SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1406 (Durazo)
Version: February 18, 2022
Hearing Date: April 19, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Excluded employees: binding arbitration

DIGEST

This bill gives managerial, confidential, supervisory, and other excluded state employees the option, after exhausting normal grievance procedures, of requesting binding arbitration as a method for resolving disputes with their State employers.

EXECUTIVE SUMMARY

Most California state employees are represented by unions. However, because of the managerial or supervisorial nature of their work, or because they handle confidential human resources information, some state workers cannot be part of these unions. Such employees are known as "excluded employees." To ensure protection of excluded employees' workplace rights, the Legislature enacted the Excluded Employees Bill of Rights (EEBR) in 1990. Among other things, the EEBR permits excluded employee organizations to represent their excluded members in employment relations with the State. If excluded employees have a grievance against their employer, state regulations establish levels of administrative review that the employees must exhaust before they can file a civil action in court. The author of this bill contends that, instead of engaging seriously at the various levels of the grievance process, state agencies routinely deny grievances and wait to engage until after the excluded employee has taken the more drastic step of pursuing the matter in civil court or with the State Personnel Board. To address the problem, this bill would give an employee organization representing an excluded employee the option of requesting binding arbitration, instead of a lawsuit in court, as the final stage of the established grievance resolution procedure.

The bill is sponsored by CalFire Local 2881. It has support from a handful of public supervisory employee associations. There is no opposition to the bill on file. The bill passed out of the Senate Committee on Labor, Public Employment and Retirement by a vote of 5-0. If it passes out of this Committee, it will next be heard by the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the Bill of Rights for State Excluded Employees which generally provides rights for excluded employees in grievances against state employers. (Gov. Code § 3525.)

2) Provides the following definitions:
   a) "employee" means a civil service employee of the State of California, which includes those state agencies, boards, and commissions as may be designated by law that employ civil service employees, except the University of California, Hastings College of the Law, and the California State University;
   b) "excluded employee" means all managerial employees, as defined, all confidential employees, as defined, all supervisory employees, as defined, and all civil service employees of the Department of Human Resources, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the Public Employment Relations Board, conciliators employed by the California State Mediation and Conciliation Service, employees of the office of the State Chief Information Officer, except as provided, and intermittent athletic inspectors who are employees of the State Athletic Commission;
   c) "supervisory employee organization" means an organization that represents members who are supervisory employees, as defined;
   d) "excluded employee organization" means an organization that includes excluded employees of the state, as defined, and that has as one of its primary purposes representing its members in employer-employee relations; and
   e) "state employer" or "employer," for purposes of meeting and conferring on matters relating to supervisory employer-employee relations, means the Governor or the Governor's designated representatives. (Gov. Code § 3527.)

3) Provides excluded employee organizations the right to represent their excluded members in their employment relations, including grievances, with the State of California. (Gov. Code § 3530.)

4) Provides that the scope of representation for supervisory employees includes all matters relating to employment conditions and supervisory employer-employee relations including wages, hours, and other terms and conditions of employment. (Gov. Code § 3532.)

This bill:

1) Enacts the Excluded Employee Arbitration Act and authorizes an employee organization representing an employee who has filed a grievance with the California Department of Human Resources (CalHR) to request arbitration of the grievance if all of the following conditions are met:
   a) the grievance alleges a dispute that is subject to specified procedures;
   b) the grievance has not been resolved to the employee organization's satisfaction after either of the following occur, as applicable, pursuant to CalHR regulations governing grievances for excluded employees: (1) the fourth level of review; or (2) in cases where there is no fourth level of review, the third level of review; and
   c) the employee organization requests arbitration in writing, submitted to CalHR, within 21 days of a decision rendered in either of the following, as applicable: (1) the fourth level of review; or (2) in cases where there is no fourth level of review, the third level of review.

2) Provides the following definitions:
   a) "excluded employee" means an excluded employee of the state, as defined;
   b) "employee organization" means any organization that represents excluded employees of the State of California;
   c) "employer" means the State of California; and
   d) "arbitration" means the binding ruling that resolves an excluded employee grievance at the fifth level of the excluded employee grievance process.

3) Requires, after a request for arbitration is made, that CalHR and the employee organization designate a standing panel of at least 20 arbitrators to be available for arbitration.

4) Provides that if there are fewer than three arbitrators available, then the employee organization or the employer may obtain the names of an additional five arbitrators from the California State Mediation and Conciliation Service within the Department of Industrial Relations.

5) Authorizes the employee organization and the employer to consecutively strike any arbitrator from the standing panel until the name of one arbitrator is agreed upon or, if no agreement is made, the last remaining person on the panel shall be designated the arbitrator.

6) Requires the name of the chosen or the sole remaining arbitrator to be submitted in writing to CalHR.

7) Provides that if the employee organization does not submit its choice of an arbitrator within 45 days after requesting arbitration, the request for arbitration would be considered withdrawn.

8) Requires the arbitrator to issue a decision for each grievance heard during the arbitration and require the decision to be based solely on the written record in the grievance, the grievance response, and the oral presentations made at the arbitration.

9) Makes the arbitrator's decision legally binding.

10) Requires the arbitrator to issue a written decision within 45 days of the conclusion of the hearing.

11) Requires the arbitrator to order the nonprevailing party to pay the cost of the arbitration, however, the arbitrator could not order the excluded employee to pay the cost of the arbitration nor could the excluded employee's representative pass the cost on to the excluded employee.

12) Sets forth the intent of the Legislature that: (1) state excluded employees shall have the right to arbitration as a fifth step to the excluded employee grievance procedure; (2) the present grievance procedure leaves too many grievances unresolved; and (3) this lack of resolution has caused more cases to be filed in California's courts, which should have been resolved at a lower level.

COMMENTS

1. Utility of arbitration in this context

Historically, this Committee has shown skepticism toward the use of arbitration as a substitute for court proceedings. Arbitration can be arbitrary, as there is little binding the arbitrator to follow the law and rarely any avenue for appeal. (*See Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, holding that a court is not permitted to vacate an arbitration award based on errors of law by the arbitrator, except for certain narrow exceptions.) Arbitration frequently happens confidentially, resulting in no procedural transparency and allowing bad actors to keep misdeeds hidden from public view. Finally, there is some evidence that arbitration breeds conflicts of interest, since one side – usually the employer in the case of workplace disputes – frequently picks and pays the arbitrator, creating incentives to rule in that side's favor in order to generate more business in the future.

In some contexts, however, voluntary arbitration can be a faster, more cost-effective method for resolving disagreements. In particular, where the parties mutually agree to arbitration as the avenue to resolve a known dispute, voluntary arbitration can serve to

bring conflicts to a swift conclusion. This is in contrast to mandatory, pre-dispute arbitration agreements, which are generally imposed unilaterally on terms that may no longer make sense or seem fair to the aggrieved party once an actual dispute arises.

Where, as in the case of a collective bargaining agreement, there is a sufficient balance of bargaining power between the parties, even mandatory arbitration is more likely to be the result of a free and informed choice, rather than coercion.

In the case of this bill, both preconditions for fair and freely chosen arbitration are in place. First, excluded employees are represented by a union and therefore have stronger bargaining leverage than an individual employee would. Second, the bill does not force employees to agree to arbitration pre-dispute, but rather gives them the option to choose arbitration at a time when they know what is at stake and can make an informed decision.

2. Who pays for the arbitration?

Under the bill's provisions, the party that loses the arbitration must pay the costs of the arbitration. In the event that the employee loses the arbitration, however, it is the employee organization – not the individual employee – that pays.

3. Prior legislative efforts to address the issue

Over the years, several pieces of legislation have attempted to provide excluded employees with mediation or arbitration of a grievance as an alternative to, or a step prior to, the filing of a civil action. (*See* Prior Legislation, below, for greater detail.) The last several iterations have been nearly identical to this bill, with only nuanced differences.

SB 950 (Nielson, 2016) passed the Assembly 75-1 and the Senate 39-0, but was then vetoed by Governor Brown. In his veto message, the Governor wrote:

> This bill adds arbitration to the existing four-step grievance process for state supervisors. Expanding the grievance process for the state's managers to include legally binding arbitration will reduce [CalHR's] ability to effectively manage state operations and will result in significant unbudgeted state costs.

SB 950 would have applied to all alleged violations of Title 2 of the California Code of Regulations. Title 2 covers a wide variety of issues related to the administration of state government. The operations of the Secretary of State's office and the Department of Fair Employment and Housing are part of Title 2, for example. Theoretically, therefore, SB 950 could have applied the arbitration option to matters involving the operation of those entities.

SB 179 (Nielson, 2019) was identical to SB 950, except that SB 179 would only have applied to disputes subject to the procedures established in Section 599.859 of Title 2. That is, SB 179 would have applied only to "a dispute of one or more excluded employees involving the application or interpretation of a statute, regulation, policy or practice that falls under the jurisdiction of [CalHR]." (2 C.C.R. § 599.859(b)(1).)

Despite the narrowing, SB 179 met a similar fate to SB 950. It passed the Senate 38-0 and the Assembly 74-0, but also fell victim to the Governor's veto pen, this time in the hands of Gavin Newsom. In his message rejecting SB 179, Governor Newsom wrote:

> Expanding the right to arbitrate to state managers and supervisors will result in increased costs not contemplated in the 2020 Budget at a time when the State is facing massive cost pressures due to the COVID-19 pandemic.

Apparently undaunted by these repeated rejections, Senator Nielsen introduced what amounted to the same bill yet again in 2021. (SB 76, Nielsen, 2021). The only modification was the inclusion of a sunset clause, set to expire on January 1, 2027. Predictably, SB 76 sailed through the Legislature without a single vote in opposition and, equally predictably, Governor Newsom promptly vetoed it. Governor Newsom wrote:

> Current law allows managers and supervisors to pursue resolution of disagreements through a four-step grievance process and pursue a claim with the State Personnel Board. SB 76 would add a costly step to this process. Additionally, SB 76 would permit excluded employees to arbitrate the Department of Human Resources' (CalHR) authorizing statutes, regulations, policies, and/or practices before non-governmental entities. This could lead to conflicts with the statutory authority delegated to CalHR and the Legislature.

This bill is essentially identical to its predecessors.

4. Arguments in support of the bill

According to the author:

> The current employee grievance process for excluded employees creates a different and confusing process for resolving such grievances that excludes a neutral decision-maker without filing a lawsuit. The lack of fairness and efficiency is one factor in creating a system where employees do not want to promote, as supervisors and managers do not presently have a mechanism to address on-the-job concerns. SB 1406 would give state managerial and

> supervisor employees the option to follow the same grievance and arbitration processes that are already in use for most state employees and are already proven to work.

As sponsor of the bill, CalFire Local 2881 writes:

> The grievance resolution process for excluded employees creates unintended consequences. Specifically, the confusing process does not allow for a neutral party to make the decision shy of filing a lawsuit. While complaints are not rampant, the fighting of fires has become more complex and on-the-job grievances do occur. Firefighters resist promoting to managerial and supervisorial ranks because they believe they lose their voice in a dispute.

SUPPORT

CalFire Local 2881 (sponsor)
California Association of Professional Scientists
Professional Engineers in California Government

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1714 (Cooper, 2022) is identical to this bill, except that it contains a sunset clause which repeals the bill as of January 1, 2028.

Prior Legislation:

SB 76 (Nielsen, 2021) was identical to this bill, except that it contained a sunset clause which would have repealed the bill as of January 1, 2027. In his message vetoing SB 76, Governor Newsom wrote: "Current law allows managers and supervisors to pursue resolution of disagreements through a four-step grievance process and pursue a claim with the State Personnel Board. SB 76 would add a costly step to this process. Additionally, SB 76 would permit excluded employees to arbitrate the Department of Human Resources' (CalHR) authorizing statutes, regulations, policies, and/or practices before non-governmental entities. This could lead to conflicts with the statutory authority delegated to CalHR and the Legislature."

SB 179 (Nielsen, 2019) was identical to this bill, except that SB 179 did not contain a sunset clause. In his message vetoing SB 179, Governor Newsom wrote: "Expanding the right to arbitrate to state managers and supervisors will result in increased costs not

contemplated in the 2020 Budget at a time when the State is facing massive cost pressures due to the COVID-19 pandemic."

SB 76 (Nielsen, 2017) was, as introduced, nearly identical to this bill. SB 76 was subsequently gutted and amended to address other matters.

SB 950 (Nielsen 2016) was substantially similar to this bill. In his message vetoing SB 950, then Governor Brown wrote: "This bill adds arbitration to the existing four step grievance process for state supervisors. Expanding the grievance process for the state's managers to include legally binding arbitration will reduce departments' ability to effectively manage state operations and will result in significant unbudgeted state costs."

AB 526 (Evans, 2007) was nearly identical to AB 1584, below. AB 526 died in the Assembly Committee on Appropriations.

AB 1584 (Evans, 2006) would have established the Excluded Employees Mediation Act, permitting excluded employees to request mediation after the fourth level of grievance review. AB 1584 died in the Senate Committee on Appropriations.

AB 1258 (Matthews, 2003) was nearly identical to AB 2802, below. AB 1258 died at the Assembly Desk without referral to a policy committee.

AB 2802 (Strom-Martin, 2002) would have established arbitration procedures for supervisory employees of the Department of Corrections and the California Youth Authority. AB 2802 died in the Assembly Committee on Appropriations.

SB 511 (Ayala, Chapter 1522, Statutes of 1990) enacted the Excluded Employees Bill of Rights which permits, among other things, excluded employee organizations to represent their excluded members in employment relations, including grievances, with the State.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 5, Noes 0)

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