

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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BENDICH, STOBAUGH & STRONG, P.C.

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 JUN 24 P 3 23

KEVIN DOLAN,
Respondent,
v.
KING COUNTY,
Petitioner.

NO. 82842-3

**RULING GRANTING DIRECT
DISCRETIONARY REVIEW**

Kevin Dolan brought this class action lawsuit in the Pierce County Superior Court against King County, claiming that employees of the county's four nonprofit public defender corporations are public employees eligible for membership in the Public Employee Retirement System. Based on its review of a stipulated factual record, and without hearing testimony, the superior court determined that Mr. Dolan and the class members are public employees for retirement system purposes. In essence, the court reasoned that employees of these nonprofit corporations are public employees and must be enrolled in PERS because the corporations are functionally arms or agencies of King County, a PERS-eligible employer. The court entered a permanent injunction, certified its decision as one meriting immediate review pursuant to RAP 2.3(b)(4), and stayed further proceedings pending review. The court later entered findings of fact and conclusions of law.

King County now seeks this court's discretionary review, agreeing with the superior court that the court's order merits review under RAP 2.3(b)(4). And the

county posits that this court rather than the Court of Appeals should hear the case because it presents issues of first impression that could have a large fiscal effect on King County and other governmental agencies. See RAP 4.2(a) (type of cases reviewed directly). Mr. Dolan responds that a permanent injunction is an appealable final judgment under RAP 2.2(a)(1), so the county may appeal rather than seek discretionary review. But he disagrees that the case merits review by this court, arguing that the superior court applied longstanding and accepted common law and statutory definitions of “employee” and “employer” in deciding this case on a voluminous factual record.

It may be debatable whether the trial court’s decision is appealable as of right under RAP 2.2(a). Both permanent and temporary injunctions were appealable under our former rules. The drafters of our current Rules of Appellate Procedure made clear that review of temporary injunctions should be by discretionary review rather than appeal, but said nothing about permanent injunctions. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.2 § 32, task force cmts. at 107 (6th ed. 2004). The permanent injunction issued here does not easily fit the definition of a final judgment under RAP 2.2(a)(1), since a final judgment is a court’s last action that settles the rights of the parties and disposes of all issues in controversy. *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). Nor does the decision appear to be a “written decision affecting a substantial right ... that in effect determines the action and prevents a final judgment or discontinues the action,” within the meaning of RAP 2.2(a)(3). The trial court did not dispose of the entire case, and its decision does not prevent the issuance of a final judgment or discontinue the action. And none of the more specialized types of decisions listed in RAP 2.2(a)(4) through (13) fits this order. Nonetheless, in a practical sense the decision here has been made, and all that

remains is implementation and enforcement. It could be argued that the decision ought to be appealable, even if it isn't.

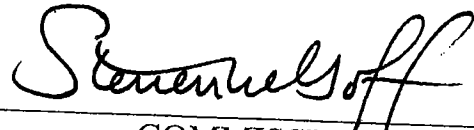
But I need not decide the appealability issue, since I agree with the trial court and the county that review is warranted under RAP 2.3(b)(4).¹ In the words of that rule, the trial court's order "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." *Id.*

Controversies have arisen in the past involving the proper classification of employees of nonprofit corporations and other organizations having strong ties to governmental agencies. For example, the attorney general was called on in 1956 to issue an opinion on whether employees of a nonprofit corporation (the Associated Students of the University of Washington) were university employees eligible for PERS membership; the opinion essentially reasoned that they were PERS employees because the corporation was an arm or agency of the university. *See* 1956 Op. Att'y Gen. No. 267. But neither this court nor the Court of Appeals has construed or even applied the controlling statutes or common law definitions in a situation of this sort.

And review now may materially advance the termination of the litigation. Such a determination is predictive at best, but a definitive ruling could well lead to a speedy resolution of this litigation on remand, whichever way it goes. And the issue seems to me to be one of broad public import calling for this court's direct review, RAP 4.2(a)(4), not only as it affects the organizations and numerous employees involved, but also as it might affect others with close working relationships with governmental entities.

¹ The parties will be free to argue the appealability issue on review, if they so choose.

The motion for direct discretionary review is granted.

A handwritten signature in cursive script, appearing to read "Steven Goff".

COMMISSIONER

June 24, 2009