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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 3rd day of November, 2008, and the 10th 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 18th day of July, 2008, both the Plaintiff and Defendant brought cross motions for summary judgment which were denied by the Court leading to the agreement to present the body of the case in this stipulated format. The Plaintiff being

1 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

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

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)

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.
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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.

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

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

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

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

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

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

19 Both parties have provided an excellent recap as to
20 history leading as to the formation of these four (4) public
21 defender organizations in King County. It is clear from the
22 history provided, that it was intent of the founders of these
23 public defender organizations to present to the public a model
24 which would provide the indigent defendants with attorneys that
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1 were not part of the same system that was attempting to
2 prosecute and convict the defendants seeking assigned counsel.
3 It is interesting to note that the public defenders themselves,
4 as well as their management, often referred to their
5 organization as "The Firm". Based on the affidavits and
6 depositions which were reviewed by the Court in detail, it is
7 clear that the attorneys and staff members considered themselves
8 as defense attorneys who were not simply going through the
9 motions as the typical stereotype often promoted by defendants
10 who were represented by "public defenders". The fact that these
11 defense attorneys, who had accepted this challenge, exercised a
12 certain amount of autonomy in deciding how they ran their
13 defender organizations helped promote a spirit of
14 professionalism akin to a private law firm.

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

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

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

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

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

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

1 defender organizations the captured audience of the county.
2 This Court does not find any indicia of an independent
3 contractor for purposes of the litigation, especially in light
4 of the fact that the only source of monetary revenue is King
5 County. The defender organizations are prohibited from
6 contracting with anyone else other than a public agency or
7 municipal government. A true independent contractor would be
8 able to contract for other sources of income (i.e., represent
9 retained clients or provide services to the private clients on a
10 sliding scale). Currently, they are prohibited from doing this
11 outside the umbrella of the King County agency (OPD). An
12 independent contractor would not need the advice and consent
13 from the county as to where they could lease office space.
14 There can be no arms-length bargaining, as a typical independent
15 contractor, when the defender organization's entire existence
16 depends on the county. Further, the testimony provided by
17 organization directors shows an increase in control by the
18 Office of Public Defender through King County, not a decrease.
19 The Court views this as "control" rather than "oversight". The
20 fact that a representative of the King County Public Defender's
21 Office would attempt to insert a contractual clause that would
22 in essence allow the county to terminate the defender contracts
23 "without cause" confirms this trend. Only one party has the
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1 negotiating power in this relationship and that is King County.
2 The evidence shows that if King County ceases to fund a defender
3 organization, there are no other options for the organization
4 other than dissolution of the corporation. Control over day-to-
5 day operations becomes secondary. These corporations, or
6 "firms", serve at the leisure of the county, which is not
7 inherently wrong. The model adopted by King County, in
8 representing indigent clients in criminal cases, has been highly
9 praised. Since the county funds most, if not all, of the key
10 personnel in the county criminal justice system, is there a
11 legitimate reason to treat these individuals (class members)
12 different for purposes of critical benefits such as a PERS
13 retirement? Does case law in Washington State support this
14 distinction?
15

16 **IV. BUDGET CONTROL**

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

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

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

19
20 **V. INTENT OF COUNTY**

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

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

18 The county's attempt to ensure salary parity between
19 the two offices demonstrates a common purpose to treat the
20 employees without distinction as to employer. That Kenny Scale,
21 and/or ordinance, was not applied to the benefit packages (e.g.
22 PERS retirement) that were provided to the prosecuting
23 attorney's office and are not available to the public defender
24 organizations. This Court does not view a self-directed 401 K
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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.3rd 881 (2008). The trial court went through a
19 similar exercise (public v. no public) in trying to determine
20 whether or not the Tri-Cities Animal Care and Control Shelter
21 (TCAC), which was a privately-run corporation that contracted
22 with the Animal Control Authority (ACA) serving Richland, Pasco,
23 and Kennewick, could be considered a public agency for purposes
24 of the Washington State Public Disclosure Act.
25

1 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.

16 3. The Extent of Government Involvement or Regulation

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

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

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

18 4. Whether the Entity was Created by the Government

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

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

10
11 The Court also is cognizant of the Oregon decision in
12 State Public Employees Retirement Board v. City of Portland (684
13 P.2d 609). This case is even more similar to the case at bar
14 with regard to the issues that dealt with employee salaries and
15 benefits. This Court agrees with the analysis provided in State
16 Public Employees Retirement Board v. City of Portland in that it
17 also believes that the public defender organizations "have an
18 alter-ego relationship" with the county. The Court noted many of
19 the same factors as indicated in the Telford criteria in that
20 the purpose of the organization, as stated in the Articles of
21 Incorporation, was to implement and provide city policy required
22 that its internal rules and regulations be appealable to the
23 city council, that PECE can be dissolved by the city council and
24 all of its directors are appointed by the city council. Given
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1 this degree of control, the Court held that PEGI was an
2 instrumentality of the city. The Court specifically rejected
3 the city's argument that PEGI should be considered separate
4 because the city did not have control of the day-to-day
5 operations of PEGI. This Court finds enough similarities
6 between the Oregon case and the case before the Bar to support
7 this Court's decision.

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

13 **IX. DICTA**

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

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

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

18
19 **X. CONCLUSION**

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

[Signature]
JUDGE JOHN R. HICKMAN

FILED
DEPT. 22
IN OPEN COURT
FEB 09 2009
Pierce County Clerk
By [Signature]
DEPUTY