Date of Hearing: April 15, 2021

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT
Jim Cooper, Chair
AB 615 (Rodriguez) – As Introduced February 12, 2021

SUBJECT: Higher Education Employer-Employee Relations Act: procedures relating to employee termination or discipline

SUMMARY: Provides minimum rights, including due process, for specified medical, dental, and resident physician subspecialty personnel, including trainees, who work for a higher education employer, as provided, among other provisions. Specifically, **this bill:**

1) Requires a higher education employer to provide a procedure for all medical and dental interns, residents, persons in resident physician subspecialty programs, as specified, and other postgraduate medical and dental trainees in unaccredited programs, as specified, to challenge a termination of employment or disciplinary action by the employer. Regarding this procedure:

   a) A higher education employee must, before exercising a challenge, first exhaust any administrative or academic grievance processes that are available to that employee.

      Here, an administrative or disciplinary action taken by the higher education employer that is neither based on clinical nor academic matters that is subject to appeal under the employer's procedures are permitted to be grieved, and the exclusive representative is permitted to file a grievance following the result of the higher education employer's formal review.

   b) A challenge by an employee must be heard by a panel consisting of an exclusive representative designee, designated representative of the graduate medical education program, and an impartial hearing officer.

      Here, the panel must have the power to review the employer's action and provide a full remedy for termination of discipline without just cause. If the employee is represented by an exclusive representative, the impartial hearing officer or arbitrator must be jointly selected by the higher education employer and exclusive representative.

   c) Establishes the precedence of a memorandum of understanding (MOU) over these provisions, if the MOU provides for this procedure.

2) Exempts application of these provisions to a termination of employment or a disciplinary action based on academic or clinical matters that are excluded from the scope of representation.

3) Defines the following terms:

   a) "Academic or clinical matters" to mean those matters that relate to the employee's acquisition of core competencies and the development of the clinical skills necessary to function at the level of the employee's credential for licensure, practice, or board certification in the academic discipline or medical specialty.

   b) "Disciplinary action" to mean restriction, suspension, nonrenewal, or termination of employment.

EXISTING LAW:

1) Governs collective bargaining in the private sector under the federal National Relations Labor Relations Act (NLRA) but leaves it to the states to regulate collective bargaining in their respective public sectors.

   While the NLRA and the decisions of its National Labor Relations Board often provide persuasive precedent in interpreting state collective bargaining law, public employees have no collective bargaining rights absent specific statutory authority establishing those rights.

2) Provides several statutory frameworks under California law to provide public employees collective bargaining rights, govern public employer-employee relations, and limit labor strife and economic disruption in the public sector through a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employers and recognized public employee organizations or their exclusive representatives. These include the Higher Education Employer-Employee Relations Act (HEERA) of 1979 which provides for public employer-employee relations between employees of the UC, California State University, and Hastings College of Law.

3) Establishes the Public Employment Relations Board (PERB), a quasi-judicial administrative agency charged with administering certain statutory frameworks governing employer-employee relations, resolving disputes, and enforcing the statutory duties and rights of public agency employers and employee organizations, but provides the City and County of Los Angeles a local alternative to PERB oversight.

FISCAL EFFECT: Unknown. This bill is flagged as fiscal by Legislative Counsel.

COMMENTS: According to the author, "Currently, residents, interns and fellows (hereafter residents) can be disciplined and terminated for a matter not directly related to academic or clinical performance. Statute does not provide due process to certain medical and dental residents and trainees employed by public institutions of higher learning. [This bill] would provide that due process, while at the same time still afford the higher education employer the ability to discipline."

The author further states that, "Medical residents and interns employed by a publicly funded university lack basic due process rights that other public employees have. This oversight has left them subject to unfair disciplinary actions and even termination. Assembly Bill 615 would afford these residents and interns an impartial review of termination and disciplinary matters, thereby providing them due process. Particularly at a time when these health professionals are over worked and sacrificing so much, it is necessary to provide a basic level of fairness to them."

1) Rights and Obligations of Employers, Employees and Employee Organizations Under the HEERA, Generally

The HEERA explicitly requires that higher education employers (or their designated representatives) meet and confer with the employee organization that is the exclusive representative of an appropriate unit on all matters within the scope of representation. Generally, the scope of representation are those matters involving wages, hours, and other terms and conditions of employment. Similarly, the employee organization is obligated to meet and confer with the employer; thus, both parties have a duty to bargain. A failure to adhere to the rights, obligations and prohibitions by either a higher education employer or employee organization pursuant to the HEERA permits either party to file a grievance in the form of an unfair labor practice with the PERB.

2) The Scope of Representation Under the HEERA

As previously stated, the scope of representation are those matters involving wages, hours, and other terms and conditions of employment. Generally, under the HEERA, the scope of representation is limited to these matters and certain items are expressly excluded. Matters that are excluded are reserved to the employer and may not be subject to meeting and conferring, provided that nothing in statute is construed to limit the right of the employer to consult with employees or employee organization on any matter outside the scope of representation.[1]

At times, whether a matter is within the scope of representation is litigated. For example: In a case involving excluding the members of a union who were employees of the California State University (a HEERA-covered employers) from newly-built parking structures, the court held that a subject is within the scope of representation by higher education employees' exclusive bargaining representatives as a "term or condition of employment" if: 1) it involves the employment relationship, 2) it is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict, and 3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives, including matters of fundamental policy, essential to the achievement of the employer's mission.[2] In this case, the availability of parking and its costs were matters of concern to employees, and the terms and conditions of employment under which parking was available were plainly germane to working conditions.

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[1] See Section 3562 (q) of the Government Code.
[2] See *California Faculty Association v. Public Employment Relations Board*, 160 Cal.App.4th 609 (2008)

That conclusion was supported by the fact that parking fees were expressly dealt with as a benefit of employment in the agreement.

The termination if employment and disciplinary matters, both inherently involving the terms and conditions of employment, are very likely within the scope of representation because 1) they each involve the employment relationship, 2) are a concern to both management and employees, and 3) negotiating these matters would not abridge the freedoms of management to exercise its prerogatives, and thus, would involve some due process rights relating to this bill.

3) "Employees" in Public Institutions of Higher Education: Relevance to Assembly Bill 615

Although one could argue whether certain individuals working for a higher education employer covered by the HEERA are "employees," the following court ruling is significantly relevant to the subject and purposes of this bill.

In *Regents of the UC v. Public Employment Relations Board (California Association of Interns and Residents),* the court held that substantial evidence supported the PERB's finding that medical housestaff participating in residency programs of clinics, institutes, or hospitals owned or operated by the university were "employees" under Section 3560 et seq. of the HEERA. Here, housestaff spent substantial time on clinical activities and direct patient care, they performed procedures with little or no supervision, they provided professional guidance for interns, medical students, and other hospital employees, and they did not administer procedures on patients "to simply polish their skills." Even if the PERB found that medical housestaff participating in residency programs at clinics, institutes or hospitals owned or operated by the university were motivated by "educational objectives," it may classify them as employees if their objectives are subordinate to services they perform.…"[3]

4) Due Process Rights for Public Employees

In the context of Assembly Bill 615, termination of employment and disciplinary matters are acutely germane to the HEERA and the scope of representation. Each of these are equally important to both the employer and employee. In addition, the United States (U.S.) Constitution provides that "… nor shall any State deprive any person of life, liberty, or property, without due process of law."[4] The California Constitution provides that "… a person may not be deprived of life, liberty, or property without due process of law…"[5]

In the public sector, generally, employees who have a *property interest* in continued employment are entitled to due process (i.e., notice and a hearing) upon a proposed termination (or deprivation) of employment. The reason that these employees have these protections is because they have successfully completed a probationary period during which they were subject to

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[3] See 41 Cal. 3rd 601 (1986).
[4] See Fourteenth Amendment, U.S. Constitution.
[5] See Section 7 of Article I.

release.[6] When permanency is acquired, "permanent" employees can be dismissed only for cause as provided by the authorizing procedures. However, due process protections are not afforded to all employees. Those who are at-will (i.e., serve at the pleasure of the appointing authority) do not have a justified expectation in continued employment. Section 2292 of the Labor Code defines an at-will position as "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." In addition, those who are probationary and non-tenured employees, also do not have a property interest in continued employment and may be released without cause during their probationary period.[7] There are some exceptions (for example: classified school employees of school districts have a right to a pre-termination hearing if dismissed for cause or unsatisfactory performance during the school year, but not otherwise). Others who, in general, do not have such rights are temporary and substitute employees when they are hired to fill in for limited-term projects or periods.

Admittedly, employees who receive written or oral reprimands are not entitled to *Skelly* rights because a reprimand, in and of itself, does not entail the loss of property. It is also is acknowledged that precise due process procedures vary regarding employment termination (or deprivation) depending on statute, practice, and other factors. However, this bill maintains the state's fundamental interests in the development and continuity of harmonious and cooperative labor relations between the public institutions of higher education and their employees. The purpose of the HEERA is to limit labor strife through a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public higher education employers and recognized public employee organizations or their exclusive representatives.

5) Maintaining Higher Education Employer Grievance Processes and Procedures and Affording Additional Measures to Safeguard Against Potential Arbitrary or Capricious Employment Decisions

The provisions of this bill provide, among other things, that a higher education employee must first exhaust any administrative or academic grievance processes that are available to that employee before exercising a challenge. In this regard, the bill is deferential to a higher education employer's administrative or academic grievance processes.

Only after exhaustion of that process, and assuming that the employee is not satisfied with a determination or decision resulting from that process, is a covered employee afforded additional rights to challenge the employer's determination or decision regarding employment.

Establishing an additional process, whereby, a tripartite panel of individuals representing the interests of the employer and employee, respectively, and an impartial hearing officer, affords the employee an opportunity to challenge the employer's initial sole determination or decision which may be viewed as arbitrary or capricious from the employee's perspective.

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[6] See *Skelly v. State Personnel Board,* 15 Cal.3d 194 (1975)

[7] See *Lubey v. City and County of San Francisco,* 98 Cal.App.3d 340, 346 (1979)

This structure may foster fairness to employer and employee interests where concerns, information, facts, and evidence would be considered by an independent panel, and affords the employee a separate opportunity to seek resolution of an otherwise disagreeable decision or determination by the employer. In addition, the specified employees in the prescribed employment setting would be afforded at least a modicum of rights regarding their employment, especially regarding those matters that may be entered into their employment record that could have substantial negative effects on prospective employment opportunities that are not directly related to academic or clinical matters.

6) Comments by Supporters

According to the California State Council of the Service Employees International Union (SEIU California), "Many hospitals throughout California and the United States have due process review before an impartial hearing officer for their resident and intern physicians. Nationally, there were 15 discipline/termination arbitration cases impacting medical residents and interns over a 20 year period. We know these matters are infrequent but the impartial due process is available when necessary. UC already has due process before an impartial hearing officer for all other employees so they are familiar with the process and already have established procedures in place. Their long-established human resources/labor relations departments handle these matters and are very familiar with the grievance and arbitration processes."

In addition, SEIU California states that, "California's resident and intern physicians employed by the UC system do not enjoy the same due process rights as other public employees, including others employed by UC. This discrimination has left resident and intern physicians particularly exposed to unfair disciplines and terminations without the impartial consideration such a decision warrants. These resident and intern physicians are particularly vulnerable – competition is steep and without completion of a residency these physicians are unable to practice medicine in California. Assembly Bill 615 is neither radical nor a departure from current law. It simply provides an impartial review of disciplinary and termination matters that are unrelated to academic or clinical matters. There is no reason to continue to deny medical residents the equal treatment that is afforded to other public employees."

7) Prior or Related Legislation

Assembly Bill 2114 (Rodriguez, 2020) was similar in its purpose regarding as the current bill. This bill was vetoed by the Governor who stated that:

> *"This bill would require certain higher education employers to provide an arbitration or hearing officer process to challenge a termination of employment or a disciplinary action for medical and dental interns and residents. The bill excludes disciplinary actions and terminations based on academic or clinical matters, making arbitration available only for matters within the scope of representation.*

"These residents and interns represent our State's pipeline of medical professionals, and they have been on the frontlines of the COVID-19 pandemic. They deserve an opportunity to challenge a disciplinary action or termination of employment that may be wrongful and that could potentially jeopardize their professional career. However, I believe that the definition of "academic" and "clinical" in this bill is too narrow and does not fully consider the various criteria used in determining a resident's readiness to safely practice.

"I encourage the affected parties to agree upon a definition that both protects employees' due process rights and patient safety."

Chapter 854, Statutes of 2017 (Senate Bill 201, Skinner) amended the HEERA to provide collective bargaining rights to student employees at the University of California (UC), California State University (CSU), and Hastings College of Law, whose employment is contingent on their status as students.

REGISTERED SUPPORT / OPPOSITION:

Support

Service Employees International Union, California *(Sponsor)*
California Academy of Family Physicians
California Chapter of the American College of Emergency Physicians
California Labor Federation, AFL-CIO
California Professional Firefighters
California School Employees Association, AFL-CIO
Los Angeles County Democratic Party
United Auto Workers, Local 2865
United Auto Workers, Local 5810
University Professional and Technical Employees-Communication Workers of America, Local 9119

Opposition

University of California *(Oppose Unless Amended)*

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