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**SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT**  
**Senator Dave Cortese, Chair**  
**2021 - 2022 Regular**

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**Bill No:** SB 206 **Hearing Date:** March 8, 2021  
**Author:** McGuire  
**Version:** January 11, 2021  
**Urgency:** No **Fiscal:** Yes  
**Consultant:** Glenn Miles

**SUBJECT:** Firefighters Procedural Bill of Rights Act

**KEY ISSUE**

Should the state extend enhanced procedural job protections under the Firefighters Procedural Bill of Rights Act (FFBOR) to temporary, seasonal firefighters employed by the California Department of Forestry and Fire Protection (CAL FIRE)?

**ANALYSIS**

**Existing law:**

- 1) Provides state employees with certain due process rights under the state constitution and existing statutory provisions whenever the state conducts adverse actions against a state employee (Government Code § 19570 et seq.).
- 2) Requires that the terms and conditions of employment for state employees be subject to collective bargaining between the state employer as represented by the California Department of Human Resources (CalHR) and the employees' exclusive representative (GC § 3512 et seq.).
- 3) Provides enhanced procedural rights to any firefighter under FFBOR related to political activity, interrogation, punitive action, and administrative appeals (GC § 3251).
- 4) Defines "firefighter" under FFBOR to mean any firefighter employed by a public agency, including, but not limited to, any firefighter who is a paramedic or emergency medical technician, irrespective of rank (GC § 3251 (a)).
- 5) Excludes from FFBOR's definition of "firefighter" an inmate of a state or local correctional agency that performs firefighting or related duties or any person covered by the Public Safety Officers Procedural Bill of Rights Act (POBOR) (GC § 3251 (a)).
- 6) Excludes from FFBOR's protection any employee that has not completed a probationary period established by the employer as a condition of employment (GC § 3251 (a)).
- 7) Requires that permanent appointment and promotion in the state civil service be made under a general system based on merit ascertained by competitive examination and includes in the civil service every officer and employee of the State unless exempted by the Constitution (Cal. Const., art. VII, sec. 1).
- 8) Authorizes temporary appointments, as specified, but prohibits any temporary employee from working more than 9 months in any 12-month period (Cal. Const., art. VII, sec. 5; GC § 19058).
- 9) Requires permanent employees appointed to the civil service to serve probationary periods (GC § 19171).
- 10) Excludes inmates in correctional facilities from the civil service (Cal. Const., art. VII, sec. 4(j)).

- 11) Authorizes the California Department of Corrections to require prisoners to work, as specified; authorizes any state or federal agency to cause prisoners to work, as specified; and permits CDCR to enter into contracts to facilitate the required employment of prisoners (Penal Code §§ 2701 and 2780).
- 12) Requires the Director of Corrections to determine which prisoners are eligible for employment and to develop employee eligibility lists as specified. Requires the agency providing work (i.e., CAL FIRE) to designate and supervise all work done by the prisoners (PC §§ 2781 and 2787).
- 13) Authorizes CDCR to establish forestry camps for juvenile youth and to require juvenile youth to work, as specified, including in support of fire suppression activities. Authorizes county boards of supervisors to provide payment of wages to juvenile youth working at the forestry camps (Welfare and Institutions Code §§ 883, 884, and 1760.4).

**This bill:**

Defines “firefighter” for purposes of FFBOR to include a temporary, seasonal firefighter employed by CAL FIRE “notwithstanding” existing statutory language that excludes inmate firefighters; persons covered under POBOR; and *any employee who has not successfully completed a probationary period.*

**COMMENTS****1. Need for this bill?**

According to the author, CAL FIRE employs many seasonal firefighters for multiple years but these employees currently have no appeal rights to contest terminations because current law excludes them from FFBOR.

In recent litigation<sup>1</sup>, a superior court found that a seasonal firefighter employed by CAL FIRE had no right to appeal his dismissal by CAL FIRE to the State Personnel Board (SPB) based on a claim that CAL FIRE violated the employee’s rights under FFBOR. SPB argued that it had no jurisdiction to hear the appeal under FFBOR since the employee (by virtue of holding a temporary appointment) had never passed a probationary period. Although the seasonal firefighter had a right to (and CAL FIRE did provide) a “name clearing” hearing, that process was limited to removing the “with cause” designation on the employee’s separation.

It is unclear why SPB refused to hear the employee’s appeal of adverse action against the seasonal employee under Government Code 19575 as opposed to GC § 3251 (i.e., FFBOR). It appears the employee’s petition alleged rights only under GC § 3251 which did not apply. Nevertheless, GC 19575 specifies that an employee’s answer to an adverse action “shall be deemed a denial of all the allegations...and *a request for hearing or investigation as provided in this article.* It is also unclear why SPB didn’t review the employee’s appeal under a possible violation of the grievance procedures contained in his Bargaining Unit MOU with CAL FIRE.

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<sup>1</sup> CAL FIRE Local 2881, et al., v California State Personnel Board, et al., 12/1/20, Superior Court of California, Sacramento County, No. 34-2020-80003329.

This bill would ensure that the enhanced protections available to CAL FIRE firefighters with permanent appointments under FFBOR would also be available to CAL FIRE firefighters with temporary appointments.

### State Employment

The state constitution mandates that every officer and employee of the state is part of the civil service except for specific positions exempted by the constitution (e.g., elected officials, legislative employees, inmates in correctional facilities, etc.) and requires that permanent appointment to and promotion in the civil service be based on merit ascertained by competitive examination. The constitution further establishes the State Personnel Board (SPB) and endows it with the task of enforcing the civil service statutes, prescribing probationary periods and classifications, adopting other rules authorized by statute, and reviewing disciplinary actions.

### Permanent Appointment versus Temporary Appointment

Permanent appointment to the civil service implicates participation in a merit-based process that includes candidate examination, selection from qualified employment lists of eligible candidates, and passage of a probationary period, upon which certain rights and responsibilities inure to the employee.

However, the constitution authorizes temporary appointment to state positions “for which there is no employment list” and limits a person from serving under a temporary appointment longer than 9 months in 12 consecutive months.

CAL FIRE employs state employees who hold both permanent and temporary appointments to their respective positions. While state employees who hold permanent appointments are subject to probationary periods, “seasonal” firefighters serve in temporary appointments and do not serve probationary periods. Since the Constitution foresees that these appointments are temporary in nature there is no expectation that employees need serve probationary periods leading to permanent civil service status.

### “employee” versus “employed by”

Please see “Recommended Committee Amendments” below for additional context. Although the constitution and the state civil service act clearly provide that a state employee means a member of the civil service (whether through a permanent or temporary appointment), other statutory provisions and case law using terminology such as “employed by” instead of “employee” create opportunities for misunderstanding and creative judicial interpretation. This bill parrots FFBOR’s terminology “employed by” rather than the term “employee”. According to Black’s Law Dictionary, “employed” signifies both the act of doing a thing and the being under contractor orders to do it. U. S. v. Morris, 14 Pet. 475, 10 L. Ed. 543; U. S. v. The Catharine, 2Paine, 721, Fed. Cas. No. 14.755.”<sup>2</sup>

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<sup>2</sup> Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed, <https://thelawdictionary.org/employed/>, 3/2/21

Penal Code 2716 authorizes CDCDR to “enter into agreements with other state agencies for the use of inmates...to perform work...” PC 2780 authorizes any department to “use or cause to be used convicts confined in the state prisons to perform work necessary and proper to be done by them at permanent, temporary, and mobile camps to be established under this article. The director may enter into contracts for the purposes of this article.”

In this sense, CAL FIRE does “employ” seasonal inmate firefighters to assist its permanent and temporary employees in fire suppression efforts each year. Additionally, other public agencies such as counties “employ” the same and juvenile youth under the jurisdiction of CDCR.

FFBOR’s current statutory construction in GC 3251 (a) that specifically excludes inmate firefighters indicates a concern that without the exclusionary language, FFBOR would extend coverage to the inmate firefighters regardless of the fact they are not state employees. Committee staff therefore, recommend amendments to clarify that this bill’s expansion of FFBOR apply only to *state employees* of CAL FIRE and not to any person “employed by” CAL FIRE.

## **2. Collective Bargaining**

The Dills Act requires that the terms and conditions of employment for state employees be subject to collective bargaining between the state employer as represented by the California Department of Human Resources (CalHR) and the employees’ exclusive representative. The provision of enhanced procedural rights for a group of state employees, particularly those represented by a bargaining unit, are arguably a matter that the respective parties should collectively bargain. Imposing rights statutorily “sets” the bargaining table in favor of one party over the other and impairs the collective bargaining process.

On the other hand, temporary or seasonal employees may be particularly disadvantaged in bargaining if the employer seeks to leverage their petitions in exchange for concessions from employees with permanent appointments.

## **3. Background on Inmate Firefighters and the Conservation Camp Program**

CDCR operates approximately 43 conservation camps, i.e., fire camps, in cooperation with CAL FIRE and the Los Angeles County Fire Department, with plans to reduce the number by eight. The program supports state, local and federal government agencies that respond to emergencies such as fires, floods, and other natural or manmade disasters. CDCR reports that approximately 3,100 inmates work at fire camps, and approximately 2,200 inmates are fire-line qualified (See <<https://www.cdcr.ca.gov/conservation-camps/>>).

According to CDCR,

Inmates receive the same entry-level training as CAL FIRE’s seasonal firefighters as well as ongoing training from CAL FIRE throughout their time in the program. An inmate must volunteer for the fire camp program, and some convictions automatically make an inmate ineligible for fire camp assignment, including sex offenses, arson, and escape with force or violence. Inmate volunteers must have “minimum custody” status, or the lowest classification for inmates based on their sustained good behavior in prison, their

conforming to rules within the prison and participating in rehabilitative programming. CDCR is responsible for the selection, supervision, care and discipline of the inmates. CAL FIRE maintains the camp, supervises the work of the inmate fire crews, and is responsible for inmate custody while on daily grade projects. In addition to fighting fires, inmate firefighters perform conservation and community service projects, including clearing brush and fallen trees to reduce the chance of fire, maintaining parks, sand bagging, flood protection and reforestation.

#### 4. Recommended Committee Amendments

The bill, as drafted, creates uncertainty as to whether it would extend FFBOR to seasonal inmate firefighters and the public safety officers that supervise them. Under current GC §3251(a), FFBOR does *not* apply to 1) an inmate firefighter; 2) a public safety officer subject to POBOR; or 3) any employee who does not complete the probationary period. Committee staff believes the author intends to address the third limitation only and retain the limitations on inmate firefighters and public safety officers. In any case, the bill's "notwithstanding" language creates confusion as to whether it also negates the first two limitations such that FFBOR would now apply to inmate firefighters and also to public safety officers serving as seasonal firefighters, either as supervisors of the inmate firefighters or in some other capacity. Additionally, it is unclear how the bill's provisions would treat seasonal firefighters from juvenile youth conservation camps operated jointly by counties, CDCR, and CAL FIRE.

The Penal Code and the Welfare and Institutions Code generally govern prisoner and juvenile labor (see above, Existing Law). However, committee staff recommends the following amendments to make clear that the bill's proposed expansion of FFBOR does not extend to inmate, juvenile youth, and public safety personnel, especially given the evolving nature of the employment relationship under California law through recent judicial case law and related legislation.

**3251.** For purposes of this chapter, the following definitions apply:

(a) (1) "Firefighter" means any firefighter employed by a public agency, including, but not limited to, any firefighter who is a paramedic or emergency medical technician, irrespective of rank. However, "~~firefighter~~" ~~does not include an inmate of a state or local correctional agency who performs firefighting or related duties or persons who are subject to Chapter 9.7 (commencing with Section 3300). This chapter does not apply to any employee who has not successfully completed the probationary period established by the employee's employer as a condition of employment.~~

*(2) Notwithstanding paragraph (1), "firefighter" also means a temporary, seasonal firefighter employed by the Department of Forestry and Fire Protection. "Firefighter" also means an employee of the Department of Forestry and Fire Protection holding a temporary appointment to a firefighter position and employed as a seasonal firefighter.*

(2) Notwithstanding paragraph (1), “firefighter” does not include an inmate of a state or local correctional agency who performs firefighting or related duties or persons who are subject to Chapter 9.7 (commencing with Section 3300).

(3) This chapter does not apply to any employee who has not successfully completed the probationary period established by the employee’s employer as a condition of employment. For purposes of this paragraph, an employee of the Department of Forestry and Fire Protection holding a temporary appointment to a firefighter position and employed as a seasonal firefighter shall be deemed to have successfully completed the requisite probationary period if the Department of Forestry and Fire Protection employs the firefighter in the same classification for a second fire season immediately subsequent to the first.

(b) “Public agency” has the meaning given that term by Section 53101.

(c) “Punitive action” means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

## **5. Proponent Arguments**

According to the California Professional Firefighters,

Temporary or seasonal firefighters employed by the California Department of Forestry and Fire Protection are not currently covered by the existing law. Those dedicated firefighters in the job classification of a Firefighter-1, perform work that is just as important and necessary for the state’s ongoing battle against increasingly dangerous wildfires, and yet are at risk of unfair employment practices with little to no recourse or protection. It is plainly unfair for one group of firefighters to be left without these protections even though they are doing similarly important and dangerous work.

## **6. Opponent Arguments:**

None received.

## **7. Double Referral:**

This bill has also been referred to the Senate Judiciary committee.

## **8. Prior Legislation:**

AB 2941 (Flora) 2020, was identical to this bill. The bill died in the Assembly Governmental Organization Committee.

AB 220 (Bass), Chapter 591, Statutes of 2007, established the Firefighter Bill of Rights.

**SUPPORT**

CAL FIRE Local 2881  
California Professional Firefighters  
United Public Employees

**OPPOSITION**

None on file.

**-- END --**