LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

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SUPERIOR COURT INVALIDATES "LAST CHANCE" AGREEMENT AND ORDERS LAPD OFFICER REINSTATED

by
Michael P. Stone
and
Melanie C. Smith

In situations where peace officers face termination for misconduct, arrangements known as "last chance" agreements have become a popular settlement option. Under one of these agreements, the officer receives a final opportunity to address misconduct and performance problems, in exchange for agreeing to accept termination as the penalty for future misconduct.

While these agreements theoretically save jobs, and are an attractive solution to officers facing termination, they are highly susceptible to abusive implementation by employers. They are most often presented to the officer on a "take it or leave it basis," leaving little to no room for negotiation. Still, many officers choose to accept these agreements, believing their chances to be better under the agreement than their chances of fighting the misconduct charges - even when the evidence of misconduct is questionable.

"Last chance" agreements also operate outside of the Memorandum of Understanding (MOU), and are usually negotiated and executed without the employee association's or union's knowledge or involvement. The effect is that individual employees who are parties to the agreements are operating under a different set of rules than those incorporated within the MOU, which establish, for all members, how the process of investigation, adjudication, discipline, and appeals of misconduct cases are to be carried out. It follows that employees subject to "last chance" agreements will be treated differently, sometimes dramatically, than other bargaining unit members who are not subject to the agreements.

But more importantly, a "last chance" agreement gives the Department complete discretion to determine when the officer has committed future misconduct that violates the agreement, triggering termination. **The officer is then terminated without the right to an administrative appeal under the Fourteenth Amendment Due Process Clause and under the Public Safety Officers' Procedural Bill of Rights Act ("POBRA") at California Government**

Code §§ 3300 et seq., having "waived" those rights when he or she signed the agreement. Because such agreements purport to waive important due process rights, they are unenforceable as a matter of law.

In August 2009, we issued a brief about the case of *Farahani v. San Diego Community College District* (2009) 175 Cal. App. 4th 1486, which invalidated a "last chance" agreement between a community college professor and his employer, the community college district. Farahani was accused of making unwelcome sexual advances towards students and staff. The District served notice of intention to impose a one-year suspension. Before proceeding to a pre-disciplinary hearing, the District presented Farahani with a "last chance" agreement under which he would accept a salary reduction and promise to refrain from sexual harassment and 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. Farahani signed the agreement. The District then received new sexual harassment complaints against Farahani and terminated his employment without right of appeal.

Farahani petitioned for a writ of mandate, arguing that the "last chance" agreement was unenforceable. The Superior Court agreed with Farahani and invalidated the agreement. The Court of Appeal affirmed the decision, ruling that Farahani's waiver of the right to appeal amounted to the waiver of a statutory due process right established for a public reason under the California *Education Code*. Such a waiver is invalid under California *Civil Code*, section 3513.

In the wake of the *Farahani* decision, we predicted that, should a police agency's "last chance" agreement involving a waiver of appeal rights reach the courts, it would be similarly invalidated. Peace officer protections under POBRA are similar to the due process protections contained in the *Education Code*; and like the rights under the *Education Code*, POBRA rights were established for a public purpose. In a 2002 case we argued to the California Supreme Court, *County of Riverside v. Superior Court (Madrigal)* (2002) 27 Cal. 3d 793, **the Court held that POBRA is a law established for a public purpose - specifically, for the protection of a class of employees (police officers) - and not subject to blanket waiver.**

Our prediction materialized on August 24, 2010, when we petitioned the Superior Court to invalidate a "last chance" agreement between the Los Angeles Police Department and a police officer who had been terminated under that agreement. In this case, the officer entered into the "last chance" agreement to avoid a recommended termination for a 2006 incident in which he allegedly harassed and acted disrespectfully towards an on-duty officer from another agency. Under the agreement, he received a 22-day suspension and agreed to "resign" from the Department upon the receipt of any future complaints, sustained by the Chief, for acts of harassment towards officers of an outside agency or failure to cooperate with officers of an outside agency. As a condition of the agreement, he was required to sign a resignation form, which was to be

held in abeyance and "accepted" by the Chief if future complaints were sustained.

In 2008, the officer appeared off-duty at a hospital with a severe hand laceration. According to Department officials, he became disruptive in the emergency room, and Sheriff's deputies were called. The Department initiated a new complaint which the Chief of Police sustained, including a charge that the officer "failed to cooperate" with Sheriff's deputies. The Chief then determined to "accept" the officer's resignation. Because the officer "waived" his rights to appeal in the "last chance" agreement, he was summarily removed without any appeal or review.

Before the Superior Court, the City of Los Angeles argued that the officer was "not terminated," and instead had voluntarily resigned. The Court rejected this creative argument. Although the officer signed a resignation form as a condition of the "last chance" agreement, it was never his desire for the resignation to take effect. The Department, in its sole discretion, determined what kind of conduct was in violation of the agreement, and the officer was terminated.

The City argued that this case was distinguishable from *Farahani*, because *Farahani* dealt with the *Education Code*, rather than POBRA. But both laws give important due process protections to a class of employees - a fact the Court recognized. The City also cited *Madrigal* for the proposition that limited waivers of POBRA rights are valid, and argued that the waiver in this case was an example of a permissible limited waiver. But *Madrigal* was a limited decision: the waiver in *Madrigal* involved a deputy who had transferred to the sheriff's department from a police department, and was appointed conditionally, pending successful completion of a background investigation. The waiver Madrigal signed only provided that he could not review the background investigation, even if it disclosed a basis for rejection. And the waiver was limited in time and scope. **In contrast, this officer's case involved a permanent waiver of essential due process protections under POBRA and the Fourteenth Amendment. *Madrigal* preserved and embraced the rule that POBRA protections cannot be waived by private agreement.**

The agreement in this case provided that the officer:

> ...acknowledges that he has been apprised of his due process rights and the procedures available to contest such disciplinary action, and that he hereby explicitly waives all rights and remedies available either under the Los Angeles City Charter or state law in order to effectuate this Agreement.

The Chief of Police, in his unfettered discretion, could decide what future conduct constituted "harassment of...or failure to cooperate with officers of an outside agency" or "failure to comply with a written order" under the agreement, and then "accept" the officer's resignation. **The officer waived not only his Charter-given rights to a hearing, but also his statutory right to an administrative appeal under**

POBRA § 3304(b), and his constitutional rights to a full-blown, trial-type evidentiary appeal under the Fourteenth Amendment Due Process Clause afforded by an unbroken line of United States Supreme Court cases, such as *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). As early as *Garrity v. New Jersey*, 385 U.S. 493 (1967), it had been held that public employees' continued employment cannot be conditioned upon a waiver of constitutional rights. Therefore, POBRA § 3304(b) has a constitutional underpinning in the Fourteenth Amendment Due Process Clause.

The Superior Court agreed that *Farahani* controlled the outcome of this case, and ordered the City to reinstate the officer with backpay.

The effect of this ruling on future settlements in disciplinary actions remains to be seen. There are indications presently that the City plans to appeal. Performance contracts and settlement agreements are still viable, and in many cases are wholesomely invoked, so long as they don't purport to waive statutory or constitutional rights in the process of establishing performance standards and consequences for failures to meet those standards.

STAY SAFE!

Michael P. Stone
Melanie C. Smith
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Pasadena, CA

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 30 years, following 13 years as a police officer, supervisor and police attorney.

Melanie C. Smith is an associate with the firm and is a graduate of Loyola Law School, Los Angeles.