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LEGAL UPDATE

August 19, 2009

To: Superintendents/Presidents, Member School Districts (K-12)

From: Frank Zotter Jr., Sr. Associate General Counsel *FZ*

Subject: Use of "Last Chance" Agreement Barred by Education Code Provision
Prohibiting Waiver of Statutory Rights
Memo No. 24 -2009

On July 28, 2009, the California Court of Appeal, Fourth District, published its decision in *Farahani v. San Diego Community College District* (2009) ___ Cal.App.4th ___, 96 Cal.Rptr.3d 900 ruling against the College District in its dispute with former faculty member Sam Farahani, who had been terminated in June, 2006. The court's decision upholds a decision of the superior court that found a "last chance agreement" in which Farahani waived his right to a hearing on his termination was void under Education Code § 87485.¹

FACTS:

Farahani had been employed by the District since 1988. Beginning in 1994, he was accused of what both female students and staff described as unwanted social and sexual advances. In October, 2000, the District gave him a written reprimand after investigating some of the complaints. In September, 2004, the District gave him a notice of suspension that initiated a possible one-year suspension because of what the notice described as a continuing pattern of such behavior. In November, 2004, Farahani's attorney from his union presented him with a proposed settlement agreement, which the attorney told him he should sign or be suspended for a year without pay.

The agreement provided for Farahani to lose one month's pay, and that for an 18-month period he would refrain from various conduct, including personal contact or communications with students off-campus. The agreement also included a clause stating that if Farahani violated the agreement he could be terminated at will, without further formal proceedings, and that he waived all rights to appeal, including the right to bring a court action. His attorney told him that

¹ The equivalent section for certificated K-12 staff is Education Code § 44924.

“although the Agreement was ‘probably . . . not legal,’” it would be best for him to sign it and get it over with, so Farahani signed.

Subsequently there were new complaints from female staff members, which the District concluded could constitute sexual harassment or a hostile work environment. The District terminated Farahani in June, 2006 and, citing the 2004 Agreement, told him that he had no right to an administrative hearing regarding this termination.

Nine months later (shortly after the District had hired his replacement), Farahani filed a petition for a writ of mandate challenging the validity of the Agreement. The District relied on the terms of the 2004 Agreement, arguing that it was a valid contract by which Farahani settled the earlier disciplinary proceeding. The superior court, however, found that the Agreement was invalid under Education Code § 87485, which provides, in relevant part, “[A]ny 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’S DECISION:

The District appealed, and once again argued that the Agreement was not covered by Education Code § 87485, contending that Farahani had gotten the benefit of the resolution of the earlier disciplinary proceedings, and therefore could not challenge the Agreement. The court of appeal, however, found this argument “too narrow,” and stated,

It is significant that section 87485 appears under Article 1, “General Provisions.” By its terms, section 87485 renders null and void *any* agreement to waive the benefits of Chapter 3, “Employment.” (§ 87485, italics added.) The only exception is an agreement pertaining to reductions in force under section 87744, which appears in the more specific Article 6.5, “Reduction in Services.”²

The court of appeal rejected a host of other arguments by the District, including that the Agreement was permissible under Civil Code § 3513 (“anyone may waive the advantage of law intended solely for his benefit”), finding that as a public employee, Farahani’s rights were not established just for his private benefit. The court also pointed out that by waiving his right to challenge allegations of misconduct *in the future*, Farahani would in effect be unable to challenge even baseless claims against him.

The court also distinguished *Leithliter v. Board of Trustees* (1970) 12 Cal.App.3d 1095, which involved a voluntary resignation. The court also would not apply the provision of the 2004 Agreement in which Farahani’s had agreed not to sue, finding that, like Farahani’s waiver of his future due process hearings, the Agreement not to sue was also barred. The court also rejected arguments that Farahani had acted in bad faith because he had been told that the Agreement was “probably illegal,” but had signed it anyway, and that his delay in bringing the litigation had prejudiced the District because some of its potential witnesses were no longer available.

The District now owes Farahani more than three years of back pay and benefits. Farahani

² In relying so heavily on the Article and Chapter headings, the court of appeal apparently chose to disregard Education Code § 5, which provides, “Title, division, part, chapter, article, and section headings do not in any matter affect the scope, meaning, or intent of the provisions of this code.”

is not entitled to reinstatement just yet, however. The superior court's order (that the appeals court upheld) directed the District to decide whether it still wants to terminate him; if so, it must give him the full due process hearing he was denied in 2004. Because one of the District's arguments was that some witnesses were unavailable after the passage of three years, however, it is not clear whether the District can mount as effective a termination now as it could have if it had done so in 2006.

It is important to note that although this decision specifically dealt with community college district employees, last chance agreements between K-12 districts and their certificated employees are likely subject to the same analysis, given the similarity of language in Education Code § 44924 and § 87485. Accordingly, we recommend that such agreements also provide for some procedural rights for the employee, such as notice of the violation of the terms of the agreement and at least a limited right to respond to the employer's allegations.

IMPLICATIONS FOR DISTRICTS:

This decision can be cited in other pending court cases for the time being. Assuming that this case is not overturned by the California Supreme Court, it will make the use of "last chance" agreements ineffective if the agreement provides that the faculty member waives future due process rights. It may also undermine any such agreements currently in place between a school district and a faculty member. Districts might still want to use such an agreement, however, if it provides for some limited procedural protections (similar to a *Skelly*³ hearing), because the employee would still be able to challenge baseless or false accusations.

In addition, because the court of appeal relied so heavily on Education Code § 87485, such agreements are probably still valid if used between a district and a *classified* employee. Even then, however, such agreement should still provide for some minimal procedural rights for the employee, such as notice of the violation of the terms of the agreement and a limited right to respond to the employer's allegations.

At this time, we do not know if the San Diego District will petition the California Supreme Court to review the court of appeal's decision. It is also possible that other interested parties may ask that the Supreme Court review the case—or to "depublish" the case so that, while the results would still be the same for Farahani and the San Diego District, the decision would no longer be binding legal precedent on other districts.

We will notify you of any subsequent developments in the case. In the meantime if you have any questions, please contact one of the attorneys in our offices.

³ *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.