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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85, 023

THIRD DISTRICT CASE NO. 94-789

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

Petitioner,

v.

HUMBERTO PEÑA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF

RESPECTFULLY SUBMITTED

ROBERT A. GINSBURG  
DADE COUNTY ATTORNEY  
111 N.W. FIRST STREET  
SUITE 2810  
MIAMI, FLORIDA 33128-1993  
Tel.: (305) 375-5151

By: John McInnis  
Assistant County Attorney  
Florida Bar No. 436038

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### INTRODUCTION

Petitioner, Metropolitan Dade County, shall be referred to herein as "Petitioner" or "the County". Respondent, Humberto Peña, shall be referred to as "Peña" or "the Employee". References to the record on appeal shall be denoted "R. \_\_\_". For the convenience of this Court, the opinion of the third district court of appeal is attached hereto as Appendix A. The opinion of the circuit court below is attached as Appendix B. The decision of the Dade County Manager is attached as Appendix C. The recommendation of the hearing examiner upon which the County Manager's decision is based, part of the record on appeal, is attached as Appendix D.

### STATEMENT OF THE CASE AND FACTS

Respondent, Humberto Peña is employed by Metropolitan Dade County in the Metro-Dade Transit Agency ("MDTA") as a bus operator. On April 5, 1989, Peña was involved in an accident in which his bus struck a pedestrian and a parked car. Appendix D-2. In a post-accident toxicology examination, Peña tested positive for nordiazepam, a tranquilizer. Appendix D-3.

By disciplinary action report ("DAR") dated May 4, 1989, Peña was charged with violations of the Dade County Personnel Rules for the Classified Service, Chapter 8, § 7, ¶¶ D, H, I and L, as well as, Article VI.1 of the labor agreement between Metropolitan Dade County and the union

representing bus operators. Appendix D-1, -2. Peña responded in writing, acknowledging that he had taken the tranquilizer four days before the accident. Appendix D-3.

Because dismissal was recommended, Peña requested and received a meeting with Acting Department Director, Dennis Carter, the official authorized to take final disciplinary action. Consistent with established MDTA policy, during that meeting, as an alternative to dismissal, the acting director invited Peña to enter into a "return to work" agreement, in which, in exchange for continued employment, he would accept a suspension and demotion and agree to participate in the county's employee assistance program. Appendix D-4. Peña rejected that agreement, and on June 2, 1989, he was dismissed from the county service. Appendix D-1.

Pursuant to §2-47, Code of Metropolitan Dade County, Peña appealed his dismissal to the Dade County Manager. Id. On October 4 and October 6, 1989, a hearing was conducted before an independent hearing examiner empowered to make findings of fact, and to transmit those findings, along with conclusions and recommendations to the county manager. Id.

At the conclusion of the hearing, the hearing examiner suggested rescission of Peña's discharge, recommending instead that the discipline be reduced to a thirty day suspension. Appendix D- 5-7. By order dated January 12,

1990, the county manager concurred, suspending Peña for thirty days, reinstating him as a bus operator, and ordering back pay for the period between his dismissal and subsequent reinstatement, less thirty days pay for the period of suspension. Appendix C. Peña did not appeal the county manager's final determination.

Ultimately, Peña and MDTA were unable to agree on the amount of back pay to which he was entitled; as a result, on November 19, 1991, Peña filed an action in the circuit court for the eleventh judicial circuit, in and for Dade County, Florida, seeking inter alia, attorney's fees and costs incurred in his administrative appeal of disciplinary action to the county manager, a determination of the amount of back pay owed, and attorney's fees and costs for the action for back wages.

The circuit court ordered mediation, which resulted in an agreement between the parties as to the amount of back pay Peña was owed. The Respondent then filed a motion seeking a determination of his entitlement to attorney's fees and costs. On October 22, 1993, the trial court entered an order finding that as to the circuit court action for back wages, Peña was entitled to an award of attorney's fees and costs pursuant to §448.08, Fla. Stat.; however, Peña was not entitled to an award of attorney's fees and costs incurred in the administrative appeal to the county manager. Appendix B- 1-2. The trial court's final

order was entered on March 7, 1994. Id. Peña appealed the trial court's order to the third district court of appeal. The third district reversed the order of the trial court, holding that Peña was entitled to an award of attorney's fees on the controlling authority of Metropolitan Dade County v. Stein, 384 So.2d 167 (Fla. 3d DCA 1980). The third district certified that its decision was in direct conflict with the decision of the fifth district court of appeal in Werthman v. School Board of Seminole County, 599 So.2d 220 (Fla. 5th DCA 1992) and the decision of the first district in Davis v. School Board of Gadsden County, \_\_\_ So.2d \_\_\_, 19 FLW D2365 (Fla. 1st DCA Case No. 93-107, opinion filed, November 7, 1994). This petition for writ of common law certiorari follows.



QUESTIONS ON APPEAL

1. Is an administrative appeal of disciplinary action pursuant to a county ordinance an "action for unpaid wages" within the meaning of §448.08, Fla. Stat.?

2. Is an employee who obtains a reduction of the level of disciplinary action in an administrative proceeding entitled to an award of attorney fees and costs where the enactment creating the administrative appeal specifically provides that an employee may be represented by counsel "at his own expense"?

### SUMMARY OF ARGUMENT

The third district court of appeal erred in holding that the Respondent, Humberto Peña, is entitled to an award of attorney's fees and costs incurred in appealing his dismissal by the director of the Metro-Dade Transit Agency to the Dade County Manager. Section 2-47, Code of Metropolitan Dade County, the ordinance creating the administrative appeal, specifically provides that an employee pursuing the remedy may be represented by counsel "at his own expense". The district court and Respondent's reliance on §448.08, Fla. Stat., a statute providing for the award of attorney's fees and costs to the prevailing party in an "action for unpaid wages" is misplaced. An administrative appeal to the Dade County Manager is not "an action for unpaid wages" within the meaning of §448.08. Werthman v. School Board of Seminole County, 599 So.2d 220 (Fla. 5th DCA 1992).

In construing §2-47, Code of Metropolitan Dade County and §448.08, Fla. Stat., this Court has a duty to provide a construction which reconciles the two enactments, giving fullest possible effect to each, and which does not render either meaningless. The traditional and historical definition of "action" means a proceeding in a court. State Road Department v. Crill, 128 So. 412, 415 (Fla. 1930). Giving the term "action" as utilized in §448.08 the traditional meaning applied by this Court in Crill, supra,

preserves the legislative intent of the board of county commissioners as expressed in §2-47, Code of Metropolitan Dade County, and avoids a conflict with §448.08, Fla. Stat. Nothing in the language of §448.08 evidences a clear intent by the state legislature to supersede enactments which deny attorney's fee awards in administrative proceedings. The district court erred in interpreting §2-47, Code of Metropolitan Dade County, so as to create a conflict. The decision below must be reversed and the decision of the circuit court must be reinstated.

## ARGUMENT

### I.

AN EMPLOYEE WHO OBTAINS A REDUCTION IN THE LEVEL OF DISCIPLINE IN AN ADMINISTRATIVE APPEAL TO THE COUNTY MANAGER IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS WHERE §2-47, CODE OF METROPOLITAN DADE COUNTY, PROVIDES THAT AN EMPLOYEE MAY BE REPRESENTED BY COUNSEL "AT HIS OWN EXPENSE".

In its discretion the Supreme Court of Florida may review any decision of a district court of appeal which the district court certifies is in direct conflict with a decision of another district court of appeal on the same question of law. Rule 9.030 (a)(2)(iv) and (vi), Fla. R. App. P. (1994). In the instant case the third district court of appeal reversed the decision of the circuit court below and held that on the controlling authority of Metropolitan Dade County v. Stein, 384 So.2d 167 (Fla. 3d DCA 1980), the Respondent, Humberto Peña, was entitled to an award of attorney fees and costs incurred in appealing to the Dade County Manager his dismissal from the county service by the director of the Metro-Dade Transit Agency. The district court panel certified that its decision was in direct conflict with the decision of the fifth district court of appeal in Werthman v. School Board of Seminole County, 599 So. 2d 220 (Fla. 5th DCA 1992) and the decision of the first district in Davis v. School Board of Gadsen

County, \_\_\_ So.2d \_\_\_, 19 FLW D2365 (Fla. 1st DCA Case No. 93-107, opinion filed, November 7, 1994).

A. An Administrative Proceeding Under §2-47, Code of Metropolitan Dade County, Is Not an "Action for Unpaid Wages" Within the Meaning of §448.08, Fla. Stat.

In the underlying action, Respondent, Humberto Peña, invoking §448.08, Fla. Stat., requested an award of attorney's fees and costs representing expenses incurred in his administrative appeal to the Dade County Manager pursuant to §2-47, Code of Metropolitan Dade County. Section 448.08, however, does not entitle Peña to such an award.

Section 2-47, Code of Metropolitan Dade County, the ordinance creating the administrative remedy Peña pursued, provides, in pertinent part:

"Any person appearing before a hearing examiner under the provisions of this section has the right, at his own expense, to be accompanied, represented and advised by counsel or other qualified representative."  
(Emphasis supplied.)

The language of the ordinance notwithstanding, Peña claims he is entitled to an attorney's fee as the prevailing party in an action for unpaid wages pursuant to §448.08, Fla. Stat. It is clear, however, that a

non-judicial administrative proceeding is not an "action" within the meaning of §448.08. State Road Department v. Crill, 128 So. 412 (Fla. 1930). This is particularly true where the real purpose of the administrative proceeding is to determine the sufficiency of the evidence underlying the administrative decision to discharge the Appellant.

Section 448.08 provides:

"The court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorney's fee." (Emphasis supplied.)

This Court has interpreted the term "action" and has provided the following definition:

"In any legal sense, 'case', 'cause', 'action,' and 'suit' are convertible terms, each meaning a proceeding in a court."

128 So. at 415, citing Blyew v. U.S., 13 Wall. (80 U.S.), 581, 595, 20 L.Ed. 638.

Black's Law Dictionary provides a similar definition:

"[The] term in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law. ... (citations omitted). An ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense...."

In the courts below Peña argued that §448.08 provides him an absolute right to an award of attorney's fee and costs. A virtually identical situation, however, was considered by the fifth district court of appeal in Werthman v. School Board of Seminole County, 599 So.2d 220 (Fla. 5th DCA 1992). In Werthman, the appellant was

employed by the school board as a teacher. Werthman was suspended and ultimately terminated because of allegations of sexual misconduct involving a student. Werthman requested and received an administrative hearing provided under Chapter 120, Fla. Stat., in connection with the termination proceeding brought by the school board under §231.36(3)(e), Fla. Stat. The hearing officer found that the evidence failed to support the allegations and recommended Werthman's reinstatement with back pay. Ultimately, the school board adopted the hearing officer's recommendations and reinstated Werthman, but denied his request for attorney's fees and costs. On appeal, the fifth district court of appeal upheld the school board's decision.

In affirming the decision below, the fifth district addressed precisely the argument raised by Peña, stating:

"Section 448.08 provides for the payment of attorney's fees in an 'action' involving accrued, but unpaid wages. We decline to extend its reach to administrative proceedings such as those involved here."

599 So.2d at 221, citing Chavez v. City of Tampa, 560 So.2d 1214 (Fla. 2d DCA 1990), rev. denied 576 So.2d 285 (Fla. 1990). The fifth district court correctly noted that the administrative appeal does not involve a "[proceeding] to recover 'unpaid wages' except in the most tangential sense." 599 So.2d at 221. Indeed, the real purpose of the administrative appeal is to determine the sufficiency of

the evidence in support of the administrative decision to take disciplinary action.

In rejecting Werthman's claim that he was entitled to an attorney's fee for successfully seeking reinstatement, the fifth district also considered §231.36(6)(a), Fla. Stat., the section authorizing reinstatement and back pay for an employee against whom the administrative charges cannot be sustained. Upon consideration of the statute, the court of appeal observed:

"If the legislature had intended for an award of attorney's fees as an additional remedy for wrongful termination, we believe that they would have so provided. As a result, we find that under this statute, reinstatement and back pay are the extent of Werthman's remedy."

599 So.2d at 222 n.1.

In the courts below, Peña argued that parties have been awarded attorney's fees under \$448.08 in connection with administrative proceedings. The fifth district court of appeal, however, addressing Greene v. School Board of Hamilton County, 501 So.2d 50 (Fla. 1st DCA 1987), Doyal v. School Board of Liberty County, 415 So.2d 791 (Fla. 1st DCA 1982) and Metropolitan Dade County v. Stein, 384 So.2d 167 (Fla. 3d DCA 1980), the case relied on by the third district in support of its decision below, points out that none of those cases expressly considers whether an administrative hearing is the equivalent of an "action" within the meaning of \$448.08. Further, none of those cases considers an enactment such as §2-47, Code of



Metropolitan Dade County, which specifically provides that a person appearing before a hearing examiner does so "at his own expense".

Similarly in Davis v. School Board of Gadsden County, \_\_\_ So.2d \_\_\_, 19 FLW D2365 (Fla. 1st DCA, November 7, 1994), the first district court of appeal held that a school board disciplinary proceeding is not an "action" within the meaning of §448.08. The district court refused to disturb the school board's discretionary authority to deny an award of attorney's fees and costs to an employee it determined had been improperly discharged.

Werthman and Davis, supra, cannot be meaningfully distinguished from the case at bar. Just as in Werthman, Peña was dismissed from public employment. He appealed that dismissal to an independent hearing officer, as did the appellant in Werthman. However, where §231.36(6)(a) is silent as to an award of attorney's fees, §2-47, Code of Metropolitan Dade County, specifically provides that any party appearing before an independent hearing examiner does so "at his own expense". Clearly, under the ordinance, Peña is not entitled to attorney's fees and costs for the administrative hearing before the hearing examiner.

B. Section 448.08, Fla. Stat., Does Not Evidence a Clear Intent by the State Legislature to Supersede Other Enactments Which Deny Awards of Attorney's Fees in Administrative Proceedings or Make Such Awards Discretionary.

Section 2-47, Code of Metropolitan Dade County is an enactment by the board of county commissioners, the legislative body of Metropolitan Dade County.<sup>12</sup> To interpret §448.08, Fla. Stat., to supersede §2-47, Code of Metropolitan Dade County, in the absence of a clearly expressed intent by the state legislature to supersede all enactments denying or making discretionary attorney's fee awards in administrative proceedings is to violate the judicial maxim that enactments should be construed so as to give a field of operation to each.

It is a fundamental principle of statutory construction that all laws or other enactments are presumed to be consistent with each other. 49 Fla. Jur. 2d Statutes, §180. It is presumed that a statute is passed with knowledge of prior existing statutes and courts favor a construction that will give a field of operation to both

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<sup>1</sup>Article VIII, §6(f) of the Florida Constitution provides: "The Metropolitan Government of Dade County may exercise all the powers conferred now or hereafter by general law upon municipalities."

<sup>2</sup>Section 166.021(3), Fla. Stat., grants to municipalities the power to enact legislation concerning any subject matter upon which the state legislature may act.

rather than construe one enactment as being meaningless or repealed by implication. Id. It is further presumed that the legislature did not intend to accomplish so important a measure as the repeal of an enactment without expressing an intent to do so. Id. As a result, where possible, the courts have a duty 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. Id.

Construing §448.08, Fla. Stat., so as to give the term "action" its traditional and historical meaning preserves the specific language and clear legislative intent of §2-47, Code of Metropolitan Dade County, as well as the more general provisions of §448.08. Nothing in the language or legislative history of §448.08 suggests the primary legislative intent was to supersede or repeal enactments that deny awards of attorney fees or make such awards discretionary in administrative proceedings.


**CONCLUSION**

The third district court of appeal erred. The Respondent, Humberto Peña, is not entitled to an award of costs and attorney's fees in connection with his appearance before an independent hearing examiner and appeal to the county manager. Section 2-47, Code of Metropolitan Dade County, specifically disallows such an award. To the

extent Peña seeks an award under §448.08, Fla. Stat., the administrative appeal provided at §2-47 is not an "action for unpaid wages" within the meaning of the statute. The decision below must be reversed and the decision of the trial court reinstated. Peña is not the "prevailing party in an action for unpaid wages" within the meaning of §448.08, Fla. Stat.

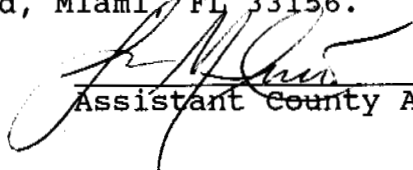
RESPECTFULLY SUBMITTED

ROBERT A. GINSBURG  
DADE COUNTY ATTORNEY  
111 N.W. FIRST STREET  
SUITE 2810  
MIAMI, FLORIDA 33128-1993

By:   
John McLinnis  
Assistant County Attorney  
Florida Bar No. 436038

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the INITIAL BRIEF OF PETITIONER was served by mail this 27th day of February 1995, upon Phillip J. Goldstein, Esq., PHILLIP J. GOLDSTEIN, P.A., One Datan Center, Suite 1119, 9100 South Dadeland Boulevard, Miami, FL 33156.

  
Assistant County Attorney