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CALIFORNIA APPELLATE COURT DEALS SEVERE SETBACK TO "LAST CHANCE" AGREEMENTS

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In situations where public employees face termination for misconduct, some public employers and unions have experimented with the concept of entering into arrangements known as "last chance" agreements. Under these agreements, the employee receives a final opportunity to address misconduct and performance problems, in exchange for agreeing to accept termination as the penalty for future misconduct.

These agreements are inherently neither desirable nor evil. They can theoretically save employees from the drastic consequence of losing their livelihood.

But our experience has indicated that these agreements are also highly susceptible to abusive implementation by employers. For example, situations often arise in which the evidence of misconduct is questionable, but for the employee, the practicality of accepting an arrangement that guarantees remaining on the job outweighs the risk and uncertainty entailed in taking a formal administrative appeal. Employees in that situation can often be induced to agree to highly unfavorable terms of continuing in the employment. These agreements also tend to create disorderly employment relations because supervisors must adjust to the reality that an employee subject to a side agreement is working under different conditions and terms than other members of the Department. Accordingly, in our representation of employee interests, we

have never strongly encouraged the resort to such agreements.

The California Court of Appeal has now dealt a severe setback to the enforceability of these "last chance" agreements. In *Farahani v. San Diego Community College Dist*., 2009 WL 2232205, the Fourth District Court of Appeal reinstated a college professor who was terminated under the terms of a "last chance" agreement that is somewhat similar to agreements that have been undertaken by law enforcement employers and employees in disciplinary matters.

The appellate court in *Farahani* ruled that the "last chance" agreement in that case was unenforceable because the employee purported to waive statutory procedural protections that were enacted for the benefit of the teaching profession and the public at large. Part of the court's reasoning was based specifically on provisions of the *California Education Code* that define procedural rights in faculty disciplinary matters. But the reasoning in the opinion appears to affect the entire practice of entering into any "last chance" agreement or other side agreement between a public employer and an employee, where the employee purports to waive statutory procedural protections.

In particular, the decision follows the general principle, codified in *California Civil Code*, section 3513, that purported waivers of the protections of statutes enacted for a public purpose are extremely narrowly construed. Section 3513 provides: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

We prevailed on that same principle in the California Supreme Court's ruling in litigation over the background file of former Deputy Martin Madrigal, entitled *County of Riverside v. Superior Court (Madrigal)* (2002) 27 Cal. 3d 793, wherein the Supreme Court held that the Public Safety Officers' Procedural Bill of Rights Act ["POBRA" *Government Code §* 3300 *et. seq.*] is a "law established for a public reason" and therefore its protections are "not subject to blanket waiver." *Id*. at 804. In *Madrigal*, the Supreme Court ruled that an employee cannot waive a POBRA protection except by "a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences." *Id*. at 806. Under that standard, the Court concluded Madrigal had waived some of his POBRA protections in connection with his desire to review his background investigation and file. *Id.* at 806-807. But that precedent stands for the general proposition that waivers of POBRA rights are narrowly construed.

We litigated the validity of a "last chance" agreement in 2006 on behalf of a Riverside County Sheriff Deputy who entered into an agreement with the

Department, without the advice of counsel, whereby he would be terminated *without* right of appeal for any "serious or significant misconduct" for the next five years. He was terminated when he allegedly violated the agreement just before the end of the five-year period, by having two beers on a meal break while at a law enforcement seminar. We overturned that last chance agreement in arbitration, and won reinstatement for the Deputy, which was upheld later in a superior court writ proceeding.

That "last chance" agreement contained numerous features that were vulnerable to challenge. In the arbitration, we made a factual argument that the discipline at hand, drinking on duty while at an all-day seminar, was not serious or significant misconduct within the meaning of the agreement.

We also challenged the agreement on legal grounds. Among the legal defects, was the Department's argument seeking to give binding contractual effect to an agreement outside the purview of POBRA and the MOU which runs afoul of the established legal rule that all public employment in California is governed by statute, not by contract. While the MOU itself might superficially appear to be a contract, the Meyers-Milias-Brown Act (*Cal. Govt. Code*, section 3500 et seq.) gives such collective bargaining agreements the force of statute. We argued that a side agreement contrary to the MOU should not be given effect, at least not without explicit approval and signature of the Riverside Sheriffs' Association (RSA).

It was acknowledged that courts had generally upheld these last chance agreements despite harsh terms, but only if the union represented the employee in making the agreement, and there was no mistake that the parties to the collective bargaining agreement intended to make the modification for the benefit of the individual employee. We distinguished cases cited by the Department that upheld last chance agreements in which the union was not a signatory, by showing that in those cases, the union was at least aware of the existence of the agreement and tacitly approved of its creation by failing to object or grieve its terms. See, e.g., *Voss Steel Employees Union v. Voss Steel Corp*., (E.D. Mich. 1992) 797 F. Supp. 585, 590 (the union was part of the negotiation process leading up to the creation of the last chance agreement, and despite its knowledge of the agreement, did not grieve its terms.)

We argued that if the RSA had been permitted to participate in negotiating a last chance agreement for this Deputy, it would have sought to negotiate terms more consistent with the terms of the MOU. RSA would likely have sought some amelioration of the five-year time span, and would likely have sought some more precise description of the covered misconduct than the "serious or significant" phrasing that was imposed.

Any slight improvement in either of these terms would have been sufficient to reverse the outcome of the Deputy's termination.

We also argued that under *Madrigal*, POBRA is a law enacted for a public reason, and POBRA rights are not subject to blanket waiver. The "last chance" agreement would have waived important POBRA rights, including the right to an administrative appeal. The arbitrator and court agreed on this issue as well. Now, the new *Farahani* decision lends binding precedential force to that argument, as one of the rights waived by Professor Farahani was a right to an administrative appeal under the *Education Code*. Slip Opn. at 1.

Plaintiff in *Farahani* was an international relations professor at Mesa College, who was accused of making unwelcome sexual advances to students and staff. The College District served notice of intention to impose a one-year suspension. Before proceeding to a pre-disciplinary hearing, however, the District presented Farahani with an agreement under which he would accept a salary reduction, promise to refrain from sexual harassment and a wide range of similar conduct for 18 months, and the District would have the right to terminate Farahani's employment without issuance of charges and right of appeal under the *Education Code* if Farahani failed to comply with the agreement. Slip opn. at 1.

If Farahani refused to sign the agreement, he would be suspended for one year. *Id.* Farahani's union attorney advised him that the agreement was probably not legal, but that it was in his best interest to accept it and try to get through the 18 months. Slip opn. at 2.

The District received new sexual harassment complaints against Farahani during the terms of the agreement, and thereupon, terminated Farahani's employment without right of appeal. Farahani petitioned for mandamus. *Id*.

In opposition to the mandamus petition, the District argued that the agreement was an enforceable binding contract. The superior court rejected that argument, and the Court of Appeal affirmed the decision in an opinion certified for publication.

The appellate opinion observes that the *California Education Code* grants due process rights to faculty members in disciplinary matters, including notice of charges, opportunity to object, a hearing before an arbitrator or administrative law judge, and a decision by the governing board. Slip opn. at 3. *Education Code*, section 87485 provides with certain exceptions that "any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void." The Court of Appeal rejected arguments by the District seeking to place the case outside the purview of section 87485. Slip Opn. at 3-4.

The College District also cited *Civil Code*, section 3513, and argued "that Farahani could lawfully waive the statutory due process protections because they were solely for his private benefit." Slip Opn. at 4. The Court of Appeal rejected that argument in terms that can persuasively be cited on behalf of any California law enforcement officer entering into any similar "last chance" agreement with an employing agency in the future. The appellate court first pointed out that the clause of section 3513 cited by the District, permitting waivers of solely private statutory benefits, is immediately followed by the clause providing that "a law established for a public reason cannot be waived or circumvented by a private act or agreement...." Slip Opn. at 4, quoting from *Covino v. Governing Board* (1977) 76 Cal. App. 3d 314, at 322. Finding the procedural protections of faculty members in the *Education Code* to be a law established for a public reason within the meaning of section 3513, the Court in *Farahani* quoted the language of the *Covino* opinion, "Legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy in the field to which the legislation relates." Slip Opn. at 4, quoting from *Covino* at 322.

The Court in *Farahani* concluded that the last chance agreement "required Farahani to waive the benefit of those statutory rights in connection with the 2004 complaints as well as in the future, rendering it impossible for Farahani to challenge the substance of the new complaints against him. *Civil Code* section 3513 does not render lawful Farahani's waiver of due process rights." Slip opn. at 4.

The Court also rejected an argument by the College District that it was inequitable, under the doctrine of "unclean hands," for Farahani to escape the consequences of an agreement. The District pointed out that "because Farahani was advised by the Union attorney that the Agreement was unenforceable, he signed it with no intention of performing." Slip opn. at 6. The Court responded, "The difficulty with the District's argument is that the Agreement itself was contrary to the express language of section 87485 and unenforceable as a matter of law." *Id*. The Court observed, "The District presented Farahani with a Hobson's choice between two 'bad,' indeed illegal, options. Contrary to the District's argument, there is nothing in the record to suggest that Farahani signed the Agreement with the intent of not performing. The record supports a conclusion that Farahani followed the Union attorney's advice to take the pragmatic course and signed the Agreement." *Id*.

Taken in conjunction with the California Supreme Court's *Madrigal* opinion, the *Farahani* decision is fully applicable to challenge any last chance agreement that waives POBRA rights, because POBRA, like the *Education Code* provisions on which the *Farahani* decision relies, has also been deemed by California law to be a statute enacted for a public reason. Indeed, the preamble to POBRA makes crystal clear the public purpose of this legislation, to "promote 'effective law enforcement' by maintaining 'stable employer-employee relations' in law enforcement agencies...." *Madrigal*, 27 Cal. 4th at 804.

The *Farahani* decision does not per se nullify every "last chance" agreement that may ever be conceived, but leaves almost no logical room for a valid agreement of this nature. From the context of POBRA, there is a high probability that a "last chance" agreement cannot waive the right of administrative appeal, a right that certainly seems central to the public purpose of POBRA to maintain stable labor relations. It seems questionable whether a "last chance" agreement could validly waive an officer's protections against unreasonable interrogation under section 3303, or the section 3304(d) statute of limitations, or the section 3305 and 3306 rights to read, sign and respond to placement of adverse comments in personnel records, or the polygraph protections of section 3307, or the workplace search restrictions of section 3309.

It seems unsafe to assume that even the relatively less fundamental POBRA protections such as protections from political activity under section 3302 or against financial disclosure under section 3308 can be validly waived in a "last chance" agreement. One interesting issue that could arise is whether a last chance agreement could waive *Skelly* rights, which are conferred by case law rather than statute.

But if any Department should remain interested in testing the extent to which the terms of a public employee's employment can be modified by a side agreement such as a "last chance" agreement, it appears that the Department should permit the union to participate meaningfully in negotiating any such agreement, and should not ask for waivers of obviously fundamental POBRA rights such as notice of formal charges and administrative appeal.

Given that an employee entering into an agreement that avoids the defects found in *Farahani* would thereby preserve most of the procedural protections against erroneous or improper terminations, a Department would not derive much advantage over the employee from extracting the type of side agreement that might remain valid after *Farahani*. It is primarily for this reason that we perceive *Farahani* as a near-mortal blow against the type of "last chance" agreements that the law enforcement agencies in this state have at times recently attempted to extract from

peace officers facing charges of terminable misconduct.

We welcome the *Farahani* decision, and urge public employers to henceforth carry out disciplinary proceedings within the well-considered boundaries adopted by the Legislature.

STAY SAFE!

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