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STATEMENT OF THE CASE AND FACTS

The Amicus adopts and incorporates by reference herein the statements of the case and facts set forth in the respective briefs of the Petitioners, Department of Administration and Robert Morrow.

## SUMMARY OF THE ARGUMENT

At each stage of these proceedings, the Respondent, Duval County School Board, has admitted that it refused to renew the annual contract of Petitioner, Robert Morrow, for the 1982-83 school year exclusively on the basis of his having attained age 70. The Duval County School Board has not disputed that the Petitioner's employment was discontinued in spite of his having received the highest ranking in each of 36 performance categories in the official 1982-83 teacher evaluation. These ratings were consistent with the Petitioner's 21-year history as an outstanding teacher. In justification of its decision not to renew Mr. Morrow's annual contract, the School Board has consistently adhered to the position that its decision was sanctioned by Section 231.031, Florida Statutes.

Section 231.031, Florida Statutes, divests a teacher of tenure status at the close of the school year following his seventieth birthday. Accordingly, and by the express terms of this provision, a 70-year old teacher loses his entitlement to continued employment at this time. To this extent only, Section 231.031 is excepted from the prohibition against age discrimination that is set forth in Section 112.044, Florida Statutes.

Furthermore, Section 231.031 allows a formerly tenured teacher to be continued in employment on an annual contract basis. There is no language in Section 231.031 that permits school boards to discharge such teachers on the basis of their age. Notwithstanding this, the First District Court of Appeal construed Section 231.031 to sanction the Duval County School Board's practice of age discrimination in its decision not to renew the annual contract of the Petitioner Robert Morrow. Such a result contravenes the express terms of Section 231.031. Moreover, it opposes a well settled public policy against age discrimination that has been articulated by statute.

For these reasons, the decision of the First District Court of Appeal should not be approved by this court.

## ARGUMENT I

THE PROVISION OF SECTION 231.031, FLORIDA STATUTES, WHICH STATES THAT "NO PERSON SHALL BE ENTITLED TO CONTINUED EMPLOYMENT IN ANY INSTRUCTIONAL CAPACITY IN THE PUBLIC SCHOOLS OF THIS STATE AFTER THE CLOSE OF THE SCHOOL YEAR FOLLOWING THE DATE ON WHICH HE ATTAINS 70 YEARS OF AGE...", ONLY DIVESTS TENURED TEACHERS OF THEIR TENURE STATUS AND DOES NOT GIVE SCHOOL BOARDS UNBRIDLED DISCRETION TO DISCONTINUE THE EMPLOYMENT OF ALL TEACHERS WHO ARE OVER 70.

The Duval County School Board contends that Section 231.031, Florida Statutes, gives it the authority to discontinue the employment of 70-year old teachers who have attained age 70. Inherent in its reasoning, and explicit in the opinion of the First District Court of Appeal, is the notion that the phrase "no person shall be entitled to continued employment" refers to all teachers, whether those on annual contract or those with tenure. This construction is untenable and should not be countenanced by this Court.

Section 231.031, Florida Statutes provides as follows::

Notwithstanding the provisions of s. 112.044, no person shall be entitled to continued employment in any instructional capacity in the public schools of this state after the close of the school year following the date on which he attains 70 years of age; however, upon recommendation of the superintendent, the person may be continued in employment beyond such date, subject to annual reappointment in the manner prescribed by law. Nothing contained herein shall apply to employment limited to substitute and part-time teaching. (emphasis added)

The Amicus submits that the entitlement to continued employment, referenced above in s. 231.031, is synonymous with tenure. Accordingly, the statute divests tenured teachers who are over 70 of their tenure status. The First District Court of Appeal rejected this analysis, stating:

Moreover, the appellees' suggestion that Section 231.031's first clause should - presumably because of its use of the phrase "continued employment" - be limited to the effect upon tenured, or continuing contract, teachers simply runs counter to the plain meaning of the statute. Under the statute's unambiguous language, it is "continued employment" to which the 70 year old teacher is not entitled, and not simply tenure or continuing contract status. Such is borne out by the use of virtually the same phrase in the second clause ("continued in employment") as is used in the first clause ("continued employment"). Thus, the rationale for the dichotomous meaning of the first and second clauses, as suggested in the Commission's order, supra, fails.

This reasoning of the First District Court of Appeal disregards a whole body of judicial precedent related to this issue.

It is a settled premise of law that, absent statutes, ordinances, contracts or policies and practices of institutions which support claims of entitlement, only a tenured teacher has an entitlement to continued employment.

A case in point, Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982) is not binding on this court, but is clearly persuasive and helpful in developing an analytical

framework. There, the court set forth guidelines for determining when a public employee has a property right or a legitimate entitlement to continued employment. According to Hearn, where statutes or ordinances delineate specific grounds for the discharge of a public employee or permit discharge for just cause only, the employee has a property right or an entitlement to continued employment.

Section 231.36 is the only state statute that provides for and governs contracts with instructional staff. Section 231.36(4)(c) sets forth specific grounds upon which teachers on continuing contracts (as was Petitioner Morrow, prior to his being placed on an annual contract) may be suspended or dismissed. That subsection provides, in pertinent part:

Any member of the district administrative or supervisory staff and any member of the instructional staff including the principal, who is on continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude....

Section 231.36(3)(e) prescribes the grounds for discharge of employees on professional service contracts, which are tenure agreements that replaced continuing contracts after July 1, 1984:

A professional service contract shall be renewed each year unless the superintendent, after receiving the recommendations required by s. 231.29(5), charges the employee with unsatisfactory performance as determined under the provisions of s. 231.29 and notifies the employee in writing, no later than 6 weeks prior to the end of the postschool conference period, of performance deficiencies which may result in termination of employment, if not corrected during the subsequent year of employment (which shall be granted for an additional year in accordance with the provisions in subsection (1))....

To the contrary, neither s. 231.36 nor any other statute sets forth grounds for the non-renewal of contracts of annual contract, non-tenured employees. Accordingly, under the Hearn analysis, only tenured teachers, i.e., those on continuing or professional service contracts, have any entitlement to continued employment.

The Supreme Court, in Bishop v. Wood, 425 U.S. 341, 96 S.Ct. 2074 (1976) stated that a property interest in employment can be created by ordinance or implied contract. As stated above, s. 231.36, Florida Statutes, gives rise to such an entitlement to continued employment for teachers who are on continuing and professional service contracts. However, there is no statute, and the Duval County School Board has not presented evidence of any implied contracts, which would give rise to an entitlement to continued employment for annual contract teachers.

Similarly, in Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, the court underscored the requirement of tenure as evidenced by a written contract or by the policies and practices of an institution to support a teacher's claim of entitlement to continued employment. The court stated:

A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all jurisdictions long has employed a process by which agreements though not formalized in writing, may be "implied." 3 A. Corbin on Contracts §§ 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promissor's words and conduct in the light of the surrounding circumstances." Id. at § 562. And, "[t]he meaning of [the promissor's] words and acts is found by relating them to the usage of the past." Ibid.

(Emphasis added).

Finally, in Cornwall v. University of Florida, 307 So.2d 203 (Fla. 1st DCA 1975), a nontenured college professor who had no rights under the university's written tenure system, under the rules and policy of the university, nor under any statute, was held to have no expectancy of continued employment. Accord, Metropolitan Dade County v. Sokolowski, 439 So.2d 932 (Fla. 3d DCA 1983); Texton v. Hancock, 359 So.2d 895 (Fla. 1st DCA 1978).

Clearly, the function of the relevant provision of s. 231.031 is to divest a 70-year old teacher of tenure status or, in other words, of his entitlement to continued employment. The Duval County School Board has failed to present any evidence that the Petitioner had such an entitlement after he was placed on annual contract. Therefore, the School Board must not be permitted to invoke this provision in order to justify its non-renewal of the Petitioner's annual contract.

## ARGUMENT II

SECTION 231.031, FLORIDA STATUTES, DOES NOT GIVE SCHOOL BOARDS THE AUTHORITY TO DISMISS ANNUAL CONTRACT TEACHERS WHO ARE OVER 70, SOLELY ON THE BASIS OF AGE. TO THIS EXTENT, SECTION 231.031 MUST BE CONSTRUED WITH SECTIONS 112.044 AND 760.10, FLORIDA STATUTES, WHICH PROHIBIT AGE DISCRIMINATION IN EMPLOYMENT.

Section 231.031, Florida Statutes, has two distinct features. The first feature contains a stated exception to Section 112.044, Florida Statutes, which prohibits age discrimination by public employers. It provides for the automatic removal of tenure status from teachers at the close of the school year following the seventieth birthday.

The second feature, in contrast, provides that the formerly tenured teacher may be continued in employment, subject to annual reappointment in the manner prescribed by law. This part of the statute neither states nor implies that age can be a factor in the nonrenewal of a 70 year old teacher's annual contract. To this extent, s. 231.031 must be construed with ss. 112.044 and 760.10, which articulate a general public policy against age discrimination.

Section 112.044, in pertinent part, makes it unlawful for a public employer to:

1. Fail or refuse to hire, discharge or mandatorily retire, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment because of age.

2. Limit, segregate, or classify employees in any way which would deprive, or tend to deprive, any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of age.

Section 112.044(3)(a) 1 and 2, Florida Statutes. The stated purpose of the act is to promote employment of older persons based on ability rather than age and to prohibit age discrimination in employment. Section 112.044(1), Florida Statutes.

Section 760.10 makes it an unlawful practice for an employer:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age handicap, or marital status.

Section 760.10(1)(a) and (b), Florida Statutes.

Sections 231.031, 112.044 and 760.10 are in pari materia, because they pertain to the same subject, namely, the permissibility of age considerations in employment decisions. See Okaloosa County Water & Sewer Dist. v. Hillburn, 160 So.2d 43 (Fla. 1964). Therefore, these enactments should be construed so as to preserve the force of each of them, without destroying their evident intent. See Markham v. Blount, 175 So.2d 526 (Fla. 1965). Adherence to this rule of construction must, of necessity, preserve the statutory protections against age discrimination for annual contract teachers who are over 70.

The Duval County School Board has argued that because Sections 760.10(1)(a) and (b) and 112.044 are substantially the same, and because the latter provision is expressly excepted from s. 231.031, the former must also constitute an exception to s. 231.031. This contention is without merit. As has previously been discussed, s. 112.044 is only an exception to the part of s. 231.031 that concerns the removal of tenure. Moreover, the School Board's argument contravenes the well settled maxim that where a statute sets forth exceptions, no others may be implied. Expressio unius est exclusio alteruis. Thayer v. State, 335 So.2d 815 (Fla. 1976).

CONCLUSION

To permit the Duval County School Board to terminate the annual contract of the Petitioner, an admittedly highly qualified teacher, solely on the basis of age, would oppose the letter and intent of Sections 231.031, 112.044 and 760.10, Florida Statutes. Therefore, the Amicus respectfully requests this Honorable Court to reverse the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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