STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEWIS RUSHTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-1551
	)	
DEPARTMENT OF EDUCATION,	)	
	)	
Respondent.	)	
_____	)	
KENNETH C. PARKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-3090
	)	
SCHOOL BOARD OF OSCEOLA COUNTY and DEPARTMENT OF EDUCATION,	)	
	)	
Respondents.	)	
_____	)	
EDWARD K. REILLY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-3091
	)	
SCHOOL BOARD OF OSCEOLA COUNTY and DEPARTMENT OF EDUCATION,	)	
	)	
Respondents.	)	
_____	)	
WILLIAM HARLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-3076
	)	
SCHOOL BOARD OF OSCEOLA COUNTY and DEPARTMENT OF EDUCATION,	)	
	)	
Respondents.	)	
_____	)	

JOHN E. PIERCE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-3581
	)	
DEPARTMENT OF EDUCATION,	)	
	)	
Respondent.	)	
	)	
FRANKLIN C. GORMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-3579
	)	
DEPARTMENT OF EDUCATION,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER

By Joint Stipulation filed October 12, 1989, and Order of Consolidation and Dismissal entered December 22, 1989, the above-styled cases were presented to Robert E. Meale, Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

The following counsel filed briefs:

For Lewis Rushton:	John J. Chamblee, Jr. Chamblee, Miles and Grizzard 202 Cardy Street Tampa, Florida 33606
For John E. Pierce and Franklin C. Gorman:	Lorene C. Powell, Assistant General Counsel FEA/United 208 West Pensacola Street Tallahassee, Florida 32399-1700
For Department of Education:	Sydney H. McKenzie III, General Counsel Carl J. Zahner, Assistant General Counsel State Board of Education The Capitol, Suite 1701 Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issue in these cases is: a) whether the Department of Education is liable for attorneys' fees and costs incurred in the prosecution of the Rushton case (DOAH Case No. 89-1551) and b) if so, whether such fees and costs should include those incurred in the prosecution of a rule challenge styled, Florida Education Association/United and Florida Teaching Profession/National Education Association v. Department of Education, DOAH Case No. 88-0847R.

PRELIMINARY STATEMENT

Each of the Petitioners was a bus driver who had attained the age of 70 years and who was employed by a school board in the State of Florida when the Department of Education promulgated a rule requiring mandatory retirement of such persons at age 70 years. Each Petitioner filed a claim of discrimination against the Department of Education and the district school board that employed him. In general, these claims asserted that each Petitioner had been subject to unlawful employment discrimination based on age.

Two unions representing the terminated bus drivers challenged the mandatory retirement rule that had forced theretirement of the drivers. This rule challenge was styled, Education Association/United and Florida Teaching Profession/National Education Association v. Department of Education, DOAH Case No. 88-0847R. The challenge was sustained, the Department of Education withdrew the rule, and the various school boards reemployed the bus drivers.

The Rushton case alone was set for final hearing in Sanford on September 28, 1989. At the hearing, counsel for all the Petitioners appeared and, together with counsel for Respondent, agreed to present the case by stipulation. The undersigned entered an order establishing deadlines for the filing of the stipulation, initial briefs, answer briefs, and reply briefs.

The parties filed a Joint Stipulation on October 12, 1989. The Joint Stipulation and various exhibits previously filed provide the basis for the findings of fact set forth below. By Order of Consolidation and Dismissal entered December 22, 1989, the undersigned gave all parties a specified period of time within which to file objections to binding all of the parties to the stipulation, closing the record, dismissing all Respondents except for the Department of Education, and issuing a single recommended order with respect to each of the above-styled cases. No party objected. Consequently, all remaining Respondents, other than the Department of Education, are hereby dismissed.

In the Joint Stipulation, counsel agreed to use the Rushton record for the purpose of determining the issues setforth above. In addition, counsel for Messrs. Pierce, Gorman, Reilly, Harley, and Parker agreed not to pursue attorney's fees and costs, other than those incurred in the rule challenge and theoretically attributable to the five individual cases. However, the Rushton case is agreed to be the means by which the rule-challenge fees and costs are recovered, if they are to be recovered at all.

After the briefs had been filed, the undersigned contacted counsel and asked them to adopt a procedure by which evidence concerning fees could be entered into the record. Suggestions included a stipulation as to the amount, the introduction of affidavits with a stipulation for determination of the issue by affidavits, or the reopening of the case for a short evidentiary hearing as to fees. The only resulting activity of which the undersigned is aware, including record activity, is a letter dated March 6, 1990, from counsel for Mr. Rushton to counsel for Respondent, with a copy to counsel for Messrs. Pierce and Gorman. In this letter, various procedures are proposed with respect to the issue of attorneys' fees. Nothing else has ever been communicated to the undersigned since that letter.

FINDINGS OF FACT

1. Petitioner Lewis Rushton is a person within the meaning of Section 760.02(5), Florida Statutes. Mr. Rushton is an individual within the meaning of Section 760.10(1).

2. The Department of Education ("DOE") is a personwithin the meaning of Section 760.02(5). The School Board of Seminole County, Florida ("School Board"), which is also a person within the meaning of the same statute, was at all material times Mr. Rushton's "employer" within the meaning of Section 760.02(6).

3. At all material times, Mr. Rushton was employed as a bus driver by the School Board, which removed him from this position on April 19, 1988. The reason for the School Board's action was that the continued service of Rushton, who was over 70 years of age, was contrary to Rule 6A-3.0141(a), Florida Administrative Code, which required mandatory retirement of bus drivers at age 70 years ("Rule"). The other Petitioners were similarly situated to Mr. Rushton. The only difference is that they were employed by different district school boards.

4. The School Board gave Rushton the option to continue in employment as a bus monitor, which was a lower-paying job than bus driver. Rushton accepted this reassignment and experienced the resulting reduction in pay beginning the 1988-89 school year.

5. At all material times, DOE, which promulgated the Rule, maintained standards affecting the ability of Rushton to engage in his occupation or trade within the meaning of Section 760.10(5). The Rule was part of these standards.

6. On January 29, 1987, Rushton filed a Complaint of Discrimination, FCHR Case No. 88-5616, against the School Board. The Florida Commission on Human Relations dismissed this complaint on November 11, 1988. On May 3, 1988, Rushton timely filed and prosecuted a Complaint of Discrimination, FCHR Case No. 88-5703, against DOE. On September 7, 1988, the Florida Commission on Human Relations issued a Notice of Determination--Cause. The Notice of Determination names as the sole respondent the School Board, which had employed Mr. Rushton prior to requiring him to retire at age 70.

7. After DOE filed a Request for Reconsideration on September 16, the Florida Commission on Human Relations issued on January 12, 1989, a Notice of Redetermination--Cause. The Notice of Redetermination names DOE as the sole respondent. The Notice of Redetermination states that DOE's "assertion that [the Rule] is an established 'bona fide occupational qualification' for employment has not been upheld."

8. The quoted statement in the Notice of Redetermination is to a final order issued December 14, 1988. The final order found the Rule to be an invalid exercise of delegated legislative authority.

9. The final order was the culmination of a Section 120.56 challenge to the Rule that had been prosecuted against DOE by two unions representing the Petitioners. This rule challenge was styled, Florida Education Association/United v. Department of Education, DOAH Case No. 88-0847R ("Rule Challenge"). The Florida Teaching Profession/National Education Association was an intervenor on the side of the petitioner in the Rule Challenge.

10. Lorene C. Powell represented the petitioner in theRule Challenge, and Vernon T. Grizzard, of Chamblee, Miles and Grizzard, and the law firm of Egan, Lev & Siwica, represented the intervenor.

11. As the final hearing in the Rule Challenge approached, DOE requested abatements of the pending cases in which individual bus drivers had sought relief under Section 760.10. At that time, the cases of all Petitioners except Mr. Rushton were pending in the Division of Administrative Hearings. The grounds for the abatements were that the decision in the Rule Challenge "would substantially affect the outcome" of the pending individual cases. Each case was abated.

12. The parties in the Rule Challenge stipulated that various counties, due to the Rule, had not rehired bus drivers who would have been rehired but for the fact that they had attained the age of 70 years. The parties also agreed that Sections 760.10 and 112.0444 [sic], together with cited federal law, "do not permit an age limitation on employment with the exception of where such an age limitation is based on Bona Fide Occupational Qualification." The stipulated issues for determination in the Rule Challenge included "whether the 70-year old age barrier . . . is a [bona fide occupational qualification] and thus a valid exception to the state and federal ban on age discrimination based solely on chronological age."

13. By memorandum dated January 11, 1989, DOE informed school board superintendents of the final order invalidating the Rule. By letter dated February 9, 1989, the School Boardnotified Mr. Rushton that DOE was no longer requiring enforcement of the mandatory retirement rule and he could return to work as a bus driver if he could meet certain lawful requirements. Each Petitioner was so notified by his respective school board.

14. By Petition for Relief filed March 21, 1989, Mr. Rushton sought relief against the School Board and DOE, including a finding that mandating his retirement due to age was an unlawful employment practice, an award of back pay and associated benefits, and an award of attorneys' fees in the prosecution of the subject proceeding and such other proceedings as were necessary or appropriate to obtain the relief and apportioning the fees between the School Board and DOE.

15. With the filing of the Petition for Relief on March 21, 1989, John Chamblee of the law firm of Chamblee, Miles and Grizzard entered his appearance for Mr. Rushton. Mr. Chamblee had been retained for Mr. Rushton by his union, the Florida Teaching Profession/National Education Association.

16. On or shortly after May 1, 1989, the School Board settled with Mr. Rushton by agreeing to compensate him for back pay, interest, and other benefits constituting relief otherwise available under Section 760.10. Similar settlements between the other Petitioners and their respective school boards resulted in the dismissal of all claims against the various school boards.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section120.57(1).

18. Section 760.10(13) provides:

> In the event that the [Florida Commission on Human Relations], in the case of a complaint under subsection (10), . . . finds that an unlawful employment practice has occurred, it shall issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including reasonable attorney's fees. Upon such notice as the commission . . . may require, such order, or any subsequent order upon the same complaint . . . may provide relief for all individuals aggrieved by any such unlawful employment practice. . . .

19. Mr. Rushton filed a complaint, pursuant to Section 760.10(10). The Final Order entered in the Rule Challenge invalidated the Rule that forced the School Board to remove Mr. Rushton as a bus driver due to his age. The resolution of the Rule Challenge led DOE to conclude, correctly, that further litigation of individual claims would be fruitless; enforcement of the Rule had been an unlawful employment practice.

20. Ignoring for a moment the amount of fees, Mr. Rushton is entitled to fees in DOAH Case No. 89-1551 provided he was pursuing meaningful relief at the time that Mr. Chamblee first entered an appearance on Mr. Rushton's behalf.

21. DOE's assertion that such claims against it are barred by the doctrine of sovereign immunity appears rebutted by the language of Section 760.10(5), which prohibits discrimination by "persons" in certain cases. Section 760.02(5) defines "person" to include the "state." The award of fees in this case is under the authority of Section 760.10(5). This fact is notaltered by any determination that the quantum of fees might include fees incurred in a separate proceeding, such as the Rule Challenge. See Appalachian, Inc. v. Ackmann, 507 So. 2d 150 (Fla. 2d DCA 1987).

22. The critical question in this case is whether Mr. Rushton may recover the fees incurred in the Rule Challenge. If not, he has no basis for recovering any fees, including those incurred in DOAH Case No. 89-1551. By the time that Mr. Chamblee appeared on behalf of Mr. Rushton, DOE had already capitulated. From a practical point of view, the only meaningful relief still sought by Mr. Rushton was finally secured on or after May 1, 1989. In settling with the School Board, Mr. Rushton has released whatever claim for fees he may have had during the period between when Mr. Chamblee first represented him and approximately May 1. Although the release did not extend to pursuing DOE for fees, DOE had already done what was necessary for Mr. Rushton to regain his job prior to the appearance of Mr. Chamblee on Mr. Rushton's behalf. Apart from the question concerning the fees incurred in the Rule Challenge, the School Board, as the employer, was the party to which Mr. Rushton naturally would look for relief in the form of reinstatement with back pay, interest, and associated benefits.

23. Therefore, the only way that Mr. Rushton can show that he was continuing to pursue meaningful relief against DOE, following the appearance of Mr. Chamblee on Mr. Rushton's behalf, is for Mr. Rushton to prove entitlement to fees incurred in theRule Challenge. Failing that, Mr. Rushton has not prevailed

against DOE in the sense that he has obtained meaningful relief during the period for which he was represented by an attorney in DOAH Case No. 89-1551.

24. The Petitioners could have prosecuted their age discrimination claims on a case-by-case basis. As each Petitioner established an unlawful employment practice, he would have been entitled to an award of reasonable attorney's fees from DOE. Instead, two unions acting on behalf of the Petitioners prosecuted a single proceeding to challenge the Rule whose enforcement had resulted in the various age discrimination cases. Because the outcome of the Rule Challenge determined the outcome of the various age discrimination cases, the prosecution of the Rule Challenge resulted in administrative efficiency and significant savings in legal fees.

25. Various courts have considered the proper scope of fees in cases in which the work was expended in a case for which fees were not recoverable, but in connection with a matter that, when litigated under a different theory, permitted the recovery of fees. In Appalachian, Inc. v. Ackmann, 507 So. 2d 150 (Fla. 2d DCA 1987), purchasers who had prevailed in an action under the Interstate Land Sales Full Disclosure Act sought attorneys' fees for legal services in a separate federal action. In the federal action, for which fees were presumably unavailable, the attorneys for the purchasers had appeared as amici to litigate the same jurisdictional questions involved in the state action. Allowingfees for work in a related federal case, the court cited Pennsylvania v. Delaware Valley, 478 U.S. 546, 106 S. Ct. 3088 (1986) for the proposition that "compensation for participation in a related administrative proceeding was proper and 'well within the zone of discretion' permitted trial courts."

26. In Delaware Valley, a citizens' group had successfully prosecuted an action under the Clean Air Act and requested fees thereunder. The Court included in the attorney's fees for services performed by the group's attorneys in the judicial action fees incurred in an earlier administrative proceeding. The Court relied upon its earlier decision, Webb v. Board of Education of Dyer County, 471 U. S. 234, 105 S. Ct. 1923 (1985):

> There, we noted that for the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be "useful and of a type ordinarily necessary' to secure the final result obtained in the litigation."

106 S. Ct. at 3096.

27. The case of Ramsey v. Chrysler First, Inc., 861 F.2d 1541, 48 FEP Cases 1089 (11th Cir. 1988), does not compel a contrary result. In that case, the court found that the prelitigation fees were duplicated in the judicial action, for which fees were awarded.

28. The attorney's fees incurred in the Rule Challenge were useful and necessary in obtaining the favorable results in the individual age discrimination cases. At minimum, the work inthe Rule Challenge took the place of the administrative effort and litigation expenses that would have been incurred in the trial of the various individual cases, which presumably would have been consolidated for hearing. In no way was the work in the Rule Challenge duplicative of the work involved in the individual cases.

29. The impediment to recovery of the Rule Challenge fees is that the record does not disclose that Mr. Rushton has paid or is under any obligation to pay either or both unions for the legal work that they provided in the Rule Challenge. Absent such a fact, any award to Mr. Rushton would represent a windfall.

30. Obviously, the unions, which retained the counsel for the Petitioners in their separate cases, prosecuted the Rule Challenge in a representative capacity, in fact employing the same counsel as were involved in the individual cases. The unique relationship between a union and its members warrants, in appropriate circumstances, ignoring technical distinctions between the parties. Cf. Fredericks v. School Board of Monroe County, 307 So. 2d 463 (3d DCA 1975) (union has standing to litigate grievances of teacher-members).

31. However, the distinction here is more significant. Mr. Rushton seeks an award for fees that the unions incurred in the Rule Challenge. It is true that, in theory, he could recover the fees incurred in DOAH Case No. 89-1551, even though it appears that his union paid for the representation. However, in that case, he was at least a party; as a member of the union, hewas presumably under some obligation to reimburse the union for any fees incurred that "Mr. Rushton" recovered. As to the Rule Challenge, Mr. Rushton seeks to recover fees for which he was never even nominally liable. The unions were the parties, and the union incurred the fees. If the union had incurred the obligation to pay fees in the Rule Challenge, Mr. Rushton would certainly not be liable on the final order or judgment. Meyer v. Scutieri, 539 So. 2d 602 (Fla 3d DCA 1989) (per curiam) (plaintiff condominium association, but not nonparty members, properly named on judgment for attorney's fees).

32. None of the authority cited by Petitioners involves a case in which the party seeking fees tries to recover fees incurred by a different party. Arguably, the principle of indemnification, which underlies the fee award, may be stretched when applied to the award of fees where the union has supplied and paid for counsel to represent a member. However, the principle is obliterated when applied to the award of fees where the union has obtained counsel to represent itself, albeit on the member's behalf. It makes no difference that Mr. Rushton could have brought the Rule Challenge, even with counsel provided by the union; the fact is that he did not.

33. For the reasons set forth above, Mr. Rushton and the other Petitioners are not entitled to the recovery of fees from DOE.

RECOMMENDATION

Based on the foregoing, it is hereby RECOMMENDED that the Florida Commission on Human Relations enter a Final Order dismissing the Petitions for Relief in the above-styled cases.

ENTERED this 2nd day of May, 1990, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
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