

The Honorable John R. Hickman  
Friday, May 22, 2009  
3:00 p.m.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KEVIN DOLAN and a class of similarly  
situated individuals,

Plaintiffs,

v.

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

Defendant.

NO. 06-2-04611-6

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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

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1 be addressed in phases, first liability and later, if liability is found, relief will be addressed in the  
2 second phase. The parties and the Court agreed that the liability phase would be addressed by  
3 cross-motions for summary judgment and, if liability could not be determined on these motions,  
4 the case would be tried by the Court.

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

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

12 In this trial on the record, the Court reviewed a very large and comprehensive body of  
13 evidence, consisting of about 6,000 pages of testimony and exhibits. The County submitted about  
14 1,400 pages of deposition testimony from 11 witnesses and declarations from 7 witnesses. Those  
15 depositions and declarations incorporated about 2,700 pages of exhibits. The plaintiffs submitted  
16 declarations for 10 witnesses with nearly 2,000 pages of exhibits.

17 The Court heard opening statements on November 3, 2008 and closing argument on  
18 November 10, 2008. The claim tried by the Court is whether plaintiffs are King County  
19 employees within the meaning of PERS. The Court issued a written decision on February 9, 2009,  
20 finding that plaintiffs are King County employees for the purpose of the PERS statute.

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

### 24 FINDINGS OF FACT

25 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),

1 Associated Counsel for the Accused (ACA), Society of Counsel Representing Accused Persons  
2 (SCRAP), and Northwest Defenders Association (NDA) – all perform this governmental function  
3 for King County.

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

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

9 4. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), TDA was created as a nonprofit  
10 corporation in 1969 to organize indigent public defense by the City of Seattle and the federal  
11 government through the federal Model City program. ~~In 1970, King County took over the~~  
12 ~~financing and administration of public defense after it was determined that public defense is a~~  
13 ~~County duty.~~ Initially, TDA was the County's sole public defense agency. JMA

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

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

18 7. NDA was created for the County during the County's 1987 budget process, to  
19 ~~provide the County with a minority-run public defense firm. The County did not issue an RFP for~~  
20 ~~a minority-run firm. Rather,~~ NDA was added as a public defense agency by the County in 1987,  
21 during the County's budgetary process for the 1988 budget. The County then assigned cases to  
22 NDA in 1988, cases that the County would have otherwise assigned to the other agencies. JMA

23 8. King County's public defense system is unique in the nation and the quality of  
24 King County's public defense has been highly praised. The King County Public Defender is a  
25 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

1 screens individuals for financial eligibility for appointed counsel and assigns the cases to one of  
2 King County's four public defense agencies. OPD is a division within a County department, the  
3 Department of Community and Human Services, which is part of the Executive Branch.

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

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

12 11. The County assigns cases to each agency based on the type of case and the market  
13 share (percentage of cases) the County allocates to each agency for that type of case, e.g., felonies,  
14 district court misdemeanors, juvenile cases, involuntary treatment, etc. Each year the County tells  
15 each agency how many cases it will get in each area. ~~The agencies do not compete for shares or~~  
16 ~~allocations.~~ *NEGOTIATES*

17 12. The County has changed these allocations somewhat over time. For example,  
18 initially TDA had a greater share of felonies and SCRAP had a greater share of juvenile and  
19 dependency cases. ~~Neither TDA nor SCRAP sought to have a smaller percentage of these types~~  
20 ~~of cases they had. Each agency tried to retain its existing percentage of the types of cases, but the~~  
21 ~~County changed its allocation of such cases to the agencies.~~ *NEGOTIATES*

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

14. The County-assigned percentages for each public defense agency is determined in

1 the County's annual budget process for County departments, divisions and agencies. After the  
2 budget is adopted, the types of cases and the percentage each agency will receive is stated in the  
3 County's contract with each agency.

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

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

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

18 18. Each year OPD sent each public defense agency a proposed detailed line-item  
19 budget based on the previous year's actual expenditures. The public defense agencies submitted  
20 to OPD their anticipated costs – based on last year's actual costs – in the detailed line-item areas,  
21 including listing the salaries and benefits for each public defense attorney and staff. If there were  
22 mandatory increases (such as increased caseload, new case areas, increases in rent, etc.), these  
23 costs were added by the County. If the County was undergoing a budgetary shortfall, OPD, like  
24 every other County agency, would be given a percentage reduction to achieve, e.g., 5% reduction  
25 in last year's budget, a reduction which the four public defense agencies had to match in their  
proposed budgets to OPD so that the public defense budget would have the County required

1 percentage reduction.

2 19. In the budget, the County provided the agencies the same employee cost-of-living  
3 adjustment (COLA) given County employees, and required the agencies to pass through that exact  
4 cost-of-living adjustment to the public defense attorneys and staff. JLA

5 20. The detailed line item budget approved by the County Council was then  
6 incorporated into each agency's contract. The contract provided that the agencies had to adhere to  
7 the budget. If the agencies did not spend the amount allocated for a line item, such as training or  
8 rent, the line item would be reduced the next year.

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

13 22. King County recently changed its budgeting method to one that treats the four  
14 public defense agencies as one agency, but it still treats the agencies as if they were a part of the  
15 County for purposes of the budget. The County's change in its budgeting method for the agencies  
16 is not material and the County could also at any time return to its previous budget approach. JLA

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

22 24. The contract is sometimes not completed before the next year begins, and the  
23 County has the agencies sign a one-page County form called "Intent to Contract," which allows  
24 public defense services to continue without a contract by following the County-approved budget  
25 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.

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

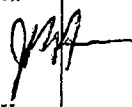
10           26.     The Kenny study developed job descriptions, education and experience  
11     requirements for each attorney classification, both prosecutors and public defenders. It also  
12     established a salary schedule – called the "Kenny scale" – with pay steps for each classification  
13     providing pay parity for prosecutors and public defenders.

14           27.     The Kenny salary scale was adopted by the County Council in Ordinance 9221 in  
15     1989. The County Council required pay parity for public defense attorneys with prosecutors,  
16     using the Kenny scale and attorney classifications. After the County Council adopted the Kenny  
17     scale, the County incorporated it into the County-approved budget for each agency and  
18     incorporated the scale directly into its annual contracts with the agencies. The County updates the  
19     scale each year and includes the cost of living increase given to County employees. The Kenny  
20     scale has been used by the County for over 18 years and is still in effect.

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

24           29.     King County directed the Kenny group to conduct a similar study and classification  
25     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

1 County employees performing similar work. The County Council did not adopt the pay parity for  
2 public defense staff at that time. County budgets for the agencies thus did not provide enough  
3 money to have pay parity for the non-lawyer defense staff with their counterparts in the  
4 prosecutor's office or other parts of the County.

5 30. ~~Although pay parity for the staff was not provided, the County set the pay rates for~~  
6 ~~the agency staff through its annual budget process and through its contract which required the~~  
7 ~~agencies to submit to the County position salary reports for attorneys and staff so that the County~~  
8 ~~would monitor the pay. The agencies were required to submit position salary reports each January~~  
9 ~~and every quarter thereafter as part of their contracts with the County.~~ 

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

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

24 33. The County's contention that the public defense agencies can manage their own  
25 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



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

7 34. The County's monetary control through the budget process, reservation of powers  
8 to audit and ultimately dismember a public defense agency, and the County's authority to allocate  
9 cases among the agencies gives the County control over the public defense agencies and plaintiffs.  
10 This control is illustrated in part by the County's actions regarding the Eastside Defender  
11 Association, SCRAP and NDA.

12 35. ~~Eastside was established as a King County public defense agency in 1978. In 1984,~~  
13 ~~the County audited Eastside. The audit found self-dealing by the Managing Director and founder~~  
14 ~~Jerry Parks, but no fault was found with the public defense attorneys' representation. What~~  
15 ~~Eastside and its director had done was apparently not illegal or in violation of the contract, but the~~  
16 ~~County decided that it would no longer allow Eastside to be a public defense agency. Because the~~  
17 ~~County was its sole source of funding, Eastside ceased to exist in 1985.~~

18 36. ~~The County assigned Eastside's caseload to the remaining public defense~~  
19 ~~agencies TDA, SCRAP, and ACA, with ACA growing the most and obtaining a new practice~~  
20 ~~area, juveniles. The plaintiff Kevin Dolan was a King County public defense attorney with~~  
21 ~~Eastside. When the County said it would no longer allow Eastside to be a public defense agency,~~  
22 ~~Dolan became a public defense attorney with ACA, taking his existing cases from Eastside to~~  
23 ~~ACA.~~

24 37. ~~After auditing Eastside, the County audited SCRAP, TDA and ACA. The County's~~  
25 ~~audit of SCRAP found that Roberts Nickels was the President of the SCRAP Board, that he held~~  
~~the two existing corporate membership certificates, that he was also the managing director, and~~

1 that SCRAP leased office space and furniture and equipment from Nickels.

2 38. The County told SCRAP that Nickels had to resign as managing director, as  
3 President of the Board of Directors, and as a member of the board, and he had to relinquish his  
4 membership certificates to two people approved by the County. The County required SCRAP to  
5 change the members of its Board of Directors, removing some members and appointing new board  
6 members who were suitable to the County. The County permitted Nickels' employment by  
7 SCRAP to continue for two years, but only on condition that the County approve Nickels'  
8 employment contract. The County also required its approval for the office and equipment leases.

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

14 40. In 2002, NDA asked the County to approve a new lease for office space in  
15 downtown Seattle. The County turned down NDA's request because the space was of better  
16 quality than the County would itself rent and rent was more than the County wanted to pay. NDA  
17 leased the space without the County's permission.

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

22 42. The County decided that NDA's response was not adequate and in August 2002 the  
23 County filed suit against NDA and asked the court to place the agency under the control of a  
24 receiver. The County's complaint summarized the audit, alleged that NDA was still incorrectly  
25 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

1 of NDA's Board of Directors and management, appointment of a receiver, and restitution of funds  
2 "misappropriated or mismanaged" by NDA's management, or alternatively dissolution of NDA  
3 and return of any funds held by NDA to the County.

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

8 44. ~~The County replied through Jackie MacLean, the director of King County~~  
9 ~~Department of Community and Human Services (DCHS), of which the Office of Public Defense~~  
10 ~~(OPD) is a unit, that:~~ JMA

11 ~~DCHS has not notified NDA that it intends to terminate any contract with~~  
12 ~~NDA at this time. However, based upon NDA's "response" to the audit report and~~  
13 ~~the fact that NDA has failed to cure any of the issues identified therein, DCHS has~~  
14 ~~determined that it will not continue to fund NDA after expiration of the Statement~~  
15 ~~of Intent on December 31, 2002, unless a receiver is appointed. Furthermore, at~~  
16 ~~such time, in accordance with the provisions of the Contract, DCHS will demand~~  
17 ~~that NDA remit the balance of its reserves to DCHS and to the extent permitted by~~  
18 ~~the applicable courts, withdraw from all cases assigned to it by OPD.~~

19 Pursuant to Section 2.60.040 of the King County Code, DCHS may contract  
20 only with nonprofit corporations formed for the *specific* purpose of rendering legal  
21 services to persons eligible for representation through OPD. I have attached a true  
22 and correct copy of KCC 2.60.040 as Exhibit 3. Thus, if NDA is engaged in  
23 providing in any other form of legal representation - whether for profit or pro  
24 bono - DCHS is prohibited by law from continuing to fund NDA.

25 NDA's governing instrument originally only contemplated indigent  
defense. The King County Code does not permit DCHS to contract with an agency  
involved in anything besides public defense.

\* \* \*

All of the funds currently held in reserve by NDA, in fact all of NDA's  
funds in general, are funds paid by the taxpayers via DCHS for the sole purpose of  
indigent defense. Any funds that NDA has maintained in reserve by mandate of the  
Contract, or by virtue of its management's under-staffing cases to run the agency at  
a profit, constitute a charitable trust fund to be held for the benefit of the King  
County taxpaying public.... [Footnotes and record citations omitted.]

DCHS will not deal with NDA's current, hand picked "board members."  
We did not discover that NDA did not have a Board of Directors or that McKee

1 and Mills had selected their own members until the audit. Before such discovery,  
2 NDA had represented to DCHS that it had a lawfully constituted Board.

3 If Mills has engaged in a practice of family law in Pierce County while in  
4 the employ of NDA as its Deputy Director, this would be inappropriate even if  
5 done on a pro bono basis. While the clients may have not paid for his time or  
6 services, DCHS did as it was then paying his salary as an employee of NDA.  
7 DCHS will not underwrite Mills' or any other NDA attorney's "pro bono"  
8 activities in other courts. DCHS pays NDA's employees to undertake indigent  
9 defense in cases assigned by OPD in King County and the City of Seattle. DCHS  
10 will not provide funds to NDA so that it may engage in other legal representation in  
11 other counties and municipalities. NDA cannot use public funds paid by DCHS for  
12 the benefit of King County taxpayers in this manner.

13 If NDA asserts that the reserves it is holding can be used by it for any  
14 purpose, DCS would object. The use of those reserves is restricted to indigent  
15 defense of OPD-assigned cases and may only be used for such purposes [Emphasis  
16 in original; paragraph numbers deleted.] JMA

17 45. The County also took the position in the NDA litigation that the agency's reserves  
18 belonged to the County, not to the agency:

19 DCHS has never agreed any "surplus" of funds paid under Contract for the  
20 representation of indigents may be kept by NDA to use for any purposes for which  
21 it sees fit. The first page of the Contract provides, "any and all funds provided  
22 pursuant to this Contract are provided for the *sole purpose* of provision of legal  
23 services to indigent clients of the Agency [NDA] [emphasis by County]." DCHS  
24 has an interest in that reserve – the money is for indigents, not for NDA's  
25 expansion. DCHS' interest entitles it to a receiver.

26 DCHS' right to NDA's funds, both operating and reserve, is further secured  
27 in Section XIII.E of the Contract which provides that in the event DCHS terminates  
28 the contract because of the "misappropriation of funds" or "fiscal  
29 mismanagement," NDA "shall return to the County those funds, unexpended or  
30 misappropriated, which, at the time of termination, have been paid to the Agency  
31 [NDA] by the County." "Misappropriation of Funds" is defined under Exhibit V to  
32 the Contract as "the appropriation of funds received pursuant to this Contract for  
33 purposes other than those sanctioned by this Contract." Id.

34 In its response to the audit, NDA admitted it paid funds received under the  
35 Contract for services rendered to or on behalf of The Law Group PLLC ("TLG")

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

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

6 48. ~~King County told Robinson that the County would not contract with NDA if either~~  
7 ~~of the two prior lawyer/managers remained with NDA. Robinson promptly removed the one prior~~  
8 ~~lawyer/manager who was managing NDA, and did not permit the other to renew involvement.~~ JMA

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

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

20 51. ~~After determining that the three existing board members were upstanding members~~  
21 ~~of the minority community, Robinson wanted to retain them as NDA board members, while~~  
22 ~~adding new additional board members. The County, however, said that the three existing board~~  
23 ~~members could not be NDA board members. Consequently, Robinson discharged them, added~~  
24 ~~new board members and obtained the County's approval for them as board members before they~~  
25 ~~were added.~~ JMA

52. King County required that the receiver amend the NDA bylaws and articles of

1 incorporation to limit its activities to only public defense. ~~The County's lawyer prepared the~~  
2 ~~amending language, modifying what the receiver had proposed.~~ King County also required that  
3 NDA's Board of Directors adopt the King County Code of Ethics, and that NDA also include it in  
4 NDA's Employee Handbook and provide a copy to each NDA employee. ~~NDA also rewrote its~~  
5 ~~employee handbook to include the many other County required provisions for employees.~~

6 53. ~~The County actions with regard to Eastside, SCRAP and NDA are not isolated~~  
7 ~~incidents. The County has used its powers, including its corrective action procedures, to require~~  
8 ~~the agencies to make a variety of changes to their internal operations.~~

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

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

56. The County assigns the cases and determines the market share (percentage of cases)

1 that each agency receives. There is no competition among the agencies for cases or market shares.  
2 The County also does not allow the public defense attorneys to do other work, for pay or pro bono,  
3 except with its permission, as is shown by its action against NDA. The public defense attorneys  
4 are required by the County to perform their services personally. They cannot subcontract their  
5 work and neither can the staff. The County also does not allow the agencies to subcontract the  
6 defense work except with County permission and no such permission has ever been granted. A  
7 true independent contractor would not have these restrictions.

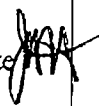
8 57. The County restricts the agencies to being nonprofit corporations with the limited  
9 purposes of providing indigent public defense. It prohibits them from contracting with anyone  
10 except another public agency or municipal government for public defense or public defense  
11 related work.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

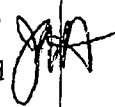
14 58. The County also restricts the agencies from having any affiliated entities, either  
15 nonprofit or for-profit. A true independent contractor would not be so restricted. In fact, the  
16 County put NDA into receivership and required it to be reorganized in part because it had created  
17 a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

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

24 60. These County restrictions assure that the agencies' sole (or virtually sole) source of  
25 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

1 bargaining with the County about the essential terms, such as benefits, because their only  
2 alternative to acquiescing in the County's demands is to end their existence.

3 61. Although the board of directors for each agency approves the County's contract  
4 with the agency, ~~this approval is just a matter of form.~~ <sup>However</sup> The agencies have no ability to negotiate   
5 the essential contract terms. The actual contract price is predetermined by the County's budget  
6 process the year before the contract, and is not a negotiated item. The County contract is then  
7 offered on a take-it-or-leave basis. The agencies have no power or ability to reject the County's  
8 take-it-or-leave offers because their existence depends solely on County funding and the County  
9 prevents them from having any other source of revenue.

10 62. The 2003 contract "negotiation" is illustrative. The County had the agencies sign  
11 its "intent to contract" forms for 2003 incorporating the budgeted amount for each agency  
12 approved in 2002. Eventually the County gave the agencies a proposed 2003 contract. The  
13 agencies and their board of directors strongly objected to the County's proposed contract. It  
14 contained numerous new detailed provisions to which the agencies objected, including termination  
15 without cause and inspection of all client files by the Public Defender, which the agencies thought  
16 violated ethical rules because the four agencies the Public Defender supervised have clients with  
17 conflicting interests. The directors of the agencies and board members met with the County  
18 officials, including the Public Defender and head of the Department, Ms. MacLean, but the  
19 County would not agree to remove the offending provisions. ~~The NDA receiver, Mr. Robinson,~~  
20 ~~tried to meet with the County Executive about the agencies' objections, but the Executive would~~   
21 ~~not meet with him, leaving the matter to his subordinates.~~ The agencies' boards decided not to  
22 sign the contract, but the County told the agencies in September 2003 they either signed the  
23 contract as is or the County would terminate their contracts. The boards and executive directors  
24 then reluctantly signed the contract because otherwise their agencies would cease to exist.

25 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



1 shows the agencies lack genuine independence. They are not independent contractors.

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

6 65. ~~Neither the public defense agencies nor the County can exercise direct control over~~  
7 ~~how public defense attorneys handle an indigent defendant's case. Public defense attorneys, even~~  
8 ~~more than other professionals, cannot be subject to day-to-day employer control because of their~~  
9 ~~constitutional and ethical duties to their clients. They must be independent in their representation.~~ *YMA*

10 66. The public defense agencies have significant, but not complete, control over their  
11 day-to-day operational matters. The day-to-day control exercised by the public defense agencies  
12 generally includes hiring, internal structure of the agency, work assignments and promotions,  
13 setting of vacation schedules and most internal discipline, and management of funds provided by  
14 the County within the constraints of the County approved budget and contract.

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

19 68. Cruz explained that the items of "independence" in operations relied on by the  
20 County as proving that the agencies were "independent contractors," including who to interview  
21 for a job, questions to ask potential hires, the decision of hiring and/or promoting, appointment of  
22 supervisors, decisions regarding internal structure, reorganization and assignment of work duties,  
23 were also in fact normal for recognized units of county government. He testified that because of  
24 the decentralization for personnel matters within King County government, the actual County  
25 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

1 organizations having collective bargaining agreements, since about 80 to 85% of the County's  
2 work force has collective bargaining agreements, including the prosecutor's office which has an  
3 agreement covering deputy prosecutors.

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

6 70. ~~Raymond Thoenig testified how the Department of Assigned Counsel operates and~~  
7 ~~the control Pierce County exercises over it, and the public defense agency directors testified about~~  
8 ~~how the public defense agencies operate and the County's control.~~ JMA

9 71. ~~This evidence is summarized in a chart based on WAC 415-02-110 and used by~~  
10 ~~DRS in the Robert B.C. McSeveney decision to determine whether a worker is an employee for the~~  
11 ~~purposes of PERS (DRS found that although Judge McSeveney signed an agreement providing~~  
12 ~~that he was an independent contractor, not an employee, he was really an employee, not an~~  
13 ~~independent contractor for PERS purposes). The chart is an appendix to the declarations of Robert~~  
14 ~~Boruchowitz and Raymond Thoenig. The accuracy of the facts in the chart is attested to by~~  
15 ~~Boruchowitz for the public defense agencies and King County panel attorneys and by Thoenig for~~  
16 ~~the Pierce County Department of Assigned Counsel.~~ OK

17 72. ~~This evidence shows that the County's control over the King County public defense~~  
18 ~~agencies is the same or greater than that exercised by Pierce County over its Department of~~  
19 ~~Assigned Counsel, a recognized unit of Pierce County government, and that the autonomy that the~~  
20 ~~King County public defense agencies have in their internal operations is not different than that~~  
21 ~~exercised by Pierce County's Department of Assigned Counsel. This evidence also shows that the~~  
22 ~~County's control over public defense agency attorneys and staff and their work is the same as or~~  
23 ~~greater than the control exercised by Pierce County over public defense attorneys and staff who~~  
24 ~~are part of its Department of Assigned Counsel and who are enrolled in PERS by Pierce County.~~ JMA

25 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

1 agencies are incorporated as nonprofits, while Pierce County's Department of Assigned Counsel is  
2 a recognized unit of County government.

3 74. ~~The agencies and public defense attorneys and staff are independent in their~~  
4 ~~representation of clients, representing defendants with the same professional independence as do~~  
5 ~~the Federal public defenders, and the Pierce County public defenders, all of whom are recognized~~  
6 ~~as official government employees, but who are independent in their representation of clients.~~ JMA

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

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

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

19 78. ~~King County may unilaterally change caseload limits mid contract, for example~~  
20 ~~lowering in midyear 2007 the number of cases an attorney may handle in juvenile court from 330~~  
21 ~~per year to 250 per year. The public defense agencies wanted to reduce attorney caseloads in the~~  
22 ~~district court misdemeanor practice area where they thought the caseloads were too high, instead~~  
23 ~~of the juvenile area, but the County did not agree and so the caseloads in juvenile practice area~~  
24 ~~were lowered, requiring the public defense agencies to add or move attorneys to that practice area.~~ JMA

25 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

1 their compliance with these limits. If a violation is found by the County, it may result in  
2 corrective action.

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

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

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

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

14 84. The County maintains in its contracts and otherwise that the funds provided to the  
15 public defense agencies are solely for the purpose of providing public defense services for the  
16 County and cannot be used for any other purpose. (The County relied on this provision in its  
17 action against NDA.) ~~Similarly, the County maintains that any additional funding received by the~~  
18 ~~agencies (if any), such as grant money, cannot be used to lower attorney caseloads or change the~~  
~~caseloads allocated by the contract.~~ JMA

19 85. The County provides funding for the agencies to purchase or lease equipment. This  
20 funding is built into the agency's budget by the County and incorporated into the contract.  
21 ~~(Before the County provided funding for such purchases, it gave the agencies County computers~~  
22 ~~and furniture to use, and they remained the property of the County under the contract.) The~~  
23 ~~County contracts require the agencies to maintain a detailed inventory of property purchased with~~  
24 ~~funds from the contract or depreciated during the contract and state that any such property in~~  
25 ~~excess of \$1,000 belongs to the County (recently changed by the County to \$5,000).~~ JMA

1        86. ~~The contract requires the agencies to maintain a reserve account to be used solely to~~  
2 ~~complete the agency's ongoing cases if the County ceases to use the agency as a public defense~~  
3 ~~agency. The County maintains, in the event of termination, that any unexpended reserves belong~~  
4 ~~to the County, not the agency.~~ *JMA*

5        87. The County required the agencies to submit several regular reports: position salary  
6 reports listing the salary of each of the lawyers and staff; monthly expenditure reports tracking the  
7 line items in the County-approved budget for the agency; monthly closed case reports; attorney  
8 case reassignment reports; reports about attorney evaluations; persistent offender reports;  
9 additional credit reports; complex litigation plans and time sheets; extraordinary case credits, and  
10 responses to client complaints, and any "additional summaries, reports or documents requested by  
11 OPD." These reporting requirements have been incorporated in the County contracts.

12        88. The contracts contain a corrective action procedure which applies if the County  
13 believes that the agency is not complying with the contract. Under this procedure, the County  
14 notifies the agency of the nature of the County complaint in writing, the agency has three working  
15 days to respond in writing with its corrective action plan to correct the deficiency specified by the  
16 County within 10 days. The County then notifies the agency whether the proposed correction has  
17 ~~in the sole discretion of the County been accepted.~~ If the agency does not satisfy the County with  
18 its corrective action, the County may terminate the contract, or continue to withhold payment.  
19 ~~Corrective action is a one-way provision. There is no corresponding remedy for the agencies if~~  
20 ~~they believe the County has not complied.~~ *JMA*

21        89. ~~The County has used the corrective action procedure to require the agencies to~~  
22 ~~make changes in the agency's internal operations and functions. The County has used it to require~~  
23 ~~the discharge of lawyers, managers, and board members, change bylaws and articles of~~  
24 ~~incorporation, require changes to practice standards, experience standards, employee evaluations,~~  
25 ~~supervision practices, and employee handbooks, adjust pay, and require work load adjustments.~~ *JMA*

90. The contract also authorizes the County to conduct audits of agencies' internal

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

7 91. ~~The County provides the agencies with access to Electronic Court Records (ECR)~~  
8 ~~equal to that provided to King County Prosecutors. Neither the public nor the King County panel~~  
9 ~~attorneys have this access. The public defense agencies are also on the County's wide area~~ JMA  
10 ~~network (WAN) and until recently all the public defense agencies used the County's e-mail~~  
11 ~~system. The County requires the public defense agencies and all public defense attorneys and staff~~  
12 ~~to comply with the County Information Management Policy, which governs County computer~~  
13 ~~usage, and it incorporates this requirement into the contract. The agencies are also required to~~  
14 ~~incorporate these County requirements into their employee handbooks and other materials~~  
15 ~~distributed to employees.~~

16 92. ~~The County has promulgated the "Standards for Supervision" for the supervisory~~  
17 ~~attorneys for the four public defense agencies, incorporating these standards into the agencies~~  
18 ~~contracts and budgets. The County supervision standards require "one full-time equivalent~~ JMA  
19 ~~supervisor for every ten staff attorneys," and provide that the "Supervisors shall not carry a~~  
20 ~~caseload," with limited specified exceptions. Id. The County "standards for supervision" are~~  
21 ~~detailed, setting forth three pages of specific requirements.~~

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

25 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

1 approves the contents of the evaluation forms. The County also establishes the method of the  
2 supervisors' evaluations of attorneys, requiring an individualized evaluation under the County's  
3 standard for attorney evaluations by supervisors. JMA

4 95. The County promulgated a Standard for Client Complaints, formalizing the  
5 County's longstanding practice. This practice – now a standard – was incorporated into the  
6 contracts. Under this practice when a client complained to OPD, OPD would contact the agency,  
7 requiring the agency to respond to OPD in writing within 24 hours using an OPD form. OPD has  
8 always treated the client complaints and agency responses as confidential because they may  
9 contain client confidence or privileged work product information. WJA

10 96. The County has an "extraordinary occurrence policy" that the County incorporated  
11 into the agency's contracts. This policy requires the agency to report to OPD any time there is an  
12 allegation that an attorney or staff member has breached a professional duty owed to a client under  
13 "Constitutional Case Law" or "RPCs." The extraordinary occurrence can lead to corrective action  
14 by the County and ultimately to contract termination.

15 97. The County sets mandatory tasks and schedules for task performance for individual  
16 public defense attorneys in the contracts. Kevin Dolan explained how these County requirements  
17 impact his work, requiring him to complete tasks within the County's schedule and make County-  
18 required notations in the client files. JMA

19 98. The County required the agencies to develop attorney practice standards. Using its  
20 corrective action procedures, the County made 32 pages of detailed changes to the standards that  
21 the agencies proposed. These practice standards are incorporated in the contract and failure to  
22 adhere to them is grounds for corrective action or contract termination. JMA

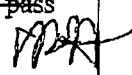
23 99. Under the contract, the County exercises tight monetary control over death penalty,  
24 murder, and other complex cases through its control over case credits and expert witness fees. In  
25 this context the King County Public Defender has told public defense attorneys that they should  
pursue a different defense, hire a different expert, or pursue a different strategy. JMA

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

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

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

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

12           104. TDA and NDA have unions that represent employees. ~~TDA and NDA do not~~  
13 ~~engage in meaningful bargaining with the unions over pay and benefits. TDA and NDA just pass~~  
14 ~~through to the employees represented by the unions what funds the County provides.~~ 

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

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

25           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



1 Washington) were eligible for PERS membership because the nonprofit corporation was an "arm  
2 and agency" of the University of Washington, an eligible PERS employer.

3 108. DRS's administrative interpretation of the PERS statute is the same as the Attorney  
4 General's. In a December 1990 PERS eligibility decision, DRS interpreted the term "employer"  
5 in PERS in the same manner as the Attorney General did in AGO 1955-57, No. 267. DRS  
6 adopted the Attorney General's interpretation as its own, and found that the employees of a  
7 nonprofit corporation, the Washington State University Bookstore, were correctly enrolled in  
8 PERS because the nonprofit corporation was an "arm and agency" of Washington State  
9 University, an eligible PERS employer.

10 109. ~~DRS found in an audit of King County DRS Examination No. 96-20 that~~  
11 ~~workers who were paid by the County through independent businesses were County employees~~  
12 ~~who should have been enrolled by the County in PERS. DRS's administrative interpretation of~~  
13 ~~the PERS statute was that, even if the workers were also employees of the independent businesses,~~  
14 ~~the County was at least a joint employer of the workers and that was sufficient for PERS.~~

### 15 CONCLUSIONS OF LAW

16 1. The Court incorporates as part of its conclusions of law the Court's February 9,  
17 2009 written decision, which explains the legal basis for the Court's trial decision.

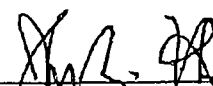
18 2. King County is a PERS employer and has a duty to enroll its employees in PERS  
19 and make PERS contributions to DRS.

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

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

24 5. King County's affirmative defenses are rejected.  
25

1 DATED this 1 day of June, 2009.

2  
3   
4 JOHN R. HICKMAN  
5 SUPERIOR COURT JUDGE

6 Presented by:

7 BENDICH, STOBAUGH & STRONG, P.C.

8  
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