the Legislature said in 1997 (Ch. 254, § 1(2)). In AGO 1955-57, No. 267, the Attorney General agreed with DRS that the employees of a nonprofit corporation (Associated Students of the University of Washington or "ASUW") were eligible for PERS membership because, due to the "degree of supervision and control" the University had the ability to exercise, the nonprofit corporation was in effect an "arm and agency" of the University of Washington, an eligible PERS employer. App. 36-37, FF 107; CP 2211-14. DRS has continued to apply this administrative interpretation of PERS.<sup>13</sup>

The Attorney General's AGO 1955-57, No. 267, gave the

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<sup>11</sup> DRS interpreted the term "employee" to encompass the common law of employment relationships prior to the 1997 statute. DRS was correct because even without the 1997 statute the common law meaning is incorporated into the term "employee." *Marquis v. Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996); *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 323 (1992).

<sup>12</sup> See pp. 31-33 *infra*.

<sup>13</sup> For example, in a December 1990 PERS eligibility decision, DRS found that employees of a nonprofit corporation, the Washington State University Bookstore, were correctly enrolled in PERS because the corporation was an "arm and agency" of Washington State University, an eligible PERS employer. App. 37, FF 108.

Legislature notice of DRS's administrative interpretation, and thus if the Legislature does not act to overturn it, there is legislative acquiescence in the administrative interpretation.<sup>14</sup> *Bowles v. DRS*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993); *Longview Fibre Co. v. Cowlitz Co.*, 114 Wn.2d 691, 698, 798 P.2d 149 (1990) (reenactment of statute).

Here, the Legislature did not merely acquiesce, it affirmatively adopted DRS's administrative interpretation as its own when it amended the PERS statute in 1997 to clarify the definition of "employee."<sup>15</sup> Laws of 1997, Ch. 254, §§ 1(2), 10 (amending RCW 41.40.010(22)). Thus, the Legislature adopted DRS's "long-standing" administrative interpretation that employees of a nonprofit corporation are public employees to be enrolled in PERS when a nonprofit corporation is an arm and agency of a PERS-eligible employer. The Legislature also reenacted the statute

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<sup>14</sup> This Court also gave notice to the Legislature that a nonprofit corporation may be "an arm and agency of the State" when it agreed with the Attorney General's opinion (AGO 1955-57 No. 267) that the nonprofit corporation (ASUW) was an arm and agency of the University. *Good v. Associated Students*, *supra*, 86 Wn.2d at 97. There, students argued that the corporation was not an arm and agency of the State because "the University has in fact never initiated, altered, or terminated any ASUW activity or program or position." 86 Wn.2d at 99. The Court agreed with the Attorney General that the University had sufficient control over the ASUW to be make it an arm and agency of the University because the Regents could theoretically overturn ASUW actions, although it never happened in practice. 86 Wn.2d at 97-99.

<sup>15</sup> The 1997 PERS amendments were prompted by the King County practice of using third-party intermediaries to pay County employees. This practice was the subject of litigation, *Clark v. King County*, some of which was before DRS. DRS Examination 96-20, filed in this record (CP 2200-2209), found in an audit that workers paid by the County through agencies were County employees whom the County should have enrolled in PERS. CP 2208-10. The County was required to enroll hundreds of "contract workers" in PERS. CP 141, 352-53.

defining “employer,” which was construed in AGO 1955-57, No. 267 (CP 2211-14), to include not only the State, but also “any political subdivision of the State.” RCW 41.40.010(4)(a).<sup>16</sup>

The Legislature *again* ratified DRS’s interpretation in Laws of 2002, Ch. 155, §§1-2; RCW 49.44.160 and .170.<sup>17</sup> This statute requires that public employees receive employee benefits, such as PERS benefits, based *not* on “labels,” “contracts,” or forms, but on their “actual work circumstances.” The Legislature stated that, for all public employee benefits in Washington, the term “public employer” should be defined “consistent with common law.”<sup>18</sup> RCW 49.44.170(2)(c) provides:

“Public employer” means: (i) Any unit of local government including, but not limited to, a county, city, town, municipal corporation, quasi-municipal corporation, or political subdivision; and (ii) the state, state institutions, and state agencies. *This definition shall be interpreted consistent with common law.* (Emphasis added.)

The Oregon Court of Appeals followed the same approach as DRS in *Public Employees Retirement Bd. v. City of Portland*, 684 P.2d 609 (Or.App. 1984), holding that the employees of a nonprofit corporation

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<sup>16</sup> RCW 41.40.010(4)(a) defines “employer” as “every branch, department, agency, commission, board and office of the state, [and] any political subdivision . . . of the state admitted into the retirement system.”

<sup>17</sup> The legislative history of the 2002 Act refers to the *Clark* case against King County discussed above, p. 16 n. 15. See *Mader v. HCA*, 149 Wn.2d 458, 475 n. 8, 70 P.3d 93 (2003).

<sup>18</sup> The Legislature also defined “employee” with respect to all public employee benefits the same way as it was already defined in PERS, again requiring that “employee” be “interpreted consistent with common law.” RCW 49.44.170(2)(a).

were eligible for Oregon's PERS. The Court found that the employees of the nonprofit corporation are eligible for PERS when, as a functional matter, it is an agency of an eligible PERS employer. The Oregon court found a nonprofit corporation was performing a City function and the City had a "degree of control." Therefore, the nonprofit corporation was an alter ego of the City. 684 P.2d at 610-11.

The Oregon Court of Appeals further held that *no* "legislative action" is necessary to specifically make a nonprofit corporation "fit the statutory definition of 'public employer.'" That argument was precisely the trial court error that the Court of Appeals reversed. *Id.* at 610-11. The Court held the question was *not* whether a nonprofit corporation itself met the statutory definition of "public employer," *id.*, but whether that nonprofit corporation was in *fact* an "instrumentality" or "alter ego" of a "public employer," the City. This determination is based on the factors concerning the City's control over the nonprofit corporation, the purposes of the corporation, and the City's funding. *Id.* at 611. And the Court specifically held that even though the corporation was "free of the City's control on a day-to-day basis," that freedom did *not* make it "separate" from the City. *Id.*<sup>19</sup>

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<sup>19</sup> The County erroneously distinguishes the *City of Portland* case on the basis that the Oregon PERS statute "apparently recognizes an alter ego" of a public agency. Br. 49. But the Oregon Court of Appeals applied the Oregon PERS statute's definition of "employer" that was then virtually the same as Washington's. The Oregon Court of Appeals applied common law principles under which the Court looks to the substance of the relationship, not just its form, in finding that the nonprofit corporation was actually in effect a City agency.

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Therefore, the Superior Court correctly rejected the County's "legislative act"/"corporate form" argument because it is contrary to DRS's "long-standing" administrative interpretation and to the common law principles statutorily incorporated into PERS in 1997 (and again in 2002). The public defenders are thus eligible for PERS benefits when as a functional matter the nonprofit public defense agencies are arms and agencies of a PERS employer, King County. 1955-57 AGO, No. 267 (ASUW); *City of Portland, supra*.<sup>20</sup>

***B. The Superior Court Correctly Found that the Public Defense Agencies Are Effectively Arms and Agencies of the County Because They Are Thoroughly Integrated Into the County and Are Subject to County Control.***

Judge Hickman concluded as a matter of law that the "public defense agencies are the functional equivalents (alter egos) of King County and each is an arm and agency of King County." App. 37, CL 3. The evidence showed that the agencies and the public defenders are thoroughly integrated into King County's budget and other systems and that the County can and does exercise extensive control over the agencies.

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The County also argued below that the Oregon PERS statute was different because it referred to "instrumentalities." CP 2541. The plaintiffs pointed out, however, that the term "instrumentalities" was added by the Oregon Legislature *after* the Court of Appeals decision to conform the statute to the Court of Appeals decision. CP 7155-56.

<sup>20</sup> Although the County contends that no nonprofit corporation can ever be an arm and agency of a PERS employer without a "legislative act" (Br. 45-47, 49), it inconsistently does not argue that the Attorney General was wrong in AGO 1955-57, No. 267, nor that the Oregon Court of Appeals was wrong in the *City of Portland* case. Br. 47-50. Instead, the County tries to distinguish them on their facts without describing the facts here.

Indeed, King County exercises control over, and has the ability to control, the agencies and public defenders in so many ways that no summary like this can adequately describe it.<sup>21</sup>

In a nutshell, the County treats the public defense agencies “as if they are County agencies or subagencies and the County acts like an employer and treats the plaintiffs as employees.” App. 34-35, FF 100. Judge Hickman compared the King County public defenders to the defenders in the Pierce County Department of Assigned Counsel, who are in PERS. Judge Hickman expressly found that the “difference between Pierce County’s Department of Assigned Counsel and the King County public defense agencies is a matter of corporate form because the public defense agencies are incorporated as nonprofits, while Pierce County’s Department of Assigned Counsel is a recognized unit of County government.” App. 27, FF 73. And “[e]ssentially the public defense agencies perform administrative functions for the County, managing public defense for King County in the same manner as other agencies that are officially part of the County government, *e.g.* Department of Assigned Counsel in Pierce County.” App. 27-28, FF 75. Judge Hickman found that the King County public defense agencies’ daily operations are “not different from the operations of other King County agencies, including the

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<sup>21</sup> This is necessarily a very brief summary. The record is very extensive, consisting of over 6,000 pages that the Superior Court reviewed. The Superior Court distilled its decision into 26 pages of findings and a 24-page memorandum decision.

Prosecutor's office," which also have day-to-day operational independence. App. 27, FF 69.

King County's public defense agencies are integrated into the County's budget process, salary structure, and administrative procedures. For example, the findings show that the County treats the agencies as County agencies in its annual budget process. App. 9, FF 17. Indeed, "[t]his budget process for the public defense agencies is really no different than for any other public agency that submits a budget to the Executive and/or County Council. In fact, starting around at least 1989, the County used the same budget method for the public defense agencies that it uses for other County departments, agencies and division." *Id.* And if the County is undergoing a budgetary shortfall the County requires the agencies to undergo the same precise budget cuts as any other County agency. CP 628 (¶23).<sup>22</sup>

The County also provides all or virtually all of the agencies' funding, normally 95 to 98%.<sup>23</sup> CP 70, 89; App. 3-4, 23, FF 2, 60. "The County contracts with each agency annually and occasionally biannually,

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<sup>22</sup> The County says that it changed its funding model for agencies in 2005. Br. 26. All it did, however, was combine the four agencies into one agency for budget purposes. CP 648-52, 1283-84, 7246.

<sup>23</sup> Just as Pierce County's Department of Assigned Counsel also provides public defense services for the City of Tacoma, two of the public defense agencies here also provide public defense services for the City of Seattle. CP 659-60; CP 2644-48. There is thus nothing unusual about a county agency or county employees also performing public defense work for a local municipality. *Id.* King County administered public defense services for Seattle in its contracts with the public defense agencies through 2004. CP 5586.

using the same contract for each agency, and expressly defining them as an “agency” in the contract. App. 28, FF 77. “The contract price is predetermined by the County’s budget process the year before and is not a negotiated item.” App. 23, FF 61. The contracts are treated by the County as mere details; the agencies’ defense services are often performed without any contract (App. 10, FF 24) and the contract itself is presented to the agency’s board in a take-it-or-leave-it form. App. 23-25, FF 60-62. “The agencies lack any ability to engage in meaningful arms’-length bargaining with the County about the essential terms, such as benefits, because their only alternative to acquiescing to the County’s demands is to end their existence.” App. 23, FF 60.

In addition to treating the agencies like other County agencies, King County also treats the public defenders the same as other County employees (except for PERS benefits). The County exercises control over pay and benefits and “acts like an employer by setting pay rates and job classifications and by monitoring the agencies to assure that they adhere to these requirements” (CP 7093, FF 25, 28), by providing “the plaintiffs the same cost of living adjustment provided to other County employees, including prosecutors” (CP 7093, FF 28), and by setting the benefits that the plaintiffs receive through its budgets and contracts (CP 7094, FF 32).

And the County requires the agencies’ board members, lawyers and staff to comply with the County “Employee Code of Ethics,” which is consistent with the agencies being County agencies and the public

defenders being County employees. App. 24, FF 82. The County's "Employee Code of Ethics" would not apply to genuine independent contractors. CP 2935-36, p. 258:19-259:46.

The agencies and the public defenders are also part of the County Wide Area Network (WAN). They use County e-mail and have Electronic Court Record (ECR) access that is the same as the prosecutors and greater than the public and greater than outside attorneys whom the County selects to be on its Assigned Counsel Panel of attorneys to represent indigent defendants. The agencies and the public defenders are governed by the County Information Management Policies for County employees. CP 657-58, 1754.

The County provides the agencies and the public defenders with the equipment and supplies for their work either by giving them to the agencies, CP 3106, pp. 104:24-105:12; 2811, pp. 83:13-22, or by providing funds for the agencies to purchase or lease them as set in the County budget. App. 31, FF 85. The County also determines where the agencies' work is performed by requiring approval for office leases, CP 7100, FF 55, and by requiring that the agencies lease only the same type of space at the same rates that County agencies lease. CP 1738 ¶19.

Judge Hickman found the County had required the public defense agencies to not only discharge agency directors, lawyers, and board members, but also to replace them with individuals approved by the County. It made the agencies rewrite articles of incorporation, bylaws,

and contracts, renegotiate leases, and change employee policies and procedures. App. 15-19, FF 39, 41-52.

Judge Hickman found that the County's contracts with the agencies contain a number of provisions that "provide for control, not merely oversight, over the agencies and plaintiffs," "particularly when coupled with the other facts of control exercised by the County." App. 28, FF 76. Foremost among those contractual provisions is the "corrective action" procedure that authorizes the County "*to require the agency to make the changes to the agency's internal operations that the County deems necessary.*" App. 32, unchallenged FF 90 (emphasis added). And the evidence shows that the County used that power on many occasions, requiring the agencies to make changes that range from major to trivial. App. 32 (listing evidence for finding 77).

Judge Hickman also specifically found that "the agencies are not independent contractors for the purposes of this litigation due to the many restrictions and controls placed on them by the County" (App. 19-20, FF 54), including limiting the agencies to indigent public defense, prohibiting them from having any other sources of revenue, prohibiting them from having any affiliated entities (either nonprofit or for-profit), and requiring County permission for office leases. Such restrictions are not imposed on true independent contractors, but are consistent with being County agencies. App. 20-22, FF 55, 57 and 58; App. 64-66. "The County also does not allow public defense attorneys to do any other work,

paid or pro bono,” which would not be true for a genuine independent contractor. App. 20, FF 56.

The County asserts ownership over the agencies’ savings and reserves. CP 2233. Unlike a true independent contractor that can retain any savings from performing services at or below the budgeted cost, the County applies any savings by an agency to the next year’s budget by reducing the agency’s payments, just as it does with any other County agency. CP 1737-39 (¶¶17, 20).

Judge Hickman also found “there is no competition among the agencies for cases or market share[s],” as genuine independent contractors would have. App. 20, FF 56. He found that the “County exerts control over the agencies through its allocation of cases and assignment of cases to the public defense agencies.” App. 5, FF 9. “The County assigns the cases to each agency based on the type of case and market share (percentage of cases) that the County allocates to each agency for that type of case.” App. 6-7, FF 11. “The County-assigned percentages for each public defense agency is determined in the County’s annual budget process for County departments, divisions and agencies.” App. 7, FF 14. The County unilaterally makes these assignments. For example, “the County took six attorney caseloads from SCRAP, ACA and TDA and assigned them to NDA to keep its caseloads up. The agencies losing caseloads protested, but the County made the change anyway.” App. 7, FF 13.

The County states in its argument, without citation to anything in the record, that the agencies are “independent.” Br. 52-55. Instead, even though the entire trial was about independence versus control, the County cites three outside-the-record materials as supposedly proving “independence” – snippets from two agencies’ websites – and some remarks by Robert Boruchowitz to an ABA committee in 2003, in which he said he had never had a judge call him and tell him to fire an attorney. Br. 53. The County’s citation to outside-the-record materials is improper. *Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). Moreover, the supposed facts about “independence” recited on pp. 54-55 (the corporations have “independent boards,” “the County does not hire or fire managing directors,” etc.) are contrary to the record evidence and the trial court’s specific findings discussed above.

Similarly, to “prove” the lack of County control of public defense agencies and public defenders, the County goes outside the record to argue that the public defense agencies were not subject to budget furloughs. Br. 21, 40 and n. 28. This outside-the-record argument is wrong. King County unilaterally imposed the same “furlough” budget reduction on the public defense agencies that it imposed on the prosecutor’s office. And the County told the public defense agencies that the County furlough cuts would be restored if the Prosecutor’s furlough cuts were restored.<sup>24</sup> The

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<sup>24</sup> Anne Daly, the director of SCRAP, and Eileen Farley, director of NDA, provided declarations on the furlough change imposed by King County. Since the County has improperly referred to outside-the-record materials, the public defenders have filed a  
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County thus treated the public defense agencies as part of the County.

The trial court's extensive findings of fact and the voluminous evidence the trial court reviewed, which can only be briefly summarized here, provide ample support for its decision that the agencies are effectively King County arms and agencies.

***C. The Superior Court Correctly Rejected the County's Argument that Some Agency Autonomy Over Administrative and Personnel Matters Precluded Them from Being County Arms and Agencies.***

King County argues that the trial court erred because the "executive directors of the corporations, in conjunction with their boards, are responsible for day-to-day operations of the corporations," thereby precluding the agencies from effectively being part of the County. Br. 54.

Judge Hickman correctly rejected this argument for several reasons. App. 25-27, FF 64-69; App. 66 ("Control over day-to-day operations is secondary"); App. 62-66. He found (App. 25, FF 64):

The County also contends that for purposes of PERS it cannot be an employer of the plaintiffs and the plaintiffs cannot be County employees because it does not exercise day-to-day control over the agencies or the plaintiffs. *The Court finds that day-to-day control is not critical here for several reasons.* (Emphasis added.)

Actual day-to-day control by the County over the agencies is not required for the public defense agencies to be arms and agencies of the County under the principles incorporated into PERS. The UW Board of

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motion under RAP 9.11(a) for the Court to consider the above declarations which disprove the County's assertions. See further examples at p. 51 *infra*.

Regents did not have actual day-to-day control over the ASUW. 1955-57 AGO No. 267, CP 2211-14. Similarly, the City of Portland had no day-to-day operational control over the nonprofit corporation that the Oregon Court of Appeals found was an alter ego of the City of Portland. *City of Portland, supra*, 684 P.2d at 611. What matters is whether, *looking at all the circumstances*, the corporation is effectively an alter ego or agency of the government.

In addition, the public defenders have a constitutional and ethical duty to maintain complete professional independence. In *Polk v. Dodson*, 454 U.S. 312, 321-22 (1981), the US Supreme Court said:

[A] public defender [who is a County employee] is not amenable to administrative direction in the same sense as other employees of the State.... State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior... [citing a rule of professional ethics<sup>25</sup>].

[E]qually important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.

Due to the legally mandated independence of public defenders, courts consider a public defender “functionally an independent contractor” with respect to their work representing clients, while recognizing that public defenders are employees for purposes such as pay and benefits.

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<sup>25</sup> The US Supreme Court cited former DR 107(B), now RPC 5.4(c) (a “lawyer shall not permit a person who recommends, employs, or pays the lawyer [*i.e.*, King County] to render services for another [criminal defendants] to direct or regulate the lawyer’s professional judgment in rendering such legal services”).

*Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991). The New Jersey Supreme Court also applied a similar analysis when it concluded a municipal public defender considered a contractor could be an “employee” under a whistleblower statute. *Stomel v. City of Camden*, 927 A.2d 129, 139-40 (N.J. 2007).<sup>26</sup>

Accordingly, the Constitution and the legal profession’s ethical rules mandate that King County’s public defenders exercise a high degree of professional independence. And therefore the fact King County does not control the day-to-day performance of work does not mean the public defenders are not County employees or that the public defense agencies are not County arms and agencies.

The trial court considered the significance of professional independence by comparing the public defenders in King County to those in Pierce County. Judge Hickman found that they were essentially the same with respect to their internal operations with the only difference being corporate form (App. 27-28, FF 73, 75):

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<sup>26</sup> In *Stomel*, the New Jersey Supreme Court also said the following facts “are indicia of an employer-employee relationship” between a government and a public defender (*id.* at 140-41): “the City is required to provide a public defender”; Stomel’s “employment required him to represent clients assigned to him by the City, and to appear in court at designated times”; he “performed essentially the same duties for the City for approximately seventeen years”; “he was not free to choose his own clients on behalf of the City”; “he was required to submit written reports detailing his court sessions and duties performed”; and “the municipal court made appointments for indigent persons to meet with him.” The Supreme Court said the fact “the City chose to provide him a 1099 form, rather than a W-2 form, is merely a factor to be considered, and is by no means controlling.” *Id.* (quoting Appellate Division). The fact that the City had no control over his independent professional judgment in handling cases was not material in the context of a public defender. *Id.* at 137-41.

The difference between Pierce County's Department of Assigned Counsel and the King County public defense agencies is a matter of corporate form because the public defense agencies are incorporated as nonprofits, while Pierce County's Department of Assigned Counsel is a recognized unit of County government.

Essentially the public defense agencies perform administrative functions for the County, managing public defense for King County in the same manner as other agencies that are officially part of County government . . .

These findings are supported by undisputed testimony.<sup>27</sup> Pierce County's executive or administrative control over Pierce County's two public defense agencies and defenders and King County's control over King County's four public defense agencies and defenders is the same, while the independent panel attorneys and an independent law firm are quite different. App. 27-28 (FF 73, 75).

Judge Hickman also found that the autonomy in some internal operations that the King County public defense agencies have is "normal for recognized units of County government and does not distinguish the public defense agencies from other County agencies." App. 26, FF 67. The findings on this point are based on the undisputed testimony of Ricardo Cruz, the former Director of King County's Office of Human Resource Management. *Id.*, citing CP 2680-86. Judge Hickman found

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<sup>27</sup> App. 27-28 (listing evidence for FF 73, 75); App. 38-48. The testimony was by Raymond Thoenig, who has been a Pierce County public defender since 1988. Like the King County Office of Public Defender (OPD), the Pierce County Department of Assigned Counsel (DAC) screens individuals for eligibility for appointed counsel. Pierce County's DAC provides public defense services in superior court, juvenile court, district court and it also provides public defenders for the City of Tacoma. Pierce County's Conflicts Office is assigned cases that DAC cannot do because of disqualifying conflict of interest. CP 2643-45.

(App. 26-27, FF 68-69):

68. Cruz explained that the items of “independence” in operations relied on by the County as proving that the agencies were “independent contractors,” including who to interview for a job, questions to ask potential hires, the decision of hiring and/or promoting, appointment of supervisors, decisions regarding internal structure, reorganization and assignment of work duties, were also in fact normal for recognized units of county government. He testified that because of the decentralization for personnel matters within King County government, the actual County agency departments and divisions operate with little significant difference from the public defense organizations, including the fact that there is nothing unique about two of the public defense organizations having collective bargaining agreements, since about 80 to 85% of the County’s work force has collective bargaining agreements, including the prosecutor’s office which has an agreement covering deputy prosecutors.

69. The day-to-day operational independence of the public defense agencies is thus not different from the operations of other King County agencies, including the Prosecutor’s Office.

Accordingly, the fact that the County does not normally exercise control over the day-to-day operations of the public defense agencies does not distinguish them from other official County agencies, nor does it establish they are not arms and agencies of the County.

***D. The Superior Court Correctly Concluded That Labels and Paperwork Do Not Control the Issues Here -- What Matters is Substance, Not Form.***

The County has no contracts with the public defenders individually and the County thus relies on its contracts with the agencies stating that they are “independent contractors” (Br. 41), and it cites their incorporation

papers, 403(b) retirement savings plans,<sup>28</sup> and a few other documents. Br. 14-32. Applying the common law incorporated into PERS, the Superior Court found that these documents are not binding on the class and prove only that the agencies are organized as nonprofits, not that they are *in fact* independent (App. 19-20, FF 54):

The County contends that the agencies are nevertheless “independent contractors” as stated in the contracts. The County points to [various forms and paperwork]. These forms, however, are not binding and show only that the agencies are organized as nonprofit corporations, not that they are independent contractors, and the Court finds, based on the evidence, that the agencies are not independent contractors for purposes of this litigation due to many restrictions and controls placed on them by the County. They are the functional equivalent of a County agency or subagency and/or alter ego of the County.

The trial court is correct because under the common law the parties’ designation of their relationship as an “independent contractor” in contracts or other such forms is a factor as to intent, but the characterization is “immaterial” and “of no consequence” if the substance of the relationship shows that the independent contractor designation is erroneous.<sup>29</sup> DRS’s regulation also states that neither the parties’ intent to

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<sup>28</sup> The trial court found these “occasional and usually employee-funded forms of retirement benefits” are not a substitute for PERS. App. 36, 64, FF 106, 33.

<sup>29</sup> *Vizcaino v. Microsoft*, 97 F.3d 1187, 1197 and 1198 n. 13 (9th Cir. 1996) (employee benefit claim applying common law under Washington law and tax law), *modified en banc*, 120 F.3d 1003 (9th Cir. 1997), *cert. denied*, 524 U.S. 1098 (1998); *enforced by mandamus*, *Vizcaino v. U.S. District Court*, 173 F.3d 713 (9th Cir. 1999), *cert denied*, 528 U.S. 1105 (2000).

IRS Revenue Ruling 87-41, cited by the United States Supreme Court in *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 324 (1992), as a source for the common law standards on employee status in a pension case, also emphasizes that forms and

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have an independent contractor arrangement, nor a disclaimer of employee status, is controlling. WAC 415-02-110(2)(c). (*See also McSeveney* case, discussed *infra* p. 40.)

Accordingly, the Superior Court correctly concluded that the County's paperwork and forms do not control the issue here because the *substance* of the relationship shows that the public defense agencies are arms or agencies of King County and the public defenders are County employees for purposes of PERS. App. 19, FF 54.

***E. The Superior Court Correctly Rejected the County's Contention that the Agencies Could Spend the County's Budgeted Funds Any Way They Wanted.***

The County contends, as it did below, that the agencies are not arms and agencies of King County because once the four public defense agencies receive their budgeted funds, "each corporation could spend [the money] any way it wanted." Br. 43; *see also* Br. 26. (agencies have "operational discretion over how the funds will be spent"). Judge Hickman correctly found the argument that they "can manage their own monies as they see fit ... is illusory." App. 15, FF 33; *accord*, App. 9-14, FF 17-32.

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documents are "immaterial" in determining whether the worker is in fact an employee for benefit purposes (1987-1 Cum.Bul. 296, 298):

[I]f the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

The County's *single* record citation to challenge these findings, CP 5465, is to one conclusory sentence in David Hocraffer's declaration. He became the King County Public Defender in 2006 and his own conduct disproves the County's "spend the [money] anyway it wanted" argument. In 2007, the County decided mid-contract to provide additional funds to lower caseloads. The agencies wanted to apply the funds to lower caseloads in district court where they thought public defenders were most overworked, but King County *required* that the agencies apply the funds to lower caseloads in the juvenile practice area. CP 1748-49 (¶58), 2922 (pp. 203-04). Thus, the agencies had no discretion; they had to spend the funds the way the County wanted.

The County's conduct in 2007 is consistent with how the County has always treated the agencies. For example, the County's line-item budget detailed expenses for specific items like "postage \$13,221," CP 1737, and required that "the Agency shall apply funds received from the County under this contract in accordance with the approved Agency annual budget." CP 1737. And the contracts also expressly provide "that the funds provided to the public defense agencies are solely for the purpose of providing public defense services and cannot be used for any other purpose. The County relied on this provision in its action against NDA." CP 7106, FF 84. (NDA is discussed *infra*, pp. 36-38.)

King County enforced compliance with the County budgets by requiring that each public defense agency submit "monthly expenditure

reports tracking the line items in the approved budget” and “quarterly position salary reports tracking each attorney’s salary and each staff member’s salary as it had been approved in the County budget.” App. 10, FF 21; *see also* App. 31, unchallenged FF 87 (listing the many required reports). King County required the public defense agencies to obtain County permission before deviating from the budget, even to hire a human resource manager using the salary savings from a vacant deputy director position. CP 1737 (¶16). King County also required the agencies to obtain its permission for office leases, and it did not allow them to use the savings from a temporary sublease. CP 1738-39 (¶¶19-20). King County enforced its budget control with audits either by the County’s Executive Audit Services, or by OPD’s “site visits.” CP 1740-41 (¶¶25, 27), 2083-84, 2098, 2810 (p. 80:12-16), 2900 (p. 122:12-21). And if a public defense agency spent money on items or in amounts that were not expressly authorized by the County, King County required “corrective action.” CP 2081, 7107-08 (¶¶88, 90). The County also maintains that any agency savings belong to the County, not the agency. CP 2233.

Thus, the undisputed testimony of many witnesses with direct knowledge, together with contracts, site visit reports, and other contemporaneous documents, show that King County tightly controlled the four public defense agencies’ spending on salaries, cost of living raises, employer taxes, benefits, rent, equipment purchase or lease, reserve accounts, and specific overhead expenses. CP 7087-7112 and 7040-65 re

FF: 18, 21, 25-29, 31-32, 41, 50, 55, 84, 85, 87-88, 90. The agencies could not spend the County's funds any way they wanted; the agencies had to spend the money the way the County had budgeted it.

King County's high level of control over the agencies' spending was most dramatically illustrated by the County's response to NDA when NDA asked the County for permission to lease office space in Seattle. CP 645 (¶70), 2229 (¶6), 2983 (p. 18:13-19.1). The County denied approval because the space was nicer and more expensive than the County allows for its official departments and divisions. *Id.* NDA leased the space anyway, using savings. *Id.* Thereafter, the County audited NDA, using its Executive Audit Services division, which audits official County agencies. App. 16, FF 41. The audit found that NDA was not in compliance with the County's requirement for public defense because "in addition to leasing an office without County permission, NDA had set up a for-profit affiliate using a portion of its savings, and did not have a working board." *Id.* The County did not approve of NDA's expenditures and its lack of a working board. "NDA replaced its board, its for-profit affiliate returned the funds to NDA, and NDA ended its affiliation with the for-profit group." *Id.*

The County decided that NDA's response was inadequate because the management that had made those expenditures was still in charge of NDA and its funds, so the County brought suit to have a receiver appointed to replace the management or "alternatively, dissolution of

NDA and the return of any funds held by NDA to the County.” App. 16, FF 42. The County maintained in the litigation that NDA’s savings belonged to the County, not NDA. CP 2233 (¶13).

The County’s actions after the receiver was appointed confirm that it treated NDA as an arm and agency of the County because the County directed the receiver as though he was a subordinate County employee. App. 18-19, FF 49-50. The receiver was required to amend NDA’s bylaws in order to limit its purpose to solely provide public defense (App. 19, FF 52) and the County’s lawyer actually helped draft the language and approved the final change. CP 2237 (¶28). The receiver wanted to retain three of the existing NDA members, while adding new board members, but the County told the receiver to discharge them and so he did, replacing them with new board members approved by the County. CP 3132, p. 75-76. The receiver obtained the County’s permission before he did anything, including hiring executive director Eileen Farley, and he did everything that the County asked for. App. 17, FF 47.<sup>30</sup> The County thus required him to discharge managers and lawyers, obtain new board members that were satisfactory to the County, terminate or renegotiate

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<sup>30</sup> The County says that NDA repaid “misappropriated public funds.” Br. p. 14, n 10. This is not correct. The receiver’s repayment was reconciliation, the difference between payment for the number of cases King County budgeted for NDA and the number of cases King County actually assigned to NDA. CP 5428; accord, CP 3013 (p. 140:11-16), 3137 (p. 96:7-9), 5526-28. Reconciliation is normal and is functionally the same as the County’s requirement that its official agencies have to return unspent funds to the general fund, instead of retaining them for their own use.

NDA's lease, write and adopt new bylaws, and revise NDA's employee manual. App. 18-19, FF 49-52.

Accordingly, Judge Hickman correctly rejected the County's contention that the agencies could spend the County budget funds anyway they wanted.

**II. THE SUPERIOR COURT ALSO CORRECTLY CONCLUDED THE PUBLIC DEFENDERS ARE KING COUNTY EMPLOYEES FOR PURPOSES OF PERS DUE TO THE COUNTY'S CONTROL OR SHARED CONTROL OVER THE TERMS AND CONDITIONS OF THEIR EMPLOYMENT.**

**A. *The Superior Court Correctly Applied the PERS Statute and WAC In Finding that King County Was an Employer of the Public Defenders.***

In addition to looking at County control over the public defense agencies, the Superior Court looked at County control over the public defenders to determine if it exercised sufficient control to be an employer or joint employer of the public defenders, even if the agencies were genuinely independent and not arms and agencies of King County.

Judge Hickman examined the "entire relationship" between the public defenders and the County, as required by WAC 415-02-110(2)(a). He determined the "County is an employer of the plaintiffs and plaintiffs are County employees for the purpose of PERS." App. 34, FF 100; see also App. 38, CL 4.

The PERS statute defines an employee as one "who is providing services for compensation to an employer, unless the person is free from

the employer's direction and control over the performance of work." RCW 41.40.010(22). And the Legislature expressly stated that the definition "shall" be interpreted "consistent with the common law." *Id.* Under the common law, a determination of employee status is fact-intensive, not mechanistic, and requires review of "[t]he entire relationship." WAC 415-02-110(2)(a). And "no one factor is determinative." *Id.* at -110(2)(d).

The County incorrectly argues here that the only factor that matters is "the right to control the details of the employee's work, not only as to the result to be achieved, but also the means and methods by which the result is accomplished." Br. 38 (emphasis by County). The County says that "[t]o establish control, the principal *must exercise control over the physical conduct of the performance of the service.*" Br. 38 (emphasis added).

Under the common law "[t]he extent of control necessary for a professional to qualify as an employee is less than that necessary for a non-professional." *PEL v. CIR*, 862 F.2d 751, 753 (9th Cir. 1988), citing *James v. Commissioner*, 25 T.C. 1296, 1301 (1956).<sup>31</sup> Indeed, public

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<sup>31</sup> In *James*, the seminal case on the employment status of professionals, the Tax Court said (25 T.C. at 1301):

[T]he control over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional employees. Yet, despite this absence of direct control over the manner in which professional men shall conduct their professional activities, it cannot be doubted that many professional men are employees.

defenders have a constitutional and ethical duty to maintain complete professional independence in performing their work. *Polk, supra*, 454 U.S. at 321-22; see also *supra*, pp. 28-29.

In 2003 DRS applied the common law principles concerning independent professional employees when it determined a part-time municipal court judge with an outside law practice was a Kent “employee” for purposes of PERS. CP 2183, *In Re the Petition of Robert McSeveney*, (9/16/2003). DRS noted that McSeveney had “independence and discretion regarding work performed” -- *i.e.*, Kent could not control his day-to-day work due to his judicial independence. CP 2193 and n. 10. But this factor was “not sufficient to overcome the remainder of the actual circumstances of his services as Kent Municipal Court Judge.” *Id.* DRS thus determined Judge McSeveney was a Kent employee because “the Municipal Court was an integral part of the City’s business,” “Judge McSeveney was required to perform the work,” and the “Judge had no ‘risk’ or ‘profit’ in performing the job.” CP 2195; see CP 2193-95 for application of every factor in WAC 415-02-110.<sup>32</sup>

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<sup>32</sup> DRS decided that Judge McSeveney was a City employee despite “the clear language of the parties’ contract” designating him as an “independent contractor” (CP 2195):

Despite the clear language of the parties’ contract, which characterized the municipal judge as an independent contractor, the Kent Municipal Court Judge position does not clearly fit within the definition of independent contractor ... [o]n the contrary, the actual factors surrounding the judge’s employment during the subject period contradict this characterization.

See also *supra*, pp. 31-33 (contracts and paperwork do not control).

In addition to accounting for the public defenders' status as professional employees, the factors considered in this situation are not precisely the same as those considered in the traditional analysis of whether a worker is an independent contractor versus an employee. The public defenders are undisputedly *not* self-employed, nor are they in business for themselves. The County argues only that they are *employees* of "independent" corporations. Br. 41. But this "triangular" relationship of the County, the public defense agencies, and the public defenders differs from "the two-party relationship involving independent contractors." *Vizcaino v. U.S. District Court (Microsoft)*, 173 F.3d 713, 723 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (applying Washington law in employee benefit case).

In *Vizcaino* the Ninth Circuit said that even if "for some purposes a worker is considered an employee of the [third-party] agency," that does not end the inquiry. *Id.* at 723. The Ninth Circuit said that the district court had established a "false dichotomy" when it decided it must determine "*which* company is the worker's employer (Microsoft or the temporary agency)," rather than merely determining whether the workers were Microsoft employees under the common law. *Id.* (emphasis added).

This Court applied the same common law control test and held that juvenile court employees have "dual status" as both county and state employees. *Zylstra v. Piva*, 85 Wn.2d 743, 747-48, 539 P.2d 823 (1975). The Court said that the "juvenile court employees are hired, controlled,

and discharged by the judges of the court,” but are “compensated by the county.” *Id.* The Court thus concluded that *juvenile court workers are County employees for the purpose of wages and benefits, but State employees for the purpose of hiring and firing. Id.*

DRS also interprets the PERS statute to incorporate these “dual” or “joint” employer principles. In another situation involving King County, DRS decided that the County had a duty as a *joint employer* to enroll “contract workers” in PERS. DRS Examination No. 96-20, *Clark v. King County*, CP 2208-09. The workers in *Clark v. King County* were hired and supervised by Metro, but paid through third-party agencies. DRS concluded that even if “the workers were properly characterized as employees of the payroll service agency” *an “individual may be simultaneously employed by more than one employer” under “the concept of ‘dual employment’ or ‘joint employment[.]’”* CP 2208 (emphasis added), *citing NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117 (3rd Cir. 1982).<sup>33</sup>

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<sup>33</sup> In *NLRB v. Browning-Ferris*, which DRS cited, the Third Circuit explained the joint employer test (691 F.2d at 1122-23):

[A] finding that companies are ‘joint employers’ assumes in the first instance that companies are ‘what they appear to be’ – independent legal entities that have merely ‘historically chosen to handle jointly ... important aspects of their employer-employee relationship.’

In ‘joint employer’ situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in ‘single employer’ cases. As this Circuit has maintained since 1942, ‘[i]t is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers.’ *The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.* Thus,

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Based on these principles, DRS concluded that regardless of whether the workers were also considered employees of the agencies, King County was a “joint employer” responsible for enrolling the employees in PERS. CP 2208-09. The Legislature affirmed DRS’s interpretation of these common law principles in the 1997 legislation amending PERS. Laws of 1997, Ch. 254 §§ 1(2), 10; RCW 41.40.010(22).

Accordingly, the issue at trial was not whether the public defenders are employees of the public defense agencies *or* King County (as the County maintains, Br. 38-42), but instead whether King County is *an employer or a shared or joint employer* of the public defenders. And King County can be a joint employer of the public defenders for PERS, even if it were not the employer of the public defenders for *all* employment purposes. *Vizcaino, supra*, 173 F.3d at 723; *Zylstra, supra*, 85 Wn.2d at 747-48; DRS Examination No. 96-20, *Clark v. King County*, CP 2208-09; *NLRB v. Browning-Ferris Indus.*, 691 F.2d at 1122-23.

***B. The Facts Found by the Superior Court Show that King County Controls or Shares Control Over the Public Defenders’ Terms and Conditions of Employment.***

King County argues the plaintiffs and the Superior Court failed to address and examine the common law factors in WAC 415-02-110(2)(b) and it contends that the public defenders “are not under the County’s

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*the ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment. [Citations omitted; emphasis added.]*

direction and control as contemplated by WAC 415-02-110(2)(d).”

Br. 36, 38, 40. Actually, the County simply failed to designate a significant part of the trial record.<sup>34</sup>

King County’s argument that the Superior Court failed to examine the WAC factors is groundless because the public defenders submitted uncontroverted evidence addressing the exact questions set forth in WAC 415-02-110(2)(d) for determining whether the public defenders are “employees” of King County. The class submitted the detailed testimony of the agency directors and others, and this is summarized in an 11-page chart that specifically addressed the questions in WAC 415-02-110(2)(d) in the same format DRS uses. App. 38-48; CP 7309-10, 7327, 7337.

The facts in the public defenders’ chart were verified by former TDA director Robert Boruchowitz and Raymond Thoenig of Pierce County. CP 7248, ¶13, CP 7278 (chart). The chart is included in the appendix to this brief at App. 38-48. The facts summarized in the chart show that Judge Hickman was correct in finding that “King County is an employer and the plaintiffs are County employees for purposes of PERS.” App. 3, 4, FF 100. Indeed, although the permissible level of administrative control over the professional activities of public defenders is very limited as an ethical and constitutional matter (see *supra* pp. 28-29), the

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<sup>34</sup> Because King County challenges the sufficiency of the evidence, it was required to bring up all the evidence before the trial court. *St. Hilare v. Food Servs. of Am.*, 82 Wn. App. 343, 352, 917 P.2d 1184 (1996).

facts summarized in the chart, as well as the facts about County control discussed *supra* pp. 19-27, show that the County has exercised control at, or perhaps above, what is constitutionally permitted.

King County apparently realizes the weakness of its position here, so it argues the public defenders' "compensation is not set by the County, as it is for County employees." Br. 18. The County's argument is baseless because the public defenders' compensation *is* set by King County, and the County has set attorney and staff salaries since at least 1990. App. 11-13 (FF 25-31), CP 1739-40 (¶¶23-24), 1909, 1963-66. Judge Hickman thus found that King County "acts like an employer by setting pay rates and job classifications and by monitoring the agencies to assure that they adhere to these requirements." App. 11, FF 25. Indeed, the King County Public Defender explained that the classification and the pay for public defenders in King County are set by the County by ordinance to provide pay parity with prosecutors (CP 1274, 1476):

Funding in King County for attorney salaries is closely regulated by ordinance (statute) [Ordinance 9221]. The King County Code requires salary parity with the prosecutors. I have attached the "Kenny" scale, which is our mandated pay scale for attorneys. The "Kenny" scale is derived from a study produced by the Kenny Consulting Group for King County in 1988. This study described pay scales and a classification system for attorneys. This classification system continues to be in use in King County. We use the classification system in assigning cases.

See also App. 11-13, FF 25-28.

King County also incorporated into agency contracts a detailed line-item budget that sets "the salaries and benefits for each public defense

attorney and staff.”<sup>35</sup> App. 11, FF 18. And King County enforced compliance with the detailed budgets by requiring that each public defense agency submit “monthly expenditure reports tracking the line items in the approved budget” and “quarterly position salary reports tracking each attorney’s salary and each staff member’s salary as it had been approved in the County budget.” App. 10, FF 21; see also App. 31, (unchallenged) FF 87 (listing required reports).

King County’s control over the public defenders’ compensation is so pervasive that it required “corrective action” by one agency, SCRAP, because it had passed on to the public defenders a 2.3% cost-of-living allowance (COLA) for a few months when the final COLA authorized by the County at a later date was 2%. CP 1741 (¶27), 2081, 2084. The County said the agency was “not in compliance” because it did not “adjust for the overpayment” by “debit[ing]” the public defenders’ compensation.” *Id.* The County required the agency to institute “corrective action” to recover the “overpayment.” *Id.*

The County also argued below that public defenders received “increased salaries” after they “negotiated with OPD and lobbied the King County Council.” CP 2548. The situation here is thus no different from *Zylstra*, where the Supreme Court said the juvenile court workers were

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<sup>35</sup> Ordinance 9221 is still in effect and the agencies are required to follow it. App. 12, unchallenged FF 27; CP 7245, 2897 (p. 112). After the County became aware of this lawsuit, it deleted the detailed salary schedules from the contracts, but it continues to control the actual salaries under Ordinance 9221. CP 1739-40 (¶23).

“employees of the county for purposes of negotiated wages, including benefits” due to “wage negotiations with the Board of County Commissioners.” *Zylstra*, 85 Wn.2d at 748.

Accordingly, the trial court did not err in finding that King County was an employer of the public defenders because, along with all the other control it exercises over the public defenders, the County has extensive control over their pay and benefits, as the trial court found. App. 9, 11-14, FF 18-25, 32; *Zylstra*, *supra*, 85 Wn.2d at 747-48; DRS Examination No. 96-20, *Clark v. King County*, CP 2208-09; CP 2183-95, *In Re the Petition of Robert McSeveney*, (9/16/2003); *Vizcaino*, *supra*, 173 F.3d at 723; *NLRB v. Browning-Ferris Indus.*, 691 F.2d at 1122-23.

**III. THE SUPERIOR COURT’S FINDINGS ARE VERITIES ON APPEAL BECAUSE THE COUNTY FAILED TO SHOW THEY ARE CONTRARY TO THE EVIDENCE AT TRIAL.**

The Supreme Court Commissioner granted discretionary review pursuant to RAP 2.3(b)(4) because the County raised a “controlling question of law,” *not* issues of *fact*. Comm. Ruling, p. 3. The question of law is the “legislative act” argument discussed in the Argument (I.A) above (pp. 12-19).

Although King County states that “[t]he basic facts in this case are largely undisputed” (Br. 6), it assigns error to 45 findings. Br. 2-4. The County, however, fails to explain or argue why any of the 45 findings are not supported by the evidence, regardless of the Court’s standard of review of the findings (substantial evidence, clearly erroneous,

preponderance).<sup>36</sup>

Instead of making any effort to explain why the facts found by the trial court are contrary to the evidence, King County's brief simply recites the "facts" as it wishes they were, ignoring both the voluminous record and the findings of fact made by the trial court. Because King County's brief fails to "present the court with argument as to why specific findings of the trial court are not supported by the evidence," the Superior Court's findings of fact should be accepted as verities on appeal. *Estate of Lint, supra*, 135 Wn.2d at 531-33.

In *Lint*, just as in this case, the appellant challenged many findings of fact, but he did not explain why the findings were erroneous and what evidence in the record showed that they were erroneous. This Court held that the appellant has a duty not merely to assign error to findings, but also to explain why they are wrong. And since the appellant did not, the findings were verities on appeal (*id.* at 531-32):

Christian assigns error to all or part of 32 of the trial court's 82 findings of fact. Although he asserts that the assailed findings are not supported by substantial evidence, his counsel's presentation in his brief consists almost entirely of a statement of facts setting forth the appellant's version of the facts in substantial detail. Suffice to say that this statement of facts varies in significant respects from the facts found by the trial court....

Significantly, in the argument portion of his brief, appellant's counsel makes reference to only three of the trial court's findings

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<sup>36</sup> Civil Rule 52(a)(1) required the Superior Court to enter these findings. And this Court held the findings should include the material facts as well as the ultimate facts that resulted in the trial court's decision. *Groff v. DLI, supra*, 65 Wn.2d at 41-42.

of fact by number and he cites to relevant parts of the record in support of his argument against only two of the trial court's findings, findings 21 and 82. As a general principle, *an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument.* See RAP 10.3. For the most part counsel has not done this. (Footnotes omitted; emphasis added.)

Here, King County assigns error to 45 findings, but neither in its statement of facts nor its argument does it explain why they are contrary to the evidence in the record. As in *Lint*, the County's statement of facts is "a recital of [only part of the] evidence that the trial court heard and rejected." *Id.* at 531. And where the County does make factual arguments, such as on "control" and "independence," it almost completely has to go outside the record. What King County has done and failed to do in its brief is within the core of what this Court held was improper in *Lint*.

King County asserts, for example, that the four King County public defense agencies are "independent," because they have "boards of directors that were not controlled in any fashion by the County" (Br. 49),<sup>37</sup> and the agencies' "independence...has... been maintained in practice because...they have their own articles of incorporation and bylaws confirming their independent nonprofit status." Br. 54.

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<sup>37</sup> The County's brief repeats these arguments in several places, *e.g.*, p. 15 ("The County does not direct or participate in the election of board members."), p. 54 ("The Boards hire their respective executive director and set the terms and conditions of his or her employment.").

But this argument “varies in significant respects from the facts found by the trial court.” *Lint* at 531. Indeed, the County’s arguments were rejected in the trial court’s decision and findings of fact and disproved by the overwhelming weight of the evidence in the record. App. 15-25, FF 39, 41-43, 46-47, 49-50, 52, 61-63, App. 65-67, 69-70, 73; CP 6662-63, 6666 (Mem.). The County has failed to argue why these trial court findings are wrong and supposedly not supported by the evidence; it instead simply ignores the findings and makes its assertions of agencies’ “independence” *without* record citations. Br. 49, 52-57.

King County slightly quarrels with only five findings, but for none of these does the County cite relevant parts of the record. *Lint, supra* at 531. It says that FF 9, 17, 25 and 34 are actually “conclusions” because they say “that King County exercised ‘control’ over the corporations’ employees.” Br. 33.

But actually “control” or the ability to control is an issue of *fact* for the trial court in deciding whether King County was acting as employer of the public defenders or whether the public defenders and agencies are independent contractors. *Hollingberry v. Dunn*, 68 Wn.2d 75, 80, 411 P.2d 431 (1966) (case cited by County at Br. 36); DRS WAC 415-02-110. Control is not an issue of law. Thus, these findings are on matters of fact – the County exercises control in many ways, including allocation of cases among the public defense agencies, assignment of individual cases, budget process the same as for all other County departments and agencies,

setting pay rates and job classifications in parity with County prosecutors, monitoring agencies to enforce its pay rates and job classifications, audits, and the power to dismember the public defense agencies. CP 7090-91, 7093, 7095, FF 9, 17, 25, 34.

Moreover, in addition to using the *word* “control,” each of the four findings also contains substantial detailed findings of fact. *Id.* King County fails to argue why those facts in those findings are not supported by the evidence, and it fails to cite any part of the record to challenge the facts in any of these findings. Br. 33. King County’s quarrel with these four findings should thus be rejected. *Lint, supra* at 532; *Hollingberry, supra* at 80.

King County also argues that finding 8 that “King County’s public defense system is unique in the nation . . .” (App. 5, FF 8) is wrong. King County does not cite any record evidence to show that the finding is erroneous. Rather, it seeks to disprove the fact with an outside-the-record report. Br. p. 41 and n. 30. This is improper under RAP 9.11, 10.3(5) and (6). *Recall of Feetham, supra*, 149 Wn.2d at 872.

Moreover, the record evidence shows that King County *is* “unique.” In fact, King County introduced this evidence. CP 4095. The class concurred. CP 664 (¶89), 668. The trial court’s finding number 8 is also precisely the same as the County’s proposed finding. CP 7349.

Because the County has not made any effort to show that any of the Superior Court findings are erroneous, the findings of fact should be

considered verities on appeal. *Lint, supra*, 135 Wn.2d at 531-33.

**IV. KING COUNTY'S "PARADE OF HORRIBLES" IS GROUNDLESS BECAUSE IT IGNORES THE SUPERIOR COURT'S FACT-BASED DECISION AND IT MISSTATES THE TEST APPLIED BY THE SUPERIOR COURT.**

**A. *Employees at the Salvation Army and the Boys and Girls Club are Not Eligible for PERS Under the Superior Court's Fact-Based Decision.***

Lacking both legal authority for its position and facts that would show the trial court's findings are wrong, King County resorts to a "parade of horrors" that will supposedly flow from the Superior Court's decision. The County thus argues that employees at "Boys and Girls Clubs of Snohomish County, ... Providence Everett Medical Center, Salvation Army, and the Tulalip Tribes" will all become eligible for PERS under the trial court's decision (Br. 57 n. 41); indeed, "virtually any employee of government contractors would become PERS eligible" and this will "literally bust state and local budgets." *Id.*, pp. 1-2, 45, 56.

King County's parade of horrors is groundless because not only is it based on misstating the trial court's test (see *infra* pp. 55-58), but it also ignores the trial court's extensive *factual findings* showing King County's control over the public defense agencies, facts which are plainly not present between Snohomish County and the Salvation Army or the Boys and Girls Clubs. For example, unlike King County, Snohomish County has not functionally integrated the Salvation Army into Snohomish County so that they are treated the same as other County agencies; Snohomish County does not treat the Salvation Army employees

as Snohomish County employees by, among other things, setting the pay and benefits of the Salvation Army's entire workforce; Snohomish County does not place restrictions on the Salvation Army to ensure that its sole (or virtually sole) source of revenue is Snohomish County; Snohomish County does not have the power to replace the Salvation Army's board members, rewrite its articles of incorporation, and ultimately dismember the organization.

Accordingly, Snohomish County certainly does not need to enroll employees at the Salvation Army and Boys and Girls Clubs in PERS because Snohomish County is very far from controlling those organizations when compared to Judge Hickman's findings detailing King County's control over the public defense agencies. Moreover, Pierce County public defenders are also enrolled in PERS as Pierce County employees, CP 2647 (¶17), and other Washington counties also recognize their public defenders as county employees. CP 2223. There is thus nothing in the record showing that any county other than King County is avoiding its PERS responsibilities by using County-controlled intermediaries to pay public defense employees. Indeed, the trial court found based on undisputed evidence that King County's public defense system is "unique." App. 5, FF 8.

Although King County's system is "unique" the County contends that the trial court erred because it is only exercising oversight that state law supposedly "mandates." RCW 10.101.060 (enacted 2005); Br. 43.

But nothing in that statute (or in RCW 10.101.030) mandates any specific standard<sup>38</sup> and neither statute, for example, even mentions compliance with any government's "Employee Code of Ethics." RCW 10.101.030, 10.101.060; *cf.* Br. 43. Moreover, nothing in either statute requires or allows the County to fire any real independent contractor's managers, lawyers, and board members, to require the agencies to rewrite articles of incorporation and bylaws, or "require[s] the agency to make the changes to the agency's internal operations that the County deems necessary." App. 32, unchallenged FF 90. There is also nothing in either statute that authorizes or requires the County to thoroughly integrate the public defense agencies and the public defenders into the County's operations, for the purpose of budget, pay, benefits and administration, while excluding them from PERS. Indeed, the County's "mandate" argument is baseless as shown by the fact that there is nothing in the record showing

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<sup>38</sup> RCW 10.101.060 conditions eligibility for funds on either meeting indigent defense standards "endorsed by the Washington state bar association" or using the funds to improve "public defense services, including...a legal representation plan that addresses the factors in RCW 10.101.030." RCW 10.101.030 requires governments to adopt standards on listed topics for public defense, but it does not require any particular standards and it describes the Washington State Bar Association (WSBA) standards as "guidelines." *Id.* The WSBA standards have not been incorporated by reference into Washington statutes. *State v. ANJ*, Supreme Court No. 81236-5, filed January 28, 2010, slip op. at 23. If King County is claiming that RCW 10.101.030 or .060 "mandates" that King County comply with WSBA standards, King County has ignored such "mandates" when it wants to. The WSBA standard on compensation for public defense attorneys and staff states "compensation **and benefit levels** should be comparable to those of attorneys and staff in prosecutorial offices in the area." Standard One (emphasis added), WSBA, Standards for Public Defense Services (January 1990), and Standards for Indigent Defense Services (September 20, 2007). Benefits include pensions, and King County has not complied.

other counties operate in the same manner as King County. The Court should thus reject the County's parade of horrors because it ignores the *factual basis* for the trial court's decision.

***B. The Superior Court's Test Focused Primarily on Control; King County is Simply Making Up What It Calls "the Trial Court's Test."***

King County creates its "parade of horrors" by concocting a two-part test that it just makes up by citing only a tiny piece of the findings, as though those were the only facts that mattered (Br. 45):

[T]he trial court's test for determining that the corporations were, in effect, County agencies was (1) the corporations carried out a public purpose, and (2) the corporations receive public financing to carry out that purpose. *See, e.g.*, CP 7088-89 (FF 1-3).

The County thus makes up the fictional "trial court's test" by referring to only three findings, on public purpose and public funding, while ignoring the extensive findings about control. *Id.* (ignoring FF 4-108). And the County argues that "[i]f the trial court's [two-part] test is allowed to stand, virtually every employee of the many contractors who routinely contract with all levels of government would become PERS eligible." Br. 45.

But rather than the County's fictitious two-part test, Judge Hickman applied the common law principles incorporated into PERS which focus primarily on *control*, and the ability to control, either the public defense agencies themselves or the public defenders directly or through the agencies. *See supra*, pp. 19-27. Judge Hickman's findings therefore almost all pertain to County control, and his memorandum

decision also focused on control. App. 63-70, 72-73.

Judge Hickman in his memorandum decision considered not two, but four factors used by courts to determine whether a nonprofit corporation is the “functional equivalent” of a public agency. App. 71. Those factors are: “(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of governmental involvement or regulation; and (4) whether the entity was created by the government.” *Id.*

The factors in the four-part test are similar to the factors considered by the Attorney General in AGO 1955-57, No. 267, and by the Oregon Court of Appeals in the *City of Portland* case, 684 P.2d 609. See *supra*, pp. 15-18. The factors are also similar to what the Attorney General and courts have used in other contexts in deciding whether a nonprofit corporation was an alter ego or functional equivalent of a public agency.<sup>39</sup> The trial court thus focused on the substance of the County’s

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<sup>39</sup> This approach has been used in a variety of other contexts. The Attorney General in AGL0 1171, No. 110, determined that a nonprofit corporation was subject to environmental laws governing state and local agencies because the corporation was the “alter ego” of a governmental agency. The Attorney General said that “[a]t first blush, it might appear that this organization is merely a private corporation and thus is not covered by the environmental impact requirement” of a statute governing state and local agencies. *Id.*, p. 3 (emphasis added). But “close examination of the relationship between this corporation and the Expo 74 commission [a governmental entity] leads us to conclude that the corporation serves, in effect, as an alter ego of the commission” because the commission was “perform[ing] certain of its functions though the vehicle of a nonprofit corporation.” *Id.*

In *Clarke v. Tri Cities Animal Care, Control Shelter*, 144 Wn.App. 185, 181 P.2d 881 (2005), the Court of Appeals determined that a nonprofit corporation was the functional equivalent of a public agency for purposes of the public records act.

(continued)

arrangement, not merely on the corporate form of the nonprofit corporations, in deciding whether based on the entire relationship the County has sufficient *control* over the agencies and the public defenders.

In addition to mischaracterizing the “trial court’s test,” King County’s parade of horrors is also based on erroneously stating that the public defenders seek an extensive “breadth of damages.” Br. 29, n. 11. The County is wrong because *no damages are sought*; instead, the public defenders seek “enrollment in PERS and an injunction,” just as the County stipulated below. CP 6478-79 and n. 1. And while there may well be a future order on omitted contributions, the sum of contributions, even with interest, is far less than the value of a PERS defined benefit plan. CP 143 (¶13).

King County’s parade of horrors argument is thus groundless because it ignores the factual basis for Judge Hickman’s decision, it misstates the test he applied, and it misstates the relief the public defenders seek.

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In *Champagne v. Humane Society*, 47 Wn.App. 887, 891, 737 P.2d 1279 (1987), a private nonprofit corporation, the Humane Society, was determined to be “essentially acting as a public entity” in performing animal control and thus it could assert the “public duty doctrine” as a tort defense as a municipal corporation even though it was “ostensibly a private corporation.” *Id.* at 891-92.

In AGO 2007 No. 6, the Attorney General determined that employees of a nonprofit corporation formed by the government were public employees eligible under LEOFF and PERS because otherwise “municipal corporations could escape their legal responsibilities to enroll fire fighter employees in the LEOFF system by forming a corporation and hiring fire fighters through the corporation.” *Id.* at 5.

**V. THE TRIAL COURT CORRECTLY REJECTED KING COUNTY'S AFFIRMATIVE DEFENSES.**

King County ends its brief with a hodgepodge of affirmative defenses, "collateral estoppel," "equitable estoppel," NLRB "exclusive jurisdiction," and NLRB "preemption," based on the same nonprofit corporation paperwork that the trial court rejected (App. 19, FF 54). Br. 59-64. King County's arguments are groundless. App. 69-71 (Mem.); App. 35-36, FF 105-06; App. 37, CL 5.

King County asserts that the NLRB has "exclusive jurisdiction" over the public defenders' PERS claim, but the NLRB has *no jurisdiction* over pension claims, for either private or public employers. 29 USC §§157, 158, 160(a) (NLRB jurisdiction is limited to unfair labor practices arising out of organizing and collective bargaining agreements). King County cites only an *unpublished decision*, *Larranga v. NDA*,<sup>40</sup> as purportedly showing the public defenders claim for PERS benefits is "preempted by federal labor laws." Br. 12, 63-64. But *Larranga* concerned a "legally deficient" claim that NDA's inability to retroactively grant pay increases to *former* employees under a collective bargaining agreement that did not cover them "*constitutes an unfair labor practice.*" *Larranga*, 2001 WL 133139 at \*1 (emphasis added). *Larranga* is irrelevant because there is no unfair labor practice alleged here, that case

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<sup>40</sup> The County implies a frivolous "collateral estoppel" exception to excuse its evasion of GR 14.1, which forbids citations to unpublished decisions such as *Larranga*. Br. 63-64.

did not involve pensions, the public defenders' pension claim here is against King County, not a public defense agency, and the public defenders' PERS claim is based on a state statute not a collective bargaining agreement.

Judge Hickman thus correctly decided that there was no NLRB "unfair labor practice" jurisdiction that preempted his jurisdiction to "decide whether or not a specific group of state employees should be considered public employees for purposes of receiving coverage under a state-provided pension plan (a/k/a PERS)." CP 6653 (Mem.), *citing Commodore v. University Mechanical*, 120 Wn.2d 120, 125-33, 839 P.3d 314 (1992).<sup>41</sup>

King County also argues that "the NLRB has concluded that the corporations are private, not public, entities" by certifying noncontested union elections for two of the agencies, TDA and NDA. Br. 64. King County's own evidence contradicts its argument. King County asked the NLRB for "[a]ny ALJ and NLRB decisions related to The Defender Association and Northwest Defenders Association" and the NLRB told the

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<sup>41</sup> In *Commodore*, the Supreme Court said that a state statutory claim is not preempted by federal labor law "if it could be asserted *without* reliance on an employment contract." *Id.* at 129 (emphasis added). Therefore, "[i]f nonunion employees can maintain a cause of action under a state statute or under common law without reference to an employment contract, then union employees should be afforded the same opportunity, *i.e.*, their state law claims should not be preempted." *Id.* at 130; *Accord, Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 864-65, 93 P.3d 108 (2004) (overtime claim under RCW 49.46 not preempted by federal labor law); *UFCW v. Mutual Life*, 84 Wn.App. 47, 51 (1996); *Ervin v. Columbia Distrib.*, 84 Wn.App. 882, 888-90, 925 P.2d 282 (1997); *Hanson v. Tacoma*, 105 Wn.2d 864, 867-71, 719 P.2d 104 (1986) (claim under City personnel rule not preempted by federal labor law).

County that there were “*None Issued.*” CP 6423 (emphasis added). Judge Hickman thus correctly decided that the NLRB had not decided anything (App. 36, FF 105):

NLRB election certifications did not decide whether attorneys and staff at TDA and NDA were public or private employees, nor whether TDA and NDA were public or private employers. The NLRB has not decided any jurisdictional issue or other issues relating to public defense agencies in King County.

King County also argues that the public defenders’ PERS claim is collaterally estopped by an unpublished reverse race discrimination action brought in 1994 by a lawyer against NDA, *White v. NDA*. Br. 12, 60. Again, the County makes a frivolous collateral estoppel argument to justify its reliance on an unpublished trial court order. The parties in *White* are different from the parties here. *Certified* class actions bind individuals who are in the class, but cases brought by individuals do not bind classes. There is no connection between *White* and the plaintiff class except their occupation, and there are no “identical issues” with *White*. The issue in *White* concerned one individual’s allegation of race discrimination against an agency and the issue here is a class action claim against King County for PERS benefits. Thus, the trial court in *White* did not consider the issue of whether White was eligible for PERS. There is thus no collateral estoppel. *Hadley v. Maxwell*, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001).

The last of the hodge-podge of affirmative defenses is that the class is “estopped under equitable principles” from bringing a claim for

PERS benefits. This is basically part of the paperwork defense the superior court rejected (see pp. 31-33, *supra*) because the public defense agencies submitted certain forms associated with their status as nonprofit corporations and some agencies created a 403(b) retirement plan, which is a nongovernmental retirement plan (primarily funded by employee contributions, if any).<sup>42</sup> Br. 60-61. The trial court also found as a factual matter that the public defenders were not estopped and did not waive their right to PERS benefits. Judge Hickman found<sup>43</sup> (CP 7110, FF 106):

Plaintiffs did not waive PERS benefits, nor are they estopped, by accepting occasional and usually employee-funded forms of retirement benefits. There is no evidence in the record of any knowing relinquishment by plaintiffs of a known right to PERS participation and no evidence supporting estoppel.

Therefore, the public defenders could not lose their right to enrollment in PERS by accepting the employment conditions in the agencies.

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<sup>42</sup> King County “effectively controlled” the benefits for the public defenders through budgets and contracts, and it did not provide adequate funds to establish a pension plan similar to PERS. FF 32, 33, App. 14. Health insurance premiums “almost entirely” used up the benefit funds provided by the County. *Id.* Some public defense agencies could not afford any retirement contributions and others made small retirement contributions to the public defenders – so small that one participant calculated she would draw \$22 to \$25 a month if she were to retire. CP 4707; FF 32, App. 14. The public defense agencies created employee-funded retirement savings plans, which Judge Hickman found were “not comparable to a PERS-type defined benefit plan.” FF 33, App. 14.

<sup>43</sup> Washington’s longstanding public policy also prohibits public employees from forgoing their rights in public employment whether through the employee’s acquiescence, acceptance of the unlawful treatment, choice to receive less pay, or even a written waiver -- any agreement or “choice” to accept less than statutorily required, even an express written agreement by a public employee, is void. *Malcolm v. Yakima School Dist.*, 23 Wn.2d 80, 83, 159 P.2d 394 (1945); *State ex rel. Pike v. Bellingham*, 183 Wash. 439, 446, 450-51, 48 P.2d 602 (1935).

## CONCLUSION

In King County courtrooms the judges, prosecuting attorneys, bailiffs, court reporters, and jail guards all receive retirement benefits in PERS, but not the public defenders. Rather than treat the public defenders the same as the recognized County employees for the purpose of PERS benefits, the County contends the public defenders work in the “private non-profit” sector. But the County exercises total control over the public defense system and the agencies, and public defenders in almost identical circumstances, such as the public defenders in Pierce County, are in PERS. Public defender Kevin Dolan thus brought this lawsuit to obtain PERS benefits.

The parties agreed to have Judge Hickman resolve the matter in a trial based on a voluminous record. Judge Hickman decided that the public defense agencies are County “arms and agencies” for the purpose of PERS due to the County’s extensive control. Judge Hickman also decided that public defenders are King County employees for purposes of PERS because the County controls or shares control over their terms and conditions of employment, particularly their pay and benefits. Judge Hickman supported his decision with findings of fact that detail the County’s control over both the agencies and the public defenders.

King County’s appeal fails to explain why Judge Hickman’s findings and conclusions are erroneous. Instead, the County treats its appeal as a new summary judgment proceeding, ignoring the evidence and

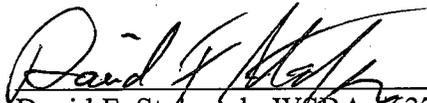
findings showing control, while it reargues the same facts concerning corporate form and agency independence over administrative matters that Judge Hickman rejected. But this is an appeal not a summary judgment proceeding, and the County has failed to show Judge Hickman's decision is erroneous. Indeed, Judge Hickman's decision is correct because he applied long-standing law to the record showing the County's control over the agencies and public defenders.

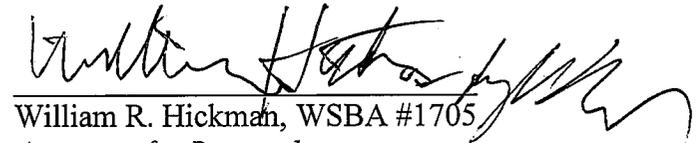
The Supreme Court should therefore affirm the Superior Court's decision and remand this action for further proceedings.

Respectfully submitted this 5th day of March, 2010.

BENDICH, STOBAUGH &  
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REED McCLURE

  
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CERTIFICATE OF SERVICE

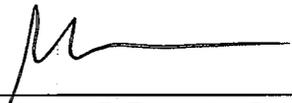
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Respondents' Brief and attached Appendix were filed with the Supreme Court in Olympia, Washington, by regular USPS mail, postmarked March 5, 2010.

I further certify that a copy of each document was served by USPS regular mail postmarked March 5, 2010 on counsel for Appellant:

Philip Talmadge  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188

I certify under penalty of perjury of the laws in the State of Washington that the foregoing is true and correct.

DATED: March 5, 2010, at Seattle, Washington.

  
\_\_\_\_\_  
Monica I. Dragoiu, *Legal Assistant*

NO. 82842-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

[Pierce County Superior Court No. 06-2-04611-6]

KEVIN DOLAN, *et al.*,

Respondents,

v.

KING COUNTY,

Appellant.

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**APPENDIX**

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## **ANNOTATED FINDINGS**

**Filed In the Trial Court  
Updated with CP Citations**

**The Findings are as edited by Judge Hickman and omit  
the text he deleted. The original Findings numbers are retained.  
Original Findings are at CP 7087 – 7112.**

### **NATURE OF THE CASE**

The plaintiff Kevin Dolan is a King County public defense attorney. He brought this class action lawsuit against King County on behalf of the lawyers and the staff of the King County Public Defense Agencies. The Court certified a class defined as:

All W-2 employees 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.

Dolan and the class (collectively, plaintiffs) contend that King County breached its duty to enroll them in the Public Employees Retirement System (PERS) and failed to make the required PERS contributions to the Department of Retirement Systems (DRS). King County denied liability and denied that Dolan and the class were due any damages.

The parties agreed on the procedure and the Court thus ordered that this class action would be addressed in phases, first liability and later, if liability is found, relief will be addressed in the second phase. The

parties and the Court agreed that the liability phase would be addressed by cross-motions for summary judgment and, if liability could not be determined on these motions, the case would be tried by the Court.

The parties filed cross-motions for summary judgment on liability supported by written evidence in the form of deposition testimony and exhibits, and declarations and exhibits. The Court denied the parties' cross-motions because material facts were in dispute.

The parties filed a joint motion for reconsideration or alternatively for the Court to try the liability phase of the case on the evidence submitted by the parties in support of summary judgment. The Court denied reconsideration, but agreed to try the case on the existing summary judgment record, as requested by the parties.

In this trial on the record, the Court reviewed a very large and comprehensive body of evidence, consisting of about 6,000 pages of testimony and exhibits. The County submitted about 1,400 pages of deposition testimony from 11 witnesses and declarations from 7 witnesses. Those depositions and declarations incorporated about 2,700 pages of exhibits. The plaintiffs submitted declarations for 10 witnesses with nearly 2,000 pages of exhibits.

The Court heard opening statements on November 3, 2008 and closing argument on November 10, 2008. The claim tried by the Court is

whether plaintiffs are King County employees within the meaning of PERS. The Court issued a written decision on February 9, 2009, finding that plaintiffs are King County employees for the purpose of the PERS statute.

The Court is now issuing findings of fact and conclusions of law under CR 52(a)(1) and CR 65(d) to set forth the material facts on which the February 9, 2009 decision and the permanent injunction are based.

[The following Findings are as edited by Judge Hickman and omit the text that he deleted. The original Finding numbers are retained.]

### **FINDINGS OF FACT**

1. King County has a mandatory constitutional and statutory duty to provide indigent defense. The four King County public defense agencies – The Defender Association (TDA), Associated Counsel for the Accused (ACA), Society of Counsel Representing Accused Persons (SCRAP), and Northwest Defenders Association (NDA) – all perform this governmental function for King County.

SUPPORTING EVIDENCE: CP1284-85 (Boruchowitz Dec. ¶¶54 & 55); CP 1733 (Daly Dec. ¶¶5, 7), CP1736 (Daly Dec. ¶13) CP1749 (Daly Dec. ¶¶59, 60); CP 4544-4611 (Chapman Dep. Ex. 88) (Bates No. 14319); CP 626 (Chapman Dec. ¶14), CP663 (Chapman Dec. ¶127).

2. The agencies receive all or nearly all of their funding from King County.

SUPPORTING EVIDENCE: CP 1285 (Boruchowitz Dec. ¶56); CP 625-26 (Chapman Dec. ¶¶13), CP 660-61 (Chapman Dec. ¶¶117-119), CP 663 (Chapman Dec. ¶127); CP1733 (Daly Dec. ¶4), CP 1745 (Daly

Dec. ¶39); CP 2232-33 (Farley Dec. ¶12), CP 2237 (Farley Dec. ¶26), CP2238 (Farley Dec. ¶33); CP2882 (Daly Dep. pp. 51:16-52:18); CP 2984 (Farley Dep. p. 25:8-19).

3. The public defense agencies were effectively created by the government to serve the government in providing indigent legal representation. They were organized as nonprofit corporations with the limited purpose of providing indigent public defense because the County required them to be nonprofit corporations with that limited purpose.

SUPPORTING EVIDENCE: CP 625-26 (Chapman Dec. ¶13), CP660-61 (Chapman Dec. ¶117-119); CP2232-33 (Farley Dec. ¶12), CP2237 (Farley Dec. ¶26); CP1733-34 (Daly Dec. ¶4-7); CP 2884 (Daly Dep. p. 60:6-12).

4. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), TDA was created as a nonprofit corporation in 1969 to organize indigent public defense by the City of Seattle and the federal government through the federal Model City program. Initially, TDA was the County's sole public defense agency.

SUPPORTING EVIDENCE: CP1267-68 (Boruchowitz Dec. ¶¶7, 8).

5. ACA was established as a King County public defense agency in 1973, and started providing public defense services that year.

SUPPORTING EVIDENCE: CP 624 (Chapman Dec. ¶9).

6. SCRAP was created in 1976, at the County's request, to provide representation in juvenile cases and it started providing those services in 1976.

SUPPORTING EVIDENCE: CP 1733 (Daly Dec. ¶6); CP 2884 (Daly Dep. p. 60:6-12).

7. NDA was created for the County during the County's 1987 budget process. NDA was added as a public defense agency by the County in 1987, during the County's budgetary process for the 1988 budget. The County then assigned cases to NDA in 1988, cases that the County would have otherwise assigned to the other agencies.

SUPPORTING EVIDENCE: CP2229 (Farley Dec. ¶4); CP 1276 (Boruchowitz Dec. ¶¶29, 30); CP645 (Chapman Dec. ¶69).

8. King County's public defense system is unique in the nation and the quality of King County's public defense has been highly praised. The King County Public Defender is a County officer, V. David Hocraffer. He is an attorney and is the head of the King County Office of the Public Defender (OPD) (formerly called the King County Office of Public Defense). OPD screens individuals for financial eligibility for appointed counsel and assigns the cases to one of King County's four public defense agencies. OPD is a division within a County department, the Department of Community and Human Services, which is part of the Executive Branch.

SUPPORTING EVIDENCE: CP 624 (Chapman Dec. ¶¶8, 9) and CP 668 (Chapman Dec, App. C-3); CP2230 (Farley Dec. ¶9); CP 5463(Hocraffer Dec. ¶2); CP1742 (Daly Dec. ¶31); CP 2803 (Boruchowitz Dep. p. 53) (Ex. 61, Spangenberg Report p. 01815).

9. The County exerts control over the agencies through its allocation of cases and assignment of cases to the public defense agencies.

SUPPORTING EVIDENCE: CP1736-37 (Daly Dec. ¶13), CP 1742 (Daly Dec. ¶31), CP1743-44 (Daly Dec. ¶32-34), CP1744 (Daly Dec. ¶37), CP 1754 (Daly Dec. ¶82); CP 7243-44 (Boruchowitz Reply Dec. ¶¶6-8); CP 7243-44 (Boruchowitz Reply Dec. ¶¶7-8), CP 7248 (Boruchowitz Reply Dec. ¶13) and CP 7278-88 (Boruchowitz Reply Dec., chart (App. B473-483)); CP 624-25 (Chapman Dec. ¶¶10) CP 626 (Chapman Dec. ¶14), CP638-39 (Chapman Dec. ¶¶47-48); CP646-47 (Chapman Dec. ¶73); CP 2821 (Chapman Dep. pp. 23:13-24:12); CP 2239 (Farley Dec. ¶36), CP2240 Farley Dec. ¶41); CP 2242-43 (Farley Dec. ¶46); CP 3110 (Mikkelsen Dep. p. 121:6-8); CP 2881-82 (Daly Dep. pp. 49:2-51:15), CP 2926-27 (Daly Dep. pp. 222:8-225); CP 2809 (Boruchowitz Dep. pp. 75:20-24), CP 2811-12 (Boruchowitz Dep. pp. 85:14-86:5); CP 2989-90 (Farley Dep. pp. 45:24-46:21), CP 3013 (Farley Dep. pp. 139:1-21), CP 3028-29 (Farley Dep. pp. 193:1-194:12).

10. The County assigns cases to one of the agencies, unless they have a disqualifying conflict of interest, in which instance the case is assigned to one of the attorneys in private practice on the County's panel of attorneys to represent indigent defendants. An agency cannot refuse a case assigned to it by the County unless it has a disqualifying conflict of interest. A panel attorney, in contrast, can refuse a case. A defendant cannot choose which public defense agency will provide representation.

SUPPORTING EVIDENCE: CP 1742 (Daly Dec. ¶31), CP1744-45 (Daly Dec. ¶37), CP 1754 (Daly Dec. ¶82); CP 2242-43 (Farley Dec. ¶46); CP 7243-44 (Boruchowitz Reply Dec. ¶¶7-8), CP 7248 (Boruchowitz Reply Dec. ¶13) and CP 7278-88 (Boruchowitz Reply Dec., chart (App. B473-483)); CP 624-25 (Chapman Dec. ¶10), CP 626 (Chapman Dec. ¶14), CP 646-47 (Chapman Dec. ¶73); CP 2821 (Chapman Dep. pp. 23:13-24:12).

11. The County assigns cases to each agency based on the type of case and the market share (percentage of cases) the County allocates to each agency for that type of case, *e.g.*, felonies, district court

misdemeanors, juvenile cases, involuntary treatment, etc. Each year the County negotiates each agency how many cases it will get in each area.

SUPPORTING EVIDENCE: CP 638-39 (Chapman Dec. ¶¶47-48); CP 1736-37 (Daly Dec. ¶13); CP 7243-44 (Boruchowitz Reply Dec. ¶¶6-8).

12. The County has changed these allocations somewhat over time. For example, initially TDA had a greater share of felonies and SCRAP had a greater share of juvenile and dependency cases.

SUPPORTING EVIDENCE: CP 2239 (Farley Dec. ¶36), CP2240 (Farley Dec. ¶41); CP 624-25 (Chapman Dec. ¶10); CP 7243-44 (Boruchowitz Reply Dec. ¶¶6-8); CP1743-44 (Daly Dec. ¶32-34); CP 3110 (Mikkelsen Dep. p.121:6-8); CP2881-82 (Daly Dep. pp. 49:2-51:15), CP 2926-27 (Daly Dep. pp. 222:8-225); CP 2809 (Boruchowitz Dep. pp. 75:20-24), CP 2811-12 (Boruchowitz Dep. pp 85:14-86:5); CP 2989-90 (Farley Dep. pp. 45:24-46:21), CP 3013 (Farley Dep. pp. 139:1-21), CP 3028-29 (Farley Dep. pp. 193:1-194:12).

13. Similarly, after NDA lost its Seattle misdemeanor caseloads because the County no longer contracted for the Seattle Municipal Court, the County took six attorney caseloads from SCRAP, ACA, and TDA and assigned them to NDA to keep its caseloads up. The agencies losing those six attorney caseloads protested, but the County made the change anyway.

SUPPORTING EVIDENCE. *Id.*

14. The County-assigned percentages for each public defense agency is determined in the County's annual budget process for County departments, divisions and agencies. After the budget is adopted, the

types of cases and the percentage each agency will receive is stated in the County's contract with each agency.

SUPPORTING EVIDENCE: CP 2239 (Farley Dec. ¶36), CP 2240 (Farley Dec. ¶41); CP 624-25 (Chapman Dec. ¶10); CP 7243-44 (Boruchowitz Reply Dec. ¶¶6-8); CP 1743-44 (Daly Dec. ¶32-34); Mikkelsen Dep. p.121:6-8; CP 2881-82 (Daly Dep. pp. 49:2-51:15), CP 2926-27 (Daly Dep. pp. 222:8-225); CP 2809 (Boruchowitz Dep. pp. 75:20-24), CP 2811-12 (Boruchowitz Dep. pp 85:14-86:5); CP 2989-90 (Farley Dep. pp. 45:24-46:21), CP 3013 (Farley Dep. pp. 139:1-21), CP 3028-29 (Farley Dep. pp. 193:1-194:12).

15. The County also assigns certain court calendars or defense functions to particular agencies, *e.g.* arraignments, domestic violence, out of custody, SRA modifications, etc. This also occurs as part of the County budget process and is later stated in the annual contracts.

SUPPORTING EVIDENCE: CP 624-25 (Chapman Dec. ¶10); CP 7243-44 (Boruchowitz Reply Dec. ¶¶6-7); CP 1754 (Daly Dec. ¶81).

16. The King County Superior Court operates out of three courthouses: the main courthouse in Seattle (KCCH); the Regional Justice Center in Kent (RJC), and the Juvenile Court in Seattle. The County also has several district courts. The County decides which agencies will handle cases in which court and how many cases each agency will have in that court. The County has changed these assignments somewhat over time, and added TDA to join SCRAP and NDA to perform work at the RJC.

SUPPORTING EVIDENCE: CP 625 (Chapman Dec. ¶11); CP 3110-11 (Mikkelsen Dep. 121:24-122:2); CP 2873-74 (Daly Dep. pp. 17:23-18:1); CP 2796 (Boruchowitz Dep. pp. 24:23-25:9).

17. The County also exercises control through its annual budget process. This budget process for the public defense agencies is really no different than for any other public agency that submits a budget to the Executive and/or County Council. In fact, starting around at least 1989, the County used the same budget method for the public defense agencies that it uses for other County departments, agencies and divisions.

SUPPORTING EVIDENCE: CP 2930 (Daly Dep. p. 237:19), CP 3593-96 (Daly Dep. Ex. 22) (County Audit “funding is subject to the budget provisions of RCW 36.40”) and CP 3598 (Daly Dep., Ex. 23) (SCRAP Budget submission to OPD), CP 2933 (Daly Dep. 247:18-248:13); CP 2991 (Farley Dep. pp. 52:5-53:14); CP 1275-76 (Boruchowitz Dec. ¶¶25-28); CP 627-632 (Chapman Dec. ¶¶20-32); CP 1736-37 (Daly Dec. ¶¶13-15); CP 2827 (Chapman Dep. p. 48:3-18), and CP 4544-4611 (Chapman Dep., Ex. 88) (2000 Contract p. 14359, status quo budget); CP 2238-39 (Farley Dec. ¶34).

18. Each year OPD sent each public defense agency a proposed detailed line-item budget based on the previous year’s actual expenditures. The public defense agencies submitted to OPD their anticipated costs – based on last year’s actual costs – in the detailed line-item areas, including listing the salaries and benefits for each public defense attorney and staff. If there were mandatory increases (such as increased caseload, new case areas, increases in rent, etc.), these costs were added by the County. If the County was undergoing a budgetary shortfall, OPD, like every other County agency, would be given a percentage reduction.

SUPPORTING EVIDENCE: *Id.*

21. To show compliance with the County budget, each agency had to submit to the County monthly expenditure reports tracking the line items in the approved budget incorporated in the contract and quarterly position salary reports tracking each attorney's salary and each staff member's salary as it had been approved in the County budget and incorporated into the contract

SUPPORTING EVIDENCE: CP 629 (Chapman Dec. ¶24), CP643 (Chapman Dec. ¶61); CP 1750 (Daly Dec. ¶67); CP 2826 (Chapman Dep. pp. 44:2-8), CP 2865-66 (Chapman Dep. pp. 194:11-195:17).

23. Just as it does for other parts of the County government, the funding for each of the four public defense agencies is determined by the County each year in the County's budget for the next year, *e.g.*, the 2008 budget adopted in 2007 determines the 2008 funding for each public defense agency. After the budget is approved, the County contracts with each of the public defense agencies for the next year. The contract amount is based on the County-approved budget.

SUPPORTING EVIDENCE: CP 2238-39 (Farley Dec. ¶34); CP 625 (Chapman Dec. ¶12), CP 632 (Chapman Dec. ¶32), CP 638 (Chapman Dec. ¶44-47); CP 2930 (Daly Dep. pp. 237:23-238:4) and CP 3593-96 (Daly Dep., Ex. 22) (County Audit of SCRAP p. 1).

24. The contract is sometimes not completed before the next year begins, and the County has the agencies sign a one-page County form called "Intent to Contract," which allows public defense services to continue without a contract by following the County-approved budget for each agency. Sometimes the actual contract is not effective until after the

end of the year it covers or until a substantial portion of the contract year has passed.

SUPPORTING EVIDENCE: CP 625 (Chapman Dec. ¶12), CP 638 (Chapman Dec. ¶44); CP 1734 (Daly Dec. ¶9); CP 2838 (Chapman Dep. p. 93:9-12).

25. The County also exercises control and acts like an employer by setting pay rates and job classifications and by monitoring the agencies to assure that they adhere to these requirements. King County determines the salary for public defense attorneys to provide parity in salaries between public defense attorneys and deputy prosecuting attorneys. The County uses the “Kenny scale” for public defense attorneys and deputy prosecuting attorneys. The Kenny scale was developed by the County as a result of a study that the County commissioned. The County commissioned the Kenny Group to study prosecutors and public defenders, classify their positions, and establish pay classifications with pay parity for public defenders with prosecutors. The study did not address benefits, only base salary.

SUPPORTING EVIDENCE: CP 626-27 (Chapman Dec. ¶¶16-19); CP 2240 (Farley Dec. ¶39); CP 1739-41 (Daly Dec. ¶¶23-26); CP 1274 (Boruchowitz Dec. ¶¶21-24); CP 3001 (Farley Dep. pp. 90:25-91:7), CP 3001 (Farley Dep. pp. 92:3-93:11); CP 2896 (Daly Dep. pp. 107:23-109:4), CP 2912 (Daly Dep. pp. 163:18-25); CP 2840 (Chapman Dep. pp. 98:19-99:6.)

26. The Kenny study developed job descriptions, education and experience requirements for each attorney classification, both prosecutors

and public defenders. It also established a salary schedule – called the “Kenny scale” – with pay steps for each classification providing pay parity for prosecutors and public defenders.

SUPPORTING EVIDENCE: *Id.*

27. The Kenny salary scale was adopted by the County Council in Ordinance 9221 in 1989. The County Council required pay parity for public defense attorneys with prosecutors, using the Kenny scale and attorney classifications. After the County Council adopted the Kenny scale, the County incorporated it into the County-approved budget for each agency and incorporated the scale directly into its annual contracts with the agencies. The County updates the scale each year and includes the cost of living increase given to County employees. The Kenny scale has been used by the County for over 18 years and is still in effect.

SUPPORTING EVIDENCE: CP 626-27 (Chapman Dec. ¶¶16-19); CP 2240 (Farley Dec. ¶39); CP 1739-41 (Daly Dec. ¶¶23-26); CP 1274 (Boruchowitz Dec. ¶¶21-24); CP 3001 (Farley Dep. pp. 90:25-91:7), CP 3001 (Farley Dep. pp. 92:3-93:11); CP 2896 (Daly Dep. pp. 107:23-109:4), CP 2912 (Daly Dep. pp. 163:18-25); CP 2840 (Chapman Dep. pp. 98:19-99:6), CP 2866 (Chapman Dep. pp. 195:1-196:10). Court’s Decision, p. 15, lines 1-24.

28. The County monitored the agencies to assure that they complied with the Kenny scale and they provided the plaintiffs with the same cost of living adjustment that the County provided to other County employees, including prosecutors.

SUPPORTING EVIDENCE: CP 1740-41 (Daly Dec. ¶¶25-27); CP 635 (Chapman Dec. ¶37), CP 639-40 (Chapman Dec. ¶51); CP 2930 (Daly Dep. pp. 235:18-237:18), CP 3517-80 (Daly Dep., Ex. 19) (contract), CP 3582-84 (Daly Dep. Ex. 20) (site review) and CP 3586-91 (Daly Dep., Ex. 21) (spreadsheet that accompanied site review); CP 3021 (Farley Dep. pp. 163:4-164:20).

29. King County directed the Kenny group to conduct a similar study and classification of public defense agency staff, which was completed in 1990. The Kenny Group reclassified the public defense agency staff and set their base pay so that it would be raised to be comparable to County employees performing similar work. The County Council did not adopt the pay parity for public defense staff at that time. County budgets for the agencies thus did not provide enough money to have pay parity for the non-lawyer defense staff with their counterparts in the prosecutor's office or other parts of the County.

SUPPORTING EVIDENCE: CP 1276-77 (Boruchowitz Dec. ¶31) and CP 1652-83 (Boruchowitz Dec., App. B-366-97) (Kenny Study for staff); CP 636-37 (Chapman Dec. ¶39).

31. In 1999, King County completed an internal study classifying the public defense agency staff and determining the rate of pay for the classifications. The County appropriated additional funds to move toward pay parity for staff, and County budget and contracts with the public defense agencies incorporated these changes.

SUPPORTING EVIDENCE: CP 1276-77 (Boruchowitz Dec. ¶¶31-32) and CP 1686-93 (Boruchowitz Dec., App. B-400-07) (County's review); CP 636-37 (Chapman Dec. ¶¶39-40), CP 637-38 (Chapman Dec. ¶43.)

32. The County also effectively controlled benefits through budgets and contracts. The County-approved budgets each year for the County public defense agencies included line items for “benefits” for the lawyers and the staff. The County characterized “employee benefits” as including mandatory employer taxes, *e.g.*, FICA, FUTA, worker’s compensation, and unemployment. Thus, the amount set by the County for employee benefits other than employment taxes was actually lower than stated in the budgets. The actual employee benefit funds that the County provided the agencies is almost entirely used for health insurance premiums. Some agencies were able to sometimes to make a small retirement contribution to the agencies’ retirement plans if they had some left-over savings at the end of the year, beyond what the County required for reserves.

SUPPORTING EVIDENCE: CP 661-662 (Chapman Dec. ¶¶120-24); CP 1742 (Daly Dec. ¶30); CP 1277-78 (Boruchowitz Dec. ¶¶33-36); CP 2917 (Daly Dep. pp. 185:17:186:4), CP 2930-31 (Daly Dep. pp. 238:12-240:20), CP 2935 (Daly Dep. pp. 255:21-257); CP 2794 (Boruchowitz Dep. pp. 15:8-16:1), CP 2794-95 (Boruchowitz Dep. pp. 17:16-18:12); CP 2830-31 (Chapman Dep. pp. 61:12-62:11), CP 2833-34 (Chapman Dep. pp. 73:24-75:6), CP 2838-39 (Chapman Dep. pp. 93:19-96:22); CP 3050 (Howard Dep. pp. 26:2-28:1), CP 3051 (Howard Dep. pp. 32:11-13) and CP 5301-02 (Howard Dep. , Ex. 158)(email exchange with County explaining NDA’s costs for employee benefits), CP 3053 (Howard Dep. pp. 40:19-41:5); CP 2995 (Farley Dep. p. 67:1-21).

33. The County’s contention that the public defense agencies can manage their own monies as they see fit, including developing 401(k) plans or something similar, is illusory when, despite their requests, they

were not provided the funds to adequately establish a pension plan similar to PERS. The benefits the County funded did not provide parity with County employees, such as employees of the Prosecutor's Office. With the funds provided by the County the agencies could not afford to fund a defined benefit plan such as PERS. Instead, the agencies established retirement savings plans, into which employees could make tax-deferred retirement contributions from their own pay. These self-directed employee-funded plans are not comparable to a PERS-type defined benefit plan.

SUPPORTING EVIDENCE: *Id.*; see also CP 2799 (Boruchowitz Dep. pp. 34:23-36:16); CP 2930-31 (Daly Dep. p. 238:12-239:11) and CP 3598 (Daly Dep., Ex. 23); CP 3097-98 (Mikkelsen Dep. pp. 69:8-70:9); CP 3129 (Robinson Dep. pp. 63:10-64:24).

34. The County's monetary control through the budget process, reservation of powers to audit and ultimately dismember a public defense agency, and the County's authority to allocate cases among the agencies gives the County control over the public defense agencies and plaintiffs.

SUPPORTING EVIDENCE: Court Opinion, page 14, based on summary of evidence.

39. Because County funding was SCRAP's sole source of income and without the County contract SCRAP would cease to exist (as Eastside had), SCRAP complied with the County's demands. SCRAP made the County-required changes to its management, membership and Board of Directors, amended its Bylaws, submitted Robert Nickels'

employment contract and its leases to the County for approval, and complied with the County's additional conditions.

SUPPORTING EVIDENCE: *Id.*

41. The County audited NDA. The audit found in addition to leasing an office without County permission, NDA had set up a for-profit affiliate using a portion of its savings and it did not have a working board. NDA replaced its board, its for-profit affiliate returned the funds to NDA, and NDA ended its affiliation with the for-profit group.

SUPPORTING EVIDENCE: CP 2229-30 (Farley Dec. ¶6); CP 2983 (Farley Dep. pp. 18:13-19:1) and CP 3659-74 (Farley Dep., Ex. 32) (County audit of NDA); CP 3117 (Robinson Dep. pp. 16:15-17:12), CP 3120 (Robinson Dep. pp. 27:21-24); CP 3132 (Robinson Dep. pp. 75:23-76:15).

42. The County decided that NDA's response was not adequate and in August 2002 the County filed suit against NDA and asked the court to place the agency under the control of a receiver. The County's complaint summarized the audit, alleged that NDA was still incorrectly organized because the new Board of Directors was improperly appointed by NDA management, and asserted that NDA had breached its contract with the County. The County sought the removal of NDA's Board of Directors and management, appointment of a receiver, and restitution of funds "misappropriated or mismanaged" by NDA's management, or alternatively dissolution of NDA and return of any funds held by NDA to the County.

SUPPORTING EVIDENCE: CP2229-2239 (Farley Dec. ¶¶6-10); CP 2982 (Farley Dep. pp. 16:20-17:11) and CP 3632-57 (Farley Dep., Ex. 31) (County complaint for receiver).

43. NDA defended on the basis of its independent contractor status stated in the parties' annual contract. NDA and individual defendants argued that the County had no standing or any legal basis for seeking a receivership and removal of NDA managers and directors since NDA was only a contractor with the County and there was currently no contract.

SUPPORTING EVIDENCE: CP 2231 (Farley Dec. ¶11).

46. The trial court granted the County's motion for appointment of a receiver, and on the County's motion appointed Jeffery Robinson, an experienced criminal defense attorney, as receiver. The County had solicited Robinson to be the receiver before bringing suit.

SUPPORTING EVIDENCE: CP 2234 (Farley Dec. ¶14); CP 3116-17 (Robinson Dep. pp. 13:23-15:10).

47. Robinson sought court approval for almost every action that he took as receiver. Before he sought court approval, Robinson sought King County's approval, because if the County did not approve his actions, it would not contract with NDA, thereby ending its existence. Robinson thus sought the County's approval of Eileen Farley as the Executive Director of NDA before he appointed her and obtained court approval for the appointment.

SUPPORTING EVIDENCE: CP 3118 (Robinson Dep. pp. 18:17-19:9), CP 3120 (Robinson Dep. pp. 27:12-29:19), CP 3133 (Robinson Dep. pp. 79:4-25); CP 2235 (Farley Dec. ¶17).

49. Shortly after the receiver was appointed, King County sent NDA a Notice of Material Breach, triggering the County's corrective action procedures. The Notice said that NDA had breached its contract and the contract would be terminated if NDA did not remedy the breach, thereby ending NDA's existence since the County was its sole source of funds.

SUPPORTING EVIDENCE: CP 2236 (Farley Dec. ¶21); CP 3134 (Robinson Dep. pp. 82:10-18), CP 3134 (Robinson Dep. pp. 84:17-85:7), CP 3137 (Robinson Dep. pp. 94:15-16), CP 4418 (Robinson Dep., Ex. 71 (Notice of Material Breach) and CP 4431 (Robinson Dep., Ex. 73 (County spreadsheet of required changes); CP 2985 (Farley Dep. pp. 28:5-21), CP 3034 (Farley Dep. pp. 214:7-22) and CP 4418-23 (Farley Dep., Ex. 71 (Notice of Material Breach) and CP 4431-45 (Farley Dep., Ex. 73) (NDA's Resp.).

50. The notice repeated the grounds on which King County had sought appointment of a receiver, and required that the receiver restructure NDA to the County's satisfaction. The County required NDA to discharge the two lawyers who had been directing and managing NDA (which Robinson had already done), obtain new board members that were satisfactory to the County, terminate or renegotiate its two leases, write and adopt new Bylaws and Articles of Incorporation, review financial records for possible inappropriate expenditures, obtain reimbursements of any such expenditures and write new employee policies and procedures.

SUPPORTING EVIDENCE: *Id.*

52. King County required that the receiver amend the NDA bylaws and articles of incorporation to limit its activities to only public defense. King County also required that NDA's Board of Directors adopt the King County Code of Ethics, and that NDA also include it in NDA's Employee Handbook and provide a copy to each NDA employee.

SUPPORTING EVIDENCE: CP 2235-37 (Farley Dec. ¶¶19-28); CP 3047 (Howard Dep. pp. 15:20-16:11), CP 3048 (Howard Dep. pp. 18:9-19:7); CP 3008 (Farley Dep. pp. 119:10-128), CP 3011 (Farley Dep., pp. 130:5-131); CP 3120 (Robinson Dep. p. 29:1-2).

54. The County contends that the agencies are nevertheless "independent contractors" as stated in the contracts. The County points to the fact that the agencies are organized as nonprofit corporations with articles of incorporation, bylaws, board of directors, who hold meetings, create minutes for these meetings, as proving their independent contractor status. The County also points to the fact that the agencies file IRS form 990s (a form used by nonprofit corporations to report their yearly income and expenses) and form 5500s (a form used to report their expenditures for employee benefit plans) show that the agencies are "independent contractors." These forms, however, are not binding and show only that the agencies are organized as nonprofit corporations, not that they are independent contractors, and the Court finds, based on the evidence, that the agencies are not independent contractors for purposes of this litigation due to many restrictions and controls placed on them by the County. They

are the functional equivalent of a County agency or subagency and/or alter ego of the County.

SUPPORTING EVIDENCE: Court's opinion, pp. 11-14.

55. A true independent contractor, for example, would not need permission to obtain an office lease. King County required the public defense agencies to submit office leases to the County for approval prior to signing. In fact, the County brought a receivership case against NDA and used its corrective action procedures to require NDA reorganization in part because NDA leased office space after the County disapproved of that lease.

SUPPORTING EVIDENCE: CP 1738-39 (Daly Dec. ¶¶19-20); CP 645-46 (Chapman Dec. ¶70); CP 2891-92 (Daly Dep. pp. 89-90:8), CP 2892 (Daly Dep. pp. 91:21-92), CP 2893 (Daly Dep. pp. 94:16-95:7); CP 2834-35 (Chapman Dep. pp. 77:6-78:13); CP 2983 (Farley Dep. p. 18:13-21) and CP 3659-74 (Farley Dep., Ex. 32) (County Audit of NDA, Bates No. p. 35150).

56. The County assigns the cases and determines the market share (percentage of cases) that each agency receives. There is no competition among the agencies for cases or market shares. The County also does not allow the public defense attorneys to do other work, for pay or pro bono, except with its permission, as is shown by its action against NDA. The public defense attorneys are required by the County to perform their services personally. They cannot subcontract their work and neither can the staff. The County also does not allow the agencies to subcontract the defense work except with County permission and no such permission

has ever been granted. A true independent contractor would not have these restrictions.

SUPPORTING EVIDENCE: CP 2231-33 (Farley Dec. ¶¶11-12), CP 2239 (Farley Dec. ¶36), CP2240 (Farley Dec. ¶41); CP 624-25 (Chapman Dec. ¶10), CP 638-39 (Chapman Dec. ¶¶47-48), CP 660-61 (Chapman Dec. ¶¶117-19); CP 1736-37 (Daly Dec. ¶13), CP 1743-44 (Daly Dec. ¶32-34); CP 3110 (Mikkelsen Dep. p.121:6-8); CP 2881-82 (Daly Dep. pp. 49:2-51:15), CP 2926-27 (Daly Dep. pp. 222:8-225); CP 2809 (Boruchowitz Dep. pp. 75:20-24), CP 2811-12 (Boruchowitz Dep. pp. 85:14-86:5); CP 2989-90 (Farley Dep. pp. 45:24-46:21), CP 3013 (Farley Dep. pp. 139:1-21), CP 3028-29 (Farley Dep. pp. 193:1-194:12); CP 7243-44 (Boruchowitz Reply Dec. ¶¶6-8); CP 7248 (Boruchowitz Reply Dec. ¶13) and CP 7278-88 (Boruchowitz Reply Dec., App. B473-483 (Chart)); Daly Dec. ¶¶59-64.

57. The County restricts the agencies to being nonprofit corporations with the limited purposes of providing indigent public defense. It prohibits them from contracting with anyone except another public agency or municipal government for public defense or public defense related work. A true independent contractor would be able to contract for sources of revenue other than indigent public defense (*e.g.*, represent retained clients or provide services to private clients on a sliding scale or develop some source of revenue other than criminal defense).

SUPPORTING EVIDENCE: CP 1733 (Daly Dec. ¶4), CP 1733-34 (Daly Dec. ¶7), CP 1736-37 (Daly Dec. ¶13), CP 1745 (Daly Dec. ¶39), CP1736-37 (Daly Dec. ¶59), CP 1749 (Daly Dec. ¶60); CP 2232-33 (Farley Dec. ¶12), CP 2237 (Farley Dec. ¶26, 27); CP 2238 (Farley Dec. ¶33); CP 1285 (Boruchowitz Dec. ¶56); CP 2984 (Farley Dep. pp. 25:8-19), CP 2985 (Farley Dep. pp. 28:5-21); CP 3118 (Robinson Dep. p. 19:4); CP 625 (Chapman Dec. ¶13), CP 626 (Chapman Dec. ¶14), CP 660-661 (Chapman Dec. ¶117-119), CP 663 (Chapman Dec. ¶127); CP 2882 (Daly Dep. pp. 51:16-52:18).

58. The County also restricts the agencies from having any affiliated entities, either nonprofit or for-profit. A true independent contractor would not be so restricted. In fact, the County put NDA into receivership and required it to be reorganized in part because it had created a for-profit affiliate.

SUPPORTING EVIDENCE: CP 1285 (Boruchowitz Dec. ¶56); CP 625 (Chapman Dec. ¶13), CP 660-661 (Chapman Dec. ¶¶117-119), CP 663 (Chapman Dec. ¶127); CP 1733 (Daly Dec. ¶4), CP 1745 (Daly Dec. ¶39); CP 2232-33 (Farley Dec. ¶12), CP 2237 (Farley Dec. ¶26), CP 2238 (Farley Dec. ¶33); CP 2984 (Farley Dep. p. 25:8-19); *Id.*; *accord*, CP 2799 (Boruchowitz Dep. pp. 34:23-36:16); CP 2882 (Daly Dep. pp. 51:16-52:18), CP 2930-31 (Daly Dep. p. 238:12-239:11) and CP 3598 (Daly Dep., Ex. 23); CP 3097-98 (Mikkelsen Dep. pp. 69:8-70:9); CP 3129 (Robinson Dep. pp. 63:10-64:24).

59. The County assigns some criminal cases to attorneys in private practice who are selected by the County to be its Assigned Counsel Panel. These attorneys are genuine independent contractors. The County treats the Assigned Counsel Panel Attorneys and the public defense agencies and public defense attorneys differently. The County does not have control over the Panel Attorneys. It just assigns them a case which they can accept or reject. In contrast, the County exercises a great deal of control over the public defense agencies and plaintiffs.

SUPPORTING EVIDENCE: CP 1754-55 (Daly Dec. ¶¶82-90); CP 7248 (Boruchowitz Reply Dec. ¶13) and CP 7278-88 (Boruchowitz Reply Dec., chart (App. B473-83)).

60. These County restrictions assure that the agencies' sole (or virtually sole) source of revenue is from the County for indigent public

defense. Because the County provides all (or nearly all) their revenue, the agencies lack any ability to engage in meaningful arms'-length bargaining with the County about the essential terms, such as benefits, because their only alternative to acquiescing in the County's demands is to end their existence.

SUPPORTING EVIDENCE: CP 3128 (Robinson Dep. pp. 61:21-25), CP 3137 (Robinson Dep. pp. 94:12-25); CP 1745 (Daly Dec. ¶¶38-41); CP 638-39 (Chapman Dec. ¶47), CP 646-47 (Chapman Dec. ¶71-76), CP 652-53 (Chapman Dec. ¶89-93), CP 663 (Chapman Dec. ¶127); CP 1270-72 (Boruchowitz Dec. ¶¶14-15), CP 1278-81 (Boruchowitz Dec. ¶38-43); CP 7242 (Boruchowitz Reply Dec. ¶4); CP 3155 (Schwanz Dep. pp. 43:5-44:21), CP 3163 (Schwanz Dep. pp. 77:2-20), CP 3171 (Schwanz Dep. pp. 108:25-109:18); CP 2806 (Boruchowitz Dep. pp. 63:7-12), CP 4195 (Boruchowitz Dep., Ex. 63) and CP4430 (Boruchowitz Dep., Ex. 66, TDA Board Minutes); CP 4009-10 (Levy Dep., Ex. 59).

61. The board of directors for each agency approves the County's contract with the agency. However, the agencies have no ability to negotiate the essential contract terms. The actual contract price is predetermined by the County's budget process the year before the contract, and is not a negotiated item. The County contract is then offered on a take-it-or-leave basis. The agencies have no power or ability to reject the County's take-it-or-leave offers because their existence depends solely on County funding and the County prevents them from having any other source of revenue.

SUPPORTING EVIDENCE: CP 3128 (Robinson Dep. pp. 61:21-25), CP 3137 (Robinson Dep. pp.94:12-25); CP 1745 (Daly Dec. ¶¶38-41); CP 638-39 (Chapman Dec. ¶47), CP 646-47 (Chapman Dec. ¶¶71-76), CP 652-53 (Chapman Dec. ¶¶89-93), CP 663 (Chapman Dec. ¶127);

CP 1270-72 (Boruchowitz Dec. ¶¶14-15), CP 1278-81 (Boruchowitz Dec. ¶¶38-43); CP 7242 (Boruchowitz Reply Dec. ¶4); CP 3155 (Schwanz Dep. pp. 43:5-44:21), CP 3163 (Schwanz Dep. pp. 77:2-20), CP 3171 (Schwanz Dep. pp. 108:25-109:18); CP 2806 (Boruchowitz Dep. pp. 63:7-12), CP 4195 (Boruchowitz Dep., Ex. 63) and CP4430 (Boruchowitz Dep., Ex. 66, TDA Board Minutes); CP 4009-10 (Levy Dep., Ex. 59).

62. The 2003 contract “negotiation” is illustrative. The County had the agencies sign its “intent to contract” forms for 2003 incorporating the budgeted amount for each agency approved in 2002. Eventually the County gave the agencies a proposed 2003 contract. The agencies and their board of directors strongly objected to the County’s proposed contract. It contained numerous new detailed provisions to which the agencies objected, including termination without cause and inspection of all client files by the Public Defender, which the agencies thought violated ethical rules because the four agencies the Public Defender supervised have clients with conflicting interests. The directors of the agencies and board members met with the County officials, including the Public Defender and head of the Department, Ms. MacLean, but the County would not agree to remove the offending provisions. The agencies’ boards decided not to sign the contract, but the County told the agencies in September 2003 they either signed the contract as is or the County would terminate their contracts. The boards and executive directors then reluctantly signed the contract because otherwise their agencies would cease to exist.

SUPPORTING EVIDENCE: CP 3128 (Robinson Dep. pp. 61:21-25), CP 3137 (Robinson Dep. pp. 94:12-25); CP 1745 (Daly Dec. ¶¶38-

41); CP 638-39 (Chapman Dec. ¶47), CP 646-47 (Chapman Dec. ¶¶71-76), CP 652-53 (Chapman Dec. ¶¶89-93), CP 663 (Chapman Dec. ¶127); CP 1270-72 (Boruchowitz Dec. ¶¶14-15), CP 1278-1281 (Boruchowitz Dec. ¶¶38-43); CP 7242 (Boruchowitz Reply Dec. ¶4); CP 3155 (Schwanz Dep. pp. 43:5-44:21), CP 3163 (Schwanz Dep. pp. 77:2-20), CP 3171 (Schwanz Dep. pp. 108:25-109:18); CP 2806 (Boruchowitz Dep. pp. 63:7-12), CP 4195 (Boruchowitz Dep., Ex. 63) and CP 4330 (Boruchowitz Dep., Ex. 66, TDA Board Minutes); CP 4009-10 (Levy Dep., Ex. 59).

63. Although the organizational structure of the public defense agencies appears to show they are independent organizations, the substance of their relationship with King County shows the agencies lack genuine independence. They are not independent contractors.

SUPPORTING EVIDENCE: Court's opinion summarizing evidence.

64. The County also contends that for purposes of PERS it cannot be an employer of the plaintiffs and the plaintiffs cannot be County employees because it does not exercise day-to-day control over either the agencies or the plaintiffs. The Court finds that day-to-day control is not critical here for several reasons.

SUPPORTING EVIDENCE: CP 662-63 (Chapman Dec. ¶¶125-27); CP 2648 (Thoenig Dec. ¶23).

66. The public defense agencies have significant, but not complete, control over their day-to-day operational matters. The day-to-day control exercised by the public defense agencies generally includes hiring, internal structure of the agency, work assignments and promotions, setting of vacation schedules and most internal discipline, and

management of funds provided by the County within the constraints of the County approved budget and contract.

SUPPORTING EVIDENCE: Court's opinion, summarizing testimony of agency directors.

67. This type of independence in day-to-day control over operations is normal for recognized units of King County government and it does not distinguish the public defense agencies from other County agencies. The Court finds compelling the testimony of Ricardo Cruz, the former director of King County's Office of Human Resource Management.

SUPPORTING EVIDENCE: CP 2680-84 (Cruz Dec. ¶¶1-12).

68. Cruz explained that the items of "independence" in operations relied on by the County as proving that the agencies were "independent contractors," including who to interview for a job, questions to ask potential hires, the decision of hiring and/or promoting, appointment of supervisors, decisions regarding internal structure, reorganization and assignment of work duties, were also in fact normal for recognized units of county government. He testified that because of the decentralization for personnel matters within King County government, the actual County agency departments and divisions operate with little significant difference from the public defense organizations, including the fact that there is nothing unique about two of the public defense organizations having collective bargaining agreements, since about 80 to

85% of the County's work force has collective bargaining agreements, including the prosecutor's office which has an agreement covering deputy prosecutors.

SUPPORTING EVIDENCE: CP 2680-84 (Cruz Dec. ¶¶1-12).

69. The day-to-day operational independence of the public defense agencies is thus not different from the operations of other King County agencies, including the Prosecutor's Office.

SUPPORTING EVIDENCE: CP 662-663 (Chapman Dec. ¶¶125-27); CP 2648 (Thoenig Dec. ¶23).

73. The difference between Pierce County's Department of Assigned Counsel and the King County public defense agencies is a matter of corporate form because the public defense agencies are incorporated as nonprofits, while Pierce County's Department of Assigned Counsel is a recognized unit of County government.

SUPPORTING EVIDENCE: CP 2644-50 (Thoenig Dec. ¶¶5-29); CP 7188 (Thoenig Reply Dec. ¶2 and CP 7230-40 (Thoenig Reply Dec., chart (App. B473-83))); CP 7248 (Boruchowitz Reply Dec. ¶13) and CP 7278-88 (Boruchowitz Reply Dec., chart (App. B473-83)).

75. Essentially the public defense agencies perform administrative functions for the County, managing public defense for King County in the same manner as other agencies that are officially part of County government, *e.g.*, Department of Assigned Counsel in Pierce County.

SUPPORTING EVIDENCE: CP 663 (Chapman Dec. ¶126); CP 2243 (Farley Dec. ¶49); CP 7242 (Boruchowitz Reply Dec. ¶3);

CP 2681 (Cruz Dec. ¶¶3-4); CP 7183-86 (Welter Dec. ¶¶5-12); CP 2645-46 (Thoenig Dec. ¶¶10-12); CP 2647-48 (Thoenig Dec. ¶¶19-22), CP 2649 (Thoenig Dec. ¶25), CP 2649-50 (Thoenig Dec. ¶29); CP 663 (Chapman Dec. ¶127).

76. The County contracts with the agencies contain a number of provisions which the County contends are only “oversight” provisions, but the Court finds that these provisions – particularly when coupled with the other facts of control exercised by the County found by the Court – provide for control, not merely oversight, over the agencies and the plaintiffs.

SUPPORTING EVIDENCE: Court’s opinion.

77. The County annually or occasionally biennially contracts with the public defense agencies and the County defines each of them as an “agency” in the contract. The same contract is used for each of the agencies. In these contracts, King County sets the maximum number of cases an attorney may handle per year in each practice area each year. Kevin Dolan testified about how these caseload limits directly affect his work.

SUPPORTING EVIDENCE: CP 625 (Chapman Dec. ¶12) CP 902 (Chapman Dec., App. C237 (contract)), CP 642-43 (Chapman Dec. ¶59); CP 1744 (Daly Dec. ¶35); CP 4544 (Chapman Dep. Ex. 88 (2000 contract)) and CP 4613 (Chapman Dep., Ex. 89, Bates Nos. 14533, 14586 (2007 contract); CP 2218 (Dolan Dec. ¶¶14-15).

79. Under the contract, the Agencies are required to monitor each attorney’s caseload to make sure they do not exceed the caseload limits and the County monitors agencies to assure their compliance with

these limits. If a violation is found by the County, it may result in corrective action.

SUPPORTING EVIDENCE: CP 3085 (Mikkelsen Dep. pp. 20:17-21:21); CP 1744 (Daly Dec. ¶36), CP 1745-46(Daly Dec. ¶43).

80. The County also states in the contract the percentage of cases and types of cases allocated by the County to each agency that occurred earlier in the budget process.

SUPPORTING EVIDENCE: CP 640 (Chapman Dec. ¶52); CP 3085 (Mikkelsen Dep. pp. 20:17-21:21); CP 4544 (Chapman Dep., Ex. 88 (2000 contract, Bates No. 14342)); CP 2218 (Dolan Dec. ¶¶13-15).

81. The agencies are required under the contract to keep track of the type of cases and to whom they are assigned. The agencies are required to submit monthly reports tracking the percentage of cases in each area that the agency has received.

SUPPORTING EVIDENCE: CP 644 (Chapman Dec. ¶¶65-66); CP 1745-46 (Daly Dec. ¶¶42-43); CP 3085 (Mikkelsen Dep. pp. 20:17-21:21).

82. The County requires the public defense agencies and all public defense attorneys, staff and board members comply with the King County "Employee Code of Ethics" ordinance, KCC § 3.04, and incorporates this requirement in its contracts with the agencies.

SUPPORTING EVIDENCE: CP 1747 (Daly Dec. ¶51); CP 643 (Chapman Dec. ¶62); CP 3008 (Farley Dep. pp. 119:17-120:1); CP 3148-49 (Schwanz Dep. pp. 17:21-18:3) and CP 4949 (Schwanz Dep., Ex. 114); CP 1270-72 (Boruchowitz Dec. ¶14); CP 4741 (Chapman Dep., Ex. 100, Bates No. 14577) and CP 4544 (Chapman Dep., Ex. 88, Bates No. 14337).

83. The County also set appropriate staffing levels for support services. These are incorporated into the agency's contracts and budgets. The staff work under the public defense attorneys and their supervisors in defending the defendants assigned by the County.

SUPPORTING EVIDENCE: CP 1747 (Daly Dec. ¶51); CP 641 (Chapman Dec. ¶53), CP 642-43 (Chapman Dec. ¶59); CP 1283-84 (Boruchowitz Dec. ¶52); CP 7241 (Boruchowitz Reply Dec. ¶2); CP 7182-87 (Welter Dec. ¶¶2-14); CP 2893-94 (Daly Dep. pp. 97:25-98:13); CP 2795 (Boruchowitz Dep. pp. 19:8-20:10); CP 3004 (Farley Dep. pp. 102:21-103:8).

84. The County maintains in its contracts and otherwise that the funds provided to the public defense agencies are solely for the purpose of providing public defense services for the County and cannot be used for any other purpose. (The County relied on this provision in its action against NDA.)

SUPPORTING EVIDENCE: CP 1270-72 (Boruchowitz Dec. ¶¶14-15); CP 2232-34 (Farley Dec. ¶¶12-13); CP 639-40 (Chapman Dec. ¶51); CP 1737 (Daly Dec. ¶17), CP 1738-39 (Daly Dec. ¶20); CP 2883 (Daly Dep. pp. 56:23-57:21), CP 2930 (Daly Dep. pp. 235:18-236:10).

85. The County provides funding for the agencies to purchase or lease equipment. This funding is built into the agency's budget by the County and incorporated into the contract.

SUPPORTING EVIDENCE: CP 1751 (Daly Dec. ¶71); CP 3106 (Mikklesen Dep. pp. 104:24-105:12); CP 641 (Chapman Dec. ¶54); CP 2811 (Boruchowitz Dep. p. 83:13-22).

87. The County required the agencies to submit several regular reports: position salary reports listing the salary of each of the lawyers

and staff; monthly expenditure reports tracking the line items in the County-approved budget for the agency; monthly closed case reports; attorney case reassignment reports; reports about attorney evaluations; persistent offender reports; additional credit reports; complex litigation plans and time sheets; extraordinary case credits, and responses to client complaints, and any “additional summaries, reports or documents requested by OPD.” These reporting requirements have been incorporated in the County contracts.

SUPPORTING EVIDENCE: CP 643 (Chapman Dec. ¶61, 2000 Contract); CP 643 (Chapman Dec., ¶61) and CP 915-16 (2000 ACA Contract, pp. 14-15); CP 5747 (2007 Contract, p. 17); CP 1750 (Daly Dec. ¶67); CP 5747 (2007 contract, p. 17); CP 3051 (Howard Dep. pp. 32:18-33:21), CP 3054 (Howard Dep. pp. 42:10-49:5) and CP 5304 (2002 Contract, list of required reports); CP 3000 (Farley Dep. pp. 88:10-89:1 [Wrong cite for reference – need to correct]); CP 2826 (Chapman Dep. p. 44:2-8).

88. The contracts contain a corrective action procedure which applies if the County believes that the agency is not complying with the contract. Under this procedure, the County notifies the agency of the nature of the County complaint in writing, the agency has three working days to respond in writing with its corrective action plan to correct the deficiency specified by the County within 10 days. The County then notifies the agency whether the proposed correction has been accepted. If the agency does not satisfy the County with its corrective action, the County may terminate the contract, or continue to withhold payment.

SUPPORTING EVIDENCE: CP 643 (Chapman Dec. ¶60); CP 1749-52 (Daly Dec. ¶¶66-72); CP 2235 (Farley Dec. ¶19), CP 2363-2368 (Farley Dec., App. F-119-24 (Notice of Material Breach)); CP 2852 (Chapman Dep. pp. 146:15-147:2).

90. The contract also authorizes the County to conduct audits of agencies' internal operations to assure compliance with the County's requirements. These audits are either by the County's Executive Audit services, or by OPD conducting a "site visit." These "site visits" are intensive audits to make sure that the agencies' internal operations comply, in the County's view, with all the County's requirements. If the County finds noncompliance by the agency, it uses its corrective action procedures to require the agency to make the changes to the agency's internal operations that the County deems necessary.

SUPPORTING EVIDENCE: CP 641-42 (Chapman Dec. ¶56), CP 658 Chapman Dec. ¶109-111); CP 2235-36 (Farley Dec. ¶20) and CP 2369-73 (Farley Dec., App. F-125-29 (Notice of Material Breach)); CP 1734-35 (Daly Dec. ¶10), CP 1736 (Daly Dec. ¶12), CP 1744 (Daly Dec. ¶36), CP 1744-45 (Daly Dec. ¶37), CP 1751 (Daly Dec. ¶68); CP 2886-87 (Daly Dep. pp. 68:18-71:21), CP 2888 (Daly Dep. pp. 74:2-75:6), CP 2900 (Daly Dep. pp. 122:8-21), CP 2918 (Daly Dep. pp. 187-88), CP 2924 (Daly Dep. pp. 212:24-213:10), CP 2930-33 (Daly Dep. pp. 236:12-247:17), CP 3582-96 (Daly Dep., Exs. 20-22), CP 3600-3626 (Daly Dep., Exs. 24-28); CP 2810-11 (Boruchowitz Dep. pp. 80:16-82:3); CP 3037-39 (Farley Dep. pp. 227:12-234:20) and CP 4470-4536 (Farley Dep., Exs. 79-85) (Ex. 79 is e-mail in which County lawyer approves County required by-law changes).

93. The County sets mandatory attorney qualifications for each practice area for each attorney classification. These are stated in the contracts and are also stated in the public defense attorney classifications that are incorporated into the Kenny scale.

SUPPORTING EVIDENCE: CP 642 (Chapman Dec. ¶57) and CP 907-908 (Chapman Dec., App. C 242-43); CP 1739-40 (Daly Dec. ¶23), CP 1746 (Daly Dec. ¶44), CP 1747 (Daly Dec. ¶53); CP 2911 (Daly Dep. pp. 160:1-161:6), CP 2911-12 (Daly Dep. pp. 162:11-163:4); CP 2866 (Chapman Dep. p. 198:3-11); CP 3104 (Mikkelsen Dep. pp. 94:20-95:5).

94. The County requires that the agencies conduct annual attorney and staff performance evaluations and this requirement is part of the contract. The County reviews and approves the contents of the evaluation forms.

SUPPORTING EVIDENCE: CP 642 (Chapman Dec. ¶57), CP 655 (Chapman Dec. ¶102); CP 1746 (Daly Dec. ¶48); CP 2871-87 (Daly Dep. pp. 8:18-71:21), CP 2888 (Daly Dep. pp. 74:2-75:6), CP 2903 (Daly Dep. pp. 135:20-137:20); CP 2854 (Chapman Dep. pp. 156:10-157-12).

95. The County promulgated a Standard for Client Complaints, formalizing the County's longstanding practice. This practice – now a standard – was incorporated into the contracts. Under this practice when a client complained to OPD, OPD would contact the agency, requiring the agency to respond to OPD in writing within 24 hours using an OPD form.

SUPPORTING EVIDENCE: CP 657 (Chapman Dec. ¶106), CP 1238-1242 (Chapman Dec., App. C-572-76) (County complaint policy) and CP 1243-45 (Chapman Dec., App. C-577-79) (County standards for representation); CP 2904 (Daly Dep. p. 139:8-19).

96. The County has an “extraordinary occurrence policy” that the County incorporated into the agency's contracts. This policy requires the agency to report to OPD any time there is an allegation that an attorney or staff member has breached a professional duty owed to a client under “Constitutional Case Law” or “RPCs.” The extraordinary occurrence can

lead to corrective action by the County and ultimately to contract termination.

SUPPORTING EVIDENCE: CP 657 (Chapman Dec. ¶107) and CP 1238-1242 (Chapman Dec., App. C-580-85); CP 1751-52 (Daly Dec. ¶72); CP 2240 (Farley Dec. ¶41); CP 2904-05 (Daly Dep. pp. 139:8-142:6), CP 2906 (Daly Dep. pp. 146:15-22); CP 2854 (Chapman Dep. p. 157:6-12).

99. Under the contract, the County exercises tight monetary control over death penalty, murder, and other complex cases through its control over case credits and expert witness fees.

SUPPORTING EVIDENCE: CP 1746-47 (Daly Dec. ¶¶49-50); CP 2900 (Daly Dep. pp. 123:22-124:23), CP 2933-34 (Daly Dep. pp. 249:6-252:1), CP 2934 (Daly Dep. pp. 252:11-253:10); CP 3086-87 (Mikkelsen Dep. pp. 24:4-28:23), CP 3108-09 (Mikkelsen Dep. pp. 113:16-114:9); CP 2804 (Boruchowitz Dep. p. 56:15-25).

100. King County exercises extensive control over its public defense agencies. It treats them as if they are County agencies or subagencies and the County acts like an employer and treats the plaintiffs as employees. The County is an employer of plaintiffs and plaintiffs are County employees for the purpose of PERS. King County's activities constitute control, not oversight.

SUPPORTING EVIDENCE: Court's opinion summarizing evidence.

101. Plaintiffs' claim is for enrollment in PERS, a state pension system for public employees authorized and defined in state statutes.

SUPPORTING EVIDENCE: Complaint.

102. Plaintiff Kevin Dolan works as a County public defense attorney with ACA. ACA does not have a union, and ACA has never had an election to determine union representation.

SUPPORTING EVIDENCE: CP 2217 (Dolan Dec. ¶10); CP 2877-78 (Daly Dep. pp. 33-35); CP 2830 (Chapman Dep. pp. 60:12-61:11).

103. SCRAP does not have a union. At one time, there was an election to determine representation, and union representation was rejected.

SUPPORTING EVIDENCE: Daly Dep. pp. 33-35.

104. TDA and NDA have unions that represent employees.

SUPPORTING EVIDENCE: CP 2999 (Farley Dep. pp. 85:3-16), CP 3001 (Farley Dep. pp. 90:18-91:7); CP 2239-40 (Farley Dec. ¶38); CP 3093 (Mikkelsen Dep. pp. 52:6-11), CP 3094-95 (Mikkelsen Dep. pp. 57:21-58:5), CP 3095 (Mikkelsen Dep. pp. 59:21-60:9), CP 3104 (Mikkelsen Dep. pp. 96:13-22), CP 3110 (Mikkelsen Dep. pp. 118:21-119:5).

105. The NLRB held elections at some (but not all) public defense agencies, after unions had filed petitions to certify unions and those public defense agencies had stipulated to elections. The NLRB election certifications did not decide whether attorneys and staff at TDA and NDA were public or private employees, nor whether TDA and NDA were public or private employers. The NLRB has not decided any jurisdictional issue or other issue relating to public defense agencies in King County.

SUPPORTING EVIDENCE: CP 2217 (Dolan Dec. ¶10); CP 2877-78 (Daly Dep. pp. 33-35; CP 2830 (Chapman Dep. pp. 60:12-61:11); CP 2999 (Farley Dep. pp. 85:3-16), CP 3001 (Farley Dep. pp. 90:18-91:7); CP 2239-40 (Farley Dec. ¶38); CP 3093 (Mikkelsen Dep. pp. 52:6-11), CP 3094-95 (Mikkelsen Dep. pp. 57:21-58:5), CP 3095 (Mikkelsen Dep. pp. 59:21-60:9), CP 3104 (Mikkelsen Dep. pp. 96:13-22), CP 3110 (Mikkelsen Dep. pp. 118:21-119:5); CP 6423 (¶¶6 and 7, Bates # KC\_D\_3-000529) (“No decisions issued” by NLRB); CP 2793 (Boruchowitz Dep. pp. 10:2-11:3).

106. Plaintiffs did not waive PERS benefits, nor are they estopped, by accepting occasional and usually employee-funded forms of retirement benefits. There is no evidence in the record of any knowing relinquishment by plaintiffs of a known right to PERS participation and no evidence supporting estoppel.

SUPPORTING EVIDENCE: Court’s opinion summarizing evidence.

107. The Attorney General interpreted the PERS statutes in AGO 1955-57, No. 267, and found that the employees of a nonprofit corporation (Associated Students of the University of Washington) were eligible for PERS membership because the nonprofit corporation was an “arm and agency” of the University of Washington, an eligible PERS employer.

108. DRS’s administrative interpretation of the PERS statute is the same as the Attorney General’s. In a December 1990 PERS eligibility decision, DRS interpreted the term “employer” in PERS in the same manner as the Attorney General did in AGO 1955-57, No. 267. DRS adopted the Attorney General’s interpretation as its own, and found that

the employees of a nonprofit corporation, the Washington State University Bookstore, were correctly enrolled in PERS because the nonprofit corporation was an "arm and agency" of Washington State University, an eligible PERS employer.

### CONCLUSIONS OF LAW

1. The Court incorporates as part of its conclusions of law the Court's February 9, 2009 written decision, which explains the legal basis for the Court's trial decision.

2. King County is a PERS employer and has a duty to enroll its employees in PERS and make PERS contributions to DRS.

3. The public defense agencies are the functional equivalents (alter egos) of King County and each is an arm and agency of King County.

4. King County is an employer of the plaintiffs and the plaintiffs are County employees for the purposes of PERS.

5. King County's affirmative defenses are rejected.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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JOHN R. HICKMAN  
SUPERIOR COURT JUDGE

Presented by:

BENDICH, STOBAUGH & STRONG, P.C.

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**FACTOR TABLE**

[Chart attached to declarations of Raymond H. Thoenig (CP 7188-89, chart CP 7190-7200) and Robert C. Boruchowitz (CP 7241-7248, chart CP 7278-7288). The chart is a summary of evidence and is part of the evidence at trial. Boruchowitz verified the facts in the chart for the King County Public Defenders and King County Assigned Counsel Panel and Thoenig verified the facts for Pierce County Public Defenders.]

This chart is based on the chart used in the McSeveney Case and is compiled under WAC 415-02-110.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(i) Lawyers must comply with detailed work instructions about when, where, how work is performed.	No. Constitution requires independent representation. But the County sets case load limits for each lawyer in each practice area which determines the number of cases the lawyer gets. The County also sets time deadlines for client contact, obtaining discovery, and responding to client complaints. The County also sets a required ratio of supervisors to attorneys (1:10), detailed requirements for attorney supervision, and requires specific entries in attorneys' case files.	No. Constitution requires independent representation.	No. Constitution requires independent representation. But County specifies time deadline for initially contacting client and responding to client.	No. Lawyers have professional independence.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMACHINE, REPRESENTING COUNTY
(ii) County provides free training, or has the right to train the worker.	Yes. County requires through its contracts that lawyers get annual CLE training in contract-related areas and Wa. St. OPD approved training at least once per year. Agencies provide in-house training paid for with County funds, and County pays for some outside training through its contracts. But OPD is planning on providing training for lawyers using state funds.	Yes. WSBA CLE requirements for (45 credits every three years). Department provides in-house training paid for with County funds, and County pays for some outside training.	No, generally. OPD on occasion encourages the Agencies to open their in-house training to panel attorneys. But OPD is planning on providing training for lawyers using state funds.	No.
(iii) Lawyers' service is integral part of County's business, or are they outside the course of the County's business.	Yes. Public defense is a constitutionally mandated County service. It is listed as "Number 1" of the "Core businesses" on the County department's website. ( <a href="http://www.kingcounty.gov/operations/DCHS/AboutUs/~media/operations/DCHS/Plans/2008BusinessPlan.ashx">http://www.kingcounty.gov/operations/DCHS/AboutUs/~media/operations/DCHS/Plans/2008BusinessPlan.ashx</a> ). Agencies do 90% of the County's public defense work. County assigns some cases to private lawyers in about 10% of cases.	Yes. Constitutionally mandated. County Department and Conflict Office do most of the County's public defense. County assigns some cases to private counsel.	Yes. But lawyer is in business and normally does not do only public defense for the County. Lawyer receives public defense work from County on a case-by-case basis.	No. Law firm is in business and represents multiple clients. Indeed Davis Wright Tremaine represented NDA's former director <i>against the County</i> in the receivership case the County brought against NDA. DWT defended on the basis that NDA was independent, but it lost.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(iv) Lawyer required to perform work personally, or can subcontract.	Lawyer must perform work personally, cannot subcontract. Agency also cannot subcontract unless written permission is obtained from the County. No such subcontract has ever been approved by the County and in the NDA receivership case, the County complained that possible subcontracting was improper.	Lawyer must perform work personally, cannot subcontract.	Yes, generally.	Yes, generally.
(v) County hires, supervises or pays others to do the same job.	Agencies generally hire and supervise lawyers. But County has required Agencies to discharge lawyers, Managing Directors and Board Members, and maintains that is has the power to do so through its corrective action procedure.	Department hires and supervises workers. County Executive has no ability to hire, supervise or discharge lawyers, except he can discharge Department Director.	No.	No.
(vi) Lawyers hire, supervise and pay others on job to furnish labor or materials.	No.	No.	Yes.	Yes.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(vii) Lawyers perform continuing services for County.	Yes. Dolan has provided these services for almost 30 years. Similarly, class members provide services on a continuing basis.	Yes.	No. Case-by-case appointments.	No. Case-by-case representation.
(viii) Lawyer's hours or routine set by County.	Dolan and class members' work hours are based on County requirements for public defense. The Agencies have office hours that correspond to the Prosecutors and the Courts. The public defenders' work hours are determined by the caseloads set by the County, by the Prosecutor's actions and by the Court's schedules.	The Department has office hours that correspond to the Prosecutors and the Courts. The public defenders' work hours are determined by the caseloads set by the County, by the Prosecutor's actions and by the Court's schedules.	No.	No.
(ix) Lawyer required to devote full time to the business of the County.	Yes. County brought NDA receivership in part because one of its lawyers was doing pro bono family law work.  Agencies are required by the County to be nonprofit corporations and they cannot do other types of work unrelated to public defense.	Yes.	No.	No.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(x) County required lawyer to perform services on employer's premises.	Agencies' offices are leased with County funds, based on the County's requirements for type of space, price and location. When NDA leased space even though County disapproved of the lease. County brought receivership action to replace management and required NDA to restructure its lease.	Yes. Department and Conflict Office are in offices leased with County funds that are located near courthouse.	No.	No.
(xi) County requires lawyer to perform work in set sequence.	County sets time deadlines for client contact, obtaining discovery and responding to client complaints.	No.	No.	No.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMINE, REPRESENTING COUNTY
(xii) Lawyers provide regular written or oral reports to the County.	Yes. County requires the Agencies to make the lawyer provide information that the Agencies in turn regularly report to the County, <i>e.g.</i> , Closed Case Reports, Persistent Offender Reports, Additional Credit reports, complex litigation plans and timesheets, extraordinary case credits, and responses to client complaints. Agencies also provide monthly expenditure reports and reports about case loads. Lawyers report to supervisors. County sets standards for supervision and requires the lawyers to maintain detailed records of "all legal services provided ... to allow monitoring of legal service" by County.	Yes. Department and Conflict Office report regularly to County on their expenditures and caseloads. The lawyer met with their supervisors on ongoing basis. County Executive does not review files or work.	No.	Unknown.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(xiii) Lawyer paid by unit of time.	Yes. Lawyers are paid a monthly salary with funds provided by the County that provides pay parity with Prosecutors under the County's Kenny Scale. Staff are paid monthly salaries with funds provided by the County.	Yes. Lawyers are paid a monthly salary that provides parity with the Prosecutor's Office. Staff are paid monthly salaries.	Yes, paid by the hour.	Yes, paid by the hour.
(xiv) County reimburses employee for job- related expenses.	Yes. Lawyers generally reimbursed for job-related expenses with funds provided by County. County annual budget contains amounts for travel and other job-related expenses.	Yes. Lawyers are generally reimbursed for job-related expenses.	Yes, generally.	Yes, generally.
(xv) Lawyers supplied tools and supplies necessary to perform the service.	No. Lawyers do not provide tools or supplies. The County provided the tools and supplies the Lawyers use for their work either by giving equipment such as computers and office furniture to the Agencies, or by funding the Agencies to purchase or lease the tools and supplies. Some lawyers have their own laptops	No.	Yes.	Yes.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(xvi) Lawyers invested in equipment used in performing labor or services	No. See 2(d)(xv) above. The County owns all equipment and supplies purchased by the Agencies over a certain dollar amount. (\$1,000 in 2003.) The County provides lawyers with computer access to the County Wide Area Network (WAN), County e-mail accounts, and greater than public access to Electronic Court Records (ECR), same access as Prosecutors. Panel attorneys do not have such access.	No. The County provides all equipment and supplies.	Yes.	Yes.
(xvii) Lawyers have right to realize a profit or have risk of loss as a result of these services for the County.	No. Dolan and the class members cannot realize a profit or loss. The Agencies are also required by the County to be nonprofit corporations limited to public defense.	No.	Yes. Lawyer is in business and can have profit or loss.	Yes. Law firm is in business.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(xviii) Lawyers offer services to several persons or firms concurrently.	No. Lawyers are limited to public defense. Agencies are required by King County to be nonprofit corporations limited to public defense. Virtually all of their funding comes from King County. Some Agencies now receive some funding directly from City of Seattle for public defense instead of through the County. Some Agencies receive small public defense related grant funding and receive some state public defense funding. Neither the lawyers nor the Agencies are in business, offering their services to the public.	No. Lawyers are limited to public defense. Department provides public defense services for Pierce County and City of Tacoma.	Yes. Lawyer is in business with multiple clients.	Yes. Law firm offers its services to the general public.
(xix) Lawyer offers services to the general public on a regular or consistent basis. "Actively advertising."	No. Lawyers can only do public defense work. They cannot represent a private client. They are not in business.	No. Lawyers can only do public defense work. They are not in business.	Yes. Lawyer is in business offering services to the general public.	Yes.

FACTORS (2)(d)	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY ASSIGNED COUNSEL PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS WRIGHT TREMAINE, REPRESENTING COUNTY
(xx) County has right to discharge lawyers at will.	No. But although the County does not directly discharge the lawyers, it can do so indirectly by not renewing the annual contract with the Agency or by telling the Agency that the lawyer's performance is inadequate. County has directed Agencies – NDA and SCRAP – to fire employees and board members.	No.	No.	No.
(xxi) Lawyer has right to terminate employment without incurring liability	Yes, generally.	Yes, generally.	Yes, generally.	Yes, generally.

### WAC Allows Consideration of Other Factors

OTHER FACTORS	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS, WRIGHT, TREMAINE REPRESENTING COUNTY
Lawyers must comply with County Ethics code for "County employees"	Yes. All of the County's ethical requirements for County employees apply to the lawyers	Yes.	No.	No.
Lawyers' annual pay set by County to provide parity with prosecutors	Yes.	Yes.	No. County has no information on what the annual pay of a panel attorney is.	No. County has no information what the annual pay for DWT lawyers and firm is.
County determines funding for benefits and knows what benefits lawyers receive.	Yes.	Yes.	No.	No.
Participates in County Annual Budgeting process for County Agencies.	Yes. Each Agency each year submits proposed budget to OPD which is included in Department's budget, in Executive's budget and the final County budget approved by the County.	Yes. Each year Department and Conflict Office submit proposed budgets to Executive which become part of executive's budget approved by County.	No.	No.
Competition for work	No. Agencies assigned cases by County.	No. Department assigns cases to itself, the conflict office, if there is a conflict or to outside independent attorneys.	Yes. Lawyer is in business.	Yes. Competes with other law firms for business.

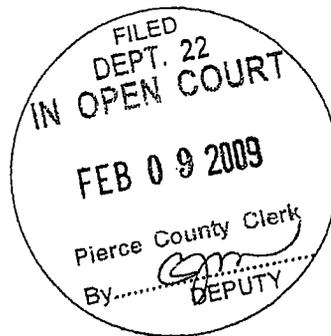
OTHER FACTORS	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS, WRIGHT, TREMAINE REPRESENTING COUNTY
County sets form of organization and tax treatment.	Yes. Agencies are nonprofit corporation because County requires them to have that organization. Agencies file tax forms (990s) and labor forms 5500 as nonprofits because County requires them to be nonprofits.	Yes. Department and Conflict Office are recognized part of County government.	No. Lawyers determine form of organization.	No. Law firm determines form of organization.
Funding source limited to County.	Yes. See xviii above.	Yes. The lawyers' funding is provided solely by the County.	No. Many other sources of funding.	No. Many other sources of funding.
County requires performance evaluation and establishes content for evaluations, corresponding to County required performance standards.	Yes.	Yes.	No.	No.

**WAC 415-02-110(3) Independent contractors work as specialists in an independently established occupation or profession. The following factors are in addition to the right and degree of control the employer has over the method or means of work. Individuals such as physicians, lawyers, dentists who follow an independent trade, business, or profession in which they offer their services to the public generally are not employees. Rev. Ruling 87-41, 1987-1 CB 296.**

FACTORS	KING COUNTY PUBLIC DEFENDERS	PIERCE COUNTY PUBLIC DEFENDERS	KING COUNTY PANEL ATTORNEYS	INDEPENDENT FIRM SUCH AS DAVIS, WRIGHT, TREMAINE REPRESENTING COUNTY
Lawyer performs only pursuant to written contract.	No. Dolan and class members do not have written contracts. Agencies generally had written contracts with the County, but they often worked without a contract for periods of time from several months to a year.	No.	No. Lawyer applies to be on panel. If accepted County assigns cases on a case-by-case basis.	Yes, generally. Law firm would normally have retainer agreement with County for the representation in the case.
In order to perform services, lawyer acquired professional occupation license or certificate.	Yes. Dolan and the other King County Public Defenders are lawyers, licensed by the Washington State Bar Association.	Yes. Pierce County public defenders are lawyers, licensed by the Washington State Bar Association.	Yes.	Yes.
Lawyers purchased worker's comp. insurance or paid taxes required for independent business.	No. Agencies paid lawyers' compensation and employment taxes with funds provided by the County.	No. Department paid worker's compensation and employment taxes.	Yes.	Yes.

<b>FACTORS</b>	<b>KING COUNTY PUBLIC DEFENDERS</b>	<b>PIERCE COUNTY PUBLIC DEFENDERS</b>	<b>KING COUNTY PANEL ATTORNEYS</b>	<b>INDEPENDENT FIRM SUCH AS DAVIS, WRIGHT, TREMAINE REPRESENTING COUNTY</b>
Lawyer filed income tax returns in name of independent business.	No. Agencies filed form 990S because County required them to be organized as a nonprofit corporation.	No.	Yes.	Yes.
Lawyer filed a Schedule of Expenses or Business Schedule C as part of personal income tax return.	No.	No.	Yes.	Yes.
Lawyers maintain separate set of books for income and expense as independently established business.	No. But Agencies are required by the County to maintain detailed financial records. The County requires the Agencies to provide regular reports. The County inspects the Agencies' records and if deemed deficient by the County, the County requires the Agencies to change their practice.	No.	Yes.	Yes.
Lawyers assumed financial responsibility for defective service as evidenced by performance cv bond, warranties, liability insurance, etc.	No. County requires Agencies to obtain malpractice insurance which they do using funds provided by the County.	No.	Yes.	Yes.

**SUPERIOR COURT'S WRITTEN DECISION**



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

KEVIN DOLAN,

Plaintiff,

vs.

KING COUNTY,

Defendant.

Cause No: 06-2-04611-6

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

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1 represented by counsel, David Stobaugh and Lynn Prunhuber, and  
2 the Defendant being represented by Michael Reiss and Amy  
3 Pannoni.

4 The Court having heard opening and closing arguments  
5 on the above dates respectively, and having reviewed the  
6 stipulated record from both the Plaintiff and the Defendant in  
7 terms of evidence submitted, hereby makes the following written  
8 decision:

9 I. INTRODUCTION

10 In the late 1960s and early 1970s, King County had the  
11 challenge of deciding what model to accept as to providing legal  
12 counsel for indigent criminal defendants. There were a number  
13 of service models that were considered by King County. They  
14 included making the Office of Public Defender a public agency  
15 under the direct control of the county executive's office,  
16 similar to Pierce County, or they could develop a panel of  
17 private counsel who would be assigned the cases on an individual  
18 basis based on experience and need, or, in the alternative, hire  
19 one outside legal firm and contract with the firm to provide  
20 legal representation for indigent defendants similar to what had  
21 previously been used in Kitsap County. The alternative, which  
22 was ultimately chosen by King County over the last 40 years, was  
23 the development of what ultimately evolved into four (4) non-  
24 profit 501 C (3) organizations, which included: 1) The Defender  
25

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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

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

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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.

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

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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  
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II. LEGAL ANALYSIS

A. Does the NLRB have "exclusive jurisdiction" over the public defenders' claim for PERS benefits?

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

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

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

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.

17  
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

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

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

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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.

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

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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  
24  
25

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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

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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 **V. INTENT OF COUNTY**

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

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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.

17  
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

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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

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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

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

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 PEGI can be dissolved by the city council and  
24 all of its directors are appointed by the city council. Given  
25

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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

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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**

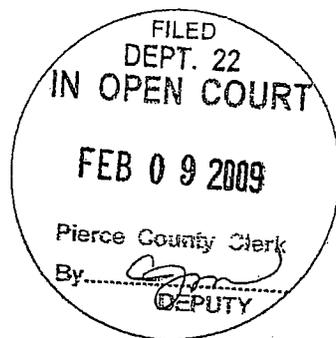
20           This Court finds, based on the evidence presented by  
21 the Plaintiff, that they have met their burden of proof as to  
22 the relief requested in showing that the Plaintiff and the class  
23 he represents should be enrolled in the PERS Retirement System.  
24 Therefore, the motion for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

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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.

19  
20  
21 John R. Hickman  
22 JUDGE JOHN R. HICKMAN



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