HB 299

<TARGET><BILL>HB 299</BILL><SUBJECT>HB 299</SUBJECT><COMM>HSTA29</COMM></TARGET>

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 5, 2016 **FURTHER REFERRALS: Labor and Commerce**

Date of Committee Action: 3-22-2016

The STATE AFFAIRS Committee considered: **HB 299**

HOUSE BILL NO. 299
"An Act excluding certain persons from participating in the Public Employees' Retirement System of Alaska."
HB 299 PERS PARTICIPATION: CONTRACTORS

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
AJS
CED
COR
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	DOA			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Spohnholz	✓			
	STUTES	✓			
	Keller	✓			
Liz Vazquez	VAZQUEZ	✓			
Chair:					
Chair:	LYNN	X			

Alaska State Legislature
House of Representatives
Representative Tammie Wilson

Interim
301 Santa Claus Lane 3B
North Pole, Alaska 99705
Phone - (907) 451-2723

Session
State Capitol Rm 412
Juneau, AK 99801
Phone - (907) 465-4797

Rep.Tammie.Wilson@akleg.gov

SPONSOR STATEMENT

HB 299

"An Act excluding certain persons from participating in the Pubic Employee' Retirement System of Alaska."

HB 299, is being brought forward on behalf of the 501(C)3, nonprofit corporation volunteer fire departments within the Fairbanks North Star Borough, operating as "independent contractors". They are currently under contract with the borough to provide emergency response services. Each nonprofit fire department has both full time paid employees and trained volunteers as emergency responders. Each of these organizations provides benefit plans for all members.

Dolan vs King County was a lawsuit between the County and independent non-profit organizations which provided indigent legal services to the county. Over a period of thirty years, King County asserted increasing budgetary and day to day authority over the formerly independent non-profit organizations. In doing so, it asserted more control over the groups that provided the services. Employees of the organizations sued the County for the state employee benefits. They argued that the County's funding and control over their "independent" organizations essentially made them state employees for the purposes of participating in the Public Employees Retirement System (PERS) and under pertinent statutes and common law principles, the Supreme Court agreed that employees of the organizations were "employees" under state law, and, as such, were entitled to be enrolled in the PERS.

HB 299 would clearly define who is eligible for the Public Employees' Retirement System of Alaska and give added protection to municipalities against such liability. In times of such fiscal strife this legislation would encourage the exploration and utilization of cost effective measures for services and promote independent organizations and business. This bill emphasizes the need, however, to maintain the proprieties of the independent relationship when contracting for the provision of essential public service.

I would appreciate your support of HB 299.

Barbara Barnes

From: Flynn, Mitch <mitch.flynn@steesefire.org>
Sent: Monday, February 22, 2016 1:09 PM
To: Barbara Barnes
Subject: HB 299

Dear Representative Wilson,

I am in support of HB 299 that prevents contractor employers and their employees from participating in the Alaska Public Employees Retirement System. I am such an employee and CEO of the Steese Volunteer Fire Department Inc. We contract fire and EMS services to the Fairbanks North Star Borough. We are not PERS eligible and desire to keep the distance between ourselves and the borough to protect our taxpayers from any perceived PERS liability.

Thank you for your support in protecting PERS and our local taxpayers from any possible PERS liability.

Mitch Flynn, Fire Chief
Steese VFD
800 William C. Leary Lane
Fairbanks, AK 99712
907-457-1519 office
907-347-7685 cell
mitch.flynn@steesefire.org

Barbara Barnes

From: Arthur Hansen <rthrhansen@yahoo.com>
Sent: Saturday, February 27, 2016 9:42 AM
To: Barbara Barnes
Subject: HB299

As a Steese Area volunteer Fire Department Commissioner I fully support passage of HB 299.
sincerely,
Arthur S. Hansen
Steese Area Volunteer Fire Department Commissioner

Barbara Barnes

From: Rep. Tammie Wilson
Sent: Saturday, February 27, 2016 2:02 PM
To: Barbara Barnes
Subject: FW: Support for HB 299 & SB 177

From: Dave Nebert [mailto:nebert@gci.net]
Sent: Friday, February 26, 2016 10:47 PM
To: Sen. John Coghill <Sen.John.Coghill@akleg.gov>; Rep. Tammie Wilson <Rep.Tammie.Wilson@akleg.gov>
Subject: Support for HB 299 & SB 177

Representative Wilson,
Senator Coghill,

I support HB 299 & companion SB 177 that prevents contractor employers and their employees from participating in the Alaska Public Employees Retirement System. I am a Fire Commission for the Steese Fire Service Area. The non-profit department contracts fire and EMS services to the Fairbanks North Star Borough. Department personnel are not presently PERS eligible and should remain that way in order to maintain a distance between the non-profit and the FNSB to protect our taxpayers from any perceived PERS liability.

Thank you for your support in protecting PERS and our local taxpayers from any possible PERS liability".

Sincerely, Dave Nebert, Commissioner, Steese Fire Service Area

Barbara Barnes

From: Steven Crouch <scrouch@northstarfire.org>
Sent: Wednesday, March 16, 2016 4:27 PM
To: Barbara Barnes
Subject: HB 299

I would like to write this letter in support of HB 299.

Steve Crouch
Fire Chief, North Star Volunteer Fire Department

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version: HB 299
Fiscal Note Number:
() Publish Date:

Identifier: DOA-DRB-HB299-03-18-16
Title: PERS PARTICIPATION: CONTRACTORS
Sponsor: WILSON
Requester: House State Affairs

Department: Department of Administration
Appropriation: Centralized Administrative Services
Allocation: Retirement and Benefits
OMB Component Number: 64

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2017**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**	**FY 2022**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Fund Source (Operating Only)							
None							
Total	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Positions							
Full-time							
Part-time							
Temporary							
Change in Revenues							

Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Not applicable, initial fiscal note

Prepared By: John Boucher, Deputy Commissioner Phone: (907)465-2200
Division: Department of Administration Date: 03/18/2016 01:05 PM
Approved By: Sheldon Fisher, Commissioner Date: 03/18/16
Agency: Department of Administration

STATE OF ALASKA
2016 LEGISLATIVE SESSION

BILL NO. HB 299

Analysis

This legislation excludes contractors and employees of contractors from participation in the Public Employees' Retirement System (PERS) defined benefit and defined contribution plans. It adds clarifying language to the PERS defined contribution definition of "member" to expressly exclude persons compensated on a contractual or fee basis. The legislation also adds clarifying language to the definition of "membership service" to mean part-time or full-time employment by a member or employee with an employer in the plan.

The PERS is currently administered to exclude contractors or persons compensated on a contractual or fee basis based on Internal Revenue Service rules. Therefore there is no cost to implement this legislation.

ALASKA MUNICIPAL LEAGUE
Alaska Conference of Mayors

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ALASKA MUNICIPAL LEAGUE

RESOLUTION #2016-08

A RESOLUTION OF THE ALASKA MUNICIPAL LEAGUE URGING THE STATE OF ALASKA TO 1) REVISE STATUTES TO REDUCE REQUIREMENTS FOR TERMINATION STUDIES; AND 2) REVISE THE PROPOSED ALLOCATION OF PERS AND TRS LIABILITY RELATED TO GASB 67 AND GASB 68 REPORTS; AND 3) REVISE STATUTES TO CLARIFY THAT EMPLOYEES OF GOVERNMENTAL CONTRACTORS ARE NOT ELIGIBLE FOR STATE RETIREMENT SYSTEM MEMBERSHIP

WHEREAS, the Alaska Municipal League (AML) has identified the following three issues with the State of Alaska administration regarding the Public Employees' Retirement System (PERS) and the Teacher's Retirement System (TRS) which may, and in some cases already have, adversely impacted municipalities; and

1. The requirement for PERS termination studies and imposition of termination penalties when a single occupant position is removed or a small classification of employees is eliminated;
2. Unwarranted administrative allocation of the net pension liability of PERS and TRS to individual employers; and
3. The risk of significant costs if governmental contractors were treated as employees qualified for inclusion in PERS or TRS; and

WHEREAS, AML believes the Legislature did not intend to create inequitable financial damage to any PERS member employer, however, with the implementation of the required PERS termination studies, as required by AS 39.35.625, a clear and inequitable impact has been created for municipal PERS employers. The history and detailed information on this issue is provided in Attachment A; and

WHEREAS, AML acknowledges that the State has issued a statement of allocation of PERS and TRS pension liabilities which is inconsistent with the 2008 statute change and is applied unfairly to municipalities through unsupported administrative allocations of the net pension liability of PERS and TRS to individual employers. The history and detailed information on this issue is provided in Attachment B; and

WHEREAS, the PERS and TRS statement of allocation was developed through a troubling agency process that lacked transparency and excluded municipal governments and school district involvement, comment or collaboration; and

WHEREAS, AML recognizes the potential for unreasonable expenses to the system if governmental contractors were treated as employees, due to the fact that municipalities, particularly smaller municipalities in Alaska, often contract with profit and non-profit entities to provide services under government contracts, and the unexpected and unplanned addition of employees entitled to potentially years of back service credit in a governmental retirement plan like PERS may adversely impact not only the particular employer, but all of the participants in the plan. The history and detailed information on this issue are provided in Attachment C.

NOW, THEREFORE BE IT RESOLVED that the Alaska Municipal League:

1. While supporting the maintenance of a sustainable salary base to pay off the PERS unfunded obligation, believes that AS 39.35.625 and any other similar statutes or regulations that require termination studies, should be revised to eliminate termination studies and costs for minor changes in municipal work force and staffing for the reasons set out in Attachment A; and further, that legislation such as SB 100, considered in the 27th legislature (included as Attachment D) would be an appropriate method to achieve this.
2. Expresses strong objections to the proposed allocation of PERS and TRS liability in the State of Alaska's contemplated GASB #67 and GASB #68 reports for audit purposes, for the reasons set out in Attachment B.
3. Supports a change to Alaska law that would, in a manner similar to Washington State, clarify that employees of governmental contractors are not eligible for state retirement system membership.

PASSED AND APPROVED by the Alaska Municipal League on this 20th day of November, 2015.

Signed: Bob Harcharek
Bob Harcharek, President, Alaska Municipal League

Attest: Kathie Wasserman
Kathie Wasserman, Executive Director, Alaska Municipal League

ATTACHMENT C

1. The Alaska Municipal League has identified the following three issues with the State of Alaska administration of the Public Employees' Retirement System (PERS) and the Teachers' Retirement System (TRS) which may, and in some cases already have, adversely impacted municipalities and school districts.
    a. The requirement for PERS termination studies and imposition of termination penalties when any position is eliminated; and
    b. Unwarranted allocation of the net pension liability of PERS and TRS to individual employers; and
    c. The risk of significant costs if governmental contractors were treated as employees qualified for inclusion in PERS or TRS.
2. The Alaska Municipal League has previously expressed concerns regarding two of these issues (a. & b.).
3. The Alaska Municipal League recognizes the potential for significant expenses to PERS and TRS if governmental contractors were treated as employees, specifically noting that:
    a. Municipalities, particularly smaller municipalities in Alaska, often contract for governmental services; and
    b. A municipality contracting for governmental services may, in order to ensure that public services are provided in a manner acceptable to the community, exercise more control over the contractor than what is normally seen in a purely contractual basis; and
    c. The Supreme Court of the State of Washington ruled in 2012 that employees of several private non-profit public defender agencies that provided services to King County by contract, were employees of the King County for purposes of the Washington PERS, resulting in a $31 million PERS liability for King County; and
    d. The Washington State Legislature subsequently modified the Washington State PERS statute to clarify that a governmental contractor is not an employer for purposes of the Washington State Retirement System, and that employees of governmental contractors are not eligible for state retirement system membership.
    e. The Washington legislation also clarifies that the determination of whether an employee/employer relationship exists under the Washington State PERS is limited solely to the relationship between the government contractor employee and the retirement system employer, and not the relationship between a government contractor and a retirement system employer.
    f. The unexpected and unplanned addition of employees entitled to potentially years of retroactive service credit in a governmental retirement plan like PERS, may adversely impact not only the particular employer, but all of the participants in the system.
    g. The intent in establishing Alaska's PERS was not to provide a retirement system to employees of government contractors.

4. While the Alaska Municipal League supports maintaining a sustainable salary base to pay off the PERS unfunded obligation, it believes that AS 39.35.625 and any other similar statutes or regulations that require termination studies, should be revised to eliminate termination studies and costs for minor changes in municipal workforce and staffing for the reasons set out in Attachment A; and further, that legislation such as SB 100, considered in the 27 Legislature (Attachment D) would be an appropriate method to achieve this.
5. The Alaska Municipal League expresses strong objections to the proposed allocation of PERS and TRS liability in the State of Alaska's contemplated GASB #67 and GASB #68 reports for audit purposes for the reasons set out in Attachment B.
6. The Alaska Municipal League supports a change to Alaska law that would, in a manner similar to Washington State, clarify that employees of governmental contractors are not eligible for state retirement system membership.

EXPLANATION OF SETTLEMENT IN *DOLAN v. KING COUNTY* TO BE SUBMITTED BY THE EXECUTIVE TO THE KING COUNTY COUNCIL FOR ITS APPROVAL

Summary of Relief Obtained in this Settlement

Under this Settlement, Class Members obtain retroactive PERS service credit for work over a 34-year period, *i.e.* from January 1, 1978 up to April 1, 2012. King County will pay all the omitted PERS contributions, about $31 million.

King County will also recognize class members as county employees with full employee benefits for their positions on July 1, 2013. These benefits include King County health insurance, as well as other King County employee benefits.

How King County accomplishes this recognition, and how it organizes public defense, are up to King County and are not part of this settlement. King County may change its public defense structure or organizations, as it determines, after input from stakeholders, e.g. it may retain its multi public defense agencies or create a new multi unit organization or create a Public Defender District under state law, RCW Chp. 36.26

The only amount that the Class Members pay under the Settlement is their pro rata share of the attorney fees, to be deducted from eventual retirement checks. The percentage to be deducted from retirement checks in the future is estimated to be about 9.2%, as explained below. The common fund attorney fee is based on a percentage of the estimated $130 million present value of the pensions obtained. The common fund is based on the PERS service obtained through this litigation to date, not on future service or on other PERS service that class members may have acquired outside of the *Dolan* litigation. Because most Class Members will have PERS service in the future or had PERS service in the past that was not obtained as a part of the *Dolan* litigation, most Class Members will have a lower percentage deducted.

The Class Included The Dolan Class Action

The Class is:

> All W-2 employees of the King County public defense agencies and any former or predecessor King County public defense agencies who work or who have worked for one of the King County public defense agencies within three years of the filing of this lawsuit;
>
> and
>
> All W-2 employees of the King County public defense agencies and any former or predecessor King County public defense agencies who have not worked for one of the King County public defense agencies within three years of the filing of this lawsuit, but who work or have worked in a PERS-eligible position within three years of the filing of this lawsuit.

The Class does not include King County public defense employees who were never in a PERS eligible position, *e.g*, student interns.

The lawsuit was filed on January 24, 2006 and accordingly the period covered by the class definition is January 24, 2003 to July 1, 2013, when King County will recognize Class Members who are then employed by King County public defense agencies as King County employees with full employment benefits for their position. This time period is the "Class Period."

There are four current King County public defense agencies: The Defender Association (TDA); Associated Counsel for the Accused (ACA); Society of Counsel Representing Accused Persons (SCRAP); and Northwest Defender's Association (NDA). There is one former King County public defense agency, Eastside Defender Association (EDA). Collectively these agencies are the "King County public defense agencies."

The Class Is Divided Into Groups For Relief

For purposes of relief, the Class consists of five groups, listed on five separate exhibits to the Settlement Agreement.

Group one consists of those Class Members who were King County public defense employees as of April 1, 2012 or at any time thereafter until July 1, 2013.

Group two consists of Class Members who were King County public defense employees at any time during the Class Period explained above, but were not currently employed as King County public defense employees on April 1, 2012 or thereafter until July 1, 2013, and who have sixty or more months of service as a King County public defense employee.

Group three consists of Class Members who before the Class Period were former King County public defense employees and who were active members of PERS sometime during the Class Period. This group is described in the second paragraph of the class definition quoted above.

Group four consists of Class Members who were King County public defense employees at any time during the Class Period, but were not currently employed as King County public defense employees as of April 1, 2012 and were employed as active PERS members as of April 1, 2012, and whose PERS service at a King County public defense agency totaled less than sixty months, but when combined with PERS service credit earned in another PERS-eligible position is equal to or greater than sixty months.

Group five consists of Class Members who are not in Groups 1-4. Group five are Class Members who are former King County public defense employees as of April 1, 2012, who are not employed as active members of PERS as of April 1, 2012, and whose PERS service as a King County public defense employee totaled less than 60 months. Group five Class Members include those who are inactive PERS members or former PERS members who withdrew their contributions, and those who were never enrolled in PERS.

Retirement Relief Provisions: Retroactive Service Credit Back to 1978 and King County Pays All the Omitted PERS Contributions

Class Members (other than those in Group five) are eligible for PERS contributions based on retroactive PERS-eligible service, going back to January 1, 1978 up to March 31, 2012.[1] The Class Members' retroactive PERS-eligible service starts with the Class Member's initial hire date with one of the King County public defense agencies, with three exceptions that apply to a few Class Members.[2]

Class Members receive service credit in PERS 2 unless they are already enrolled or were previously enrolled in PERS 1 or PERS 3, in which case they will earn service credit in the plan in which they are or were previously enrolled. Class Members are entitled to retroactive PERS-eligible service credit based on the service credit rules for the PERS plan applicable to them when they worked at the King County public defense agencies.

For Group one Class Members, King County will pay the PERS contributions for retroactive PERS-eligible service back to January 1, 1978.[3] The Group one Class Members for whom King County will make the PERS contributions are listed on Exhibit B of the Settlement Agreement.

For Group two Class Members, King County will make the PERS contributions for retroactive PERS-eligible service back to January 1, 1978. Group two Class Members are listed on Exhibit C of the Settlement Agreement.

For Group three Class Members, King County will make the PERS contributions for retroactive PERS-eligible service back to January 1, 1978, except certain Class Members who are in PERS 1 may have contributions for earlier service as provided in footnote 1. Group three Class Members are listed on Exhibit D of the Settlement Agreement.

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[1] Class Members who (a) are now enrolled in PERS 1, (b) who are or were employed in a PERS-eligible position during the Class Period, and (c) who have not yet attained thirty years of PERS-eligible service, are entitled to retroactive service credit for service at the King County public defense agencies before 1978, but only to the extent that service or a portion of the service does not exceed the thirty-year maximum service credit for PERS 1.

[2] The exceptions are: (1) for Class Members hired by one of the public defense agencies before January 1, 1978, their retroactive PERS-eligible service under this agreement begins on January 1, 1978; (2) for those Class Members initially hired in a position that is not PERS-eligible (*e.g.*, student intern), their eligible service begins when they start working in a PERS-eligible position (*e.g.*, lawyer); (3) for those Class Members already enrolled or previously enrolled in PERS 1, 2 or 3, their PERS eligible service commencement date will be their prior enrollment date, but they will earn retroactive monthly service for their work as a King County public defense employee starting with their initial hire with one of the public defense agencies, unless the service is within exceptions 1 or 2 stated above, in which case the provisions of those exceptions applies, or unless they are within the provision concerning PERS 1 members with less than 30 years of PERS service as described in footnote 1.

[3] Because King County enrolled King County public defense employees in PERS in the pay period encompassing April 15, 2012, those Group one Class Members, who began employment at a King County public defense agency after April 1, 2012 and who had no previous periods of employment at a King County public defense agency, have already had all PERS pension contributions paid. King County therefore does not owe any PERS contributions for these Group one Class Members.

For Group four Class Members, King County will make the PERS contributions for retroactive PERS-eligible service back to January 1, 1978. The Group four Class Members are listed on Exhibit E of the Settlement Agreement.

For Group five Class Members, King County will make the PERS contributions for retroactive PERS-eligible service back to January 1, 1978, only if (a) the Group five Class Member obtains a PERS eligible job in the future, and (b) the eligible service, that the Class Member obtains in that PERS-eligible job, coupled with the Class Member's retroactive PERS-eligible service gives the Class Member sixty or more months of PERS eligible service. Group five Class Members who obtain a PERS eligible job in the future must notify King County that they have been enrolled in PERS as a result of that job and must notify King County when their service in the PERS-eligible job, coupled with their service as a King County public defense employee, gives that Class Member sixty months of PERS service. The Group five Class Members are listed on Exhibit F of the Settlement Agreement.

Class Members Will Become King County Employees with Full Employee Benefits As Of July 1, 2013

On July 1, 2013, Class Members who are employed by the King County public defense agencies immediately before July 1, 2013 shall become employees of King County with full employee benefits for their positions. How King County accomplishes this recognition, and how it organizes public defense, are up to King County and are not part of this settlement.

Class Members may use or cash out their accumulated vacation as provided in their collective bargaining agreement or public defense agency's personnel policies. Class Members may carry over up to 100 hours of sick leave, provided that the maximum amount of carried-over sick leave may be increased by King County in cases of exceptional need.

King County will use the Class Member's initial hire date with a King County public defense agency as their initial King County hire date for purposes of determining vacation and leave accrual rates.

Compromised Claims, Counterclaims and Defenses

The settlement is a compromise. Plaintiff contends that the Class Members did not have the same employee benefits as King County employees, e.g., those working in the Prosecuting Attorney's Office in similar positions. Plaintiff contends that the Class Members have claims for non-PERS benefits (the "other benefit claims") that they could bring in an amended complaint and litigate in this case. King County has defenses to that claim and also could contend that the other benefit claims would not relate back to the date of filing of the lawsuit. The Class would dispute these King County contentions. The Settlement compromises, releases and fully extinguishes all of the other benefit claims in return for valuable consideration from King County explained below.

In addition to recognizing Class Members as King County employees, with full employee benefits for their position, on July 1, 2013, King County is making omitted PERS contributions to establish retroactive PERS-eligible service credit back to 1978 for the Class Members. King

County is further compromising by foregoing its statute of limitations defense that Class Members could not receive service credit for any time period more than three years before this lawsuit was filed, i.e., before January 24, 2003. King County is also paying both the employer contributions to PERS and the contributions to PERS that would have been deducted from the Class Members' salaries on either a pre-tax basis as employer pick-up contributions or on an after tax basis as employee contributions before 1984. King County contended that it was entitled to reimbursement for the employer pick-up contributions and the Class argued that King County was not so entitled. Under the Settlement Agreement, King County forgoes any right to seek reimbursement or payment from the Class Members for the PERS contributions. King County's agreement not to assert its statute of limitations defense and or to seek reimbursement or payment from Class Members, its agreement to pay the PERS contributions for the retroactive PERS-eligible service and its recognition of those Class Members employed by the King County public defense employees immediately before July 1, 2013 as King County employees with full employee benefits for their positions constitute the valuable consideration that the Class receives in exchange for compromising, releasing and extinguishing the other benefits claims in this Settlement Agreement.

Common Fund: Value of Pension Relief Obtained

In a class action, the value of the relief obtained for the class is called the "common fund" and the common fund obtained in the *Dolan* class action settlement is the value of the PERS pension benefits conferred upon Class Members as a result of Class Counsel's efforts.[4]

Plaintiffs' expert determined the present value of the PERS pension benefits. The present value is based only on the retroactive PERS-eligible service that Class Members obtained under the Settlement Agreement. It does not include prior PERS service that Class Members may have nor does it include PERS service that Class Members have after April 1, 2012 when the Court ordered King County to begin enrolling currently employed Class Members in PERS and to make the required PERS contributions.

Plaintiffs' expert determined that the present value of PERS pension benefits obtained due to Class Counsel's efforts is about $130 million. The present value calculation uses standard present value assumptions set forth in the Settlement Agreement. The Settlement Agreement accepts $130 million as the common fund based on the present value calculation and the underlying present value assumptions.

Class Counsel's Attorney Fee and Costs

Class Counsel are the law firm of Bendich, Stobaugh & Strong, P.C., and the firm's attorneys. Class Counsel's attorney fees and costs are based on *Bowles v. Dept. of Retirement Systems*, 121 Wn.2d 52, 72, 73 (1993). There, the Washington Supreme Court determined that the class counsel's fee and the reasonableness of the fee in a class action involving public

[4] As a result of Class Counsel's efforts, the currently employed Class Members will become King County employees with full employee benefits for their positions on July 1, 2013. This relief has considerable value and may be considered in assessing the reasonableness of the class counsel's common fund fee, but is not part of the Common Fund as defined in the Settlement Agreement.

employee benefits is based on the percentage of the common fund that the requested fee is. The Supreme Court explained that the "benchmark" fee in a common fund case is 25% of the recovery obtained and 20% to 30% is the usual range for a common fund fee. *Id.*

In *Bowles*, the plaintiff class obtained an increase in the value of their PERS pension benefits. And the court in *Bowles* required DRS to advance the attorney fees out of the PERS fund on behalf of the plaintiff class subject to future reimbursement by the class. *Bowles*, 121 Wn.2d at 69. Attorney fees in *Bowles* were calculated as a percentage of the present value of the class recovery and that percentage was then deducted from the class members' future pension payments in order to repay DRS for advancing the fee on behalf of the class members.

The common fund obtained in this action is the value of the PERS pension benefits conferred upon Class Members as a result of Class Counsel's efforts, which Class Counsel's expert calculates, using actuarial methods, at about $130 million. Thus, the 25% benchmark common fund fee under *Bowles* would be $32.50 million and the range for a common fund fee would be $26 to $39 million, 20% to 30%. The $12 million common fund fee Class Counsel seeks here (about 9.2% of the $130 million common fund) is below the normal range for common fund fees. Class Counsel would seek the $12 million as their fee even if the common fund value were lower so long as the $12 million dollar fee is at or below the normal range, i.e., if it is 20% or less of the common fund.

Award to Named Plaintiff

The named plaintiff Kevin Dolan is to receive a plaintiff's award of $45,000 for his work in assisting class counsel. Mr. Dolan's participation from 2006 through 2012 has included but is not limited to, commencement of this lawsuit, class certification, discovery matters (including answering interrogatories, producing extensive personal records, and deposition testimony), preparation of declarations, attendance at meetings, communications with Class Members, and assisting Class Counsel in the trial court proceedings, the proceedings in the Supreme Court, and in the Legislature.

Payment By Class Members Through Deductions From Their Future Retirement Checks of Attorney Fee Advanced by DRS

As in *Bowles*, the Class will pay the common fund attorney fee advanced by DRS through a percentage deduction from their future pension checks. As in *Bowles*, the percentage to be deducted is the percent that the common fund attorney fee is of the common fund, i.e., 9.2% with a common fund of $130 million and a common fund attorney fee of $12 million. The percentage would be higher here if the common fund were lower or it would be lower if the common fund were higher. As in *Bowles*, DRS will advance the class members' payment by: (1) King County paying the common fund fee to Class Counsel out of the omitted PERS contributions to otherwise be paid to DRS or (2) if DRS prefers, by the PERS Trust Fund or DRS advancing the Common Fund Fee. The Class Members will repay the advanced common fund attorney fee to the PERS Trust fund(s) or DRS by the deductions from retirement benefits.[5]

[5] As an alternative, instead of repaying DRS from the Class Members future retirement benefits for the advance of the common fund attorney fee, the Class Members may pay DRS or the PERS fund directly. If the Class Member chooses this option, the Class Member's pro rata share of the common fund attorney fee will be determined

Not all class members will have the same percentage deducted because the percentage deduction from a class member's future retirement benefit is based only on the retroactive PERS-eligible service earned for the King County public defense work that is the subject of this action and excludes other PERS service the Class Members may have had previously or PERS service they will have in the future. With a $130 million common fund and a $12 million attorney fee, Class Members who obtained all their PERS eligible service due to Class Counsel's efforts will have an estimated 9.2% deduction. For those who did not obtain all their PERS eligible services due to the Class Counsel's efforts, the deduction percentage will be lowered by the fraction that the PERS service obtained in the *Dolan* litigation is to their overall PERS service. For example, if a Class Member had 120 months of retroactive PERS-eligible service in King County public defense agency work and a total of 360 months of PERS service credit at retirement, the fraction is one-third and the actual percentage deducted would be one-third of 9.2%, or about 3.07%, with a $130 million common fund and $12 million common fund attorney fee. Because most Class Members will earn additional PERS service after resolution of this case or because they have prior PERS service, the actual deduction will be less than the estimated 9.2% as shown in the preceding illustration.

For Class Members who are Judges participating in the Judicial Benefit Multiplier Program, the deduction percentage is based on the effect that the retroactive PERS-eligible service obtained in this case has on the percentage of the Judge's final average salary the Judge is eligible to obtain as a pension.[6]

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based on the percentage of the common fund that the value of the Class Members PERS pension benefit is of the common fund. For example, if the value of the Class Member's PERS Benefit is $500,000, the Class Member's pro rata share would be $500,000 divided by $130,000,000 (common fund) times $12,000,000 (common fund attorney fee) which equals about $46,154 (Class Member's pro rata share of the common fund attorney fee). If the Class Member chooses this alternative, the Class Member may pay their share of the pro rata common fund attorney fee by using funds in an existing retirement account (such as an IRA) or they may choose to repay DRS over five years either by payroll deductions for those employed in PERS positions or by a payment plan acceptable to DRS for those not employed in PERS positions.

[6] By way of illustration, under PERS 1 and 2, a PERS member earns 2% of his or her average final salary for each year of service, while under the Judicial Benefit Multiplier Program, participating Judges earn 3.5% of their final average salary for each year of Judicial service. Thus, for each year of service as a Judge — by way of illustration on how the deduction percentage for the common fund attorney fee is calculated for Judges participating in the Judicial Benefit Multiplier Program — if Class Member Judge has 10 years of retroactive PERS-eligible service as a King County public defense employee and 15 years of PERS service as a Judge in the Judicial Benefit Multiplier Program when the Judge retires, the public defense service equates to 20% of his or her average final salary (10 years times 2% per year) while the Judge's work as a Judge in the Judicial Benefit Multiplier Program for 15 years equates to 52.5% of the Judge's average final salary (15 years times 3.5%). Thus, in this illustration, the Judge's PERS pension equals 72.5% of the Judge's average final salary. The Judge's King County public defense service thus provides, in this illustration, about .2759 or 27.59% of the Judge's final salary (.20 divided by .7250 equals .2759 or 27.59%) and the deduction percentage for the Judge for the common fund attorney fee would be .2759 times 9.2 which equals 2.538% of the Judge's monthly pension amount.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KEVIN DOLAN and a class of similarly situated individuals,	)	No. 82842-3
Respondents,	)	
v.	)	En Banc
KING COUNTY, a political sub-Division of the State of Washington,	)	
Petitioner.	)	
	)	Filed August 18, 2011

CHAMBERS, J. — In *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the United States Supreme Court guaranteed to indigents the right of legal representation at public expense. King County, like other local governments in this state, sought ways to provide the required defense services to indigent criminal defendants. After investigating several different models, the county settled on a unique system using nonprofit corporations to provide services funded through and monitored by the county's Office of the Public Defender (OPD) (formerly the Office of Public Defense). It is, in many ways, a model system providing quality representation to the poor. Over time, the county has taken steps to improve and make these nonprofit organizations more accountable to the county. In so doing, it has asserted more control over the groups that provide defender services. Kevin Dolan contends that the defender organizations are now no different than any other agency of King County and that the employees of these defender organizations are now, and for some time have been, entitled to be enrolled

in the government's Public Employees Retirement System (PERS). After a trial on the record, the trial court agreed with the class. Applying the pertinent statutes and common law principles, we hold that the employees of the defender entities are "employees" under RCW 41.40.010(12) and are entitled to be enrolled in the PERS. We affirm the trial court and remand to that court for further proceedings regarding remedies.

FACTS AND PROCEDURAL HISTORY

Resolution of the issues presented requires a detailed review of the relationship between King County and its public defender organizations. In 1969, the first King County nonprofit public defender entity, The Defender Association (TDA), was created as a joint venture with the city of Seattle and the federal Model Cities Program. The independent nature of TDA was a primary reason for the county's adoption of this model. The county thought public defense "must be divorced as far as possible from the control of the entity which is placing the recipients' liberty in jeopardy, that is, from King County." Clerks Papers (CP) at 1314 (Report of King County Council Operations and Judiciary Committee).

Over the years, the system evolved into its present form, with four public defense organizations providing almost all indigent defense services for the county. The Associated Counsel for the Accused (ACA) was created in 1973. The Society of Counsel for the Representation of Accused Persons (SCRAP) was formed at the request of the county in 1976. The Northwest Defenders Association (NDA) was established in 1987 in response to the county's desire for an organization with a larger number of minority management and board members. Another public defense

organization, the Eastside Defender Association, was formed in 1978 and then discontinued in 1984.

A few years after its formation, TDA had several King County representatives on its board of directors. At the time, local government participation seemed "necessary to assure the visibility and longevity of the program." CP at 1336 (Letter from King County Executive). However, by 1979, all the nonprofit public defender groups had independent boards and substantial autonomy over operations. *See id.* at 1336-37; *see also* CP at 1340-42 (1979 TDA Contract). Each defender organization negotiated a contract with the county for the services the organization would perform for a fee. The county managed its public defense program through the OPD, a division of King County's Department of Community and Human Services and ultimately part of the county's executive branch. The OPD was and is responsible for screening eligible defendants, assigning cases, negotiating and administering the contracts with the four defender groups, and managing the funds provided by the county. The OPD and the public defender organizations negotiate new contracts annually.

Over the course of several decades the county began to exert more and more control over the defender organizations. This evolution of greater county control was in response to several events and the county's desire for efficient budgeting, high quality of defender services, and parity in pay among deputy prosecutors and public defenders doing similar work. An event in 1984 seems critical to the evolution of the relationship between the county and defender organizations. An audit of the Eastside Defender Association revealed that the director was engaged in

some self-dealing, including renting space from his daughters and paying his wife for financial advice, and that the organization's board consisted of himself, his wife, and his mechanic.[1] These revelations caused the county to cancel its contract with Eastside Defender Association, which immediately then ceased to exist. It also caused the county to carefully scrutinize expenditures and to require a reorganization of its relationship with all the defender organizations.

The defender organizations were required to provide the county with a detailed budget of the costs of providing anticipated defender services, and those estimated costs became part of the contract amount between the county and the organization. CP at 1270-71 (Boruchowitz Decl). By 1990, the county went to a cost pass-through budget system, also referred to as a zero-based budget system.[2] *Id.* at 1273, 1275. Expenses of each defender organization became a line item in the county's budget. CP at 628-29 (Chapman Decl.). The contract budgets were based on the defender organizations' actual costs and the county's projection of the case load, which in turn determined the number of defense lawyers needed and the ratios of staff to lawyers. *Id.* at 629, 634. Later the defender organizations were advised by the county that equipment purchased for $1,000 or more belonged to the county. CP at 1279 (Boruchowitz Decl.). Through this process, the county had effective right of control and approval over all leases and other defender organizations' expenditures. *E.g.* CP at 2891-92 (Daly Dep.).

Also during the 1980s, the defender organizations argued that defender

[1] Despite the irregularities, there did not appear to be any violations of the law or the contract between the Eastside Defender Association and the county. CP at 1345.

[2] The county used the same budget system for its own agencies and departments. CP at 628 (Chapman Decl.).

lawyers should receive the same pay as prosecutors because they did similar work and, unlike prosecutors, defenders were constitutionally mandated. In 1989, the county commissioned the Kenny Group to study prosecutors and public defenders, classify their positions, and address the issue of pay parity for public defenders. The Kenny Group created and classified five levels of deputy prosecuting attorneys, three levels of senior deputy prosecuting attorneys, four levels of public defense attorneys, and three levels of senior public defense attorneys. CP at 627 (Chapman Decl.). The Kenny classifications became known as the Kenny Scale. *Id.* at 626. The county provided by ordinance that salary parity would be phased in over two years.[3] The record before us is less than crystal clear on parity. It appears that while the county made an effort toward parity, the defender organizations never felt parity was achieved. According to the defender organizations, the county failed to provide funding for senior defender positions and therefore the organizations had to classify defenders in lower classifications than prosecutors with similar experience.[4] CP at 1282 (Boruchowitz Decl.). The county also took the position that parity only applied to base pay and not benefits. *Id.* at 1277. The county did provide funding for mandatory employer taxes such as the Federal Insurance Contribution Act tax and unemployment insurance. *Id.* at 1278. The county also provided sufficient funding for medical benefits; however, the county did not provide sufficient funding for the defender organizations to make meaningful retirement contributions. CP at 662 (Chapman Decl.). Apparently the defender organizations had goals of

[3] King County Ordinance 9221 (Nov. 22, 1989) (CP at 715-20).

[4] The defender organizations sought funding for 17 new "senior" positions based on the Kenny Scale classifications, but the county rejected the request. CP at 1282 (Boruchowitz Decl.).

providing retirement benefits of up to four percent but funding only permitted a contribution of one percent, two percent, or nothing depending on the budget. *Id.*; CP at 1278 (Boruchowitz Decl.).

In 2002, NDA sought to rent some office space in downtown Seattle that carried a higher rent than customary for defender groups. In August 2002, the county audited NDA and found what it considered several irregularities. NDA, perhaps believing it could legitimately do so as an independent organization contracting with the county, was branching out into civil and for-profit work and rented office space for these purposes. The county perceived NDA's actions as using some of the county's funding for improper purposes. Further, the county believed NDA did not have a properly constituted board of directors and had leased a space unapproved by the county. The county's Department of Community and Human Services brought a receivership action against NDA. On September 27, 2002, the trial court granted the county's motion to have a receiver appointed for NDA. The receiver was given "exclusive possession and control over all assets [of NDA], with the power and authority to preserve, protect, and liquidate them for the benefit of plaintiff [King County]."[5] CP at 2335.

In the process of reorganizing NDA, the county required changes in the composition of the board of directors, bylaws, corporate articles, employee policies, financial practices, and contract with the county for all of its public defender organizations. CP at 3120 (Robinson Dep. at 27-29); CP at 2236-37 (Farley Decl.). All defender groups were made subject to a new contract that gave King County the

[5] The order was amended on November 15, 2002, upon request for clarification by the receiver, to read "for the benefit of Northwest Defenders Association." CP at 2341.

authority to terminate the contract without cause upon 45-days notice, to review client files, to unilaterally determine whether funds were properly expended, and which also restricted the organizations' ability to turn down individual cases.[6,7] *Id.* at 2238; CP at 1279 (Boruchowitz Decl.); CP at 646 (Chapman Decl.); CP at 2393-2413, 2394, 2395, 2397, 2411 (2003 NDA Contract).

The record reflects that many defender board members had serious misgivings about the new order of things and were very concerned about the new limits on the defender organizations' ability to limit assignments and thereby run the risk of ethical dilemmas. One board member said the county was transforming a supposedly independent nonprofit into a "'vassal agency.'" CP at 4331 (TDA Board Minutes). But, because the county was the source of the vast majority of revenue, to refuse to agree to the contract meant that the organizations, like the Eastside Defender Association, would cease to exist.[8]

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[6] In subsequent years, the contract language was softened, including the termination clause. CP at 5690-5710 (2007 Contract). Rather than at will by the county, contracts after 2004 could be terminated "for convenience by either party" upon 60-days notice. *Id.* at 5695.

[7] As part of its budgeting matrix, the county also required each defender organization to maintain a reserve fund that would provide sufficient funds to complete services to clients assigned to the organization in case of contract termination. CP at 643-44 (Chapman Decl.).

[8] In 2004, the city of Seattle ended its 20-year arrangement with King County to provide defense services through its defender organizations. It contracted directly with ACA, and ACA now receives approximately $3 million a year from the city, about one quarter of the total operating budget. However, ACA could not continue its public defense operations without the $9 to $10 million provided by county funding. CP at 660 (Chapman Decl.). TDA receives approximately 90 percent of its funding from King County, with some additional grants from the county and the State for racial disparity and sexually violent predator programs, and other funding sources for public defense related work, such as a contract with Seattle Municipal Courts, making up the balance. CP at 1285 (Boruchowitz Decl.). TDA could not continue in its present form without county funding. *Id.* SCRAP receives 98 percent of its annual $10 million budget from King County, with the remainder made up of two small grants from the county and the State for public defense related projects. CP at 1733 (Daly Decl.). The county was the sole source of funds for NDA in 2003. CP at 2238 (Farley Decl.). It appears that was still the case until at least 2008.

According to evidence in the record, these board members agreed to the new arrangement primarily out of concern for what would happen to the organizations' employees and because of concern for the organizations' client base. *See* CP at 646-47 (Chapman Decl.); CP at 1281 (Boruchowitz Decl.). Ultimately all defender groups signed the contract despite serious misgivings.

In 2005, the county developed a new and complex "public defense payment model." CP at 648-52 (Chapman Decl.). The budgets of all of the defender organizations were blended together for presentation to the county, and the county calculated an average percentage to be allocated to each organization on the basis of projected caseloads, the Kenny Scale, attorney to staff ratios, and past data on the overhead expenses and administrative costs for each organization. The new model effectively treats the four defender organizations as one for budgeting purposes. CP at 652 (Chapman Decl.).

There is no dispute the defender organizations have autonomy to make day-to-day decisions on the representation of indigent clients. Because, of course, the county is bringing the charges against the defendants represented by the defender organizations, the county has made an effort not to interfere with attorney/client relationships or trial strategies.

On January 24, 2006, Dolan filed a class action in the Pierce County Superior Court on behalf of the employees of the four King County defender organizations seeking enrollment in PERS. The trial court certified the class of "[a]ll W-2 employees of the King County public defender agencies and any former or

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See id. at 2243.

predecessor King County public defender agencies who work or have worked for one of the King County public defender agencies within three years of filing this lawsuit." CP at 7087 (Findings of Fact and Conclusions of Law at 1). The parties agreed to separate the trial into two distinct phases: liability first, then remedies. The parties further agreed that, if the court denied summary judgment, the judge should decide the issues on the basis of the written record alone. The trial court denied both parties' motions for summary judgment and commenced a bench trial on the written record to determine liability.

The class presented evidence that the county treated the defender organizations exactly like the county treated any other agency of the county. For example, defender groups participate in the county budgeting process exactly like any other agency. *See* CP at 2684 (Cruz Decl.); CP at 2646-47 (Thoenig Decl.). Each item of expense such as rent, payroll, lease payments on equipment, and other costs, becomes a separate line item in the budget.[9] It is the budget process that determines the amount the defender group receives. In the event of a budget crisis where there is a countywide reduction in budget, the defender groups must reduce their budgets in the same percentage as other agencies.[1] CP at 628 (Chapman Decl.). Once the budget is approved, the total budget amount becomes the contract amount. *Id.* at 625. According to evidence presented by the class, there is no real negotiation of the contract, and signing the contract is a formality, which sometimes

[9] It is not clear whether this remains the case after the new 2005 budget process came into effect.
[1] After oral argument, Dolan submitted supplemental evidence regarding furloughs. The county responded with a motion to strike the supplemental evidence and impose sanctions. We grant the motion to strike but decline to impose sanctions. In addition, King County submitted an answer to an amicus brief filed by the Washington Attorney General, and Dolan responded with an objection, which we are treating as a motion to strike. The motion is denied.

occurs after the contract period has expired. *Id.* at 625, 631, 638-39. The county has maintained that the defender organizations may not retain for their own purposes any profits or any funds that may be left over from the budget. CP at 2233 (Farley Decl.); *see also* CP at 1237-38 (Daly Decl.). Nor are they held liable for any budget shortages. *See* CP at 7176 (Resp'ts' WAC Factor Chart). The class also points out that, like the defender organizations, county agencies have authority to exercise discretion in day-to-day activities including the hiring and firing of employees. CP at 268-82 (Cruz Decl.).

The county points out that the defender organizations have historically been independent, with their own articles and bylaws, control over day-to-day operations, and independent boards of directors. Moreover, the organizations file Form 990 with the Internal Revenue Service (IRS), which confirms their status as private nonprofits. *See, e.g.,* CP at 6146 (TDA tax exemption form). The county also asserts that the organizations have complete control over their funds, stating that the budgetary formula "generated a sum of money that *each corporation could spend any way it wanted.*"[11] Br. of Pet'r at 43.

The county has made an admirable effort to establish parity among the lawyers who work for the prosecutor's office and the defender organizations. All receive the same cost-of-living increases. All employees of the defender organizations must comply with the county's "'Employee Code of Ethics.'" CP at 1747 (Daly Decl.).

The trial court found the class was eligible for PERS enrollment on the

[11] In fact, the portion of the record cited for the proposition states that the organizations can "allocate the total contractual sum *in a variety of ways.*" CP at 5465 (emphasis added).

separate but overlapping ground that the defender organizations were arms and agencies of the county, and the county was an employer of the organizations' employees. The court granted an injunction ordering enrollment, but left the enrollment date open pending further motions by the parties. The trial court did not reach the issue of remedies. The county moved for certification for immediate discretionary review under RAP 2.3(b)(4) and a stay of proceedings pending appeal. The trial court granted both motions, and we accepted review. Thus, the question before this court is the eligibility of the class for enrollment in PERS. Since we have never interpreted or applied the PERS statutes and regulations at issue here, it is a question of first impression.

ANALYSIS

1. Standard of Review

Where the record at trial consists entirely of written documents and the trial court therefore was not required to "'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,'" the appellate court reviews de novo. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (quoting *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969)). However, where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). The county argues that de novo review is proper here.

Dolan responds that the substantial evidence standard is more appropriate in this case. Dolan points out that the trial court was required to weigh over 6,000 pages of testimony and exhibits, resolve conflicts, and issue formal findings of fact as required by CR 52(a)(1). In essence, Dolan argues that the complexity and size of the record, and the careful weighing of that record for over three months by the trial court, make the substantial evidence standard preferable to de novo review despite the lack of any specific issues of credibility.

Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no determination of witness credibility. *See Smith*, 75 Wn.2d at 719. However, substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings. *See Rideout*, 150 Wn.2d at 352; *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (deference rationale not limited to credibility determinations but also grounded in fact-finding expertise and conservation of judicial resources). We apply the substantial evidence standard in this case because of the size and complexity of the record and the need to resolve conflicting assertions. Having examined the record carefully, however, we would reach the same result if we applied a de novo

standard of review.

2. PERS Eligibility

a. *Arms and Agencies*

A PERS eligible employee must work for a PERS employer. *See* RCW 41.40.010(12) (former RCW 41.40.010(22) (1997)); RCW 41.40.010(13) (former RCW 41.40.010(4) (1993)). A PERS "employer" is defined in relevant part as "every branch, department, agency, commission, board, and office of the state." RCW 41.40.010(13)(a), (b). Counties are "but arms or agencies of the state." *State ex. rel. Taylor v. Superior Court*, 2 Wn.2d 575, 579, 98 P.2d 985 (1940). Thus, if we conclude, as Dolan contends, that the defender organizations are in fact arms or agencies of the county, then the defender organizations' employees are employees as defined by RCW 41.40.010(12).

Dolan asserts that under common law standards the county has such a right of control over the organizations that the organizations are arms and agencies of the county, and thus the State, and therefore employees of the organizations are PERS eligible. Dolan argues the county has general control over the organizations through its budget process and the fact that the organizations would not exist without county funding.[12] Dolan asserts the county has used that control to "rewrite articles of

[12] For example, as mentioned above, the contract price is not a negotiated term, but is determined the previous year by the county's budget process. CP at 625, 631, 638-39 (Chapman Decl.). The contracts appear to be considered mere details; the constitutionally mandated services of the defender organizations are often performed without any contract for the corresponding period having been signed. *Id.*; CP at 1734 (Daly Decl.). The contract is presented in a "take it or leave it" form, where "leaving it" means the organizations would cease to exist. In essence, Dolan argues that the county creates its own public defense budget each year, then uses the organizations as a "pass-through of County funds to pay salaries of its lawyers and staff." CP at 2243 (Farley Decl.). According to the record, the budget "is the main way that the County Council exercises its authority over County operations." CP at 2684 (Cruz Decl.).

incorporation, bylaws, and contracts, renegotiate leases, and change employee policies and procedures." Resp'ts' Br. at 23-24. Dolan points out the defense organizations are thoroughly integrated into the county budgeting process and administrative procedures to the extent that the only difference between the King County nonprofit entities and the Pierce County Department of Assigned Counsel, an official county department, is formal, not functional. Resp'ts' Br. at 20-21, 30 (citing CP at 662-62 (Chapman Decl.); CP at 2648 (Thoenig Decl.)). Dolan also contends the many limitations imposed on the defender groups are further evidence of control, including prohibitions on other sources of revenue, affiliation with other entities, leasing of office space, competition with other defender organizations for market share, and spending budgeted funds from the county. Resp'ts' Br. at 24-25, 34-36 (citing, *e.g.,* CP at 660-61 (Chapman Decl.); CP at 1738, 1749 (Daly Decl.); CP at 2237, 2239 (Farley Decl.)).

King County calls Dolan's claim a "de facto agency" argument and contends de facto agencies are disfavored under Washington law. The county maintains that, even if there is such a thing as a de facto agency in Washington, the defender organizations are independent both historically and in their day-to-day operations, as their private nonprofit status in contracts, corporate documents, and tax forms indicates. Br. of Pet'r at 54-55 (citing, *e.g.,* CP at 6183-6299 (Organizations' Articles of Incorporation); CP at 5903-6168 (Organizations' IRS Filings)). The county asserts contrary to Dolan's claims that a defender organization could spend the lump sum budgeted to it "any way it wanted." Pet'r's Br. at 43 (emphasis removed). It also disputes that the organizations are required to have an exclusive

relationship with the county. Pet'r's Br. at 17 n.3 (citing, *e.g.,* CP at 2843-44 (Chapman Dep. at 113-14)). As discussed above, the county argues that it is undisputed the defender organizations have autonomy to hire and fire and promote employees. The defenders respond that their limited authority to decide how to spend funds and to hire and fire is no different than the authority enjoyed by other county agencies.

Dolan relies largely on two sources of authority for the proposition that the control the county has over the defender organizations can render them arms and agencies of the State. In 1956, the Washington Attorney General issued an opinion that stated that the Associated Students of the University of Washington (ASUW), a nonprofit corporation that is the primary student organization at the university, was an "arm and agency" of the university—and thus the State—because the university had the right of final approval of all actions taken by the ASUW. 1956 Op. Att'y Gen. No. 267, at 2-3. Thus, employees of ASUW were entitled to be included as members of the state retirement system. *Id.* at 6.

Similarly, the Oregon Court of Appeals held a private nonprofit formed by the city of Portland to manage its energy policy was an instrumentality of the city for the purposes of Oregon's PERS. *State ex rel. Pub. Emps.' Ret. Bd. v. City of Portland,* 69 Or. App. 117, 684 P.2d 609 (1984)). Specifically, the court found that control over day-to-day operations was not necessary for its ruling because under the articles of incorporation the city council could dissolve the corporation at any time, and the directors served at the council's pleasure. *Id.* at 121-22. The fact that the city never exercised that authority did not matter—just having it was enough to

make the nonprofit corporation an instrumentality of Portland. *Id.* at 122.

These sources support Dolan's position that, analytically, the issue is the nature of the relationship between the county and the defender organizations. There is a substantial body of law distinguishing between the employment relationship and the independent contractor relationship. The bedrock principle upon which relationships are analyzed under the common law is the right of control. *Hollingbery v. Dunn*, 68 Wn.2d 75, 80-81, 411 P.2d 431 (1966). The focus is on substance and not on corporate forms, titles, labels, or paperwork. *See* WAC 415-02-110(2)(c) (noting that for purposes of PERS eligibility, "whether the parties regard the worker as being an independent contractor is not controlling" and "disclaimers . . . are not binding on the department for the purpose of determining employer-employee status").

Dolan's argument is further supported by the statutory definition of "employee." In 1997, the legislature amended the PERS statutes. Laws of 1997, ch. 254. The definition of "employee" in former RCW 41.40.010(22), *recodified as* RCW 41.40.010(12), was amended with instructions to the Department of Retirement Systems (DRS) to "adopt rules and interpret [the] subsection consistent with common law." Laws of 1997, ch. 254, § 10(22). The legislature made clear that the amendments were meant to be "consistent with long-standing common law of the state of Washington and long-standing department of retirement systems' interpretations of the appropriate standard to be used in determining employee status." *Id.*, § 1(2). Therefore, if the "arm and agency" theory asserted by Dolan is part of Washington common law or relied on by DRS, the county's control over the

organizations may be determinative of whether the organizations' employees are employees as defined by RCW 41.40.010(12).

The attorney general opinion relied on by Dolan is both a part of Washington common law and used by DRS in determining employee status. In that opinion, as described above, the attorney general found that ASUW was an "arm and agency" of the State because the university had the power to control its actions, and thus its employees were PERS eligible. 1956 Op. Att'y Gen. No. 267, at 2-3. First, this court, albeit in a different context, adopted and applied the reasoning of the attorney general opinion over 30 years ago, and explained that, although the university had never exercised its power, failure to exercise it did not mean the power did not exist. *Good v. Associated Students of Univ. of Wash.*, 86 Wn.2d 94, 97-99, 542 P.2d 762 (1975). The court therefore rejected the contention of three students that ASUW was an independent organization and not an "arm and agency" of the university. *Id.* at 99.

Second, the same attorney general opinion has been relied on by DRS in the context of PERS eligibility. According to the record, following a newspaper exposé claiming that the Washington State University (WSU) bookstore was operating for profit, "it was questioned whether the bookstore's employees should be covered under [PERS]." CP at 6608 (DRS Mem.). Further investigation revealed that the "State Auditor . . . did not consider this entity either as part of WSU or as another state agency or political subdivision." *Id.* The bookstore's payroll officer likewise asserted that "the bookstore is considered a separate operation and not part of the University." *Id.* The DRS audit team requested review from the DRS Legal Affairs

Unit. *Id.* at 6610. In answering the question of whether the bookstore was a valid PERS employer, and thus whether its employees were validly enrolled in PERS, the DRS response stated that under the 1956 attorney general opinion it did not matter whether the bookstore was considered a separate PERS employer or simply part of the university. CP at 6606 (DRS Letter Ruling, Dec. 31, 1990). The letter explained that "the Bookstore is an arm and agency of WSU (AGO 55-57 No. 267), as the entire capital stock of the Bookstore is under the control of the WSU Board of Regents." *Id.* Thus there was no question that the employees were PERS eligible; the only question was the administrative one of whether the bookstore should have reported as a separate entity or under the umbrella of WSU. *Id.* at 6607. The letter did not to answer that question. *Id.*

According to the attorney general opinion adopted by this court and DRS, the State may have such control over an entity that it is an arm and agency of the State, and its employees therefore eligible for PERS as "employees" under RCW 41.40.010(12).[13] We thus can consider whether, under the common law as

[13] The county is correct that both this court's opinion in *Good* and the DRS interpretation addressed above are distinguishable because the right to control was explicit in the corporate articles or bylaws of the organizations at issue, but that fact should not end the inquiry. As in *Hollingbery* and the common law, we must look beyond formalities to the actual nature of the relationship. *Hollingbery*, 68 Wn.2d at 80 ("Whether in a given situation, one is an employee or an independent contractor depends to a large degree upon the facts and circumstances of the transaction and the context in which they must be considered."). The county makes two arguments disputing this proposition. First, the county asserts that the definition of a public employer for PERS purposes does not include private nonprofit corporations. *See* RCW 41.40.010(13)(a), (b) (former RCW 41.40.010(4)(a), (b)). The county argues that because the statute defines a PERS employer in relevant part as "every branch, department, agency, commission, board, and office of the state" the defender organizations cannot be PERS employers. *See id.* It asserts that because the county did not enact ordinances designating the organizations as official county departments, they cannot be PERS employers under the statute. The county's argument is high formalism, and entirely overlooks the fact that the "arms and

incorporated into former RCW 41.40.010(22), the employees of the defender organizations are state employees.

b. County Control Over Defender Organizations

We would like to emphasize that no single factor controls. *Hollingbery*, 68 Wn.2d at 81. An independent contractor, whether for profit or nonprofit, does not lose its independence simply 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 contractor an agency of the government.[14] "'The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.'" *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (quoting *Epperly v. City of Seattle,* 65 Wn.2d 777, 785, 399 P.2d 591 (1965)). However, government cannot create an agency to perform a government function, incorporate it into its yearly budget process and control it like any other

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agencies" determination rests on the amount of control the county has, not the method by which the county creates its departments. We reject such a limited view of what constitutes a government agency. Second, the county argues that "de facto" agencies are disfavored under Washington law. Br. of Pet'r at 55. It bases this argument on "the well-understood concept that while there can be a de facto officer, there can be no officer de facto without an office de jure." *Id.* The county also cites some case law that has little discernable relevance to the case at hand. *See Higgins v. Salewsky*, 17 Wn. App. 207, 562 P.2d 655 (1977). This argument is at best obscure and at worst nonsensical.

[14] The dissent incorrectly asserts that our decision rests "on contractual provisions permitting the County to supervise the end-level quality of the product it bargained for." Dissent at 11. Despite the dissent's characterization, the problem does not lie with any particular contractual provisions. The defender organizations can no longer be considered independent contractors not because the county has inserted supervisory provisions in the contract, but because the county has in actual practice expanded its control far beyond the supervision of end-level quality.

government agency, and claim it is an independent contractor simply because of the form of name or title.

The county argues that "[t]he proper focus . . . is the County's control over the manner in which *the corporations' attorneys and staff* perform their work." Reply Br. of Pet'r at 4. The county argues that the defenders are free to defend clients without interference and may hire and fire without interference, and that the county does not interfere with the defender groups' day-to-day activities. Thus the county reasons that it merely seeks a result as a principle and does not control the manner in which the independent contractors perform. *Id.* at 21 (citing *Hollingbery*, 68 Wn.2d at 80-81; Restatement (Second) of Agency § 220 (1958)). Under its reasoning, the county could turn its sheriff's department into a nonprofit corporation and because the sheriff generally has authority to hire and fire and carry out police work, the sheriff's department would become an independent contractor. The county is wrong.[15]

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[15] The dissent argues, like the county, that lack of control over the day-to-day job performance of the organizations' employees precludes a finding that the employees are entitled to PERS benefits. The dissent is correct that control over the details of the work is generally the fundamental inquiry in determining employment relationships. However, that test is unhelpful in this case for several reasons. First, "a public defender is not amenable to administrative direction in the same sense as other employees of the State." *Polk County v. Dodson*, 454 U.S. 312, 321, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981). Because "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client," and "it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages," insistence on the traditional test of control over the details of the employee's day-to-day job performance is unworkable in this context. *Id.* at 321-22. Second, the DRS itself has, for similar reasons, determined that an employee relationship existed under similar circumstances despite lack of control over details. Resp'ts' Br. at 40. The DRS held that a judge who contracted with the City of Kent was an employee for PERS purposes despite an explicit disclaimer in the contract, and despite the fact that the city had no control over the details of his work. CP at 2183-96 (*In re the Petition of Robert McSeveney* (9/16/2003)). Many of the factors applied to the judge by the DRS are strikingly similar to the factors as applied to the agency

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. The following examples of the county's right of control over the defender organizations support our conclusion that, under common law principles, the defender organizations are in fact agencies of the county. The defender organizations were created specifically to carry out a constitutionally mandated function of the county. Generally, independent contractors determine their own formal structure, such as the composition of their boards, articles, and bylaws; but the county has imposed stringent control over the defender organizations' formal structure. Generally, independent contractors may have many clients, but the defender organizations are true captives of the county in the sense that they cannot have other clients without the county's consent and the county provides virtually all of the organizations' funding.[16] Independent contractors can usually bid for or negotiate contracts; the

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employees. *Compare* CP at 2193-94 (DRS WAC Factor Chart), *with* CP at 7171-81 (Respondents' WAC Factor Chart). Finally, the dissent's limitation of the common law control test to individual employees entirely ignores the fact that an organization may be an arm and agency of the State. That determination, as we have described, turns on the nature of the relationship between organizations, not individual employees within the organizations.

[16] The county counters that like an independent contractor, some of the organizations can and do contract separately with municipalities other than King County. Br. of Pet'r at 17 n.3 (citing, *e.g.*, CP at 2843-44 (Chapman Dep. at 113-14)). Presumably the county means the city of Seattle, since that is the only other municipality with which the record shows the organizations contracted. *E.g.*, *id.* at 659-60. Other than cities and other government entities, the county strictly limits with whom the organizations may contract. The county code states that the county "may enter into agreements with nonprofit corporations formed for the specific purpose of rendering legal services in behalf of indigents to provide legal services to persons eligible for representation through the public defense program." King County Code 2.60.040. The county has interpreted this to mean the organizations, unlike a true independent contractor, may never "engage[] in providing [] any other form of legal representation – whether for profit or pro bono." CP at 2232 (Farley Decl.).

contracts of the defender organizations are merely a pass-through of the county's budgeting process.[17] Independent contractors may generally lease space or acquire property without approval; the defender organizations may not lease or acquire property without the county's approval and the county has asserted that property owned by the organizations belongs to the county.[18]

Further, independent contractors would generally realize profits or losses and nonprofit entities would be entitled to set aside money for future growth and expansion. Independent contractors generally do not have customers establish a pay scale for their employees or require the independent contractors to give their employees the same cost-of-living increases that the customer's employees receive.[19] While no single factor or combination of factors is controlling, we hold that the county has exerted such a right of control over the defender organizations as to make them agencies of the county.[2] We hold that under Washington common law as adopted in RCW 41.40.010(12), the employees of the defender organizations are

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[17] The dissent chooses to ignore this fact completely when it states that "the corporations could negotiate with the County on their own accord" to receive pension funding. Dissent at 10. The lack of any real negotiating power on the part of the public defender organizations is evidenced by the numerous unilateral decisions made by the county over the years. In the context of the facts of this case, it is remarkable to suggest that the organizations could have negotiated pensions if they wanted them.

[18] The county appears to have changed its rent approval requirements upon being made aware of the employees' claims in this lawsuit. CP at 2834-35 (Chapman Dep.).

[19] Also unlike a true independent contractor, as noted above, the county inserted a "termination at will" clause in 2003, which effectively gave the county the power to terminate the existence of any or all of the organizations at its slightest displeasure. This clause was replaced by a "termination for convenience" clause in the following years, which is not easily distinguished in actual effect.

[2] The dissent suggests our holding "places numerous government contracts with independent contractors at risk of being misconstrued as creating employer-employee relationships." Dissent at 11 n.6. The dissent cites no examples of contractors whose circumstances even remotely resemble those of the public defenders here.

employees of the county for purposes of PERS.

3. King County's Affirmative Defenses

a. Collateral Estoppel

The county argues collateral estoppel bars Dolan's claim on the basis of an unpublished summary judgment order in *White v. Northwest Defenders Ass'n* that found an NDA employee was not an employee of the King County OPD for the purposes of a wrongful termination claim. Order Granting Summ. J., *White v. NDA,* No. 94-2-09128-0 (King County Super. Ct., Wash. Dec. 2, 1994). Collateral estoppel requires, at a minimum, that the identical issue was decided in the prior action. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). In *White,* the issue was whether the OPD was vicariously liable for employment discrimination, and the court issued a three-page summary judgment order determining that it was not. Here the issue is whether Dolan and the class he represents are PERS eligible. The cases are not comparable. Moreover, collateral estoppel requires identical parties or privity with the original parties. *Id.* Ted White was fired from NDA in 1994, and the class includes persons who have worked for one of the four defender organizations between 2003 and 2009. Thus he is not, as the county asserts, a "member of the class," and there is no privity. Br. of Pet'r at 60. We reject the county's collateral estoppel argument.

b. Equitable Estoppel

The county asserts that because the organizations filed nonprofit corporate forms with the IRS, and because the employees participated in certain benefits programs available only to private employees, and organized in labor unions with

representatives certified by the National Labor Relations Board, Dolan is equitably estopped from claiming PERS benefits. Equitable estoppel requires (1) an admission, act, or statement inconsistent with a later claim; (2) another party's reasonable reliance on the admission, act, or statement; and (3) injury to the other party that would result if the first party is allowed to contradict or repudiate the earlier admission, act, or statement. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (quoting *Bd. of Regents v. City of Seattle,* 108 Wn.2d 545, 551, 741 P.2d 11 (1987)). Perhaps because King County required the defender organizations to give the appearance of being private, the county is arguing the employees cannot now claim to be public employees. But it is difficult to understand how the county relied on their private status, or what else the employees should have done. Moreover, accepting the county's argument would elevate form over substance. That is clearly contrary to the scheme laid out by the legislature and DRS. *See* RCW 41.40.010(12); WAC 415-02-110. The county's equitable estoppel argument is not convincing, and we reject it as well.[21]

CONCLUSION

We affirm the trial court's determination that employees of the agencies are also county employees for the purposes of PERS. We hold that King County has such a right of control over the defender organizations that they are arms and agencies of the county. We remand to the trial court for further proceedings

[21] The dissent makes a similar argument, claiming that the organizations can "realize the benefits of being both a private employer and an agency of the County." Dissent at 9. We make no such holding. There may well be collateral consequences for the public defender organizations resulting from their status as arms and agencies of the State. But those consequences are not now before us.

consistent with this opinion.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Mary E. Fairhurst

J. Robert Leach, Justice Pro Tem.

Richard B. Sanders, Justice Pro Tem.

Justice Susan Owens

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MEMORANDUM

To: The Honorable Bob Lynn

Fr: Representative Tammie Wilson

Re: Hearing Request HB 299

Date: February 26, 2016

Dear Chair Lynn,

I respectfully request HB 299 be considered in House State Affairs at your earliest convenience. My staff on this piece of legislation is Barbara Barnes. She can be reached at (907) 465-4797.

Sincerely,

Tammie

Rep. Tammie Wilson