IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,023

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs.

HUMBERTO PEÑA,

Respondent.
_____/

ON PETITION TO REVIEW CERTIFIED CONFLICT FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF RESPONDENT, HUMBERTO PEÑA

Respectfully Submitted,

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INTRODUCTION

Respondent, HUMBERTO PEÑA, will be referred to herein as "PEÑA" or "Respondent." Petitioner will be referred to as "DADE COUNTY" or Petitioner. For the convenience of the Court, Respondent has included an Appendix, which contains a copy of Dade County Personnel Rules, Dade County Administrative Order A.O 7-3, an excerpt from the Collective Bargaining Agreement between Petitioner, DADE COUNTY, and Respondent HUMBERTO PEÑA'S Union, and the letter of dismissal with Disciplinary Action Report.

The following symbols will be used for reference purposes:

(R) for references to the Record on Appeal.

(A) for references to the Appendix attached to this brief.

Unless indicated to the contrary, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

Respondent, PEÑA, is a bus driver employed by DADE COUNTY, through the Metropolitan Dade County Transit Agency (MDTA), having been employed as a bus driver since October 10, 1971 (R. 21). On April 5, 1989, Respondent was driving his bus on Abbott Street near 72nd Street in Miami Beach, Florida, when his bus struck a pedestrian and a parked vehicle (R. 22). After the accident, a supervisor from the MDTA, as is required in bus accident cases, took Respondent for a toxicology test at the Mount Sinai Medical Center Lab, and the test result, which came back on April 13, 1989, was positive for Nordiazapam, which is a drug contained in the tranquilizer, Centrax (A. 34, R. 23). PEÑA informed the supervisor that he took the tranquilizer four days before the accident after an argument with his wife (R. 23). PEÑA did not work from the date he took the tranquilizer until the date of the accident, four days later.

On May 10, 1989, Respondent was given a Disciplinary Action Report (DAR) (A. 30-34), dated May 4, 1989, which DAR was based upon violation of Personnel Rules, Metro-Dade, Chapter VIII, Section 7, Paragraphs (D), (H), (I) and (L) and Article VI.1 of the Collective Bargaining Agreement between METROPOLITAN DADE COUNTY and Transport Workers Union, Local 291 (A. 30-32). Respondent, PEÑA, filed a written response to the positive findings of Nordiaza-

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pam, and that response was attached to the DAR (A. 33). PEÑA reiterated that he took one Centrax on April 1, 1989, four days before the accident, and that the Centrax was a tranquilizer.

The MDTA'S complaint against Respondent, as presented in the DAR, was that Respondent tested positive for unauthorized drugs in his system and he was willfully negligent in the operation of his bus, causing injury to another person (A. 30-31, R. 21-25). The County was considering termination of PEÑA, and, as it is customary in those cases where dismissal of the employee may be forthcoming, the County scheduled a meeting with the Department Director, then interim Director, Dennis I. Carter, and all management personnel between the Director and the employee (R. 121-122). The meeting and agenda were set up and conducted entirely by the County. No agreements, deals or other alternatives were discussed at the meeting.

After the County investigates the facts leading to a DAR for an MDTA employee, Dennis I. Carter would be the person who makes the decision on punishment, if any. Mr. Carter's decision in this case was to suspend Respondent, PEÑA, for thirty (30) days, and demote him to the position of Bus General Helper, a job which entails washing and cleaning busses, as well as filling the fuel tanks. On June 2, 1989, the County presented a proposed agreement to PEÑA for his signature, wherein PEÑA would have to agree to undergo drug rehabilitation, including random drug testing, counseling through the County's Employee Assistance Program (EAP) for a substance abuse problem, voluntarily give up the right to operate a motor vehicle for the DADE COUNTY Government, and take a demotion to Bus General Helper. Failing to agree to all of the conditions set forth by the County, PEÑA would be terminated as an employee of DADE COUNTY (R. 24-25). When the proposed agreement was presented to PEÑA on June 2, 1989, a copy of which was provided by "FAX" to PEÑA'S counsel, the agreement was rejected and immediately upon rejection, PEÑA was terminated. Pursuant to DADE COUNTY'S Personnel Rules, Chapter VIII, Section 5, an employee may appeal a dismissal to a Hearing Examiner within fourteen (14) days of the dismissal (A. 12). On June 5, 1989, PEÑA appealed his termination by Certified Mail to Ms. Grace Poley, Personnel Director, Metro DADE COUNTY (R. 20).

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The only charge against PEÑA which was to be determined by the Hearing Examiner was PEÑA'S violation of duty involving the happening of the motor vehicle accident. At the start of the Hearing before the County's appointed Hearing Examiner, the County stipulated that PEÑA was not under the influence of drugs at the time of the accident, and all of the charges relating to that initial complaint were dismissed by the Hearing Examiner (R. 23). The Hearing on PEÑA's appeal was conducted before Hearing Examiner Edward T. Quigley on October 4, 1989, and October 6, 1989 (R. 21). Testimony at the Hearing was taken of PEÑA, Bus Supervisor Amore, DADE COUNTY'S accident investigator, Kenneth Lasseter, M.D., a toxicologist, Miles E. Moss, an accident reconstruction expert, Bus Superintendent Nathaniel Handy, and Chief of Employee Relations Division, MDTA, Ronald T. Jones.

Dr. Lasseter testified that the effect of 10 mg. of Centrax taken four days prior to an accident would be nil and that one would expect to find some traces of Nordiazapam in a person who took 10 mg. of Centrax four days before being tested. Dr. Lasseter also testified that the toxicology results were not subjected to professional interpretation, but the result was allowed to speak for itself. That act, under the circumstances, was unreasonable. It was also Dr. Lasseter's opinion, within a reasonable degree of medical certainty, that HUMBERTO PEÑA was not a drug or substance abuser (R. 23).

Miles E. Moss, who is a Transportation Consulting Engineer and an expert in Accident Reconstruction, based his testimony upon his examination of photographs of the scene; photographs of the vehicles involved in the accident; and the testimony of PEÑA, that the other automobile's doors were closed when he, PEÑA, started to make his turn. Mr. Moss's opinion was that the bus came in contact with an open door of the parked automobile, and that reaction time in response to the car door being opened into the path of the bus was such that PEÑA could not have taken evasive action to avoid the collision (R. 23-24).

Nathaniel Handy, PEÑA's Division Superintendent, testified that based upon his understanding of what occurred, PEÑA should receive a twenty (20) days suspension while other management personnel thought that a thirty (30) day suspension was more appropriate (R. 25). Ronald

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T. Jones, Chief of Employee Relations at the MDTA, told the Hearing Examiner that PEÑA's case received a great deal of attention because of his drug test results, which results were provided to the County Manager. Mr. Jones was of the opinion that PEÑA should be terminated; however, in the past, violators of the drug policy would be demoted, and therefore, if Interim Director Carter were more comfortable with demotion, that would be acceptable to Mr. Jones (R. 24).

In view of all of the testimony and evidence, Hearing Examiner Quigley found, among other things, that: (1) PEÑA's appeal was within the rules and guidelines set out and required by DADE COUNTY (R. 22); (2) the County proposed an agreement, already executed by Mr. Carter and to be executed by HUMBERTO PEÑA, wherein PEÑA would be suspended for thirty (30) days, demoted and required to join the County's EAP (A. 26-29, R. 24); and (3) the agreement clearly spells out that HUMBERTO PEÑA has a drug problem and the agreement required PEÑA to admit to this drug problem (R. 24). Hearing Examiner Quigley then came to conclusions based upon the testimony and evidence addressed at the Hearing, some of his conclusions being as follows: (1) that the County failed to prove that Respondent had or has a drug problem, and demanding that PEÑA sign an agreement that states he is a drug abuser was completely unreasonable on the part of the County (R. 25, 26); (2) that the County did not take all of the actual circumstances of the case into consideration (R. 26); and (3) that PEÑA, who has been a good employee and has a good record, should have received a lesser punishment (R. 26).

Based upon the findings and conclusions, Mr. Quigley recommended to the County that they rescind the dismissal of HUMBERTO PEÑA and that the dismissal be expunged from Mr. PEÑA's Personnel file (R. 26). Mr. Quigley further recommended that the dismissal be reduced to a suspension of thirty (30) working days, and he recommended that HUMBERTO PEÑA be given all of his back pay which was lost as a result of the dismissal, less the thirty days, as well as being given back all of his rights and benefits, which may have been lost as a result of the dismissal (R. 26, 27). Based upon Mr. Quigley's findings, conclusions and recommendations, the County Manager, Joaquin G. Aviño, on January 12, 1990, advised HUMBERTO PEÑA that he was modifying the action of the MDTA by reducing Mr. PEÑA's dismissal to a thirty (30) day suspension, rein-

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stating him as a Bus Operator, and ordering the County to reimburse Mr. PEÑA for any lost back pay (R. 28). The MDTA accepted reinstatement and did not appeal or otherwise contest the Hearing Examiner's findings, conclusions and recommendations or the County Manager's modification.

DADE COUNTY, through the MDTA, determined the total amount of back pay that Mr. PEÑA allegedly lost as a result of his dismissal, and on February 9, 1990, DADE COUNTY presented to Mr. PEÑA, a check for $16,374.32, which represented his back pay, less FICA, Withholding Taxes and monies paid to PEÑA by Unemployment Compensation. PEÑA rejected the payment as being insufficient, and returned the check to DADE COUNTY (R. 40, 36-37). When PEÑA and DADE COUNTY reached an impasse with regard to a determination of the back wages that PEÑA lost as a result of his dismissal, PEÑA, on November 19, 1991, filed suit against DADE COUNTY, seeking, among other things, full compensation for his lost wages, attorney's fees and costs involved in the Administrative Appeal of his dismissal, and attorney's fees and costs in the Circuit Court action for unpaid wages (R. 1-18). Although the Complaint filed contained four counts, the main thrust of Respondent's claim against DADE COUNTY was for payment of unpaid wages, and for attorney's fees and costs incurred in both the Administrative Appeal and the Circuit Court lawsuit filed in order to force DADE COUNTY to pay PEÑA his lost wages.

With the exception of a Request for Production and Request for Admissions served together with the Complaint, no depositions or other discovery was conducted in the case. On November 23, 1992, the Circuit Court Judge entered an Order of Referral to Civil Mediation, and set trial for the two week trial period commencing April 26, 1993 (R. 63-66). The parties submitted to Mediation on July 21, 1993, at which time DADE COUNTY agreed to pay PEÑA his requested back wages and to reserve the issue of attorney's fees and costs for determination by the Court (R. 84). On July 26, 1993, PEÑA filed his Motion for Determination of Entitlement to Attorney's Fees and Costs (R. 81-82), and on October 22, 1993, the Court entered its Order on PEÑA'S Motion for Determination of Entitlement to Attorney's Fees and Costs, finding that there were two distinct claims for attorney's fees and costs, both being made pursuant to Florida Statute Section 448.08, with one being directed to the Administrative Appeal and the other directed to the Circuit Court

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lawsuit. The Court further found that Respondent, PEÑA, "...was required to and did exhaust his administrative remedies by appealing, through DADE COUNTY, to a Hearing Examiner, his dismissal from the Metro Dade Transit Agency, which appeal resulted in recommendation by the Hearings Examiner that Plaintiff [PEÑA] be reinstated as a bus operator, with back pay, excepting a thirty day recommended suspension" (R. 95). The Court found that the Circuit Court lawsuit was a claim for unpaid wages, and therefore, Florida Statute Section 448.08 was applicable to PEÑA'S lawsuit filed against DADE COUNTY for back pay; however, the Court declined to award attorney's fees and costs for the required Administrative Action (R. 95-96).

The parties agreed to a reasonable attorney's fee and costs for the Circuit Court action, and on March 7, 1994, the Circuit Judge entered a Final Judgment for Attorney's Fees and Costs, awarding those fees and costs for the Circuit Court action, but denying any fees or costs for the Administrative action between the parties (R. 93-94). DADE COUNTY did not appeal or cross appeal the Court's award of attorney's fees and costs for the Circuit Court action.

SUMMARY OF ARGUMENT

The Third District Court of Appeal was correct in determining that attorney's fees under Florida Statute Section 448.08 are awardable to a successful employee/claimant in any proceeding to obtain unpaid back wages. The Court did not differentiate between Administrative Proceedings and Circuit Court proceedings, so that in each type of proceeding which would result in obtaining an employee's back wages, that employee would have the right, pursuant to Section 448.08, to request attorney's fees and costs, and a Court would have the right and power to assess attorney's fees and costs against the employer. The fact that the Statute speaks of an "action", is not determinative of the issue of whether or not attorney's fees would be awardable in an administrative proceeding, since the Statute did not specifically exempt Administrative Proceedings. Courts have consistently held that even though Administrative Proceedings are not judicial in the sense that they include all of the same matters as one would traditionally find in a courtroom, where the work performed in the Administrative Proceeding is just as necessary to obtain relief as a courtroom proceeding, statutes authorizing attorney's fees for litigation would be construed to apply in like man-

ner to Administrative Proceedings. In this case, because PEÑA was required to exhaust his administrative remedies before proceeding further, PEÑA should be entitled to attorney's fees for exhausting his administrative remedies, especially in light of the fact that the employer, DADE COUNTY, does not contest entitlement to an award of attorney's fees and costs for a court action to enforce the Mandate of the Administrative Proceeding.

POINTS ON APPEAL

I

THERE IS NO CONFLICT BETWEEN THE DECISION SOUGHT TO BE REVIEWED AND THE DECISIONS OF THE 5TH AND 1ST DISTRICT COURTS OF APPEAL, WERTHMAN v. SCHOOL BOARD OF SEMINOLE COUNTY, 599 So.2d 220 (Fla., 5th DCA, 1992) AND DAVIS v. SCHOOL BOARD OF GADSDEN COUNTY, 646 So.2d 766 (Fla., 1st DCA, 1994).

A. PEÑA'S redress is governed procedurally by a Collective Bargaining Agreement and Dade County Personnel Rules.

B. Redress for Werthman and Davis was governed procedurally by two Florida State Statutes.

If this Court finds that there is a direct and express conflict between the decision sought to be reviewed and Werthman and Davis, the issues on the merits may be stated as:

II

A STATE STATUTE TAKES PRECEDENCE OVER A COUNTY ORDINANCE AND WHEN THE PROVISIONS OF EACH CANNOT CO-EXIST, THE COUNTY ORDINANCE MUST FALL

III

FLORIDA STATUTE SECTION 448.08 MAY APPLY TO ANY CLAIM FOR UNPAID WAGES WHICH INVOLVES AN EMPLOYEE ACTION AGAINST AN EMPLOYER

A. The purpose of the Statute is to allow equanimity between employers and employees.

B. Werthman is Distinguishable from PEÑA

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IV

FLORIDA STATUTE SECTION 448.08 APPLIES TO ADMINISTRATIVE ACTIONS

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION SOUGHT TO BE REVIEWED AND THE DECISIONS OF THE 5TH AND 1ST DISTRICT COURTS OF APPEAL, WERTHMAN v. SCHOOL BOARD OF SEMINOLE COUNTY, 599 So.2d 220 (Fla., 5th DCA, 1992) AND DAVIS v. SCHOOL BOARD OF GADSDEN COUNTY, 646 So.2d 766 (Fla., 1st DCA, 1994).

On February 2, 1995, this Court postponed its decision on jurisdiction, and set the briefing schedule. This Court's jurisdiction rests solely on the Third District Court of Appeal's certification that its decision, based upon what it felt to be the controlling authority of Metropolitan Dade County v. Stein, 384 So.2d 167 (Fla., 3rd DCA, 1980), was in direct conflict with Werthman vs. School Board of Seminole County, 599 So.2d 220 (Fla. 5th DCA, 1992), and Davis vs. School Board of Gadsden County, 646 So.2d 766 (Fla., 1st DCA, 1994). Petitioner filed its Notice to Invoke Discretionary Jurisdiction pursuant to Art. V, §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(VI).

An in-depth review of all four decisions shows that there is no conflict between the decisions, therefore jurisdiction of this Court is not automatic under the above-cited Rule of Appellate Procedure. Under the constitutional prerequisite of express and direct conflict, one of two situations must clearly appear: (1) an announced rule of law which conflicts with other appellate or Supreme Court expressions of law; or (2) an established rule of law is applied to produce a different result in a case which involves the same controlling facts as the prior case. E.g., Nielson v. City of Sarasota, 117 So.2d 731, 732 (Fla., 1960); Ansin v. Thurston, 101 So.2d 808 (Fla., 1958). Essentially, jurisdiction exists only if the essential effect would be that the case sought to be reviewed overrules the case cited for conflict. Ansin, *supra*, at 811. The Third District's perception of a conflict between the case sought to be reviewed and Werthman and Davis is thus clearly misplaced.

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A. PEÑA'S redress is governed procedurally by a Collective Bargaining Agreement and Dade County Personnel Rules.

PEÑA'S claim was made pursuant to a Collective Bargaining Agreement between PEÑA'S Union and DADE COUNTY, the Dade County Personnel Rules and a Dade County Ordinance, all of which provide that an employee who is given a disciplinary action, has the right to and, if that employee intends to contest the disciplinary action, must take an Administrative Appeal of the disciplinary action. Only the Ordinance says that an employee may have his or her own counsel at the employee's expense. The Personnel Rules and the Collective Bargaining Agreement are silent as to attorney involvement. In Stein, the same Personnel Rules and County Ordinance were in effect and applied to his claim.

DADE COUNTY takes the position that Florida Statute Section 448.08 is inapplicable in this case only as to the Administrative Action. Attorney's fees and costs in PEÑA were awarded by the Trial Court for enforcement of the results of the Administrative Action, the amount of both costs and attorney's fees having been agreed upon by both PEÑA and DADE COUNTY. No appeal or cross appeal was taken by DADE COUNTY of the Trial Court's Order Awarding Fees and Costs for the Circuit Court action. It is clear, therefore, that DADE COUNTY does not contest Section 448.08's applicability to PEÑA'S claim for attorney's fees and costs for his effort to collect his unpaid wages, except as to the Administrative proceedings.

B. Redress for Werthman and Davis was governed procedurally by two Florida State Statutes.

Werthman, and Davis, were both actions brought under Florida Statutes. Chapter 231, Florida Statutes, governs school personnel in the State of Florida and is pertinent to claims by employees of the various County School Boards. Administrative actions regarding school employees are also taken pursuant to and in conjunction with the Administrative Procedures Act, Florida Statute Sections 120 *et seq*. The Statutes under which the aggrieved school employees travel provide for reasonable attorney's fees and costs at the discretion of the School Board hearing the administrative appeal. Werthman, found that the School Board did not abuse its discretion in failing to award attorney's fees to Mr. Werthman. The Fifth District Court of Appeal found that the Board

had the right, under the existing State Statutes, Chapters 120 and 231, to award or not to award fees, so that the denial of fees was within their discretion.

The Werthman opinion cites to Krueger vs. School District of Hernando County, 544 So.2d 331 (Fla., 5th DCA, 1989). In that case, The Fifth District Court of Appeal sent back to the School Board, Krueger's claim for attorney's fees, stating that the School Board should have had an evidentiary hearing on entitlement to attorney's fees, not that Krueger was entitled to fees. By citing to the Krueger case, the Werthman Court made clear that the issue was not whether or not attorney's fees were awardable for an administrative action, but that the School Board had the right to make the determination of awarding fees, which was not automatic.

Petitioner, in its Brief, cites to 49 Fla. Jur 2d Statutes § 180 for the proposition that Section 448.08 and Dade County Ordinance 2-47 should somehow be reconciled with each other so as to preserve the force and effect of each. The language of § 180, 49 Fla. Jur 2d, Statutes is as follows:

> "Where two statutes are found to be in conflict, however, rules of statutory construction must be applied to reconcile the conflict, if possible. The courts presume that statutes are passed with knowledge of prior existing statutes, and will favor a construction that gives a field of operation to both rather than construe one statute as being meaningless or repealed by implication....Hence, where it is possible, it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions, and to find a reasonable field of operation that will preserve the force and effect of each."

This statement refers to Statutes, State law, and not County Ordinances. This section is not applicable to Petitioner's argument; however, it is applicable to Respondent's argument that applying either Florida Statute Section 120.57 or Florida Statute Section 448.08 would not defeat the intent of the legislature. Hence, where two Statutes, Sections 448.08 and 120.57, both apply and are not mutually exclusive, the Appellate Courts would not force the Trial Court or Administrative Tribunal to accept either one, but would allow the matter to proceed pursuant to one of the applicable Statutes. In both Werthman and Krueger, the Fifth District found that the School Board had the

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right to proceed under Florida Statute Section 120.57 and did not have to proceed under Florida Statutes Section 448.08.

The Werthman Court was very well aware that other District Courts had allowed attorney's fees in administrative actions, when they stated, at page 221

> "We note that other courts have utilized this Statute to award attorney's fees in connection with administrative proceedings.
>
> * * * * * * *
>
> Furthermore, none of these cases involves termination proceedings brought by a School Board under Chapter 231, which does not involve proceedings to recover 'unpaid wages' except in the most tangential sense."

The Fourth District Court of Appeals also considered the attorney's fee issue in a School Board administrative proceeding in Sulcer v. McFatter, 497 So.2d 1349 (Fla., 4th DCA, 1986). In that particular case, the School Board asserted that it did not have the power or authority to award attorney's fees and costs to an employee who was the prevailing party in an administrative proceeding. The Court stated, at page 1350: "We hold that the Board does have such discretion and reverse the Board's holding to the contrary." The Court did go on to explain that their holding should not be construed as "...mandating an award of fees. Rather, we are holding that the Board possesses the authority to award fees."

Clearly, the line of cases regarding School Board employees is not in conflict with the Third District's decision in PEÑA v. METROPOLITAN DADE COUNTY or Stein. All of the District Courts appear to hold that attorney's fees and costs are awardable to the prevailing party in an Administrative Proceeding; however, it is not a mandatory award and the Appellate Courts will not disturb the discretionary power of the various school boards to award attorney's fees and costs. The School Board may, under the Administrative Procedures Act, and the School Personnel Statutes, award attorney's fees and costs to a prevailing employee in an administrative action. This does not conflict at all with Florida Statute Section 448.08, in that this Statute simply says that the Court may award attorney's fees and costs in an action for unpaid wages. There is no "direct or

express" conflict between the PEÑA and Stein decisions and the decisions in Werthman and Davis. Accordingly, this Court should dismiss this action for a lack of jurisdiction.

II

A STATE STATUTE TAKES PRECEDENCE OVER A COUNTY ORDINANCE AND WHEN THE PROVISIONS OF EACH CANNOT CO-EXIST, THE COUNTY ORDINANCE MUST FALL

Dade County Code, Section 2-47, directly conflicts with Florida Statute Section 448.08, and it is, therefore, invalid, only as far as the conflict. In the Third District Court case of Scavella vs. Fernandez, 371 So.2d 535 (Fla., 3rd DCA, 1979), the Court had for determination the issue of Metropolitan Dade County Code, Section 2-2, as it conflicted with Florida Statute §768.28(6). Dade County had enacted in its Code, a provision that notice of a claim against the County must be given within sixty (60) days of the happening of the incident; otherwise, the claim is barred. Florida Statute § 768.28 provides that notice of a claim against governmental agencies, which includes Metropolitan Dade County, must be given within three (3) years of the date that the claim accrues; therefore, the notice provision of each directly conflicts with the other. The Third District stated, at page 536

> "Under the Home Rule Amendment, Dade County may not enact an ordinance which is in 'conflict with this Constitution *or any such applicable general law...*' Art. VIII, § 6(2), Fla.Const. of 1968 (reenacting Art. VIII, § 11(5), Fla.Const. of 1885). The sole issue presented on this appeal by the plaintiff from the order of dismissal is thus whether Section 2-2 is in 'conflict' with Section 768.28(6). It is."
>
> * * * * * * *
>
> "It seems obvious that, under this definition, the two provisions in question here *cannot* co-exist. One need only put them side by side in order to make this determination. The state statute gives 3 years to file a claim; the ordinance 60 days to file the same claim for the same thing against the same entity. The county thus purports to take away 2 years and 10 months of time which the state has granted. The conflict between the statute and the ordinance is no less than self-evident. Hence, the ordinance must fall."

County ordinance 2-47 is in direct conflict with State Statute Section 448.08. Pursuant to the County Ordinance, if we accept the County's position, attorney's fees in connection with collecting back

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pay or wages are not available against Dade County. State Statute, Section 448.08, however, provides that the court may award a reasonable attorney's fee in an action involving unpaid wages and does not differentiate between persons, corporations or governmental entities. Because of the conflict between the Ordinance and the Statute regarding attorney fees, the provision of the Ordinance which does not allow attorneys fees must fall. See also Acme Specialty Corporation v. City of Miami, 292 So.2d 379 (Fla., 3rd DCA, 1974).

III

FLORIDA STATUTE SECTION 448.08 MAY APPLY TO ANY CLAIM FOR UNPAID WAGES WHICH INVOLVES AN EMPLOYEE ACTION AGAINST AN EMPLOYER

A. The purpose of the Statute is to allow equanimity between employers and employees.

In another District Court case cited in Werthman, Doyal v. School Bd. of Liberty County, 415 So.2d 791 (Fla., 1st DCA, 1982), Theresa Doyal went through an Administrative Action before the Public Employees Relation Commission, and she obtained a favorable order. The favorable order was not able to be implemented because of a power struggle between the School Board and the School Superintendent. Doyal was required to file suit against the School Board in order to force payment of her wages. Part of her claim was for attorney's fees. Doyal claimed these attorney's fees pursuant to Section 57.105, Florida Statutes (1979), Section 448.08, Florida Statutes (1978), and Section 120.69(7), Florida Statutes (1974). The only Statute in Doyal which is relevant to PEÑA'S claim is Section 448.08, Florida Statutes (1985), which is the Statute governing an award of attorney's fees for a claim for unpaid wages. The other cited Statutes in the Doyal case are in regard to filing a claim to enforce an agency action, Section 120.69(7), Florida Statutes (1974) and absence of a justiciable issue of law or fact, Section 57.105, Florida Statutes (1979). The 1st District, at page 793 stated:

> "In enacting Section 448.08, the Legislature intended to avoid the inequity which would result if an employee were required to pay her own attorney's fees in actions for unpaid wages."

Although the unpaid salary and benefits only amounted to $4,000.00, Doyal had incurred some $6,000.00 in attorney's fees. The Court felt that Section 448.08 had been enacted to remedy the obvious inequity of having to spend more money to enforce payment of back pay than the amount of the back pay involved. The District Court of Appeal reversed the order of the trial court with regard to denying Doyal attorney's fees and ordered the court to determine a reasonable attorney's fee for Doyal.

The Statute authorizing the award of attorney's fees to a prevailing party in an action for unpaid wages applies to all types of actions for unpaid wages, and has been approved in several of the District Courts in Florida. In the case of Tampa Bay Publications, Inc. v. Watkins, 549 So.2d 745 (Fla., 2nd DCA, 1989), Watkins filed suit against Tampa Bay Publication for failure to pay commissions on her sale of advertising for the magazine. As part of her complaint, Watkins sought a reasonable attorney's fee under Section 448.08. The parties had settled their differences prior to the trial with regard to everything except the attorney's fee award. Although the parties agreed that Watkins was entitled to $5,000.00 in unpaid wages, the trial court awarded $9,375.00 as attorney's fees under Section 448.08, and Tampa Bay Publications appealed that order to the 2nd District. The Appellate Court, in affirming the lower court award, stated, at page 747:

> "Additionally, we note there are certain legislative policy considerations embodied in section 448.08. In actions for unpaid wages, the legislature has specifically provided a means to equalize the disparate positions of employees in attempting to collect for the fruits of their labors. As in personal injury lawsuits, plaintiffs in actions for unpaid wages often do not have the financial means to obtain counsel on an hourly basis. If plaintiff's counsel were only limited to a contingent recovery rather than a reasonable court-awarded fee under section 448.08, attorneys would be discouraged from assuming stewardship of cases to recover unpaid wages unless substantial amounts of money were involved. Therefore, section 448.08 acts as a method by which to equalize otherwise disparate financial abilities of employees to retain counsel. By enacting section 448.08, the legislature obviously intended to avoid the inequities which would result if an employee were required to pay one's own attorney's fees in actions for unpaid wages. *Doyal v. School Bd. of Liberty County*, 415 So. 2d 791, 793 (Fla., 1st DCA, 1982)."

In the instant case, the Circuit Court found that PEÑA was entitled to attorney's fees because he had to file suit against the County in order to determine the amount of the unpaid wages that the County owed. The County has not appealed that ruling, and was essentially in agreement with the Court that Section 448.08 applied to PEÑA'S action against the County in the Circuit Court. The Trial Judge, however, drew a distinction between an Administrative Action and a Circuit Court lawsuit, by finding that Section 448.08 does not apply to the Administrative Proceedings, but applies only to trial court actions. Even though the Statute itself is silent, several District Courts have found that, in effect, Section 448.08 does apply to Administrative Actions, and that there should not be a distinction between an Administrative Action for unpaid wages, and a Circuit Court action for unpaid wages. By drawing such a distinction, the Courts would be saying to employees who may be or are entitled to collect unpaid back wages, that the only way they can enforce their right to collect back wages and not suffer the loss of attorney's fees and costs in that enforcement, would be to file a lawsuit after an Administrative Action, regardless of the outcome of the Administrative Action. This procedure would defeat, in its entirety, the rules regarding Exhaustion of Administrative Remedies, and would just promote litigation.

In the 5th District Court case of *Jimenez v. Public Employees Relations Commission* 616 So. 2d 465 (Fla., 5th DCA, 1993), Walter Jimenez was dismissed because it was alleged he falsified records. An evidentiary hearing, before a Hearing Officer, resulted in a reduction of the dismissal to a suspension of 30 days, and Jimenez requested the Public Employees Relations Commission to award attorney's fees and costs with regard to the Administrative Action. The request for attorney's fees was denied, and Jimenez appealed to the 5th District Court of Appeal. Although the controlling Florida Statute in that case was Section 447.208(3)(e), Florida Statutes (1991), the language of the Court, in reversing the Commission's denial of attorney's fees is applicable to PEÑA'S claim. The 5th District stated, at page 466, that:

> "In *Rowe* and its progeny, courts have noted that the reason attorney's fees are awarded to wrongfully discharged employees is to insure that they are able to secure competent legal counsel because they are often with limited financial resources."

The District Court went on to state that a decision to award attorney's fees under the relevant Statute is within the discretion of the Commission; however, the Commission must consider all relevant factors before granting or denying a request for fees. The Court then reversed the order denying attorney's fees and remanded the matter back to the Commission for further consideration.

B. Werthman is Distinguishable from PEÑA

Petitioner further takes the position that Werthman is virtually an identical situation to PEÑA'S claim. That does not appear to be what the *Werthman* opinion says. In fact, the opinion, at page 221, states

> "...We note that other courts have utilized this statute to award attorney's fees in connection with administrative proceedings."

It goes on to cite as its authority for that statement, several Florida cases, including Metropolitan Dade County vs. Stein, 384 So.2d 167 (Fla., 3rd DCA, 1980). The *Stein* case is more closely related to PEÑA'S claim than is *Werthman*. There are two Third District opinions on *Stein*. The first one was Metropolitan Dade County vs. Stein, 296 So.2d 643 (Fla., 3rd DCA, 1974). Norbert Stein was also an MDTA employee, although not a bus operator. Stein was an investigator for the County. He was terminated and had to go through the identical procedure as PEÑA, which is to take an administrative appeal pursuant to Dade County Code, Section 2-47. After Stein pursued his administrative appeal, he appealed to the Dade County Circuit Court, and DADE COUNTY, following an adverse ruling in the Circuit Court, appealed to the Third District Court of Appeal. In the second appeal by Dade County, the Third District found that Stein was entitled to attorney's fees pursuant to Section 448.08; however, the Court limited the fees to the time period subsequent to July 1, 1978, the effective date of Section 448.08. The Court stated, at page 168,

> "However, it appears that the period of time for which the wrongfully discharged employee is recovering back wages extends from March 9, 1972 to June 20, 1979, a part of which is subsequent to July 1, 1978. The recovery of back wages being in the nature of a continuing claim, the wrongfully discharged employee would be entitled to attorney's fees expended on his behalf in securing the back wages for the period subsequent to July 1, 1978."

The only reason that the court declined to award fees for the services prior to July 1, 1978 was that there was no contract or statute providing for attorney's fees which was applicable to Stein's claim prior to July 1, 1978. It is clear that if Section 448.08 been in existence on March 9, 1972, the date that Stein was terminated, he would have been entitled to attorney's fees from that date forward.

It should also be noted, in Werthman, that Mr. Werthman, a terminated teacher, was seeking costs and fees pursuant to Florida Statute Section 231.36(6)(a), which is part of the statutes relating to Personnel of School System. This is the statute under which Werthman was traveling and was applicable to his claim. The Court specifically found that proceedings brought under Chapter 231 are not proceedings to recover unpaid wages. The Court also found that Section 448.08 and § 230.234, Florida Statutes, were not applicable to School Board termination proceedings. PEÑA'S action is not a school board action and is not governed by nor was it brought pursuant to either Chapter 230 or Chapter 231, Florida Statutes.

IV

FLORIDA STATUTES, SECTION 448.08 APPLIES TO ADMINISTRATIVE ACTIONS

Any Metropolitan Dade County employee who is aggrieved by the County's determination of dismissal of that employee from County employment, may appeal that determination to a Hearing Examiner for determination by the Hearing Examiner of whether or not the action taken by the County should be sustained or reversed. This procedure is strictly an Administrative Remedy, and any aggrieved employee must exhaust his or her Administrative Remedies prior to proceeding further against the County. (See Appendix, Metro-Dade Personnel Rules and Metropolitan Dade County Administrative Order No. 7-3). PEÑA, in following this procedure, timely filed his Notice of Appeal requesting a Hearing Examiner, and proceeded to present all of the available evidence to the Hearing Examiner for determination of the propriety of the County's action in dismissing him. PEÑA had no other choice -- he was required, under DADE COUNTY'S Personnel Rules, and the Collective Bargaining Agreement between DADE COUNTY and the Union representing the

MDTA Bus Operators, to pursue his administrative remedy in order to reverse the County's decision to dismiss him. (See, Appendix, Collective Bargaining Agreement, excerpt). The only way that PEÑA could have gotten his job back was to take the Administrative Appeal, have the Hearing Examiner recommend reversal, and have the County Manager accept the recommendation of the Hearing Examiner. Absent that procedure, PEÑA would have no right to take any action against DADE COUNTY, and no right to collect unpaid or back wages. This is exactly what PEÑA did, and the County Manager accepted the Hearing Examiner's recommendation of reinstatement with back pay.

The procedure of appealing a DAR has been one that has been in effect for many years. This procedure existed well before the Legislature enacted Florida Statute Section 448.08 in 1978. The Third District Court of Appeal, in *Metropolitan Dade County v. Stein,* 384 So.2d 167 (Fla. 3rd DCA, 1980), construed that Statute in determining whether or not Stein, a dismissed MDTA investigator, was entitled to attorney's fees and costs under Florida Statute Section 448.08, as a result of his successfully being reinstated to his position with DADE COUNTY. The Third District Court of Appeal did not differentiate between the lawsuit and the administrative action. The Court based its granting and denial of attorney's fees on the effective date of the Statute, thus awarding fees only for the time period after the effective date of the Statute.

Denying PEÑA, and others similarly situated, reimbursement of incurred attorney's fees and costs for Administrative Appeals, not only makes it more difficult for persons such as PEÑA to obtain competent qualified counsel to represent them, but it makes it financially undesirable to pursue the claim, since the benefits obtained by winning may very well be greatly diminished by the payment of attorney's fees. Section 448.08 was enacted specifically for the purpose of protecting employees against employers who are in a much better financial position than the employees, and who obviously can make decisions to terminate, demote or suspend employees without the fear of having to pay anything other than the employees lost wages, should a court or administrative officer find that the actions of the employer were wrong. It would appear that government employees, because they are required to pursue any claims for unpaid wages, demotions, suspensions or other

job related problems, through administrative proceedings and not lawsuits, are, in effect, being discriminated against, because persons employed in the private business sector, can take their actions directly to the Circuit Court, and if they are successful in their claims for unpaid and/or back wages, be awarded attorney's fees for obtaining those wages. A government employee's entitlement to attorney's fees under the trial judge's order would only be applicable in an action to enforce compliance with the result of the Administrative Action. This result would certainly not seem to be the intention of the legislature in enacting Section 448.08, Florida Statutes (1985).

Petitioner, DADE COUNTY, has taken the position that the Administrative Appeal pursued by HUMBERTO PEÑA was not an "action" within the meaning of Florida Statute Section 448.08, and relies upon Werthman and State Road Department vs. Crill, 120 So. 412 (Fla., 1930) as its Florida authority that an Administrative Appeal is not an "action" as contemplated under Section 448.08. State Road Department vs. Crill, *supra*, dealt basically with splitting causes of action and whether or not the matter is finally disposed of by the lower tribunal, therefore appealable as a final resolution without leaving other matters to be resolved. In its description of the words "case," "cause," "action," and "suit," the Court was trying to determine whether a dismissed count in the lower court would result in a splitting of a cause of action. To equate the opinion of the Supreme Court in State Road Department vs. Crill, *supra*, with a holding that an administrative proceeding is not an "action", as that contemplated by Section 448.08, is certainly stretching the holding of the Court in 1930, especially since the matter of an administrative proceeding was not before the Court and Section 448.08 did not even come into existence until approximately 48 years after the case was heard.

Petitioner also cites as authority an old United States Supreme Court case, which itself was cited in State Road Department vs. Crill, *supra*; however, later United States Supreme Court cases have held that the term "action" applies to both judicial and administrative proceedings. In Pennsylvania vs. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), the United Stated Supreme Court stated at page 3094,

> "Section 304(d) of the Clean Air Act, 84 Stat. 1706, 42 U.S.C. §7604(d), provides, in pertinent part, as follows:
>
> 'The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.'
>
> The Commonwealth argues that the plain language of the statute clearly limits the award of fees to 'costs of litigation' for 'action[s] brought' under the Act, and that the lower courts erred in awarding attorney's fees for Delaware Valley's activities in Phases II and IX, both of which involved the submission of comments on draft regulations to administrative agencies. The United States echoes these assertions, and contends that the 'actions' contemplated by § 304(d) are judicial actions, not administrative proceedings. We reject these limiting constructions on the scope of § 304(d).
>
> Although it is true that the proceedings involved n Phases II and IX were not 'judicial' in the sense that they did not occur in a courtroom or involve 'traditional' legal work such as examination of witnesses or selection of jurors for trial, the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree."

The Court further stated, at page 3095,

> "Although § 1988 authorizes fees in 'any action or proceeding' brought to enforce the Civil Rights Acts, and § 304(d) applies only to 'any action' brought under the Clean Air Act, this distinction is not a sufficient indication that Congress intended § 304(d) to apply only to judicial, and not administrative, proceedings."

Obviously, the United States Supreme Court felt that the Legislature, in allowing attorneys fees for legal proceedings, was not making a distinction between judicial and administrative proceedings, and that both judicial and administrative proceedings were, for all intents and purposes, "actions" under the terms of the Clean Air Act.

The Second District Court of Appeals, in Appalachian, Inc. vs. Ackmann, 507 So.2d 150 (Fla., 2nd DCA, 1987), in considering attorney's fees for time spent by counsel as *amici* in a federal case found that such time was compensable time in furtherance of the Plaintiff's claim, and therefore affirmed the award of attorney's fees for those services. The Court referred to Pennsyl-

vania vs. Delaware Valley Citizens' Council for Clean Air, *supra*, citing to the proposition that the Supreme Court permitted compensation for participation in a related administrative proceeding. In the First District Court Case of Department of Education vs. Rushton, 638 So.2d 100 (Fla., 1st DCA, 1994), the Court found that there was authority in both State and Federal sectors which supported an award of attorney's fees for collateral proceedings which include administrative matters.

The trial court, in PEÑA'S case, later reversed by the Third District Court of Appeal, declined to award attorney's fees for the administrative proceeding, not for any reason other than the differentiation between a Court proceeding and an administrative proceeding. The Court obviously misinterpreted the full meaning of Section 448.08, finding that it applied only to judicial proceedings and not to administrative proceedings. Although Petitioner cites to old cases and Black's Law Dictionary in an effort to convince this court that there is a difference between judicial and administrative proceedings, one need not go any further than one of Florida's own Statutes regarding costs for indigents. Florida Statute § 57.081(1) states that "Any indigent person who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge...." Subsection (3) further states that "If an applicant prevails in an action, costs shall be taxed in his favor as provided by law and, when collected, shall be applied to pay costs which otherwise would have been required and which have not been paid." Although the Statute provides that costs for an indigent may be waived in either a judicial or administrative proceeding, when it comes to recovery of those costs, the Statute requires that an applicant who prevails in an "action", and the costs are taxed in his favor, shall pay those costs which had not been paid. It is obvious that the Statute did not provide that costs have to be paid, if taxed, only in a judicial proceeding, but where costs are recovered, in any proceeding or "action", they must necessarily be paid by the indigent person if they are the party recovering the costs. Had the legislature wanted to provide only for the recoupment of costs in a judicial proceeding, it would have stated that in paragraph (3) and would have differentiated between a judicial proceeding and administrative proceeding, instead of using the word "action" as all inclusive of judicial and administrative proceedings.

In the First District Court case of Greene vs. School Board of Hamilton County, 501 So.2d 50 (Fla., 1st DCA, 1987), Greene appealed an order of the School Board, which found that he was not entitled to an appointment as a principal/director, a pay adjustment or attorney's fees and costs. The First District reversed the School Board, finding that Greene was, in fact, entitled to a salary commensurate with a director's position, even if that position were not available. The District Court ordered a higher salary for Greene, and further found, at page 52, that

> "As a prevailing party in an action for unpaid wages, appellant is entitled to attorney's fees and costs pursuant to section 448.08, Florida Statutes (1985) and section 57.041, Florida Statutes (1985)."

The award of attorney's fees and costs obviously apply to the administrative proceedings before the school board and not to the appeal before the First District. Had the First District determined that Greene was entitled to fees only for pursuing his claim to the appellate court, and only for costs in the appellate court, the opinion would have so stated and would have been pursuant to Rule 9.400, Florida Rules of Appellate Procedure. Florida Statute § 57.041 provides that a party who recovers a judgment is entitled to recover his legal costs. Although the term recovering a judgment is reflected in the rule, the First District apparently felt that because Greene was successful in pursuing his claim, that he should be entitled to the costs in the administrative proceeding before the school board, and his attorney's fees pursuant to Section 448.08.

CONCLUSION

Based upon the reasons and authorities set forth above, it is respectfully submitted that the Administrative Proceeding was, for all intents and purposes, a "trial", with both sides presenting evidence and testimony which was subject to cross-examination and a requirement to follow rules of procedure. The same full trial preparation for proceeding in front of a Circuit Court Judge was necessary for presenting the case to the Hearing Examiner. Because it was necessary to go through an administrative proceeding in order to obtain back wages, HUMBERTO PEÑA is entitled to attorney's fees pursuant to Florida Statute Section 448.08, and costs pursuant to Florida Statute § 57.041 for the Administrative action.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 16th day of March, 1994, to: JOHN McINNIS, ESQ., Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 Northwest 1st Street, Miami, Florida 33128-1993.

BY: _____
PHILLIP J. GOLDSTEIN

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