SHERIFF OF PALM BEACH COUNTY,

Appellant,

v.

PALM BEACH COUNTY POLICE BENEVOLENT ASSOCIATION, INC., Chartered by the FLORIDA POLICE BENEVOLENT ASSOCIATION, INC.,

Appellee.

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-6198

Opinion filed September 6, 2012.

An appeal from the Public Employees Relations Commission.

Mark E. Levitt, Michael Mattimore and Peter L. Sampo of Allen, Norton & Blue, P.A., Tallahassee, for Appellant.

G. "Hal" Johnson of the Florida PBA Inc., Tallahassee and Larry Fagan of the Palm Beach County PBA, Inc., West Palm Beach, for Appellee.

CLARK, J.

The Sheriff's Office of Palm Beach County appeals the final order of the Public Employees Relations Commission which determined that the Sheriff's Office violated section 447.501(1), Florida Statutes by refusing to process a former deputy's grievance to arbitration. The PERC ruled that the "Last Chance Contract"

entered into by the Sheriff's Office and the former deputy prior to the termination action did not constitute a waiver of *all* the former deputy's avenues to contest the termination and in this case, did not waive his right to grieve his termination under the grievance and arbitration clause of the collective bargaining agreement. The Commission ordered the Sheriff's Office to cease certain actions and to process the former employee's grievance to arbitration.

Finding no grounds to reverse under sections 120.68(7) or 447.504(2), Florida Statutes, the Commission's order is AFFIRMED.

BENTON, C.J., CONCURS; MAKAR, J., CONCURS WITH OPINION.

MAKAR, J., concurring.

Last chance agreements (LCAs), sometimes known as return to work agreements, are written contracts between employers and wayward employees designed to provide the latter with one more chance at workplace redemption or suffer the consequences, typically termination. See generally Peter A. Bamberger & Linda H. Donahue, Employee Discharge and Reinstatement: Moral Hazards and the Mixed Consequences of Last Chance Agreements, 53 Indus. & Lab. Rel. Rev. 3 (1999). They are enforceable if correctly and precisely drafted; those that are not can become Hydra-like to their drafters by cutting off remedial paths only to find that others remain or have sprouted. See Drew Sarrett, Last Chance Agreements For Federal Employees: Hidden Costs and Unseen Problems, 18 Fed. Circuit B.J. 157, 163 (2008); see also Martinez v. S. Fla. Water Mgmt. Dist., 705 So. 2d 611, 612 (Fla. 4th DCA 1997); Confessor Tony Ramirez v. Amalgamated Transit Union, 33 F.P.E.R. 209 (2007). As one commentator recently noted, a last chance agreement "is a simple concept in theory" but experience shows that leeway exists "for one more chance after the last chance." James J. Carty, One More Chance After The Last Chance: When Labor Arbitrators Fail To Enforce Last-Chance Agreements, 36 Okla. City U. L. Rev. 633, 634 (2011).

In this case, the Palm Beach Sheriff's Office entered the LCA with Sergeant

Brett Raban, a member of the Palm Beach County Police Benevolent Association, which represents his interests in this appeal. By entering the LCA, the Sheriff's Office bargained away its right to terminate Raban for his initial violations of rules and regulations but received in return the ability to terminate Raban for any future violations without Raban contesting them; at least that was the Sheriff's Office's intent.

The problem in this case is that the language of the LCA did not conclusively eliminate all of Raban's remedial options. A small window of ambiguity exists through which Raban plausibly asserts that he bargained away all his remedial rights, except the right to have an arbitrator decide whether the LCA should be applied to allow his termination due to his subsequent violation. This situation is much like that in United Steel Workers of America v. Century Aluminum of Kentucky, 157 F. App'x 869, 874 (6th Cir. 2005), where the court held that the last chance agreement at issue failed to clearly and unambiguously waive the issue of guilt; instead, it only waived the manner in which discipline could be imposed. The court noted that the employer could have drafted the agreement to exclude the issue of "factual guilt" from arbitration, but did not. Id. Likewise here, nothing prevented the Sheriff's Office from clearly and unambiguously excluding all avenues of relief or review including the arbitrability of factual guilt for the new violation alleged against Raban. Notably, both the

hearing officer and the Public Employees Relations Commission ("PERC") found that the LCA at issue was enforceable generally; and, per its terms, Raban could not appeal to a hearing review board. But, as PERC's final order noted, the LCA did not exclude all remedial possibilities, stating "[h]ad the Sheriff included language similar to that found in numbered paragraph one in the concluding paragraphs of the Agreement which excluded the option of 'challenge in any forum,' our analysis would be different." Because the LCA did not, I concur that affirmance is proper.