12-30

IN THE

SUPREME COURT OF FLORIDA

ROBERT P. MORROW,

Petitioner,

vs.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

CASE NO. 69,424

DEPARTMENT OF ADMINISTRATION, etc.,

Petitioner,

vs.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

CASE NO. 69,430

On Discretionary Review of a Question Certified, by the District Court of Appeal First District of Florida, to be of Great Public Importance

ANSWER BRIEF OF RESPONDENT DUVAL COUNTY SCHOOL BOARD

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STATEMENT OF THE CASE AND THE FACTS

Respondent, Duval County School Board ("School Board") believes that the statement of the case and facts of this matter were properly outlined by the First District Court of Appeals below in its opinion in *Duval County School Board v. State, et al*, _____ So.2d _____, 11 FLW 1335 (Fla. 1DCA, 1986). The Court stated at page 1335:

> "Morrow was employed continuously as a teacher in the Duval County school system from 1962 through June, 1983. He received tenured, or continuing contract status in 1965. He reached age 70 in September, 1981. During the 1981-82 school year, Morrow was informed by school officials that in view of his having attained the age of 70, he would be subject to the provisions of Section 231.031, Florida Statutes, at the close of the school year. That section provides:
>
> "231.031 *Maximum age for continued employment of instructional personnel.* 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.
>
> "Subsequently, Morrow received an *annual* contract for the school year 1982-83 and continued teaching at Forrest High School. In April, 1983, Morrow was informed that he would not receive a contract for the ensuing 1983-84 school year.
>
> "Morrow filed a complaint with the Human Relations Commission alleging an unlawful employment practice under Section 760.10, Florida Statutes. He claimed that he was not continued in employment solely because of his age. The School Board did not and does not, dispute the fact that Morrow's age was the sole factor in not allowing him to continue teaching in the Duval County school system. In fact, it is not disputed that Morrow consistently received high performance evaluations throughout his teaching career, including his last year.

> "Voluntary conciliation having failed, Morrow's petition for relief was referred by the Commission, pursuant to section 120.57, Florida Statutes, and Rule 22T-9.08(5) and 22T-8.16(2), Florida Administrative Code, to the Division of Administrative Hearings for the purpose of conducting an evidentiary hearing and submitting a recommended order.
>
> "A hearing was held before the hearing officer who subsequently submitted a recommended order finding that the School Board had committed an unlawful employment practice under Section 760.10, and recommending that Morrow be awarded back wages and benefits and that the School Board be ordered to evaluate his request for continued employment without reference to his age. Essentially, the Commission's final order adopted the hearing officer's recommended order.
>
> "This case boils down to legal issues involving the proper application of Section 231.031 and its interplay with Sections 112.044 and 760.10. The School Board construes Section 231.031 as permitting the School Board the authority to refuse to continue to employ 70 year old tenured teachers solely because of their age. Morrow and the Commission, on the other hand, assert that the proper interpretation of Section 231.031, as stated in the recommended order and final order, is that although the 70 years old's *tenure status* is automatically terminated by Section 231.031 because of his age, the decision not to rehire the 70 year old on an annual contract basis may not be made on the basis of the teacher's age."

Based upon those facts, issues and arguments, the Appellate Court below, by order filed June 12, 1986, found that the Florida Commission on Human Relations ("Commission") erred and that the School Board's interpretation of the law was correct. *Id.* The Court found the Commission's and Morrow's construction of Section 231.031, Florida Statutes, with respect to the statutory phrase "annual reappointment in the manner prescribed by law" to be contorted since that phrase referred to procedural requirements of appointing and hiring teachers as contained in Section 230.33(7), Florida Statutes. *Id.* In addition, the Court rejected Petitioners' argument that Section 231.031, Florida Statutes, was a status conversion statute with respect to teacher tenure. *Id.*

Petitioners sought rehearing in the Court below and requested that the Court certify a question of great public importance. The Court, in a decision, filed September 3, 1986, denied rehearing but agreed to certify the following question to be of great public importance:

> "DOES A COUNTY SCHOOL BOARD HAVE THE RIGHT, BY VIRTUE OF THE PROVISIONS OF SECTION 231.031, FLORIDA STATUTES, TO REFUSE TO REHIRE A TEACHER ON AN ANNUAL CONTRACT ON THE SOLE BASIS THAT SUCH TEACHER HAS REACHED AGE 70?"

Id. _____ So.2d _____, 11 FLW 1901 (Fla. 1DCA, 1986).

It was pursuant to such certification that discretionary review by this Court was sought and ultimately granted. After this Court accepted jurisdiction and formulated a briefing schedule, The Florida Education Association/United, AFT, AFL-CIO and the Florida Teaching Profession-National Education Association petitioned to intervene in support of Petitioner Robert P. Morrow ("Morrow") as *amici curiae*. The Petitioners and *amici* timely filed their initial briefs and it is to those initial briefs that Respondent is now filing its Answer Brief.

SUMMARY OF THE ARGUMENT

The School Board submits, in response to the question certified by the First District Court of Appeal, that a county school board has the right, pursuant to Section 231.031, Florida Statutes, to refuse to rehire an annual contract teacher solely because that teacher has attained the age of 70.

The School Board believes the First District's decision, filed June 12, 1986, was correct in holding that such right and authority existed pursuant to Section 231.031. That decision is based upon a statutory construction which is the only logical and correct construction of Section 231.031. That construction is

supported by a widely accepted canon of statutory construction. The Court gave words of common usage a construction in their plain and ordinary sense. Under such a construction, the statutory term "continued employment" as contained in the first clause of Section 231.031 was properly construed to mean that it is employment to which a teacher is no longer entitled at age 70, not tenure or continuing contract status.

Furthermore, the Appellate Court properly construed the phrase "in the manner prescribed by law" in the second clause of Section 231.031 to refer to the procedural requirements of Section 230.33(7), Florida Statutes. Such construction is based on the undisputed fact that Section 231.031 is specifically excepted from the application of the age discrimination prohibition of Section 112.044, Florida Statutes. Sections 112.044 and 760.10, Florida Statutes, each contain the same age discrimination proscriptions. Therefore, the exception from Section 112.044, a more specific statute, is also an exception from Section 760.10, the more general statute.

Although not mentioned in its opinion, the Appellate Court's construction squares with other recognized canons of statutory construction. It is the position of the School Board that, in terms of legislative action, Sections 231.031 and 112.044, represent the latest legislative expression on the subject matter of age discrimination. Therefore, those statutes should take precedence over Section 760.10. However, and even if Section 760.10 was the last legislative expression, Sections 231.031 and 112.044 must take precedence because they are the more specific statutes. In that regard, Section 231.031 deals specifically with teachers. Section 112.044 deals specifically with age discrimination proscriptions relative to public employers and employees. Section 760.10, on the other hand is a general statement on discrimination which includes *inter alia* proscriptions against age discrimination. Accordingly, regardless of the dates of legislative enactment, the more specific statute should prevail.

The School Board submits that permitting teachers to be involuntarily retired after age 70 does not violate equal protection or due process. The application of Section 231.031, in Duval County does not deny 70 year old teachers equal protection because all such teachers are treated the same. There is no evidence that Mr. Morrow was treated any different than any other teacher in a similar situation.

Furthermore, there is no denial of due process because neither property interests nor liberty interests are involved. If a 70 year old teacher is retained, on an annual basis, at the discretion of the superintendent, he or she would stand in the same shoes as a probationary employee with no property interest in the contract after expiration of its term. Thus, the absence of a property interest would not trigger due process requirements.

The same is true for a liberty interest. Since Mr. Morrow's employment was not renewed, because of his age, there has been no charge which would seriously damage his community standing. Even if the charge that Mr. Morrow is over 70 could be construed as damaging his community standing, there has been no showing that the charge is false. Thus, there is no liberty interest to bring forward due process requirements.

Finally, much has been made about recent congressional action which has amended the Federal Age Discrimination in Employment Act to remove the 70 year age cap. Pub. Law 99-592. A review of that law shows that it is inapposite to this proceeding because of its prospective and not retroactive application. At all times relevant to the proceeding under review, the Federal Age Discrimination in Employment Act applied only to those individuals over the age of 40 but under the age of 70. 29 USC §631(a).

ARGUMENT:

A COUNTY SCHOOL BOARD HAS THE RIGHT, BY VIRTUE OF THE PROVISIONS OF SECTION 231.031, FLORIDA STATUTES, TO REFUSE TO REHIRE A TEACHER ON AN ANNUAL CONTRACT ON THE SOLE BASIS THAT SUCH TEACHER HAS REACHED AGE 70.

Duval County School Board submits that the First District Court of Appeal was correct in its decision filed June 12, 1986, and that decision should be affirmed together with an affirmative answer to the question certified. In support of its position, the School Board offers the following argument.

I. THE STATUTORY CONSTRUCTION RENDERED BY THE APPELLATE COURT BELOW IS THE ONLY LOGICAL AND CORRECT CONSTRUCTION AND THUS SHOULD BE AFFIRMED.

a. Section 231.031, Florida Statutes, cannot be construed as a status conversion provision for tenured or continuing contract teachers.

Petitioners would have this court believe that the proper interpretation of Section 231.031, Florida Statutes, merely involves some sort of status conversion for tenured teachers. Under that theory, once a teacher reaches the age of 70, he or she would merely lose tenured or continuing contract status. Thereafter, the teacher is converted to and placed on annual contract status subject to reappointment in the manner prescribed by law. In addition, the status conversion argument, advances the theory that such annual reappointment is governed by Section 760.10, Florida Statutes.

Neither the Appellate Court below nor the School Board has accepted that argument. Indeed, as shown in other parts of this brief such an argument would render Section 231.031 a purposeless and useless piece of legislation while

remaining on the statute books. See Part II, *infra*. In that regard, the School Board respectfully submits that the Appellate Court below was correct in its statutory construction:

> "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.[3] 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.
>
> "[3]The terms 'tenured teacher' and 'continuing contract' are used synonymously. See *e.g. Texton v. Hancock*, 359 So.2d 895 (Fla. 1st DCA 1978)."

Duval County School Board v. State, supra.

The Court's construction is supported by a generally accepted tenet of statutory construction that words of common usage should be construed in their plain and ordinary sense. *Carson v. Miller*, 370 So.2d 10 (Fla. 1979); *Tatzel v. State*, 356 So.2d 787 (Fla. 1978). In that regard, throughout Chapter 231, Florida Statutes, there exist several terms relative to teacher employment which may be relevant to this proceeding. For example, in Section 231.031 are found the terms "continued employment" and "continued in employment". In Section 231.36(1)(a), Florida Statutes, relates to "contracts" and "continuing contracts". In Section 231.36(3)(a) concerns "professional service contracts". Section 231.36(4) again deals with "continuing contracts".

It is accepted that where certain language is used in one Section of a statute and different language is used in other sections of the same statutory chapter, it is presumed that the language is used with a different intent. 49 Fla. Jur. 2d, *Statutes*, §133. Thus, because the legislature used "continued employment" in

Section 231.031 and "continuing contract" or "professional services contract" for tenured employees in Section 231.36, it must be presumed that those terms have different meanings.

Since those terms must have different meanings, the legislative use of different terms at varying parts of the same statutory chapter means that, with respect to the matter *sub judice*, the legislature did not intend that, after age 70, a teacher merely lost tenure or continuing contract status. In that regard and relative to the use of different terms, it is well established that the legislature is presumed to know the distinction between terms used by it in a particular statute. See, *Myers v. Hawkins*, 362 So.2d 926 (Fla. 1978).

The Court's construction of Section 231.031 reflects legislative intent which is facially clear and unambiguous - that a school superintendent man do what would otherwise be prohibited - *i.e.* to refuse to renew employment when a teacher attains the age of 70 years. From the language of Section 231.031 it is plain that it is *employment* to which the seventy year old teacher is no longer entitled, not tenure or continuing contract status. *Duval County School Board v. State, et al., supra.* Indeed, it is employment to which such teacher is no longer entitled whether or not the vehicle which provides such employment is a continuing (tenure) contract, special services contract, annual contract, or some other form of contract.

Accordingly, the Court's interpretation and construction of Section 231.031 as not being a status conversion statute is the only correct and logical construction which can be made. To construe the statute otherwise would render it purposeless and useless while allowing it to remain on the statute books. Such results are not favored and should be avoided. See Part II, *infra* and *Sharer v. Hotel Corporation of America*, 144 So.2d 813 (Fla. 1962).

b. The phrase "in the manner prescribed by law" in Section 231.031, Florida Statutes, relates only to procedural requirements of Section 230.33(7), Florida Statutes.

Inextricably related to the untenable status conversion, exposed by the Petitioners, is their misconstruction of the second clause in Section 230.031, as that clause permits continued Superintendent recommended employment "subject to annual reappointment in the manner prescribed by law." Under the Petitioners' incorrect interpretation, a tenured or continuing contract teacher, upon reaching the age of 70 years would no longer be entitled to continued or tenured employment. However. after that teacher had his or her status converted to an annual contract basis, he or she could not be further discontinued on the account of exceeding the age of 70 years. Clearly such a "Catch-22" could not be what the legislature intended in view of the express exception from the public employee age discrimination prohibition of Section 112.044.

The basic problem with the Petitioners' erroneous construction lies with the interpretation (actually misintepretation) of the second clause of Section 231.031. That clause allows the Superintendent to approve continued annual employment "subject to reappointment in the manner prescribed by law." The Petitioners have misconstrued this clause as requiring application of the substantive provisions of Section 760.10(1)(a).

In contrast, the School Board, and the Appellate Court below interpret that clause as to reappointment "in the manner prescibed by law" to be procedural. In that regard, the School Board respectfully submits that if a tenured or continuing contract teacher is converted to the status of an annual contract teacher, any further reappointments must be made according to certain procedural requirements. Specifically these procedural requirements are found at Section 230.33(7), Florida Statutes, which reads *inter alia* as follows:

> "**230.33 Duties and responsibilities of Superintendent.** - The superintendent shall exercise all powers and perform all duties listed below and elsewhere in the law; provided that in so doing he shall advise and counsel with the school board. . .
>
> * * *
>
> "(7) PERSONNEL. - Be responsible, as required herein, for directing the work of the personel, subject to the requirements of Chapter 231, and in addition he shall have the following duties:
>
> (a) *Positions, qualifications and nominations.* - Recommend to the school board duties and responsibilities which need to be performed and positions which need to be filled to make possible the development of an adequate school program in the district; recommend minimum qualifications of personnel for these various positions; and nominate in writing persons to fill such positions. All nominations for reappointment of supervisors and principals shall be submitted to the school board at least 8 weeks before the close of the postschool conference period. *All nominations for reappointment of members of the instructional staff shall be made after conferring with the principals and shall be submitted in writing to the school board at least 6 weeks before the close of the postschool conference period.*" (Emphasis added)

Clearly, the established and lawful procedure for teacher reappointment is made by the Superintendent after conferring with the several school principals. The undisputed facts in this matter show that Morrow conferred with his principal, Mr. Poppell, and that the principal recommended to the Superintendent that Morrow be reappointed for the 1982-83 school year. (R. IV, 21, pp. 586-8). The Superintendent then recommended reappointment to the School Board. (R.I, 19A, pp. 153-8). Conversely, for the next year, neither principal nor superintendent recommended reappointment. (R. IV, 21, pp. 573-4). Thus, Morrow's annual contract employment was discontinued, pursuant to the clear and unambiguous language of Section 231.031.

Stated in another manner, Morrow was reappointed for the 1982-83 school year "in the manner prescribed by law." In the identical manner, he was not recommended for reappointment in the following school year. Since the procedural

requirements of Section 230.33(7)(a) mandate that reappointments be made upon superintendent recommendation, there were absolutely no irregularities in Morrow's case. The procedural requirements of Section 230.33(7)(a) were followed thus satisfying second clause of Section 231.031.

The School Board's position that the phrase "in the manner prescribed by law" refers to established procedures and not additional substance, is found on the face of Section 231.031. Indeed, the express exception of Section 231.031 from the substantive public employee age discrimination prohibition (Section 112.044), makes it clear that he phrase "in the manner prescribed by law" refers to procedure and not substance.

The express exception of Section 112.044, Florida Statutes, by Section 231.031, Florida Statutes, is significant because of the substantial as well as substantive similarity of Section 112.044 and Section 760.10. See, *e.g.* part II, *infra*. By excepting out Section 112.044 and not its statutory twin Section 760.10, the statute in question, Section 231.031 would have no effect at all.

This anomolous situation was recognized by the Appellate Court below when it rejected similar arguments with respect to the phrase "in the manner prescribed by law" and held that the arguments advanced by the petitioners *sub judice* are "a contorted construction of Section 231.031. *Duval County School Board v. State, et al., supra*. The Court further held:

> "It is abundantly clear that the phrase 'annual reappointment in the manner prescribed by law' refers to the procedural requirements of Section[2], not to the provisions of Section 760.10 which section includes the proscription against age discrimination much the same as Section 112.044, a section which is even more specific than Section 760.10 (in the sense that Section 112.044 deals only with age discrimination and applies specifically to *public* employers) and which the legislature saw fit to specifically except from the operation of Section 231.031." (Footnote omitted).

Id.

Again, when all relevant statutes are considered *in pari materia*, the Appellate Court below has advanced the only correct and logical interpretation of Section 231.031 with respect to the case *sub judice*. Accordingly, the Appellate Court below should be affirmed.

II. WITH RESPECT TO AGE DISCRIMINATION, SECTIONS 231.031 AND 112.044, FLORIDA STATUTES, TAKE PRECEDENCE OVER SECTION 760.10, FLORIDA STATUTES, AS THE LATEST AND MORE SPECIFIC LEGISLATIVE EXPRESSION.

Although not discussed by the Court below, its opinion squares with well recognized principles of statutory construction. Since Section 231.031, Florida Statutes is the latest legislative expression on age discrimination it should take precedence over Section 760.10, Florida Statutes. Along those same lines, since both Sections 231.031, Florida Statutes, are more specific than Section 760.10, Florida Statutes, they should take precedence regardless of chronology of enactment.

a. Section 231.031, Florida Statutes, is the more recent legislative pronouncement on age discrimination.

The Commission has seized upon certain enactment dates for Sections 231.031 and 760.10, Florida Statutes, to establish precedence of Chapter 760.10 over Section 231.031. See Commission's initial brief at pp. 14-18. However, a closer examination of legislative histories clearly indicates that Section 231.031, Florida Statutes, is the latest legislative expression and should prevail.

It is the School Board's position that Section 231.031 because of its being saved from legislative sunset in 1982 reflects the latest legislative expression. See, *e.g.* 1982 Fla. Laws, Ch. 82-242. Assuming *arguendo*, but certainly not admitting that Chapter 82-242 is not the latest pronouncement, Section 231.031, Florida Statutes, must still prevail. In that regard, while Section 760.10, Florida Statutes, was amended in 1981, the amendatory legislation did not touch Section

760.10(1)(a) which is relevant to this proceeding. Instead, 1981, Fla. Laws, Ch. 81-109 spoke only to Section 760.10(8)(b), which is not involved in this proceeding. 1/ Thus as far as Section 760.10(1)(a) is concerned, the most recent legislative expression was made at its 1977 legislative nativity and no later.

Conversely, the existing form and text of Section 231.031 came into existence because of amendatory legislation in 1980. See, 1980 Fla. Laws Ch. 80-295, Sec. 7. It is easy to see that Section 231.031 is three (3) years more recent than Section 760.10(1)(a). Since 1980 Fla. Laws, Ch. 80-295, Sec. 7, dealt unequivocally and specifically with the text of Section 231.031, it becomes the more recent legislative expression with respect to age discrimination.

The legislature is presumed to know of the existence of other statutes touching on subjects dealt with by its enactments. *Woodgate Development Corporation v. Hamilton Investment Trust,* 351, So.2d 14 (Fla. 1977); *State ex rel. School Board of Martin County v. Department of Education,* 317 So.2d 68 (Fla. 1975). The legislature must be presumed to have known of the existence of Section 760.10(1)(a) when it specifically amended Section 231.031, in 1980, to contain its present text. Clearly, the 1980 amendment of Section 231.031 to its present form is the most recent expression of the legislative will on the subject of age discrimination. Accordingly, Section 231.031 must prevail and take precedence over Section 760.10(1)(a). See, *e.g.* (in cases involving similar but inconsistent statutes), *Askew v. Schuster,* 331 So.2d 297 (Fla. 1976); *Sharer v. Hotel Corporation of America, supra.*

1/ Section 760.10(8)(b) allows employers to observe, without threat of an unlawful employment practice, bona fide seniority systems and benefit plans. While this particular section does not allow the existence of such seniority systems and benefit plans to excuse age discrimination pursuant to Section 760.10(1)(a), Section 760.10(8)(b) is inapposite to this proceeding. The School Board has admitted that Morrow's employment was terminated because of his age. No reliance on a seniority system or benefit plan has been alluded to by the School Board nor alleged by Morrow.

Furthermore, Section 112.044, Florida Statutes, which deals specifically with age discrimination by public employers, and which has been legislatively, excepted from Section 231.031, Florida Statutes, is a later legislative expression than Section 760.10, Florida Statutes. In that regard, Section 112.044 was last amended in 1981 Fla. Laws Chapter 81-169. This specific amendment was signed by the Governor on June 24, 1981 and filed with the Secretary of State on June 25, 1981. In contrast, 1981 Fla. Laws Chapter 81-109, which last amended Section 760.10, Florida Statutes, was signed by the Governor on June 23, 1981 and filed with the Secretary of State on June 24, 1981.

Like the case of the Section 760.10 amendment, cited by the Commission, the Section 112.044 amendment involved a statutory subsection not relevant to this proceeding. If the Commission is correct in its position that Section 760.10 is a later legislative expression than Section 231.031, Florida Statutes, then Section 112.044 by virtue of one day should be the latest legislative expression regarding age discrimination and should take precedence over Section 760.10. Therefore its statutory exception from Section 231.031 should take precedence over Section 760.10.

b. Sections 231.031 and 112.044, Florida Statutes, are the more specific laws relative to age discrimination.

Section 231.031, Florida Statutes, deals only with instructional personnel of a school system. The discrimination prohibitions in Section 112.044, Florida Statutes, deal *specifically* with age and are part and parcel of Chapter 112, Florida Statutes, which deals *specifically* with public officers and employers and employees. Thus, Sections 112.044 and 231.031 deal specifically with age discrimination in the public sector with even more specific reference to teachers in the public school system. Clearly, Sections 231.031 and 112.044 are more specific

than Section 760.10, Florida Statutes, which is a law of general application touching all types of employment and all types of discrimination, including but not limited to age discrimination.

Based upon that situation, the chronological order of enactment becomes irrelevant. In that regard this Court has consistently held that:

> "It is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation 'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the more comprehensive statute to the extent only of the repugnancy, if any'."

Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959), *quoting from Stewart v. Deland-Lake Helen Special Road & Bridge Dist.*, 71 So. 42, 47 (1916); *State, ex rel Loftin v. McMillan*, 45 So. 882 (1908).

Stated somewhat differently, when there appears to be a conflict between a statute dealing generally with a certain subject and another dealing specifically with a certain phase of that subject the specific legislation controls. 73 Am. Jur. 2d, *Statutes* §257. See also *Bryan v. Landis*, 142 So. 650, 653 (Fla. 1932). The control of the specific over the general occurs regardless of their temoral sequence. *Busic v. United States*, 446 U.S. 398, 406; 100 S.Ct. 1747, 1753; 64 L.Ed 2d 381, 389 (1980).

The only time the latest expression of the legislative will prevails over an earlier expression by the informed concept of implied repeal is when the two statutes present a positive and irreconcilable repugnancy. *State v. Dunmann*, 427 So.2d 166, 168 (Fla. 1983) *citing State v. Gadsden County*, 58 So. 232, 235 (Fla. 1912). However, there must be a manifest intent that the later general act should supersede the earlier special act. *State v. Dunmann, supra.*

In determining that intent, the Court must "ascertain whether the legislature expressed its intent as to a new statute's preempting an entire area of law or whether the legislature meant an existing law to remain in effect regardless of a new statute which might appear to infringe on the scope of the former." *Id.*

In that regard, the legislative intent and purpose behind the specific age discrimination provisions for the public sector employers and employees is stated as follows:

> "(1) LEGISLATIVE INTENT; PURPOSE. - The Legislature finds and declares that in the face of rising productivity and affluence, older workers find themselves disadvantaged, both in their efforts to retain employment and in their efforts to regain employment when displaced from jobs. The setting of arbitrary age limits, irrespective of capability for job performance, has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons. In comparison to the incidence of unemployment among younger workers, the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability, is high among older workers, whose numbers are great and growing and whose employment problems are grave. In industries affecting commerce, the existence of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods. *It is the purpose of this act to promote employment of older persons based on ability rather than age and to prohibit arbitrary age discrimination in employment.*"

Section 112.044(1), Florida Statutes.

Similarly, the legislative intent and purpose behind the Human Relations Act is stated as follows:

> "(2) The general purposes of ss. 760.01-760.10 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state."

Section 760.01(2), Florida Statutes.

From the foregoing, it can be seen that both Sections 112.044 and 760.10 go to the same legislative purpose - prohibition age discrimination. It can also be seen that their respective legislative purposes are so similar to be almost identical. In addition to their legislative purposes being substantially similar, their substantive provisions with respect to prohibited activities are almost identical. See, *e.g.* Tab No. 3 to the Appendix to this brief in which the substantive provisions of Sections 760.10 and 112.044, Florida Statutes, are compared.

Thus, as to the particular age discrimination laws there is no conflict which would cause Section 760.10 to have precedence as to the latest legislative expression. On the contrary, in the case *sub judice,* covering a public sector educational situation, Section 112.044, as the more specific statute on Age Discrimination governs.

The only conflict between statutes involves the application of Section 231.031 and Section 760.10. However, even that conflict can be resolved in favor of the School Board's position. When Sections 231.031, 760.10 and 112.044 are read *in pari materia*, it is clear that the intent of the legislature in enacting and re-enacting Section 231.031 was to permit district school boards to do that which would otherwise be prohibited - to discontinue the employment of a teacher *solely* because that teacher attains 70 years of age. The legislature, through the reference to Section 112.044 contained in Section 231.031, made clear its intention that Section 231.031 was to constitute an exception to the provisions of Section 112.044 and, by necessary implication, to those substantially similar portions of Section 760.10(1)(a) as well. See, *e.g. Duval County School Board v. State, et al, supra.*

This construction gives full effect to the provisions of all three statutes and eliminates the unnecessary and undesired result of repeal by implication. As has been stated previously, it is well established that Courts presume that statutes

are passed with knowledge of prior, existing statutes; and that the legislature does not intend to keep contradictory enactments on record, or to effect the repeal of an important statutory provision without expressing an intent to do so. *Woodgate Development Corporation v. Hamilton Investment Trust; supra;* See, *e.g. State ex rel. School Board of Martin County v. Department of Education, supra.*

On the other hand, the construction advanced by the Commission that Section 760.10(1)(a) in some manner supersedes Section 231.031 - would deny any effect to Section 231.031. Thus, Section 231.031 would be impliedly repealed or at least rendered purposeless and useless while remaining in the statute books. Such construction is strained, artificial, confusing and as shown in the cases cited *supra*, should be avoided. See *e.g. Sharer v. Hotel Corporation of America, supra.* That case involved the construction of two sections of the Workmen's Compensation Act dealing with permanent partial disability. In rejecting a construction which, in the Court's words, would have "disanulled" the "very purpose for which the Special Disability Fund was created", the Court stated at page 817:

> "It should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation, Legislators are not children who build block playhouses for the purpose, and with the gleeful anticipation, of knocking them down. It would be the heighth of absurdity to assume that the legislature intentionally prescribed a formula which creates the need for a Special Disability Fund, and in the next breath deviously destroyed its own handiwork - thus making a mockery of the intended beneficent purpose of the Special Disability Fund itself." (footnote omitted)

Since Sections 231.031, 122.044 and 760.10(1)(a) can be reconciled in the manner set out above, without a conflict, it should really not be necessary to reach the question of which section would be controlling if there were a conflict. However, the School Board maintains that, in the event of conflict, Section 231.031, with its reference to Section 112.044, is controlling as both the more recent and the more specific expression of the legislative will.

III. PERMITTING PUBLIC SCHOOL TEACHERS TO BE INVOLUNTARILY RETIRED AFTER AGE 70, AT THE DISCRETION OF THE SUPERINTENDENT DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS REQUIREMENTS.

Amicus, Florida Teaching Profession - National Education Association ("FTP-NEA") has raised constitutional arguments in support of Morrow's position. These issues and arguments involve equal protection and due process and were not entertained in the initial administrative proceedings nor were they raised in prior appellate proceedings below. The equal protection and due process arguments are based on the alleged arbitrary and irrational manner the provisions of Section 231.031, Florida Statutes, have been applied by the School Board. For the reasons stated below, the arguments should fail.

a) There is no violation of Equal Protection

The School Board submits that the evidence of record shows that there was no arbitrary or irrational application of Section 231.031, Florida Statutes. In that regard, all 70 year old teachers are treated the same. Upon reaching the age of 70 years, the superintendent after recommendation from staff determines the school system's needs and then makes the decision to continue employment or not. See, *e.g.* the testimony of Herb A. Sang who, when testifying about Section 231.031, Florida Statutes, said:

> "The way I see it and the way I interpret it, the intent is that come the 70th birthday, once they finish that particular year, that is a forced retirement date and so to extend that there should be some circumstance that would cause us to want to extend it.
>
> "So what I look for as the instructional leader, I look to see is there something that would be to the welfare of the students which were there for that we would have by the extending of the time for the individual on a contract. It's nothing personal with the person, no matter who they are. I don't take into consideration are they a good teacher, are they a bad teacher. I don't take that into consideration at all. I look at the background and is there something

> happening here? Is there something of continuity that another year of a project that's involved -- would that be of value to the students for that same person to be there for another year? Is it in an area where it's a critical shortage, that it's a specialist in special education, that you can't find someone to fill that position, or maybe there's a shortage of chemistry teachers, or whatever it is.
>
> "If there would be reasons that it would be to the advantage to allow a person to continue employment, that's what I make my decision upon and not trying to determine whether this is a good teacher or a bad teacher or you like him or you don't like him. I just don't take that into consideration."

Exhibit No. 1, Deposition of Herb A. Sang, pp. 23 (lines 12-25), 24 (lines 1-14). R. Vol. 19, p. 153.

Again at page 26 (lines 13-15) of the Sang Deposition, R. Vol. 19 p.156:

> "I do not make my decision based upon whether a teacher is good or the teacher is bad. I make it more upon supply and the need and what the reasonings are."

There is no evidence of record that shows Mr. Morrow was treated any different than any other teacher who had attained the age of 70. If, as petitioners contend, other teachers, at or over the age of 70, were allowed to continue teaching, the non renewal of Mr. Morrow's contract was based upon his age. However, it and the retention of any other 70 year olds were also made in relation to school system needs. As to any other teachers at or over the age of 70 who may have been retained on an annual basis, there is no evidence that they worked at the same school or taught in the same field as did Mr. Morrow. Accordingly, the needs of the school system as to those particular teachers may have indeed been different than for Mr. Morrow.

Indeed, there is absolutely no evidence in the record of this proceeding before either the Commission or the Appellate Court below that the statutory provision in Section 231.031, Florida Statutes, was or is unreasonable or arbitrarily applied. See, e.g.*White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979). The record of this proceeding makes it perfectly clear that the DOAH hearing

officer, under the separation of powers established between the executive and judicial departments, made it clear that, under the Florida Constitution, he was not allowed to rule on constitutional issues. Transcript of Testimony, p. 12, p. 36, R. Vol. IV, p. 457.

This Court has recognized that reasonably applied and fairly enforced age restrictions are constitutional. *White Egret, supra.* In this case, the record reflects there is absolutely no evidence which would support any sort of constitutional finding relative to equal protection. Clearly, while some material was identified and proffered as Exhibit 2-6, the DOAH hearing officer refused to admit same into evidence. See, recommended order, R. Vol. I, pp. 99-106. See also *Morrow v. Duval County School Board,* 7 FALR 3885 at 3898 (FCHR, 1985).

b. There is no violation of due process

The Duval County Teacher Tenure Act, 1941 Laws of FL., Ch. 21197, Sec. 2, provides in pertinent part as follows:

> "During the probationary period of employment, any contract with a teacher may or may not be renewed upon the nomination of the board of trustees . . .and during such probationary period of employment, a teacher may be discharged or demoted under any existing contract. . .for any one or more of the causes enumerated in Section 4 of this Act, preferred, established and found to exist as provided for in Section 5 of this Act."

Section 4 of the Duval County Teacher Tenure Act, *Id.*, as amended by 1972 Laws of Fla., Ch. 72-576, Sec. 3, and 1981 Laws of Fla., Ch. 81-372, delineates the five causes for demotion or discharge, none of those causes is for the age of the teacher. Section 5, of the Duval County Teacher Tenure Act as amended *Id*, sets forth procedures to be followed. The Duval County Teacher Tenure Act, 1941 Laws of Fla., *supra*, as amended by 1972 Laws of Fla., Ch. 72-576, Sec. 1, defines probationary period of employment as the duration of employment antecedent to a teacher's receiving tenured status.

These provisions of the Duval County Teacher Tenure Act are analogous to the provisions of the general law with respect to annual, professional service and continuing contracts; See, *e.g.* Section 231.36, Florida Statutes, which provides for entitlement to an annual contract with conditions for dismissal during its term [Section 231.36(1), Florida Statutes]; which also provides for professional services contracts and conditions for dismissal [Section 236.36(3), Florida Statutes] ; and which provides for continuing contracts and conditions for dismissal [Section 231.36(4), Florida Statutes].

Pursuant general and special state law with regard to teacher contracts, the only proceedings required to dismiss an annual contract teacher occur during the term of the contract. Once the contract has run its annual term there are no proceedings required to establish cause for non renewal. That may be done at the discretion of the School Board upon recommendation of the superintendent. See, also *e.g.* Sections 230.23(5) and 230.33(7), Florida Statutes.

Under the situation of an annual contract employee, it is the School Board's position that the employee would stand in the same status as a probationary employee. Therefore, there is no property interest in the contract which would require constitutional due process protection. *Board of Regents v. Roth*, 408 U.S. 564; 33 L.Ed 2d 548; 92 S.Ct. 2701 (1972).

Further, there is no liberty interest involved in the non renewal of Mr. Morrow's contract which would trigger a due process requirement. In *Roth*, supra, the Court recognized that the employer did not make any charge that would seriously damage Mr. Roth's community standing. 408 U.S. at 573-74.

Following *Roth*, it has become well established that loss of employment alone, even with proof that termination has made the employee less attractive to future employers is not sufficient to implicate a liberty interest. *Martin v. Unified School District No. 434, Osage County,* 728 F.2d 453, 455 (10 Cir. 1984) [statement of

school board president that non renewal was based upon "occurrences this year and continuance of previous concerns"]; *Loehr v. Ventura County Community College District*, 743 F.2d 1310 (9 Cir. 1984) [newspaper article commenting upon allegations of incompetence]; *Smith v. Board of Education of Urbana School District No. 116*, 708 F.2d 258 (7 Cir. 1983) [statements regarding use of profanity, lack of respect and disciplinary problems].

From the record, it is clear that the only reason Mr. Morrow's contract was not renewed was because he had reached the age of 70. Thus, in order to bring forward a liberty interest, the school board's reasons for non renewal must be claimed to be false in order for the employee to obtain, as a result of a constitution right to clear his name. *Codd v. Velger*, 429 U.S. 624 51 L.Ed. 2d 92; 97 S.Ct. 882 (1977). [only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is. . .a hearing required."] 429 U.S. at 628; 51 L.Ed. 2d at 97; 97 S.Ct. at 884.

Thus there has been no deprivation of due process.

IV. THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS DO NOT APPLY TO SITUATIONS PRIOR TO THEIR EFFECTIVE DATE.

The Petitioners have advised the Court of recent congressional amendments made to the Federal Age Discrimination in Employment Act Pub. Law 99-592. The School Board submits that Section 7 of Pub. Law 99-592 specifically provides for an effective date of January 1, 1987. Thus, the Federal amendments have prospective and not retroactive application. Accordingly, for the dates 1983-December 31, 1986, Federal law age discrimination law applied only to those individuals who were over 40 but were less than 70 years old. 29 USC §631(a).

CONCLUSION

For the foregoing reasons, the question certified by the Appellate Court below must be answered in the affirmative. Stated differently, a county school board has the right, pursuant to Section 231.031, Florida Statutes, to refuse to rehire an annual contract teacher solely because that teacher has attained the age of 70. Accordingly, the decision and opinion of the Appellate Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 5th day of December, 1986 to:

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