IN THE SUPREME COURT,
STATE OF FLORIDA

PRISCILLA WILLIAMS,

Petitioner,

vs. Case No. 85,041

STATE OF FLORIDA,
DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent,

_____/

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL
OF THE FIRST DISTRICT
OF THE STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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DESIGNATION OF PARTIES AND ABBREVIATIONS

The following designations and abbreviations will be used in this Brief:

The Florida Retirement System, Chapter 121, Florida Statutes, will be referred to as FRS, or as Chapter 121, Florida Statutes.

The Florida Administrative Code will be referred to as the FAC.

The Petitioner, who was the Petitioner below, Priscilla Williams, will be referred to as the Petitioner or Ms. Williams.

The Respondent, State of Florida, Division of Retirement will be referred to as Respondent or the Division.

The employing agency for the Petitioner, the Gadsden County Board of County Commissioners, will be referred to as the Gadsden County or the County.

The State courts system will be referred to as the State or as the State courts system.

Reference to pages in the Record on Appeal will be made as follows: (R-).

Reference to pages of the Decision of the First District Court of Appeal will be made as follows: (1st DCA Opinion -).

STATEMENT OF THE CASE

The Appellee generally agrees with the Statement of the Laws as set forth in her Initial Brief with the following clarifications.

The Petitioner was an employee of the State by virtue of Section 29.04(1), Florida Statutes, which states that her "salary" was to be paid by the State Treasurer upon requisition. There were no provisions in that law which would permit her to also be an employee of the County. By law, the County's participation was very limited in what and how it could pay to an official court reporter. Under Section 29.04(3), Florida Statutes, the County could pay the funds necessary "to pay the cost of reporting in criminal proceeding . . . to provide competent reporters in such proceedings." In the Final Order (R. 127-157), the Division stated that the section did not make Ms. Williams an employee of the County but permitted the County to pay "supplemental" funds to her as the official court reporter.

The County is required by Section 939.15, Florida Statutes, to provide pay the costs of defendants in criminal matters, including appeals. It is a statutory requirement, not a contractual matter, that required payments of costs.

Petitioner did not raise any constitution issues in the case below.

One of the issues dealt with in the Recommended Order was the question of Internal Revenue Service Forms W-2 and 1099. The Recommended Order found that Form 1099 was "a similar form" to the W-2 form (R. 120). The Division rejected that finding of fact in the Final Order (R. 140) because the Form 1099 is not a form used by employing agencies on which they report salaries.

STATEMENT OF THE FACTS

The Division adopts the Statement of Facts as found in the Prehearing Stipulation at R. 42 to 44 and in the Final Order at 136 to 142.

SUMMARY OF ARGUMENT

The Petitioner was a former official court reporter for the Second Judicial Circuit who was subject to be assigned to any circuit or county court within that judicial circuit. Under the provisions of Section 29.04(1), Florida Statutes, she was a statutory employee of the State, receiving a "salary" of $5,400 per year for providing court reporting services within the judicial circuit. Section 29.04)3), Florida Statutes, permits the County to pay supplemental funds necessary to pay the cost of reporting in criminal proceedings to provide for competent reporters in legal proceedings. Those two sections, read in para materia, hold that the reporter is a state employee and not a county employee since the county can pay "costs" or "fees" but not "salaries". The fees paid to Ms. Williams, if paid as part of her salary, were wrongly paid and contrary to the clear and unambiguous wording of the law.

The County was required under Section 939.15, Florida Statutes, to pay the "costs allowed by law" in a criminal appeal for any defendant who has been adjudged insolvent, or where the defendant has been discharged or the judgment reversed. The law was a policy decision made by the Legislature to protect the federal constitutional rights of defendants. Therefore, it is the law and not any contractual relationship with the State or the County that required the County pay the reporter costs to Petitioner in criminal matters.

When we realize that the County was required by statute to pay the costs, it becomes unreasonable to mix the terms "costs" and "salaries" as if the two were interchangeable. The very use of the two different terms in Chapter 29, Florida Statutes,

signifies that the Legislature meant them to be different in substance. If it had wanted to include the transcript fees as part of the reporters salary, it could have easily done so by a few changes in wording. However, it did not do that, indicating that it meant exactly what it said - salary was to be paid by the State and costs by the County.

Petitioner then raises a constitutional issue where no such issue was raised in the proceeding below nor was a constitutional issue raised before the District Court. Regardless of the merits of her argument, she has waived her right to argue that issue at this point in the proceeding.

Petitioner then claims that retirement laws should be liberally construed to permit her to have the benefit. The position of the Division, is the the law should be followed, even in her case. When the Division has a decision to make on a member's retirement account where the equities in the case are about evenly balanced, then that decision should be tilted in favor of the member. That, however, is not the same as granting benefits without reviewing the law, the rules and case law.

The Division is seeking give Ms. Williams that which she is entitled to under the law applying the statute to the facts of her case. Petitioner worked as an official court reporter for more than 17 years. From March 1985, until February 28, 1990, she made a total of $94,840.95 in extra fees. Her average final compensation or average of the high five years of compensation <u>if</u> she is successful in this claim, will increase by $18,968.19, giving her a total of AFC of $24,368.19 ($5,400 plus $18,968.19). The additional retirement benefit amounts to an unjust enrichment of Petitioner.

In the Recommended Order, the Hearing Officer stated that Petitioner was in a "regularly established" position by virtue of have been in a temporary employment position for six (6) months. In the rule in existence at that time of her retirement, temporary employees of local agencies were not eligible for FRS membership. However, if a temporary employee was in such a position in excess of four (4) (not six (6) months), that person was considered to be filling a regularly established position and therefore a compulsory member of FRS. However, Ms. Williams was never a temporary employee of the County for any period of time and so the rule did not apply to her.

Since she never was regular employee of the County by operation of the above rules, then she could not have performed "additional duties for the same employer". That provision is inapplicable in this case

While a person can certainly be a regular employee of a local agency independent of the above rules, there was no evidence that she was an employee hired under the normal methods of applications, interviews, etc. There was no application for employment introduced into evidence, no evidence that Ms. Williams was eligible for the standard benefits given all County employees such as life insurance, health insurance, etc., and little evidence that she was an employee at all. In short, she was supposed to be a County employee but only for retirement purposes.

Petitioner was paid the extra fees on Internal Revenue Service Form 1099, a form used to pay non-salary compensation, interest, and miscellaneous income. The form is not "a similar form" to the W-2 form. It has a different use. The term "a similar form" is used for a form that may be adopted by IRS at a

future date to enable the Division to retain the qualified tax status of the FRS under Section 401(a), Internal Revenue Code.

In Section 121.021(22), Florida Statutes (1991), the Division has treated the first and second sentences as separate and distinct from each other. The first sentence deals with salary for a person who receives all of his compensation by salary while the second sentence applies to a person who receives all of his compensation from the fees of the office. It originally applied only to the old fee officers who derived their "compensation" from the fees collected by their office.

To the knowledge of the Division, there have been no "fee officers" since 1973. The above language comes from a former retirement system which included fees obtained by a fee officer as salary. Petitioner argues that the Division should have held a full evidentiary to develop all of the issues and the underlying facts. The Prehearing Information Sheet, the Recommended Order and the Final Order developed the issues and the facts of the case. If the purpose of an administrative proceeding is to develop the facts and the issues, then a hearing would have produced nothing that is not now before the Court right now or that was before the District Court. The issue that the fees were set by statute vs. judicial rule is fully developed by the Parties. Since the Hearing Officer touched on it only briefly, the Division was free to determine that the fees were paid by judicial rule.

The law states that the reporter will be paid a "salary" for her appearance. The transcription of trials, etc., are not covered in the salary provision and are therefore "special or particular services" as found by the District Court in it opinion.

NOTE: Since the Division is omitting the Introduction as found in Petitioner's Initial Brief, we are beginning the numbering of the Points of Argument with Argument II to agree with the numbering of the points in the Initial Brief.

ARGUMENT II

TRANSCRIPTION BY PETITIONER OF TRANSCRIPTS FOR INDIGENT CRIMINAL DEFENDANTS IS A PART OF THE COMPENSATION ARRANGEMENT WITH THE STATE AND COUNTY, AND PAYMENTS FOR SUCH TRANSACTIONS DO NOT CONSTITUTE PAYMENTS MADE ON BEHALF OF THE THIRD PARTY FOR PROFESSIONAL SERVICES.

A significant part of this case and the ultimate decision that this court must make involves Sections 29.02, 29.03, 29.04 and 29.05, Florida Statutes, (1991) which state in part as follows:

> **S. 29.02; Duties of court reporter - The official court reporter shall, upon the request of the presiding judge, or that of the state attorney or defendant, report the testimony and proceedings with objections made, the rulings of the court, the exceptions taken, and oral or written charges of the court in the trial of any criminal case in the circuit court, and the testimony in any preliminary hearing when so requested by the circuit judge or state attorney of that circuit and shall report the testimony and proceedings with objections made, the rulings of the court, the exceptions taken, and oral or written charges of the court in the trial of any civil case in said court upon the demand or request of the attorney for either party.**
>
> **. . .**
>
> **S. 29.03; Compensation for services - The official circuit court reporter shall be entitled to receive for each day or fraction of a day in which such reporter shall be engaged in reporting testimony and proceedings in any civil case not less than $10 a day, nor less than $10 in any one case, for each day or fraction of a day in which such reporter shall be engaged; and said reporter shall also, when ordered by either party in a criminal case or by the presiding judge report the arguments of counsel arguing the facts to the jury, and shall receive as compensation thereof**

not less that $10 for reporting each such argument. . . . . Such reporter shall receive the same fees as provided in this section when rendering similar service in criminal or other courts of this state. . . .

S.29.04; Salaries, expenses, etc., of official circuit court reporters.-

(1) Each official circuit court reporter shall receive an annual salary of $5,400, unless otherwise provided for in the appropriations act, payable in 12 equal monthly installments by the Treasurer upon requisition of such court reporter. The reporter, when in attendance upon the trial of any cause in any county in his circuit, shall be reimbursed for travel expenses as provided in s. 112.061. The reporter shall at all times be subject to the call and order of the circuit judge to perform any service required by this chapter. No reporter shall report for more than one judicial circuit except in cases in which the reporter of a circuit is incapacitated.

(2) . . .

(3) The funds necessary to pay the cost of reporting in criminal proceedings shall be supplemented by the respective counties as necessary to provide competent reporters in such proceedings.

S.29.05; Transcripts in criminal cases - Upon the demand of the state attorney, or the residing judge in any criminal cases, or the defendant within the time allowed for taking an appeal and for the purpose of taking an appeal in a criminal case, such reporter shall furnish with reasonable diligence a typewritten transcript of the testimony and proceedings, together with the charges of the court, and shall receive therefor the same fees for such transcript as provided in s. 29.03, and the costs for same shall be taxed as costs in the case.

There are several points of law that are obvious in the above sections. First, the official court reporter doesn't have to do anything to earn the salary provided for in Section 29.04(1), Florida Statutes. The reporter must appear at the trials, depositions, hearings, etc., to earn the salary. The salary basically comes with the appointment. It can be likened to

a statutory "appearance fee". In the Op. Att'y Gen. Fla. 72-39 (1973), it was stated in part that:

> **It appears settled that an official court reporter's salary is intended to compensate him for all routine attendance at and reporting of trials in connection with the enforcement of the criminal laws of this state. As noted in AGO 064-144, the official court reporter is entitled to compensation in addition to his salary only when reporting arguments of counsel in a criminal case or, of course, for transcribing the proceedings reported by him. Accord: Attorney General Opinion 070-45. His fees for reporting the argument and preparing a transcript and copies of the proceedings for use in the trial of the cause are chargeable as costs in the proceedings to be paid by the defendant if he is convicted and solvent, or by the county if he is discharged or insolvent.** (citation omitted)

However, apart from the salary paid to the official court reporter, the law allows the charging of fees for his or her service and for providing transcripts. In order to earn the "fees", the reporter must actually report the several types of trials and/or hearings as appropriate. Then, payment for the time and the transcript will be made as discussed infra.

Second, the official court reporter is paid the salary by the State Treasurer upon the submission of the requisition for each month. Based on the clear wording of the law, there is no authority in the law for the County to pay a salary to the Petitioner or any other official court reporter. See AGO 064-144. In a situation where the law mentions one thing, it is the implication that another thing is excluded. The court may apply the principle of espressio unius est exclusion alterius as stated in Thayer etc. vs. State, etc., 335 So2d 815 (Fla 1976) to hold that the law, by providing for payment on salary by the State Treasurer, excludes payment of any salary by the County. If

Gadsden County paid any part of the salary of $5,400 to the Petitioner, it was obviously not authorized and had no power to do so.

Under the provisions of Section 29.03, above, and the Rule 2.070, Rules of Judicial Administration, an official court reporter is an employee of the State of Florida. Regardless of what documents may have been generated between the Petitioner and Gadsden County, her employment as an official court reporter was dependent wholly upon her appointment and retention by the State judiciary. Under no provision of Florida law, are official court reporters of the State deemed to be county employees for any purpose whatsoever.

An official court reporter is an employee of the State under Section 29.01, Florida Statutes, above, as a matter of law. Therefore, regardless as to whatever evidence may have been presented as to the dealings between the Petitioner and Gadsden County, no finding could be made that such a reporter of the State of Florida is a county employee. This is not a case whereby the dealings between private parties is determinative as to whether or not an employer-employee relationship has been created. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966).

Petitioner argues that the forms introduced into evidence, the M-10 (Personal History Forms), the loyalty oath and the FR-11, Application for Retirement, somehow prove she was a County employee. As is argued elsewhere in this Brief, the M-10 form filed by the County probably was not noticed by the Division in 1973 because we also received an M-10 form the the State courts system. As to the loyalty oath, that is an internal form only with no distribution outside of the agency. Certainly, it was not

provided to the Division. As to the Form FR-11, the form is unaudited by the Division and as such it is not accepted as accurate, correct and truth until it is audited. Statements made on the form can be disputed and often are disputed by the Division as part of a pre-audit and post-audit process. Further, she 1) acknowledged that she signed the form 2) for the purposes of applying for retirement. She did not swear to the accuracy of the statement on the form.

A part of Petitioner's argument seems to be that under Section 29.03(3), Florida Statutes, the County is authorized furnish "funds necessary to pay the cost of reporting in criminal proceedings" as a supplemental source of money. This, however, does not seem to cover salaries but does seem to cover "costs", just as it says. The costs would be those mentioned in Section 29.03, Florida Statutes, above, in which the Legislature has mandated that the counties shall pay the supplemental funds necessary to pay the cost of court reporting in criminal proceedings as necessary to provide competent reporters in such proceedings. There is nothing in the law and no reason to believe that the provision of law alters the employer-employee relationship between the State and its official court reporters, but rather provides an additional funding source from the counties to pay the cost of court reporting in criminal cases.

By judicial rule, the Supreme Court has addressed the area of compensation of the official court reports. In Rule 2.070(g), Rules of Judicial Administration, it states in part as follows:

> **Compensation. Each official court reporter shall on a monthly basis certify to the chief judge of the circuit to which the reporter is appointed the number of hours' service of the reporter and**

the reporter's approved deputies in criminal and juvenile proceedings, excluding depositions, in circuit and county courts. Upon approval by the chief judge, such certification shall be submitted by the chief judge or the chief judge's designee to the state courts administrator no later that the 10th day of the following month.

Therefore, we can see that the salary certification process is through the chief judge of the circuit to the courts administrator and then to the State Treasurer for payment.

While the statutory provisions of Section 29.04, Florida Statutes, dealing with salaries seems clear, the provisions of Sections 29.03 and 29.05, Florida Statutes, relating to "fees" is certainly much less clear.

Petitioner, in her Initial Brief on Argument II, begins by citing Section 29.05, Florida Statutes, dealing with transcripts in criminal cases. She argues that she does have the legal requirement to prepare such transcriptions. The Division fully agrees with that position. Payment for the transcripts is made under the provisions of Section 29.03, Florida Statutes. Although the responsibility of the County is not directly mentioned in the law [except in Section 29.04(3), Fla. Stat.], we know that Section 939.15, Florida Statutes, requires that the County in which the crime was committed pay the "costs allowed by law" for defendants adjudged insolvent in cases on appeal, when the defendant is discharged or the judgment is reversed. The basis for Section 934.15, Florida Statutes, comes from federal constitutional protections and is not dependent upon on the above section of law.

Section 939.15, Florida Statutes, (1991) some version of which has been in the statute books for 100 years, reads in part as follows:

> **When the defendant in any criminal case pending in any circuit or county court, a district court of appeal, of the Supreme Court of this state has been adjudged insolvent by the circuit judge or the judge of the county court, upon affidavit and proof as required by s. 924.17 in cases of appeal, or when the defendant is discharged or the judgment reversed, the costs allowed by law shall be paid by the county in which the crime was committed, upon presentation to the county commissioners of a certified copy of the judgment of the court against such county for such costs.**

In State vs. Byrd, 378 So2d 1231 (Fla 1979), the Court stated that:

> **The clear intent and purpose of the statute (939.15, F.S.) was not to grant an indigent defendant a right but to prescribe which governmental entity in the State of Florida must pay the the court costs of an indigent defendant in a criminal case. Without this statute there would be doubt as to which entity, be it county or state, or which departmental budget, such as that of the public defender's office, should be chargeable with providing the payment of these costs and expenses.**

Therefore, we can see that the reason that the County pays the costs of the official court reporter is not a random choice but is a decision of the Legislature predicated on constitutional rights of the defendants.

Nevertheless, Petitioner argues that it is not reasonable to "exclude payment for the transcript from compensation for purposes of calculating retirement on the basis that the transcript is a benefit to an indigent defendant." Initial Brief, page 11.

To the contrary, the Division argues that it would be even more unreasonable to mix the sections on "fees" and "salary" for retirement purposes when Chapter 29, Florida Statutes, plainly

treats them as different items that are in the law for very different reasons. The Attorney General addressed the payment of salary in AGO 73-39, when he said that "(i)t appears to be settled that an official court reporter's salary is intended to compensate him for all routine attendance at and reporting of trials in connection with the enforcement of the criminal laws of this state." at 64. That is certainly very different from performing the service of transcribing testimony at trials, hearings and/or arguments. The mere fact that the two different items are in the same chapter of Florida Statutes does not indicate that they should both be treated as compensation for retirement purposes. For example, in Section 29.10, Florida Statutes, in the First Judicial Circuit, an official court reporter, under certain circumstances, can also be the secretary to the chief judge or judges of the circuit. That is a additional duty. The question is would that reporter receive additional compensation that would be included for retirement purposes? Notably, Petitioner does not cite any provision of law that holds that the sections of law, above, should be read as she has argued. If a law deals with cows, horses and ducks, then under Petitioner's reasoning, we can call all of them horses or all of them cows. This, of course, would be ridiculous. Lee vs. Casablanca Restaurant, 447 So2d 951 (Fla 1st DCA 1984)

While Petitioner does not see a difference in the terms "fees" and "salary", there is a real difference as viewed in the law. Black's Law Dictionary defines "fee" as:

> **A charge fixed by law for services of public officers or for use of a privilege under control of government (citation omitted). A recompense for an official or professional service or a**

> **charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done.** Black's Law Dictionary 614 (6th ed 1990)

The term "salary" is defined as:

> **A reward or recompense for services performed. In a more limited sense, a fixed periodical compensation paid for services performed. A stated compensation paid periodically as by the year, month, or other fixed period, in contrast to wages which are normally based on an hourly rate.** Black's Law Dictionary 1337 (6th ed 1990)

The two items, fees and salaries, are different by definition and by purpose. Assuming arguendo that Chapter 29, Florida Statutes, did not exist, the State or any county could certainly contract with any court reporter for services, but obviously, be enacting that law, the State wanted a reporter who was readily available at the request of the court or the attorneys in a criminal proceeding. That meant that the reporter had to be guaranteed some type of income. The simplest manner to do that was - by law - to establish a salary for the reporter as has been done in Section 29.04(1), Florida Statutes. That guarantee of a salary enabled the court to have a reporter available and still permitted the reporter to charge additional costs for transcripts on a copy basis, the same manner that all other reporters are paid - an appearance fee plus the transcript fee. Rather than having no rational basis to exclude payment of transcript fees from retirement calculations, there is every basis to exclude them and no basis not to do so.

Concerning Petitioner's argument that other state and

county employees provide services to and for the benefit of third parties, the services performed by those employees are a part of their jobs, not services that are outside of their jobs. These services are a part of their compensation for retirement purposes because that those services are part of their job descriptions. Apparently, the Petitioner has no job description or at least none that was introduced into evidence. Therefore, the statute is her job description.

As to the constitutional issue, Petitioner did not raise any constitutional issues in the proceeding below (R. 44), even though she had the duty to do so [State ex rel Fla State Board of Nursing vs. Santora, 362 So2d 116 (Fla 1st DCA 1978)]. Therefore, that issue cannot be raised at this time on appeal [Sunland Hospital vs. Garrett, 415 So2d 793 (Fla 1st DCA 1982); Atwood vs. Hendrix, 439 So2d 973 (Fla 3rd DCA 1983)]. The constitutional issues were not raised on the appeal to the First District Court of Appeal. Therefore, it should not be considered by this Court.

However, should the Court choose to review the argument of Petitioner, the Division submits that she is really arguing apples and oranges. She talks about the compensation paid to public defenders without any citation to law of case authority. She talks about compensation paid to "other public employees" who provide services to indigent persons without any statement as to whom these employees are, nor does she provide any citations to statutes and to case law. Obviously, there are many persons who provide services to indigents at one time or another, such a nurses, corrections officers, court personnel, etc. However, that in itself does not make any constitutional issue in the case at bar.

Petitioner makes several wrong assumptions. First, she assumes that these employees were handled differently than she was. Then she makes the assumption that their situations, jobs, conditions of employment, job classification and compensation are the same as hers. There is no evidence in the record to support either assumption, and her statements about the "facts" are pure speculation. Without knowing the classes of employees she is describing, the Division is unable to advise the Court of differences in fact or law that might indicate a basis for different treatment.

We note, for example, that Section 29.03, Florida Statutes, deals with appearance fees for both civil and criminal proceedings and the original version of the law set the page charge for transcripts in either case, while Section 29.05, Florida Statutes, deals with providing transcripts in criminal cases on appeal and Section 939.15, Florida Statutes, deals with pay costs in cases when the defendant has been adjudicated insolvent, the defendant is discharged or the judgment is reversed. The costs in Section 29.05, Florida Statutes, are those stated in Section 29.03, Florida Statutes, and the "costs for same shall be taxed as costs in the case." If they are taxed as costs by the official court reporter, then they don't sound very much like a "salary for retirement" purposes. It could be argued that the moneys involved are costs to the county and salary to the reporter, but the statute does not appear to permit the county to pay the fee to the reporter and then seek the costs through taxation on appeal.

The obvious question is if the Legislature wanted the fees to be included in the official court reporter's salary for

retirement purposes, why didn't it just say that instead of continually referring to the transcripts, etc., as "costs"? Well, quite simply, it never crossed the mind of the Legislature that these "fees", which are plainly marked and denominated as fees, would ever be confused for salary. If we look at the tag lines or the descriptive phrases given to each, they are clearly different; if we look at how the official court reporter "earns" each, they are clearly different; if we look at the manner that payment is made, then they are clearly different.

Not only are the above statutory provisions dealing with fees for transcripts different than the provisions for salary, but the judicial rules also treat the two provisions differently. In addition to the judicial rule on "compensation", the rule dealing with "fees" in the Rules of Judicial Administration, 2.070(e), states in part as follows:

> **Fees -The circuit and county court judges of a judicial circuit by majority vote may set the maximum fees for court proceedings and depositions to be charged by court reporters by administrative order. The order shall be uniform in and for all courts throughout the territorial jurisdiction of the judicial circuit and shall be recorded. . . .**

It is obvious that the salary is set by Section 29.04(1), Florida Statutes, while the fees are set by judicial rules [Anderson vs. State ex rel Kriser, 374 So2d 591 (Fla 1st DCA 1979)]. Based on the difference in treatment and separate statutory and judicial rules on salary and fees, it would appear clear that "compensation" and "fees" are very different and should be treated differently.

However, even if all of that is true, and the Division

submits that it is, the argument of the Petitioner is that the "fees" nevertheless constitute "compensation" for retirement purposes under Chapter 121, Florida Statutes, and should be added to her average final compensation thereby increasing her retirement benefit by more than four (4) times the present amount.

Compensation is defined in Section 121.021(22), Florida Statutes, (1991) in part as follows:

> **'Compensation' means the monthly salary paid a member, including overtime payments paid from a salary fund, as reported by the employer on the wage and tax statement (Internal Revenue Service form W-2) or any similar form. When a member's compensation is derived from fees set by statute, compensation shall be the total cash remuneration received from such fees. Under no circumstances shall compensation include fees paid professional persons for special or particular services. . . .**

The above definition of "compensation" has been the same since FRS was established in December, 1970, with the exception of the deletion of bonuses as part of compensation. To the knowledge of the Division, there are no more "fee officers" and there have not been any since 1973 when Article V of the Constitution became effective. The above language was a carry over from similar language in a former retirement system, the "State and County Officers and Employees Retirement System", Chapter 122, Florida Statutes, which defined "salary" in Section 122.02(3), Florida Statutes, as follows:

> **'Salary' shall mean the fixed monthly compensation paid officers and employees, and where officers' or employees' compensation is derived from fees set by statute, salary shall be the total cash remuneration received from such fees. Under no circumstances shall salary include fees paid professional persons for**

special or particular services.

Thus, it is clear that the current definition of "compensation" can be traced back to a definition of salary used over 25 years ago. Unfortunately, the definition of "compensation" in Section 121.021 (22), Florida Statutes, was not updated over the years to reflect the fact that fee officers do not and have not existed for a very long time. The failure of the Division to keep the statutes current has led, in part, to this current litigation. The other part of the problem was that no one at the Division had ever really thought that the situation of the official court reporter could possibly come under the purview of the statute. If anyone were to have asked employees of the Division at anytime within the last 20 or more years about this problem we now face the question about the inclusion of reporter fees as part of salary, the answer would have been a resounding "no". In the view of the Division, the mixing of payments of "fees" with statutory "salary" for retirement purposes was not done and still is not done.

Petitioner argues that the provisions of FRS should be liberally construed in her favor. As a general principle, the Division certainly agrees with that statement. When the Division has a decision to make on a member's retirement account where the equities in the case are about evenly balanced, then that decision should be tilted in favor of the member. However, she then goes on to quote from the opinion, a statement that makes little sense in her case. She quotes from the City of West Palm Beach vs. Holaday, 234 So2d 24 (Fla 4th DCA 1970), as follows:

We can think of no area where there is a stronger

need to shield those who have given devoted service. . . . The feeling of knowing that those later years one will be able to afford himself and his family with the necessities of life should not be likely taken away . . .

The problem is that the Division is not trying to take anything away from the Petitioner. Rather, it is seeking to apply the statute to the facts of her case. Petitioner began work as an official court reporter in January 1, 1973 and retired February 28, 1990 (R. 13). According to the information she provided (which information is unaudited and unverified), from March 1985, until February 28, 1990, she made a total of $94,840.95 in fees for her transcriptions. Since a member's benefit is determined based on the average final compensation (hereinafter, AFC) or average of the high five years of compensation [Section 121.021(24), Florida Statutes, (1994)], <u>if</u> she is successful in this claim, her AFC will increase by $18,968.19. With her salary of $5,400 per year, her <u>total AFC</u> would now be $24,368.19. Assuming that the number of years of service is constant, her benefit would increase from four (4) to five (5) times her original benefit. So this case is really not about the Division taking food or necessities from the Petitioner. It is about a simple loophole in the law that can be enlarged to make a giant case.

It might be a different situation if Ms. Williams has been attempting to obtain this dramatically increased benefit during the time she was still working, at any time from 1971 through early 1990. However, from the information in the record, she first inquired about the inclusion of the fees into her AFC was in either December, 1989, or January, 1990 (R. 10). Had an inquiry been made to the Division sooner and been successful, then the

Legislature, had it chosen to do so, could have changed the law at an earlier date, possibly affecting Petitioner's benefits on a prospective basis. By waiting until the time of retirement, that statutory change was not possible except in a prospective manner after her retirement. Grady et al vs. Division of Retirement, 387 So2d 419 (Fla 1st DCA 1980)

As to this issue in this Argument, that being payments made on behalf of the third party for professional services, there can be no dispute that the County receives no benefit from having to pay for the transcripts of the trials, hearings, etc. That benefit goes to the defendants. The only reason the County does make the payments is that it is required to make them by law! Therefore, there can be no real issue that the payments are made on behalf of third parties. The issue about the professional nature of the services will be considered infra.

ARGUMENT III

THOSE PAYMENTS RECEIVED BY PETITIONER FOR SERVICE RENDERED PURSUANT TO S. 29.03 AND S. 29.05, FLORIDA STATUTES, WERE FOR WORK PERFORMED IN A REGULARLY ESTABLISHED POSITION AND THEREFORE CONSTITUTED COMPENSATION FOR THE PURPOSE OF CALCULATING RETIREMENT BENEFITS.

The Division has already argued that under the law, the Petitioner, as an official court reporter, was an employee of the State and was not an employee of the County. Section 29.04, Florida Statutes, clearly states that an official court reporter is an employee of the State by virtue of being paid a salary by the State Treasurer. There is no provision in Chapter 29, Florida Statutes, which would allow, as a matter of law, the County to pay salary as opposed to fees and expenses. In AGO 064-144, the Attorney General stated in part as follows:

> **Section 29.04 provides for an annual salary to be paid circuit court reporters; there is no other statutory provision concerning compensation of circuit court reporters.**

Under the provisions of Section 29.03, Florida Statutes, and Rule 2.070, Rule of Judicial Administration, an official court reporter is an employee of the State. Under no provision of Florida law, are official court reporters of the State of Florida deemed to be county employees for any purpose whatsoever. Petitioner argues that she received federal tax forms W-2's from the County. She may well have received such W-2 forms. But all of those forms are unaudited and unverified as to the correctness and compliance with both federal tax law and state retirement laws. The term "compensation" in Section 121.021(22), Florida Statutes, limits

items that can be considered compensation for retirement purposes, while those same items (that are not considered compensation for retirement purposes) will be taxable in the member's federal income tax. While the W-2 forms exist, the Division did not then and does not now agree that they were properly issued by the County.

In the proceeding below, the Hearing Officer found, as a matter of law, that Petitioner had been employed in a position for over six months and therefore was occupying a regularly established position with the County (R. 117). That conclusion of law was rejected by the Division in the Final Order (R. 138, 139). At the time of Petitioner's retirement, the appropriate retirement rules dealing with membership vel non stated that temporary employees of local agencies were not eligible for membership [Rule 22B-1.004(5)(e), FAC, eff 2/7/89] However, if a temporary employee was in the such a position in excess of four (4) (not six (6) months), he/she was considered to be filling a regularly established position [Rule 22B-1.004(4)(b), FAC, eff 2/7/89] and were thus a compulsory member of FRS. However, this rule never was applicable to Ms. Williams because she was not even a temporary employee of the County for any period of time! She had no employment status at all.

Since she never was a temporary employee of the County and was not eligible to become a regular employee of the County by operation of the above rules, then she could not have performed "additional duties for the same employer" and that provision is inapplicable in this case [Rule 22B-1.004(4)(c)1., FAC].

Independent of the operation and effect of the above rule, a person can certainly be a regular employee of a local agency.

However, there was no application for employment introduced into evidence, no evidence that Ms. Williams was eligible for the standard benefits given all County employees such as life insurance, health insurance, etc., and little evidence that she was an employee at all. Yet somehow, in spite of these omissions, she was supposed to be a County employee for retirement purposes. In short, there was little evidence that she was a county employee independent of the operation of the above rules.

Petitioner argues that there is nothing in the record that would establish the existence of a contract for services between her and the County. There is, in fact, no evidence of any contract for either employment or services unless the statute can be said to have established a unilateral contract for services. As it concerns what account the fees paid for the preparation of the transcripts came from, there is likewise no evidence in the record. As to the W-2 forms that are referred to in the Pre-Hearing Stipulation, they likewise are not in evidence. Other than the reference in Paragraph 3 (R. 43), we don't know the amount that they were for nor the amounts paid by the State and the County.

As to the issue that Petitioner was not an employee of the County, the Division continues to maintain that, as a matter of law, its position is correct. The FRS Form M-10 is received by the Division and essentially is unaudited unless it is obvious that there is a problem with the enrollment. There would be especially no reason to audit Petitioner's M-10 because the Division had also received a similar form from the State Court Administrator. As to the loyalty oath, that is not sent to the Division but is an internal document of the County. There is no

explanation why Petitioner was required to sign this oath. In all likelihood, it was a standard procedure used by the County and which it required of the Petitioner. A bare form with no explanation is of little help and really of little use in understanding what occurred in January, 1973.

As to what money was paid by the County as salary under Section 29.04, Florida Statutes, the authority for such payments was Section 29.04(3), Florida Statutes, which provides that "(t)he funds necessary to pay the cost of reporting in criminal proceedings shall be supplemented by the respective counties as necessary to provide competent reporters in such proceedings."

With the record as provided on appeal, it is impossible to determine why the County used W-2 forms and in what amount. It may have been to pay a portion of the State salary of $5,400. What we do know from the law is that the County had no legal right to make Ms. Williams an employee. It may very well be that the W-2 form was used based on improper information. We simply don't know. But it is also inappropriate in the face of no evidence to assume that the W-2 forms were completed properly and validly.

Petitioner again argues that she can be an employee of both the State and the County even though the law only permits her to be paid a salary by the State Treasurer upon the submission of a requisition by the month. The County has no authority in the law to pay any salary to the Petitioner. Under the principle of espressio unius est exclusion alterius, where the law mentions one thing, it is implied that another thing is excluded. The result is that she is a State employee and not a County employee.

As an employee of the State under Section 29.01, Florida Statutes, above, as a matter of law, no finding of fact could be

made that such a reporter of the State is also a county employee. Essentially, the two employments are mutually exclusive.

While the Division agrees that a person may be employed in two or more FRS covered employments during the same time period, (for example, an employee who works in a day job and also has an evening custodial job), we are not dealing with two employments here, but one employment with the State and a supplemental payment from the County. This is consistent with Section 939.15, Florida Statutes, which provides that the County and not the State will pay for the cost of transcripts in certain criminal cases. She cannot enter into a contract with the County, but that is unnecessary. Petitioner is able to be paid because the law says she has to be paid. There is no need in this situation for any contract for employment or for services since the services are not let for bid nor are they negotiated between the parties because the costs are set by the chief judge and the other judges in the judicial circuit. Rule 2.070(e), Rules of Judicial Administration.

Petitioner raises the issue that the Division did, in fact, consider some funds paid to Petitioner as salary in calculating her AFC while at the same time continuing to argue that she was not a County employee. That is true; however, to what extent the Division used funds paid by the County is unknown.

The reason for the Division's action is rather simple. Section 29.04(1), Florida Statutes, states that "(e)ach official circuit court reporter shall receive an annual salary of $5,400, unless otherwise provided in the appropriations act, payable in 12 equal monthly installments by the Treasurer upon requisition of such court reporter." Thus, the salary is set by statute. The Division does not know of any legal authority for it to challenge

the payment of the $5,400 especially in view of Section 29.04(3), Florida Statutes, which allows the County to supplement the necessary funds. Quite frankly, the Division does not see itself as having the power to question the payment of the salary of $5,400.

Petitioner then cites Rule 22B-6.001(16)(sic), FAC, defining "compensation", as the "total gross monthly salary paid a member", including:

. . .

5. Cash remuneration received for fees set by statute,

The **conclusion** Petitioner then reaches is that the moneys at issue were part of her "total gross monthly salary", a conclusion which is argument and not fact and which is not supported by her argument. Since she was an employee of the State, the additional moneys she received from the County were not salary but were supplemental moneys paid pursuant to Section 939.15, Florida Statutes. Therefore, the basis and authority for the payments are not even in Chapter 29, but in another chapter! The salary is authorized in Section 29.04(1), Florida Statutes, and the other payments authorized elsewhere. The two, fees and salary, are different. It is really not very complicated.

The case of Matter of Compensation of Hunter, 635 P.2d 1371 (Or. App. 1981) involved the issue as to whether official court reporters in Oregon were State or County employees for the purpose of workers' compensation. At 635 P.2d 1372, the Court of Appeals of Oregon framed that issue:

The parties agree that the basic test for

> **determining an employment relationship for workers' compensation consists of two elements: 1) the existence of a contract for hire; and 2) the employer's right to control the employee's services. A dispute has arisen here because the County bargains with and pays court reporters, while the State, through its circuit court judges, controls and benefits from their services.**

And, after reviewing numerous statutory provisions relating to official court reporters, the Court held at 635 P.2d 1373:

> **The right to control is also important from a policy standpoint. The judges of the State of Oregon benefit directly from the services of the court reporters. They not only perform reporting duties in court, but are also the judges' official secretaries. See ORS 8.330. The State benefits most directly from court reporters' services, and it should be responsible for providing their workers' compensation insurance.**

And, after quoting an Oregon law in which an official court reporter "shall be deemed a county employee" under the provisions of applicable public employee retirement plans "only", the Court held at 635 P.2d 1374:

> **Because the legislature did not list workers' compensation as one of the purposes for which court reporters are deemed to be County employees, they should be treated otherwise as employees of the State."**

The theme running throughout this entire opinion is that regardless of what contractual or financial relationship may exist between official court reporters and the counties, unless they are statutorily deemed to be county employees, they will be held to be State employees because the state judiciary controls, and benefits most from, the services of such reporters.

The analysis and reasoning in Matter of Compensation of Hunter, supra, are persuasive authority to the case at bar.

The argument of Petitioner then becomes that the County was an agent of the State and that the County payments should be included in her AFC on that basis. The fact that the Legislature determined that the payments to official court reporter were to be made by counties does not make the counties the agents of the State any more then any state law applicable to local government makes the agency into agent of the State.

ARGUMENT IV

THOSE PAYMENTS RECEIVED BY PETITIONER FOR SERVICES RENDERED PURSUANT TO S. 29.03 AND S. 29.05, FLORIDA STATUTES, CONSTITUTED MONTHLY SALARY PAID A MEMBER AS REPORTED BY THE EMPLOYER ON A W-2 OR SIMILAR FORM.

Petitioner now argues that the payments she received under Sections 29.03 and 29.05, Florida Statutes, constitute a monthly salary and points to the fact that the moneys paid by the County to her were apparently paid by the month (R. 15-19).

That payment schedule is really without any significance because any vendor or provider of a service is going to bill for the service on a period basis. A monthly basis is as good as any other basis and is generally accepted in the commercial world for sending bills and invoices to customers. Far from agreeing with Petitioner, the Division does dispute that the amounts paid to her by the County were salary payment. It would seem rather basic that the question on salary and fees is the very issue that is at the center of this case. If the fees are salary, then Ms. Williams should have them included in her AFC; if they are not salary, it is an additional payment made pursuant to law and should not be included in her AFC. Whatever the moneys may turn out to be, they were paid by one agency (the County) while her salary was paid by another agency (the State).

She argues that the phrase ". . . reported by the employer on the wage and tax statement (Internal Revenue Service Form W-2) or any similar form" means that a Form 1099 used to report miscellaneous income such as interest or dividends is a "similar form". Thus, since her fees were reported on the Form 1099, they should have been included in the AFC. However, the term "or other

similar form" does not refer to the Form 1099 but to a form similar to a W-2 that the IRS might adopt in the future. The FRS, as a qualified retirement plan under Section 401a, of the Internal Revenue Code (IRC), must comply to certain provision of the IRC or be in danger of losing its tax exempt status. That would be a truly terrible outcome because the value of retirement benefits could then be imputed as constructive income to working FRS members. Therefore, the Legislature has installed some "fail safe" provisions in Chapter 121, Florida Statutes, to prevent, in part at least, such a problem from happening. For example, Section 121.30, Florida Statutes, reads in part as follows:

> **(5) No benefit hereunder shall exceed the maximum amount allowable by law for qualified pension plans under existing or hereafter-enacted provisions of the Internal Revenue Code as otherwise provided by law.**
>
> **(6) Any provision of this chapter relating to an optional annuity or retirement program must be construed and administered in such a manner that such program will qualify as a qualified pension plan under existing or hereafter-enacted provisions of the Internal Revenue Code of the United States, and the division may adopt any rule necessary to accomplish this purpose of this subsection not inconsistent with this chapter.**

(Note: the following explanations are not part of the law as quoted above.)

(5) Section 415, Internal Revenue Code;

(6) Sections 121.055 and 121.35, Florida Statutes

In the same manner, the Legislature has taken steps to ensure that in the event that the Internal Revenue Service adopts a new form to replace the W-2 form or defines taxable income differently so that another form is also needed, the language a "similar form"

would cover the problem. To argue, as Petitioner does, that the Form 1099 is also used to report compensation to the IRS is to state the obvious. It is not used and never has been used to report compensation for retirement purposes. The Division issues the W-2P ("P" signifies a "pension form" to IRS) and has done so for nearly 25 years. It strains at credulity to believe that the Division does not know the difference between the two forms or the purpose for which each one is used. It is an issue that has nothing to do with statutory construction and everything to do with the administration of a retirement plan in such a manner to allow for the occasional exigency of federal tax laws.

Petitioner next argues that the Division has misinterpreted Section 121.021(22), Florida Statutes, and that the omission of a comma somehow changes the statutory meaning of "compensation" so that the requirement that a "monthly salary" be paid from a salary account does not exist. The rule is the best interpreter of the statute; Rule 22B-6.001(46), FAC, defines a regularly established position as one that is paid from a salaries account (state position) or one that will be in existence for a period in excess of four (4) consecutive months (local agency). The courts have held that the punctuation used in statutes, while useful, is the least reliable index of legislative intent. Fla. State Racing Commission vs. Bourguardez, 42 So2d 87 (Fla 1949). It should not be used to create doubt, to distort or to defeat the legislative intent. Wagner vs. Botts, 88 So2d 611 (Fla 1956). In addition, it will be disregarded to avoid absurd results. Baker vs. Morrison, 86 So2d 805 (Fla 1956). Petitioner's argument would produce such a result and should be disregarded. Based on this rule, she has obviously misinterpreted the statute.

ARGUMENT V

THOSE PAYMENTS RECEIVED BY PETITIONER FOR SERVICES RENDERED PURSUANT TO S. 29.03 AND S. 29.05, FLORIDA STATUTES, CONSTITUTED COMPENSATION DERIVED FROM FEES SET BY STATUTE.

Petitioner proceeds to argue that the payments she received under Sections 29.03 and 29.05, Florida Statutes, constitute compensation derived from statutory fees.

This argument, of course, centers on the definition of "compensation" in Section 121.021(22), Florida Statutes. It has consistently been the position of the Division that the fees paid to Petitioner were not set by statute but were set by judicial rule. As a matter of law, the fees were authorized and set pursuant to Rule 2.070(e), Florida Rules of Judicial Administration. Under this rule, the compensation of, and the fees to be charged by court reporters are not authorized and set by statute but by judicial rule. Rule 2.070, Florida Rules of Judicial Administration, adopted generally by reference the annual salary for court reporters set forth in Section 29.04, Florida Statutes, for a 60-hour work month. See 2.070(g)(1), Rules of Judicial Administration. Anything in excess of 60 hours per month is charged at the rate of $10 per hour or appearance.

Section 121.021(22), Florida Statutes, states in part as follows:

> **'Compensation' means the monthly salary paid a member, including overtime payments paid from a salary fund, as reported by the employer on the wage and tax statement (Internal Revenue Service form W-2) or any similar form. When a member's compensation is derived from fees set by statute, compensation shall be the total cash remuneration**

received from such fees. Under no circumstances shall compensation include fees paid professional persons for special or particular services. . . .

In the past, the Division has treated the first and second sentences as separate and distinct from each other. In fact, the Division has interpreted the second sentence as applying to a person who receives all of his compensation from the fees of his office. It was originally applied only to the old fee officers who derived their "compensation" from the fees collected by their office.

The above definition of "compensation" has been the same since FRS was established in December, 1970, with the exception of the deletion of bonuses as part of compensation. To the knowledge of the Division, there have been no "fee officers" since 1973. The above language was a carry over from similar language in a former retirement system, the State and County Officers and Employees Retirement System, Chapter 122, Florida Statutes, which included as salary, fees obtained by the fee officer.

Thus, it is clear that the current definition of "compensation" can be traced back to a definition of salary used almost 25 years ago. It was the Division's understanding that the second sentence of Section 121.021(22), Florida Statutes, relating to certain "fees set by statute" would never include any fees received by an official court reporter appointed under Section 29.01, Florida Statutes.

Petitioner then cites Rule 22B-6.001(16)(sic), FAC, to support her argument, but that is really the same argument as used with the statute. While the Division does make mistakes, this was not one of them. The Division agrees that we should be held to

its own rules, but equally important, we believe those rules should be properly interpreted. The above rule is addressing the situation in which all of the compensation is derived from fees set by statute. There is nothing in the rule that covers the mixed situation - where there is a salary plus fees set by statute. Obviously then, that situation is not compensation under the law.

As to the Division's rejection of the Hearing Officer's Conclusions of Law, Section 120.57(b)10, Florida Statutes, states that an "agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order." [Alles vs. Dept of Professional Regulation, Construction Industry Licensing Board, 423 So2d 624 (Fla 5th DCA 1982)] In the case at bar, the Division has chosen to address the Conclusions of Law in the Recommended Order rather then reject them as a group.

While the Division agrees that it has not adopted any rules on compensation as it relates to the case at bar, the Division submits that it was not an "active' issue in the administration of the FRS. In fact, since the FRS was begun in December, 1970, there is not one case of any inquiry by an FRS member to the Division on this issue. It is no wonder that the Division believed this to be a "dead" issue and not one in which any rules needed to be promulgated. While the Division could have easily explained its policy in an administrative hearing, the Final Order served to explain that policy (R. 127-157). As the District Court pointed out in its opinion:

> **The real issue between the parties is not a factual one, as evidenced by the extensive factual stipulation between the parties. The dispute concerns the legal interpretation of section 121.021(22), Florida Statutes, and rule 22B-6.001(16), (sic), Florida Administrative Code.** (1st DCA Opinion - 14, 15)

If that is true, and the Division submits that it is, then an evidentiary hearing would not have added anything to this proceeding. Since hearings under Chapter 120, Florida Statutes, are for the purpose of determining the facts in a case, and where the parties agree to a lengthy and detailed stipulation as to the factual matters, there is no need for a hearing where the dispute centers around legal and not factual matters. United States Service Industries-Florida vs. State, Dept HRS, 383 So2d 728 (Fla 1st DCA 1980). In short, a hearing probably would not have added any facts or information to what is already in the record.

Petitioner next argues that the fees in this case were set by statute and not by rule as argued by the Division. While the case of Anderson etc., vs. State, ex rel Kriser, etc., 374 So2d 591 (Fla 1st DCA 1979) does indeed concern itself with prior Rule 1.035(b), Florida Rules of Civil Procedure, it is broad enough in its reasoning to extend to the current Rule 2.070(e), Rules of Judicial Administration. It states that official court reporter fees may be set by administrative order or, in that case, by a trial judge setting transcript fees. Petitioner argues that Rule 2.070(e) makes no provision for the setting of fees for transcripts. Both Anderson and Reedus vs. Friedman, 287 So2d 355 (Fla 3rd DCA 1973), relating to predecessor Supreme Court rules, say otherwise. Anderson deals with transcript fees for official

court reporters in criminal cases under a prior rule to Rule 2.070(e). The repealed rules relating to the setting of fees for official court reporters did not even mention court proceedings and depositions, and yet the First and Third District Courts of Appeal held that they authorized the setting of court reporter's fees by circuit administrative order, including transcripts of court proceedings. Petitioner next implies that the Rule 2.070(e), could deprive an official court reporter of retirement benefits in Chapter 121, Florida Statutes. That is not true. Ms. Williams will and should get everything permitted to her by law but no more. She will receive her retirement benefit based upon an AFC of $5,400 rather than an AFC of $24,368.19.

Upon the above authorities of law, it is respectfully submitted that the second sentence of Section 121.021(22), Florida Statutes, defining the term "compensation" under the FRS to include certain "fees set by statute", should not include any fees received by an official court reporter appointed under Section 29.01, Florida Statutes, in that such fees were not "set by statute", but rather, were authorized and set by judicial rule.

ARGUMENT VI

THOSE PAYMENTS RECEIVED BY PETITIONER FOR SERVICES RENDERED PURSUANT TO S. 29.03 AND S. 29.05, FLORIDA STATUTES, DID NOT CONSTITUTE FEES PAID A PROFESSIONAL PERSON FOR SPECIAL OR PARTICULAR SERVICES.

Petitioner now argues that the payments made to her did not constitute fees paid to a professional person for special or particular service because court reporting is not a "profession" and the services are not "special or particular service". The issue then becomes whether a notary public or an official court reporter is a "professional person" and then whether the services were for "special or particular services."

While notaries public are not regulated in the normal and usual fashion by the Department of Business and Professional Regulation, they are regulated under Chapter 117, Florida Statutes, by the Governor. Notaries Public are considered to be public officers (1 Fla Jur 2d, Acknowledgments, s. 40) and are appointed to terms of four (4) years by the Governor [Section 117.01(1)]. They may be suspended from their office by the Governor (Section 117.01(4) and removed from office by the Senate (Art. IV, Sect 7, Fla. Const.). A notary public is required to make a formal application, take an oath of office and post a bond (Section 117.01(2), Florida Statutes).

As the above issues relate to court reporting, it is known in the legal community that a court reporter must be a notary public. In Chapter 65-326, Laws of Florida, the Florida Legislature expressly recognized and defined the practice of shorthand court reporting to be a profession. Chapter 65-326,

Laws of Florida was codified in Official Florida Statutes as Sections 457.011 through 457.16, Florida Statutes (1965). Those sections of Chapter 457, Florida Statutes, as amended, last appeared in Official Florida Statutes (1977) and they were repealed effective July 1, 1978. Currently, Section 29.025, Florida Statutes, provides for the Supreme Court of Florida to establish minimum standards and procedures for qualification, certification, discipline, and training for court reporters, but to date that section has not been implemented by the Supreme Court of Florida. An individual, in order to engage in court reporting, must enter and complete an extensive and difficult course of study to learn either long-hand reporting or machine reporting. Court reporters have professional associations and a certification program that includes both speed and accuracy. To state that court reporting is not a profession is to discount the mental processes necessary to perform the services. For the purposes of Chapter 121, Florida Statutes, court reporting has been considered a profession.

The next issue is whether the services provided by Petitioner were for "special or particular services." The salary of $5,400 per year established in Section 29.04(1), Florida Statutes, is the "appearance fee" mentioned by the Attorney General in AGO 72-38. The Division submits that the separate and additional fees paid to Petitioner by Gadsden County (R. 15 to 19) were fees for special or particular services. It is clear that any services performed <u>in addition to</u> appearances in court, etc., for the reporting of proceedings would constitute services that were not a part of the those stated in Section 29.04(3), Florida Statutes, dealing with salary and were therefore special or

particular services. Rule 2.070(e), Florida Rules of Judicial Administration, makes provision for "fees" for such special or particular services.

The above argument is self-evident in an analysis of Rule 2.070, Florida Rules of Judicial Administration. Under subdivision (g), provision is made for court reporters to be paid at an hourly rate for their appearances in court proceedings. Under subdivision (e), provision is made for an administrative order in any circuit to set the maximum fees for court proceedings and depositions to be charged by court reporters. Included within such fee-structure would be the transcribing of proceedings and of depositions. As set forth in the last sentence of subdivision (e):

> **. . . . In the absence of an order, the fees for court proceedings and depositions to be charged by court reporters shall be as provided by law.**

Section 29.03, Florida Statutes, sets forth the fees to be charged for transcripts of trial proceedings in the absence of an administrative order under Rule 2.070(e), Rules of Judicial Administration. Nothing could be clearer than the fact that when a court reporter does a transcription of a court proceeding or of a deposition, they are performing special or particular services within the meaning of that term in Section 121.021(22), Florida Statutes.

Petitioner again asserts that it is not logical to treat salary under Section 29.04(1), Florida Statutes, differently for retirement purposes than the treatment accorded Sections 29.03 and 29.05, Florida Statutes. The Division submits that there is no reason to treat the three (3) sections in a similar manner. It

makes more sense from the point of view of statutory interpretation to treat them according to their substantive provisions than to ignore the clear wording of the statute, the judicial rules and the provisions of Chapter 121, Florida Statutes.

CONCLUSION

It is respectfully submitted that the Petitioner, Priscilla Williams, has failed to show any reversible error below, and the Opinion of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this ANSWER BRIEF OF APPELLEE was mailed to Edgar Lee Elzie, Esquire, MacFarlane Ferguson, 210 South Monroe Street, Post Office Box 82, Tallahassee, Florida 32302, this 8th day of May, 1995.

STANLEY M. DANEK
Division Attorney

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