



## **CASE REPORT**

**Non-profit agency public defenders serving King County eligible for PERS system.**  
**DOLAN V. KING COUNTY**, WA. Sup. Ct. Docket No. 82842-3 (Washington State Supreme Court, August 18, 2011)

In its decision, the Washington State Supreme Court finds that, based on a very specific set of facts, the non-profit public defender entities providing services to King County are “arms and agencies” of King County and not independent contractors. The employees of the agency, therefore, are “employees” within the meaning of the Public Employment Retirement System statute, RCW 42.40.010, and entitled to inclusion in the system.

**I. Facts.** The facts of this case are critical to understanding the Court’s decision. Over a period of thirty years, King County asserted increasing budgetary and day-to-day authority over the formerly independent non-profit organizations which provide indigent legal services to the County.

A review of the record reveals that the County, perhaps for very legitimate reasons, has gradually extended its right of control over the defender organizations until they indeed have become vassal agencies of the County.<sup>1</sup>

**II. Applicable Law and Analysis.** The Court listed the following examples of the County’s right of control, contrasting those controls with common law principles used to determine an independent contractor:

1. Defender organizations were created to carry out a constitutional mandated function of the County.

2. Generally, independent contractors determine their own formal structure, such as the composition of their boards, articles, and by-laws. The Court noted that King County has imposed stringent controls over each defender organization’s internal structure.

3. Generally, independent contractors may have many clients. The defender organizations were “true captives of the County in the sense that they cannot have other clients

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<sup>1</sup> Opinion at p. 20.

without the County's consent."<sup>2</sup> The County provides virtually all of the funding to the organizations.

4. Independent contractors usually bid for and/or negotiate contracts. The contracts for the defender organizations were merely pass-throughs of the County's budgeting process.

5. Independent contractors generally lease space or acquire property without approval. The defender organizations cannot lease or acquire property without the County's consent and property purchases over \$1,000 became County property.

6. Generally, independent contractors can realize profits or losses and non-profit entities are entitled to set aside money for future growth and expansion. This is not so under the King County structure.

7. Generally independent contractors set their employees' salaries. The defender organizations are prohibited from having other clients. The defender agencies must pay rates set by the County and increases are limited to the same cost of living increase that King County employees receive.

8. Generally, independent contractors establish their own wage scale.

The court notes that no single factor or combination of factors is controlling but holds that "the County has exerted such a right of control over the defender organizations as to make them agencies of the County." Accordingly, the Court held that under Washington common law, as adopted in RCW 41.40.010(12), the employee's defender organizations are employees of the County for the purposes of PERS.

**III. Conclusion.** This decision does not mean that cities which contract with independent contractors for defense services will be obligated to pay for PERS retirement benefits for those employees. The Court recognizes that:

An independent contractor, whether for profit or not for profit, does not lose its independence solely because it is providing a public service at the request of the government. Further, government can and should exact high standards of performance from its independent contractors. Prudent financial controls and careful oversight of contract compliance does not render a contract an agency of the government. 'The retention of the right to inspect and supervise to ensure the proper completion of the contract does not viciate the independent contractor relationship. [citation omitted] However, government cannot create an agency to perform a government function, incorporate it into its yearly budget process and control it like any other government agency, and claim it is an independent contractor solely because of the form of name or title.'

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<sup>2</sup> Ibid.

As your city attorneys, we will carefully review your contracts for defender services to ensure that you maintain adequate financial controls consistent with the Court's opinion. This case emphasizes the need, however, to maintain the proprieties of the independent contractors relationship when contracting for the provision of essential public services.