IN THE SUPREME COURT OF FLORIDA

PRISCILLA WILLIAMS,

Petitioner,

vs.

STATE DEPT. OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.

CASE NO. 85,041

PETITION FOR DISCRETIONARY REVIEW OF DECISION OF DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER PRISCILLA WILLIAMS

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SUMMARY OF ARGUMENT

The Division argues that "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" (Respondent's Brief, p. 4). Petitioner was in fact the court reporter for Gadsden County only and did not rotate within the circuit (R-42, 114).

The Division's argument that Petitioner was not a County employee is contrary to the findings of fact of the hearing officer, the Opinion of the First District Court of Appeal, and the pre-hearing stipulation entered into by the Division.

Petitioner admits that she raises a constitutional issue which was not raised by her in the proceeding below. However, that constitutional issue, equal protection, was raised because the First District Court of Appeal in its decision opined that the payments in question were payments "made on behalf of a third party . . .", and therefore not compensation for retirement purposes. Because that ground for denying Petitioner relief was first raised by the First District Court of Appeal in this Opinion, it is only fair that Petitioner be able to respond to it.

In its argument, regarding the calculation of Petitioner's retirement benefits, the Division inaccurately states the compensation to which it stipulated.

There is no basis in the record for the Division's non-rule policy regarding Section 121.021 (22), the hearing officer rejected the Division's position as being contrary to the plain meaning of the statute, and its position has not been promulgated by rule.

There is no rational basis for concluding that transcription is a special or particular service while the reporting of the proceeding to be transcribed is not, and the exclusion of "special or particular services" applies only to professional persons, which Petitioner is not.

ARGUMENT II

It is not "obvious that an official court reporter doesn't have to do anything to earn the salary provided for in Section 29.04 (1), Florida Statutes," as argued by Appellee, (Answer Brief, p.9). In order to earn the salary provided for in Section 29.04, the court reporter must report the proceedings attended. The "reporting" is the taking of stenographic notes by the court reporter of what is said at the proceeding; the "transcription" under 29.05, which is at issue in this proceeding, is the preparing of a typed written transcript of the proceedings based on those stenographic notes. Obviously a court reporter cannot transcribe a proceeding if she has not first reported it.

The Division cites AGO 064-144 for the proposition that there is no authority in law for the County to pay a court reporter a salary. What the Division fails to point out is that that AGO relates only to reporting and not transcribing, and specifically states that "Your attention is directed to the fact that the above comments do not relate to the transcribing of a court reporter's stenographic notes for appellate purposes. . ." The opinion goes on to state that the County shall pay the cost of transcription.

The Division's argument that payment to a court reporter by the County is excluded under the statutory construction principal of expressio unius est exclusio alterius is misplaced. The issue is compensation for transcripts under 29.05, not salary for reporting under 29.03.

The Division next argues again that no matter what the evidence shows, Petitioner could not be an employee Gadsden County, saying:

> "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 a received a M-10 from the State Court's System. As to the loyalty oath, that is an internal form only with no distribution outside 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 true 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. . ."(Answer Brief, p. 11, 12).

None of these statements contained in the Division's brief are supported by the record in this case, and Petitioner would respectfully request this Court to ignore these statements. Furthermore, the Division's position with Petitioner's status as employee of Gadsden County is in conflict not only with the finding of fact of the hearing officer (R-114) and with the opinion of the First District Court of Appeal (p. 14), but is in conflict with its own stipulation (R-43).

The Division overlooks the distinction between "costs" and "fees." As pointed out by the Second District Court of Appeal in Dade County v. Straus, 246 S.2d. 137 (Fla. 3d DCA, 1971),

> "Costs and fees" are all together different in their nature generally. The one is an allowance to a party of expenses incurred in the successful transaction or defense of a suit. The other is compensation to an officer for services rendered in the progress of the cause. See Crawford v. Bradford, 23 Fla. 404, 2 S. 782, 783 (Fla. 1887).

It should be noted that Section 29.05 provides for "fees" for transcripts, and then provides that those fees may be taxed as costs. Fees set by statute are, pursuant to Section 121.01, Florida Statutes, and the Division's Rule 22B-6.001 (16), included in compensation for retirement purposes, and the fact that the amount of those fees may be included in an assessment of costs does not change their status as fees. Furthermore, as mentioned earlier, the Division's position that all payments from the County are costs and therefore not compensation for retirement purposes is contrary to its pre-hearing stipulation.

The issue is not how Black's Law Dictionary defines "fees" or "salary" but rather how the Florida Retirement System Act and the Division in its own rules define compensation. Under definitions in both the statute and in the rule the payments received by Petitioner for transcripts pursuant to Chapter 129 constitute compensation and should be included in calculation of retirement benefits.

The Division argues that the compensation received by other State and County employees who provide services for the benefit of third parties should be included in their compensation for retirement purposes and those provided by Petitioner should not because the services provided by those other employees are included in their job descriptions and Petitioner has no job description other than Chapter 29. The Division is correct that the statute is Petitioner's job description, and that job description required Petitioner to furnish transcripts on the demand of the state attorney, presiding judge, or defendant in a criminal case.

Petitioner admits that she did not raise this constitutional issue below, and concedes that normally she would therefore be barred from raising such and issue at this time. In this case, however, the constitutional issue first arose of when the First District Court of Appeal's based its opinion upon a determination that compensation for transcription should be treated differently for compensation for reporting because the transcription work constituted a professional service provided to a third party. Because this third party beneficiary theory was first raised by the First District Court of Appeal, it would be unjust to disallow Petitioner the opportunity to present argument with respect to that theory.

As for the argument of the Division that Petitioner only assumes that other employees are handled differently from herself, Petitioner would cite to Section 27.51 regarding the duty of public defenders to represent indigent persons.

The Division next argues that Section 29.05 provides that fees for transcripts be taxed as costs, and argues that "If they are taxed as costs by the Official Court Reporter, then they don't sound very much like a "salary for retirement" purposes." (Appellee's Brief, p. 18).

Costs in a case are taxed by the court, not the court reporter. The court reporter is required to transcribe the proceedings and the County is required to pay her regardless of whether

her fees for so doing may be taxed as costs. The court reporter has no legal authority to seek to recover cost of the transcripts from an indigent defendant. The fees charged by the court reporter pursuant to services provided under Chapter 29 were compensation to the court reporter and costs to the County.

The Division next argues that if the legislature had wanted fees to be included in Official Court Reporter's salary for retirement purposes, it could have and would have just said so instead of referring to transcript as "costs." The compensation sought to be included in retirement under Section 29.05, however, is not referred to in the statute as costs, but as fees. The statute goes on to provide that the fees may be taxed as costs, but clearly states that the court reporter "shall receive therefore the same fees for such transcript as provided in Section 29.03."

The issue is not whether the statutory provisions dealing with compensation for transcripts differ from those dealing with compensation for reporting proceedings. The issue is whether fees for transcripts comes within the definition of compensation in the Florida Systems Retirement Act, and the answer is that it does.

There is no evidence to support the Division's argument that the language in the definition of compensation for retirement purposes which includes fees set by statute is there as an oversight or that part of the definition of compensation regarding the fees set by statute referred only to fee officers as they existed prior to 1973.

The Division states on page 20 of its brief that Petitioner argues that including fees as compensation for retirement purposes will increase Petitioner's retirement benefits by more than four times the present amount. There is no record basis for this statement by the Division, it is incorrect, and Petitioner respectfully requests this Court to ignore it.

On page 21 its brief the Division states the following:

> . . . Unfortunately, the definition "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 Division to keep the statutes current has lead, in part, to this current litigation. 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 preview of the statute. If anyone were to have asked employees of the Division at any time within the last 20 years or more 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".

There is no basis in the record for the statements by the Division, and Petitioner respectfully requests the Court to ignore those statements. Petitioner further would point out that changes in Florida Statutes are a function of the Florida Legislature, and not the Division of Retirement.

The information regarding the payments for transcripts which Petitioner received, which the Division characterizes and unaudited and unverified, is information to which the Division stipulated in the pre-hearing stipulation in this cause (R-44).

There is no basis in the record for the Division's statement that Petitioner's salary is $5,400.00 a year, or that her benefit would increase from four to five times if the relief sought is granted. Petitioner therefore respectfully requests this Court to ignore those statements in the Division's brief. The Division is well aware that Petitioner is now receiving benefits based on payments she received from the County as well as the $5,400.00. It stipulated in the pre-hearing stipulation that a part of the compensation Petitioner received pursuant to Chapter 29 was from a Gadsden County salary account as reflected in her W-2s, and further stipulated that the Division calculated Petitioner's retirement benefits based on the payments she received from Gadsden County as Official Court Reporter as reflected in the Gadsden County W-2s as well as those from the State (R-43). The Division is now apparently attempting to ignore its stipulation and claim

that the payments received from Gadsden County for court reporting services which the Division did count and is counting toward retirement now should not be counted toward retirement. The obvious basis for this action is that the Division is at a loss as to justify its exclusion of part of the compensation Petitioner received from Gadsden County as compensation for purposes of retirement while allowing other compensation she received from Gadsden County to be included as compensation for purposes of retirement, and further is unable to reconcile its claim that Petitioner was not an employee of Gadsden County with its inclusion in retirement calculations of monies she received from Gadsden County.

ARGUMENT III

The Division continues to base its opposition to payment of retirement benefits to Petitioner on the grounds that the County can pay court reporter fees but not a court reporter salary. What the Division continues to overlook is that the issue is whether or not the payments made to Petitioner fall within the definition of compensation as set forth in Chapter 121 and in the Division's own Rule 22B - 6.001 (16), both of which include cash remuneration received for fees set by statute. Since the Division is arguing that under Chapter 29 Petitioner received fees set by statute rather than salary set by statute, the Division is in effect admitting that under its own definition the fees paid for transcripts do constitute compensation within the meaning of the Florida Retirement System Act.

The Division next argues that the appropriate rule regarding membership in the Florida Retirement System was Rule 22B-1.004 (5) (e) FAC, and that because Petitioner was never a County employee she could have never been a temporary County employee, and therefore could not qualify for the Florida Retirement System. The issue, however is not one related to temporary

employees under Rule 22B-1.004 (5) (e), but rather one relating to regularly established positions under Rule 22B-1.004 (4).

The Division continues to claim that Petitioner was not an employee of Gadsden County even though it stipulated in the pre-hearing stipulation that: (1) she received payments from a Gadsden County salary account pursuant to Chapter 29; (2) that such payments were evidenced by W-2s; and (3) that it has included such payments made by Gadsden County to Petitioner in calculation of her retirement benefits. Apparently the Division has realized that, under its own rule, if Petitioner filled a regularly established position for Gadsden County, then for all additional duties performed for the same employer Petitioner is considered to be filling a regularly established position for retirement purposes.

In his Recommended Order the Hearing Officer found as a matter of fact that Petitioner was identified in the County's records as a salaried employee who filled a regularly established position and that employment position was in existence for a period beyond six (6) consecutive months. Based on that factual finding, the Division is bound by its own rule to include all payments Petitioner received from Gadsden County pursuant to Chapter 29 in calculating her retirement income. Because it does not wish to do that, it has taken the position that no matter what the evidence shows, no matter what the Hearing Officer found as a matter of fact, and no matter what the First District Court of Appeals concluded, Petitioner was not an employee of Gadsden County.

The Division argues that it doesn't know from the record how much money the County paid Petitioner from a salary account for which it issued W-2s. The amount is not in the record because these payments were not at issue since the Division stipulated it was already including them in the calculation of Petitioner's retirement benefits. The relevant facts, to which the

Division stipulated, are that the County paid Petitioner for court reporting services from a salary fund, issued W-2s, and issued a certification to the Division of Retirement that Petitioner was an employee of Gadsden County.

As to the question as to why the Division considered some funds paid to Petitioner's salary in calculating her AFC while at the same time continued to argue that she was not an County employee, the Division argues that it did so because Section 29.04 (1) states that each Official Court Reporter shall receive and annual salary of $5,400.00 from the State Treasurer and that the Division does not know of any legal authority for it to challenge or question the payment of the $5,400.00. This argument is misleading. It is not the inclusion of the $5,400.00 paid by the state pursuant to Section 29.04 (1) that relates to Petitioner's status as a County employee, it is the Division's inclusion in its calculation of retirement benefit of those monies received by Petitioner from Gadsden County which the Division cannot explain. The Division has in fact treated Petitioner as a County employee, and has stipulated to as much, but is seeking to avoid admitting the fact because, under the Division's own Rule 22B-1.004 (4) (c), the inescapable result of such action is the inclusion of all monies paid by Gadsden County to Petitioner in calculation of her retirement benefits.

The Division next argues that the monies received by Petitioner from Gadsden County do not constitute cash remuneration for fees set by statute because the fees were received pursuant to §939.15 and not Chapter 29, and because fees and salary are different. There are two problems with this argument by the Division.

First, §939.15 does not set fees, it merely states who will pay them. Second, the statutory and rule definitions of compensation includes cash remuneration received for fees set by statute, and there is no requirement that they be set by any particular statute. If the Division is claiming

that they are set by Section 939.15, then the Division is admitting that the payments are remuneration received for fees set by statute. Even if the monies received were fees pursuant to Section 939.15, as the Division argues, they must be included in the calculation of retirement compensation under the Division's own rules.

With respect to the Division's argument based on matter of compensation of Hunter, 635 P.2d 1371 (Oregon App., 1981), it should also be noted that the Oregon Court stated that the most important factor in its decision was that the Oregon statutes specifically provided that court reporters be deemed county employees for purposes of retirement, and since the legislature did not by statute deem them employees of the County for purposes of worker's compensation, they should be treated as state employees for that purpose. There is no statute in Florida which states that court reporters are to be deemed county employees for some purpose other than retirement but fails to list retirement as one of the purposes for which they are county employees. The reasoning, then, of the Court in Hunter is inapplicable to this case. Indeed, Florida Rule of Judicial Administration 2.070 (h) provides that a court reporter is an officer of the Court for all purposes while acting as a reporter in a judicial proceeding or discovery proceeding. Because the rule does not state that a court reporter is an officer of the Court while preparing a transcript outside a judicial or discovery proceeding, under the reasoning followed by the Oregon Court, it would follow that a court reporter is not a state employee for purposes of preparing transcripts.

ARGUMENT IV

The Division again argues that if the payments received from the County are not "salary," they should not be included under AFC. As pointed out earlier, the Division's own Rule 22B-6.001 (16) includes within the definition of Compensation five (5) particular types of payments in addition to monthly salary. Although the payments from the County should be included in

Petitioner's AFC because they were salary within the meaning of the statute, even if they did not constitute salary they still constituted compensation as that term has been defined by the Division's own rule.

The statutory definition of compensation for retirement purposes includes monthly salary paid a member as reported by the employer on a W-2 or, any similar form. The Division argues that the phrase "or 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. There is no basis in the record for this statement and Petitioner respectfully requests that this Court ignore it. Petitioner further says that the language used in the statute is "or any similar form," and if the legislature had intended to limit compensation to income reported on successor or replacement forms to the W-2, it would have said so. The Division also argues that it knows enough about its own forms to know whether it should issue a W-2 or not. Although that contention is certainly debatable, it is significant to note in this case that the forms at issue are not those issued by the Division, but rather those issued by Gadsden County.

Petitioner has not misinterpreted Section 121.021 (22), Florida Statutes. The words "paid from a salary fund" are included within the phrase "including overtime payments paid from a salary fund" and clearly modify "overtime payments". This interpretation is supported, not inconsistent with, Rule 22B-6.001 (46), FAC, cited by the Division. That rule, (which does not define compensation), defines a regularly established position with the State as one compensated from a salary appropriation. As for a regularly established position in an agency, the rule contains no requirement regarding source of funds. The rule which does deal with the definition of compensation is the Division's Rule 22B-6.001 (16), and that rule definition of compensation also contains no requirement with regard to the source of the compensation.

ARGUMENT V

On page 36 of its brief the Division states that "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." There is no basis in the record for this statement, and Petitioner respectfully requests that this Court ignore it. The Division further states on page 37 of its brief the following:

> 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, 1990, there is not one case of any inquiry by and 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. . .

There is no basis in the record for these statements by the Division, and Petitioner respectfully requests that this Court ignore them. It is a basic principle of administrative law that where an agency does not refine statutory standards through rule making it is required to explain the policy behind its decisions in each individual case, and to present evidence to support that policy. While the agency claims that it could have easily justified its policy at hearing, it did not do so, and it cannot cure that deficiency in a final order. Anheiser Busch, Inc. v. DBR, 393 S.2d 1171 (Fla. 1st DCA, 1981). If, as argued by Division, a hearing would have not added any facts or information to what is in the record, it can be concluded that Division has no factual basis for its non-rule policy and would have been unable to establish it had it attempted to do so.

Rule 2.070, Florida Rules of Judicial Administration, does not provide for fee for transcripts, though it specifically provides for other court reporter fees. As pointed out by the

Division, the decisions in Anderson, etc. v. State, ex rel Kriesler, etc., 374 S.2d 591 (Fla. 1st DCA, 1979) and Reedus v. Friedman, 287 S.2d 355 (Fla. 3rd DCA, 1973), related to rules that also did not specifically mention fees for transcripts. The point ignored by the Division is that the rule construed in those two cases granted the Circuit Court authority to set all fees charged by court reporters, and thus by the wide scope of the rule would include transcript fees. The Rule 2.070 at issue does not address "fees to be charged by court reporters" as did the old rule, but rather addresses "fees for court proceedings and depositions" without any mention of fees for transcripts. Under the principle of expressio unius est exclusio alterius, because the rule specifically mentioned the fees for these specific items, it by implication excluded fees for transcripts.

Page 29 of its brief, the Division states that "she [the Petitioner] will receive for retirement benefit based upon an AFC of $5,400.00 rather than and AFC of $24,368.19." As pointed out earlier, there is no basis in the record for this assertion and it is incorrect.

ARGUMENT VI

The Division on page 41 of its brief makes the following statements:

> 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 an 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.

There is no evidence in the record to support the statements, and Petitioner respectfully requests the Court to ignore them.

Not only is there nothing in Florida law to indicate that a court reporter is a "professional person," but such a contention is contrary to the laws of the United States of America. 29 CFR Section 541.3 provides in part as follows:

> (e) (1) Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions in advanced academic degree is a standard (if not universal) perquisite. . .

Because the education required of court reporters does not meet this standard, court reporters would not qualify as a "professional person" with reference to the Fair Labor Standards Act.

The Division next argues that because Chapter 29.04 (1) does not cover fees for transcripts, such fees are therefore for special or particular services. There is no basis for such a distinction by the Division. As pointed out by the Hearing Officer, ". . .because a court reporter is required by law to report and transcribe criminal proceedings, . . . it is illogical to characterize the transcribing of a criminal proceeding as a "special or particular service" while labeling the reporting of the identical proceeding as something else. Indeed, the statute does not contemplate such a distinction" (R-121).

Contrary to argument of the Division, Rule 2.070(e), Florida Rules of Judicial Administration, as they existed at the time of Petitioner's retirement, made no provision for fees for special or particular services, and indeed made no provision for fees for transcripts at all, and

the Division has presented no authority or rationale for treating transcribing of proceedings pursuant to Chapter 29 as a special or particular service while treating reporting of proceedings under Chapter 29 as not being special or particular.

The Division last argues that there is no reason to treat payments made to Petitioner pursuant to Sections 29.04, 29.03, and 29.05 in a similar manner. There is such a reason, and that reason is the definition of compensation set forth in Section 121.021 (22), Florida Statutes, and Rule 22B-6.001 (16), Florida Administrative Code.

Respectfully submitted this 8th day of June, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: STANLEY M. DANEK, ESQUIRE, Cedars Executive Center, Building C, 2639 North Monroe Street, Tallahassee, Florida 32399-1560, this 8th day of June, 1995.

EDGAR LEE ELZIE, JR.