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 REPLY BRIEF

RESPECTFULLY SUBMITTED

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I

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW; THEREFORE, THE MATTER IS PROPERLY WITHIN THIS COURT'S JURISDICTION.

As certified by the third district court of appeal, conflict exists between the decision below and the decisions of the first district court of appeal in Werthman v. School Board of Seminole County, 599 So.2d 220 (Fla. 5th DCA 1992) and Davis v. School Board of Gadsden County, ___ So.2d ___, 19 FLW D2365 (Fla. 1st DCA Case No. 93-107, opinion filed, November 7, 1994) It is, therefore, appropriate for this Court to assume jurisdiction and resolve the conflict.

In his answer brief Peña states there is no conflict between the decision below and Werthman and Davis, arguing that the award of attorney's fees and costs in the instant case is governed by a collective bargaining agreement and the Dade County personnel rules[1], while Werthman and Davis were controlled by applicable statutes governing the rights of school board employees. The distinction Peña attempts to draw is completely illusory.

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[1]In this regard, Peña is incorrect. The administrative procedure invoked in his appeal is created and governed by §2-47, Code of Metropolitan Dade County.

The conflict between these decisions lies in the fact that the third district court of appeal below and the district courts of appeal in Werthman and Davis all specifically considered the application of §448.08, Fla. Stat., to administrative disciplinary proceedings and reached opposite conclusions. The third district, relying on its earlier decision in **Metropolitan Dade County v. Stein**, 384 So.2d 167 (Fla. 3d DCA 1980), concluded that §448.08 mandates an award of attorney's fees and costs, even in an administrative proceeding. The fifth district court of appeal concluded the statute does not apply to administrative disciplinary proceedings and the first district concurred in Davis. In declining to apply the holding of Stein to the case before it, the district court in Werthman correctly observed that the school board statute creating the administrative remedy did not provide for an award of attorney's fees and costs to prevailing employee, thus the legislature obviously did not intend a broader remedy.

Contrary to the implications of the decision below, awards of attorney's fees and costs are not mandatory in administrative proceedings. The school board statutes demonstrate the state legislature has the authority to create an administrative procedure placing decisions as to whether to award attorney's fees and costs in disciplinary appeals within the discretion of school board authorities.

Clearly, neither §448.08 nor any other enactment makes such awards mandatory. It is equally clear there is no legislation creating an exemption or exception from §448.08 under the school board statues or §120.57, Fla. Stat.

Similarly, as the legislature for Metropolitan Dade County, the board of county commissioners has the authority to create an administrative procedure which makes such awards discretionary in disciplinary appeals for county employees or which denies such awards outright.[2],[3] There is no provision of general law forbidding an enactment such as §2-47 which denies such an award.

Section 2-47, Code of Metropolitan Dade County, allows a party to be represented by counsel "at his own expense". Had the board of county commissioners intended an award of attorney's fees as an additional remedy for wrongful disciplinary action, it would have so provided. As a result, in proceedings under §2-47 reinstatement and back pay appropriately represent the full measure of relief to which Peña is entitled. Clearly, the decision below cannot be reconciled with Werthman and Davis.

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[2]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."

[3]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.

As stated in Petitioner's initial brief, the courts have a duty to reconcile enactments and avoid interpretations which unnecessarily create conflicts between two pieces of legislation. Peña's contention that this principle does not apply to ordinances is without merit or support. Clearly, the courts have the same duty to reconcile the language of a statute and an ordinance as between two statutes.

Peña's recognition that the administrative procedure act ("APA") at §120.57, Fla. Stat., is not in conflict with §448.08 conveniently ignores the inherent legislative recognition that an administrative proceeding under the APA is distinct from an "action for unpaid wages" brought pursuant to §448.08. Indeed, a fundamental tenet of statutory construction is the presumption that a statute is passed with prior knowledge of existing statutes. 49 Fla. Jur. 2d Statutes §180. The creation of a provision for attorney's fees and costs in proceedings under the APA clearly indicates legislative awareness that §448.08 did not already provide for an award of fees and costs in administrative proceedings. To hold otherwise would render §120.57 a meaningless and unnecessarily duplicative act. Necessarily, the conclusion that §448.08 does not create a right to an award of attorney's fees and costs in an administrative proceeding demonstrates the conflict between the district court decisions in Werthman, supra, and Davis,

supra, and Peña. This conflict is the basis for this Court's jurisdiction in the instant proceeding.

II

THE COURTS HAVE A DUTY TO CONSTRUE ALL ENACTMENTS, INCLUDING STATUTES AND LOCAL ORDINANCES, IN A FASHION WHICH DOES NOT PRODUCE UNNECESSARY CONFLICT.

An appeal of disciplinary action pursuant to §2-47, Code of Metropolitan Dade County, is not an "action for unpaid wages" within the meaning of §448.08, Fla. Stat. To characterize it as such warps the fundamental nature of the proceeding and is misleading to the Court. As stated in Petitioner's initial brief, and as noted by the fifth district court of appeal in Werthman, supra, such an appeal only involves "unpaid wages" in the most tangential sense. The real purpose of the proceeding is to test the sufficiency of the evidence in support of the administrative decision to discharge Peña from the county service. Though reinstatement and back pay was part of the relief Peña obtained, at no time in the administrative proceeding was there a demand for attorney's fees or costs and no opportunity for the county manager to consider the appropriateness of such an award. The demand for attorney's fees was raised for the first time when Peña commenced his action in circuit court.

Peña's argument that §2-47, Code of Metropolitan Dade County, is in conflict with §448.08, Fla. Stat., is untenable. If, as Peña obliquely suggests, the two

enactments are placed "side by side", no conflict is apparent. A conflict between the two enactments exists only if the interpretation of the reference in §448.08 is expanded to encompass administrative disciplinary proceedings such as that created by §2-46. Certainly, this interpretation was not contemplated by the legislature in enacting §448.08, Fla. Stat., or §120.57, Fla. Stat.. If, however, the language of §448.08 is given the traditional, historical interpretation, the statute and the ordinance can co-exist.

III

SECTION 2-47 AND SIMILAR ENACTMENTS DO NOT DISCRIMINATE AGAINST GOVERNMENT EMPLOYEES.

Respondent contends that §2-47 and similar enactments imply discrimination against government employees "because persons employed in the private business sector can take their actions directly to the Circuit Court" is without merit. Peña conveniently ignores the fact that the courts of Florida do not recognize wrongful termination as a cause of action. In Florida, a private sector employee who is wrongfully discharged has no recourse unless a remedy is created by contract, statute or ordinance. If such a remedy exists, an employee who prevails in a judicial action for unpaid wages is indeed entitled to attorney's fees and costs incurred in that action.

Any employee, government or private, who must resort to the circuit courts for enforcement of a decision for reinstatement and back pay is entitled to be awarded the costs of that action. Thus, **Tampa Bay Publications, Inc. v. Watkins**, 549 So.2d 745 (Fla. 2d DCA 1989), is distinguishable from the case at bar, because in Watkins the entire action was instituted to recover unpaid commissions. Fees and costs were, therefore, appropriate. Respectfully, **Doyal v. School Board of Liberty County**, 415 So.2d 791 (Fla. 1st DCA 1982), **Metropolitan Dade County v. Stein**, 384 So.2d 167 (Fla. 3d DCA 1980), and the other cases on which Peña relies in which attorney's fees and costs for administrative proceedings were awarded to employees under §448.08 without other statutory authority are incorrectly decided.

IV

IF AFFIRMED, THE DECISION BELOW WILL HAVE AN UNDESIRABLE CHILLING EFFECT ON GOVERNMENT EMPLOYEES WHO CONSIDER APPEALING DISCIPLINE THROUGH THE REQUIRED ADMINISTRATIVE PROCESS.

Peña's argument that §448.08 superseded §2-47 so as to permit or mandate an award of attorney's fees, it raises extremely dangerous policy implications for any employee who chooses to appeal an administrative disciplinary action pursuant to §2-47 or similar enactments.

Section 448.08 provides for an award of attorney's fees and costs to the "prevailing party" in an "action for

unpaid wages". The statute does not distinguish between a prevailing employer and a prevailing employee. See Carpenter v. Metropolitan Dade County, 472 So.2d 795, 796 (Fla. 3d DCA 1985). This Court is invited to take notice of the fact that in the vast majority of disciplinary appeals brought pursuant to §2-47, the employer is the prevailing party, not the employee. This is true, not only in discharge appeals, but is also true for appeals of suspensions and demotions. The decision below, and the position Peña asserts, clearly invite a a flood of litigation by prevailing employers seeking attorney's fees and costs in suspension, demotion and discharge appeals brought pursuant to §2-47 and similar enactments. While such actions would clearly be to the economic advantage of the County and other employers, affirming the decision below would have a profound chilling effect on employees and would ultimately dissuade many employees from appealing disciplinary actions. This is particularly true where the potential adverse financial consequences of an unsuccessful appeal would outweigh the potential benefits, especially in appeals from suspensions, and to a lesser extent, demotions. It is self-evident that this is an undesirable result which would not create equanimity between parties, but would place employees at a distinct disadvantage. Public policy demands that a decision which invites such a result must be avoided.

CONCLUSION

The decision below must be reversed. The Respondent's appeal of a disciplinary action to the county manager pursuant to §2-47, Code of Metropolitan Dade County, is not an "action for unpaid wages" within the meaning of §448.08, Fla. Stat. The Respondent is, therefore, not entitled to an award of costs and attorney's fees pursuant to §448.08. The decision of the third district court of appeal, if affirmed, will have an undesirable chilling effect on all employees who consider appealing disciplinary actions pursuant to enactments such as §2-47, since in many cases the financial consequences of an unsuccessful appeal may outweigh the benefits to be obtained. Petitioner, therefore, respectfully requests that the decision of the trial court be reinstated.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the INITIAL BRIEF OF PETITIONER was served by mail this 17th day of April 1995, upon Phillip J. Goldstein, Esq., PHILLIP J. GOLDSTEIN, P.A., One Datran Center, Suite 1119, 9100 South Dadeland Boulevard, Miami, FL 33156.

Assistant County Attorney