

IN THE SUPREME COURT OF FLORIDA

ROBERT P. MORROW,

Petitioner,

v.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

DEPARTMENT OF ADMINISTRATION, ETC.,

Petitioner,

v.

DUVAL COUNTY SCHOOL BOARD,

Respondent.

FILED
DEPT. OF STATE
CLERK
By: [Signature]

CASE NO. 69-424

FIRST DCA NO. BG-460

CASE NO. 69,430

ON APPEAL FROM THE FLORIDA DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER
DEPARTMENT OF ADMINISTRATION

DANA C. BAIRD
DANICA W. PARKER
325 John Knox Road
Suite 240, Building F
Tallahassee, Florida 32399-1570
(904) 488-7082

ATTORNEYS FOR PETITIONER
STATE OF FLORIDA, DEPARTMENT OF
ADMINISTRATION, FLORIDA COMMISSION
ON HUMAN RELATIONS

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CITATIONS	ii
ARGUMENT	
I. READING SECTIONS 231.031 AND 760.10, FLORIDA STATUTES, IN PARI MATERIA, THE COUNTY SCHOOL BOARD MAY NOT PREMISE ITS DECISION ON WHO TO SELECT FOR ANNUAL CONTRACT EMPLOYMENT ON THE AGE OF THE INDIVIDUAL APPLICANT.	1-3
II. IF SECTIONS 231.031 AND 760.10, FLORIDA STATUTES, ARE CONSTRUED TO BE IN IRRECONCILABLE CONFLICT, SECTION 760.10 SHOULD PREVAIL AS THE LAST EXPRESSION OF LEGISLATIVE WILL OVER THE ISSUE OF FORCED RETIREMENT.	4-5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

<u>Cases</u>	<u>Pages(s)</u>
<u>Housing Authority of City of Sanford v. Billingslea,</u> 464 So.2d 1221 (Fla. 5th DCA 1983)	2
<u>Mann v. State,</u> 300 So.2d 666 (Fla. 1974)	1
<u>Morrow v. Duval County School Board,</u> 7 PALR 3885 (FCHR 1985)	3
<u>Palmquist v. Johnson,</u> 41 So.2d 313 (Fla. 1949)	1
<u>Sanders v. State,</u> 46 So.2d 491 (Fla. 1950)	1
<u>State v. Ross,</u> 447 So.2d 1380 (Fla. 4th DCA 1984)	4
 <u>Statutes, Florida</u>	
Section 112.044, Florida Statutes	2, 4
Section 231.031, Florida Statutes	1-5
Section 760.10, Florida Statutes	1-5
 <u>Laws of Florida</u>	
Chapter 80-295, Laws of Florida	4
Chapter 81-109, Laws of Florida	4
Chapter 78-49, Laws of Florida	4

I. READING SECTIONS 231.031 AND 760.10, FLORIDA STATUTES, IN PARI MATERIA, THE COUNTY SCHOOL BOARD MAY NOT PREMISE ITS DECISION ON WHO TO SELECT FOR ANNUAL CONTRACT EMPLOYMENT ON THE AGE OF THE INDIVIDUAL APPLICANT.

The School Board essentially adopts the First District Court of Appeal's interpretation of section 231.031, Florida Statutes, construing the phrase "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" not only as removing the affected teacher from tenured or continuing contract status, but also as giving the School Board the absolute right to terminate a teacher because he has reached 70 years of age. School Board's Answer Brief at 6-12.

The School Board's interpretation of section 231.031, Florida Statutes, renders section 760.10, Florida Statutes, inoperable with respect to public school teachers who have been denied annual reappointment based on age. This reading ignores one of the primary rules of statutory construction; that is, "the duty of a court to find for apparently conflicting statutes a reasonable field of operation which may preserve the force and effect of each statute and cause them to harmonize, if possible, by a fair, strict or liberal construction." Palmquist v. Johnson, 41 So.2d 313, 316 (Fla. 1949); Accord Mann v. State, 300 So.2d 666 (Fla. 1974). This is especially true where, as here, sections 231.031 and 760.10 relate to the same subject. Sanders v. State, 46 So.2d 491 (Fla. 1950).

As evidenced by the construction placed on section 231.031, Florida Statutes, by the DOAH hearing officer, whose interpretation was adopted by the Commission, and the dissenting opinion of Judge Shivers, the pivotal

phrase is subject to more than one construction. Inasmuch as only tenured or continuing contract teachers have entitlement to continued employment, it is more reasonable to assume that the Legislature intended the phrase to operate as an automatic reversion of tenured or continuing contract teachers over the age of 70 to the status of annual contract teachers.

As such, teachers reaching the age of 70 lose their entitlement to continued employment notwithstanding the protections of sections 112.044 and, by analogy, section 760.10. Cf. Housing Authority of City of Sanford v. Billingslea, 464 So.2d 1221 (Fla. 5th DCA 1985). Notwithstanding this loss of tenure, the second clause of section 231.031 provides that teachers over the age of 70 are to be considered for employment on an annual contract basis in the same lawful manner as any other teacher. Accordingly, contrary to the School Board's contention at pages 9 and 11 of its Answer Brief, the reference to section 112.044 contained in the first clause of section 231.031 relates only to this loss of tenure and in no way negates the requirement in the second clause that annual reappointments be made in the manner prescribed by law.

The Commission's interpretation is a fair reading of both statutes. It gives effect to section 231.031's express language by removing tenure for teachers who are 70 years of age while preserving the force of sections 231.031 and 760.10 which prohibit annual contract decisions being made in a discriminatory and unlawful manner:

. . . In this case, Section 231.031, Florida Statutes, can be harmonized with Section 760.10, Florida Statutes, by reading the first clause of Section 231.031, Florida Statutes, as an automatic reversion of tenured teachers who attain the age of 70 to annual contract employees and be reading the second clause of Section 231.031 as prescribing the manner for annual reappointment.

Nothing contained in Section 231.031, Florida Statutes, indicates any legislative intent that the annual reappointment decision respecting teachers who have attained the age of 70 may be based solely on those teachers' ages contrary to the Human Rights Act of 1977. The statute rather provides that such reappointment decisions must be made "in the manner prescribed by law."

Morrow v. Duval County School Board, 7 FALR 3885, 3888-9 (FCHR 1985).

The School Boards' interpretation conflicts with the clear and unambiguous prohibition against age-based employment decisions, violative of section 760.10, Florida Statutes. In the absence of an equally clear and unambiguous expression of legislative intent to the contrary, section 231.031, Florida Statutes, should not be construed so as to entirely exempt a class of individuals from the protections of a remedial statute.

II. IF SECTIONS 231.031 AND 760.10, FLORIDA STATUTES, ARE CONSTRUED TO BE IN IRRECONCILABLE CONFLICT, SECTION 760.10 SHOULD PREVAIL AS THE LAST EXPRESSION OF LEGISLATIVE WILL OVER THE ISSUE OF FORCED RETIREMENT.

The School Board contends that if sections 231.031 and 760.10, Florida Statutes, are in irreconcilable conflict, section 231.031 should take precedence over section 760.10 as the latest and more specific legislative expression. School Board's Answer Brief at pages 12-18.

The effective date of the respective provisions as currently written determines which provision was last in point of time. See, e.g., State v. Ross, 447 So.2d 1380, 1382 (Fla. 4th DCA 1984). In parts here pertinent, section 231.031 took effect as currently written on October 1, 1980. Ch. 80-295, Laws of Fla., ss. 7.20. Section 760.10, previously numbered 23.167, took effect as currently written one year later on October 1, 1981. Ch. 81-109, Laws of Fla., ss. 1, 2. Thus, chapter 81-109, rather than chapter 80-295, was the last expression of legislative will since it is the later promulgated statute.

Chapter 78-49, Laws of Florida, authorized the involuntary retirement of employees not covered by section 112.044, pursuant to bona fide seniority systems or employee benefit plans if such retirement was not otherwise unlawful under federal law. Three years later, the Legislature deleted this statutory exception from the general prohibition against age-based employment decisions and specifically made it unlawful to involuntarily retire any individual for reasons other than ability to perform the job. Chapter 81-109, Laws of Fla.

Subsequent to the 1978 amendment but prior to the 1981 amendment, section 231.031 was amended to read as it is currently written. The School

Board asserts that section 231.031 permits "district school boards to do that which would otherwise be prohibited-to discontinue the employment of a teacher solely because the teacher attains 70 years of age." School Board's Answer Brief at page 17.

The Legislature's removal of the last vestige of sanctioned age-based forced retirement in its most comprehensive antidiscrimination statute is an unequivocal expression on legislative intent that such forced retirement is unlawful. This is especially true where, as here, the Legislature extended the protections against age-based employment decisions far beyond that required by federal law.

Should sections 231.031 and 760.10, Florida Statutes, be construed to be in irreconcilable conflict, section 760.10 should prevail as the manifest legislative intent that forced retirement for reasons unrelated to performance is unlawful.

Respectfully submitted,

BY: Danica W. Parker
Dana C. Baird
Danica W. Parker
325 John Knox Road
Suite 240, Building F
Tallahassee, Florida 32399-1570
(904) 488-7082

ATTORNEYS FOR PETITIONER
STATE OF FLORIDA, DEPARTMENT OF
ADMINISTRATION, FLORIDA
COMMISSION ON HUMAN RELATIONS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served by First Class United States Mail, postage prepaid, upon Robert J. Winicki, Esquire, Post Office Box 4099, Jacksonville, Florida 32201; Gerald A. Schneider, Esquire, William Lee Allen, Esquire, Gary E. Eckstine, Esquire, Neill W. McArthur, Jr., Esquire, City of Jacksonville, 1300 City Hall, 220 East Bay Street, Jacksonville, Florida 32202; Thomas W. Brooks, Esquire, and Charlene Miller Carres, Esquire Post Office Box 1547, Tallahassee, Florida 32302; and Leslie Holland, Esquire, FEA/United, 208 West Pensacola Street, Tallahassee, Florida 32301, this 30th day of December, 1986.



Attorney