

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

SB 206 (McGuire)  
Version: March 15, 2021  
Hearing Date: March 23, 2021  
Fiscal: Yes  
Urgency: No  
TSG

**SUBJECT**

Firefighters Procedural Bill of Rights Act

**DIGEST**

This bill provides temporary, seasonal firefighters with the workplace protections contained in the Firefighters' Procedural Bill of Rights once they have successfully completed work on one fire season.

**EXECUTIVE SUMMARY**

The Firefighters' Procedural Bill of Rights (FPBOR) enhances the workplace rights that firefighters can exercise in relation to political activity, interrogation, punitive action, and administrative appeals. Not all firefighters qualify for FPBOR's protections, however. Of particular relevance to this bill, existing law excludes from FPBOR firefighters who have not completed their "probationary period." Based on that exclusion, a California court recently ruled that temporary, seasonal firefighters are not protected by FPBOR, since they do not have a "probationary period," and therefore cannot, according to the Court, "complete" that period. The ruling is currently on appeal. This bill would settle the matter – prospectively though not for the particular case -- by amending FPBOR to cover temporary, seasonal firefighters beginning in their second fire season immediately following the first.

The bill is author sponsored. Support comes from public employee and professional firefighters' unions, who assert that temporary, seasonal firefighters do substantially similar work to that of full-time firefighters and therefore deserve the same workplace rights. There is no known opposition at this time. The bill passed out of the Senate Labor, Public Employment, and Retirement Committee by a vote of 5-0.

## PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides firefighters, pursuant to the Firefighters' Bill of Rights (FPBOR), with enhanced procedural rights in relation to political activity, interrogation, punitive action, and administrative appeals. (Gov. Code § 3250 *et seq.*)
- 2) Defines "firefighter," under FPBOR, 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. (Gov. Code § 3251(a).)
- 3) Excludes from FPBOR's definition of "firefighter" both:
  - a) an inmate of a state or local correctional agency that performs firefighting or related duties; and
  - b) any person covered by the Public Safety Officers Procedural Bill of Rights Act (POBOR). (Gov. Code § 3251(a).)
- 4) Excludes from FPBOR's protections any employee that has not completed a probationary period established by the employer as a condition of employment. (Gov. Code § 3251(a).)

This bill:

- 1) Provides that temporary, seasonal firefighters employed by the Department of Forestry and Fire Protection are protected by FPBOR upon successful completion of their probationary period.
- 2) Deems a temporary, seasonal firefighter 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.

## COMMENTS

### 1. About the Firefighters Procedural Bill of Rights (FPBOR)

Enacted in 2007, the FPBOR provides firefighters with an additional layer of workplace protections in recognition of the unique and dangerous nature of firefighting work. (AB 220, Bass, Ch. 591, Stats. 2007.) Specifically, firefighters protected by FPBOR have enhanced procedural rights in relation to political activity, interrogation, punitive action, and administrative appeals.

Firefighters protected by FPBOR cannot be prevented from, or coerced into, engaging in political activity except when on duty or in uniform. (Gov. Code § 3252(a).) Similarly,

they have a right to run for a seat or serve on a local government board, as long as it is not the board of the agency where they are employed. (Gov. Code § 3252(b).)

Firefighters protected by FPBOR can only be investigated about matters that might lead to disciplinary action against them under stringent conditions. They cannot be forced to take a lie detector test. (Gov. Code § 3257.) They generally cannot be obligated to disclose personal financial information. (Gov. Code § 3258.) Their lockers and other assigned storage spaces at work cannot be searched without a warrant unless they are present and consent to the search. (Gov. Code § 3259.) If they are interrogated as part of the investigation, firefighters enjoy a series of added protections. For example, a firefighter under interrogation must be informed of the nature of the investigation before interrogation begins, has a right to have a representative present throughout the questioning, and must be offered formal immunity from criminal prosecution before the firefighter is obligated to answer potentially incriminating questions. (Gov. Code § 3253.)

If the agency employing a firefighter protected by FPBOR ultimately determines that it will impose discipline upon that firefighter, the firefighter is entitled to a timely written decision about the matter. (Gov. Code § 3254(f).) The firefighter then has the right to an administrative appeal or, where applicable, arbitration. (Gov. Code § 3254.5.)

Finally, FPBOR establishes a private right of action and a series of legal remedies that firefighters can use to enforce their rights under the statute. (Gov. Code § 3260.)

## 2. Not all firefighters are covered under FPBOR's protective umbrella

Not all firefighters are protected by FPBOR. FPBOR expressly excludes inmates and anyone covered by the Public Safety Officers Procedural Bill of Rights Act from its definition of firefighter, thus depriving them of FPBOR's protections. (Gov. Code § 3251(a).) Of particular relevance to this bill, FPBOR also excludes from its protections any employee that has not completed a probationary period established by the employer as a condition of employment. (*Ibid.*)

## 3. FPBOR limbo for temporary, seasonal firefighters

FPBOR's exclusion of any employee that has not completed their probationary period creates ambiguity in the case of temporary, seasonal firefighters. Temporary, seasonal firefighters work up to the legal maximum for public employees who are not part of the civil service: nine months out of the year. (Cal. Const., art. VII, § 5; Gov. Code § 19058.) Since temporary, seasonal firefighters are not permanent civil service employees, no probationary period is required of them and they simply do not have one. (Gov. Code § 19171.) Under the existing FPBOR language, that poses a conundrum: are temporary, seasonal firefighters *excluded* from FPBOR protections because they have not completed

a probationary period? Or are they *covered* by FPBOR because they have no probationary period to complete?

This bill amends the language in FBOR to eliminate the ambiguity created by this conundrum. In lieu of the ambiguity, it establishes clearly that temporary, seasonal firefighters *are* eligible for FPBOR's protections, but only beginning with their second fire season immediately following successful completion of their first fire season.

#### 4. Pending litigation on the issue

The question addressed by this bill – whether temporary, seasonal firefighters qualify for FPBOR's protections – is directly at issue in a case recently decided and pending appellate review. (*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.)

The dispute involves Wade Sizemore, and two other similarly situated temporary, seasonal firefighters. Sizemore had been fighting fires for three years, from late spring to late fall, as an employee of CalFIRE when, in late June of 2018, he was fired “for cause” on account of alleged acts of insubordination. Sizemore denied the allegations and requested a “name clearing” review of his notice of termination. After conducting the review, the CalFIRE Unit Chief in charge expressed interest in reversing the termination decision. The Chief was told that he could not, so he limited his decision to removing the “with cause” designation from Sizemore’s termination notice.

Sizemore sought to appeal that determination to the State Personnel Board (SPB). The SPB refused to take up the matter, citing lack of jurisdiction pursuant to Section 63.1 of title 2 of the California Code of Regulations: “[t]he [State Personnel] Board does not conduct Name Clearing Hearings, nor is there any right of appeal to the Board from the decision of an appointing authority, except as otherwise provided by law.” Sizemore then sought a court order instructing either the SPB or CalFIRE to grant him an administrative appeal. He argued that he was entitled to such an appeal in accordance with his rights under the FBOR.

The district court disagreed with Sizemore. It ruled that because Sizemore had never successfully “completed” a probationary period – having never had one at all – Sizemore did not meet the threshold to qualify for FPBOR protections. The decision is now pending review before California’s Third District Court of Appeal.

In the past, this Committee has expressed hesitation regarding bills that could interfere with pending litigation. Any such interference could result in a direct financial windfall to a private party, prevent a court from deciding an action based upon the laws in place at the time the cause of action accrued, or create a situation where the legislative branch is used to circumvent the discretion and independence of the judicial branch.

Those concerns do not appear to be applicable to this situation, however. Although there is litigation pending, passage of this bill should not impact the outcome of that particular case because the events giving rise to the cause of action took place in the past. This bill, if passed, would only operate prospectively. (*See, Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal. 2d 388, 393: "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.") Thus, while passage of this bill would definitively answer the question posed by the pending case going forward, that answer would not necessarily apply to the pending case itself. That said, it should be noted that if this bill is enacted, counsel for the appellees in the pending case are likely to point to passage of the bill as evidence that temporary, seasonal firefighters were not previously covered under the FPBOR, since the Legislature would not need to pass legislation including temporary, seasonal firefighters if they already were. (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087: "the Legislature does not engage in idle acts.")

#### 5. Possible ambiguity from the phrase "fire season"

Based on suggestions from the Senate Committee on Labor, Public Employment, and Retirement, the author amended this bill to require temporary, seasonal firefighters to successfully complete a probationary period before they qualify for FPBOR's protections. Those amendments create equity since, without them, temporary, seasonal firefighters would qualify for FPBOR immediately, while full time firefighters would have to complete a probationary period before qualifying. The problem, as previously mentioned, is that temporary, seasonal firefighters do not have a probationary period. The amendments creatively sidestep this problem by deeming a temporary, seasonal firefighter's first fire season to be that firefighter's probationary period. So, if a temporary, seasonal firefighter successfully completes one fire season and is rehired for the following fire season, that firefighter is protected by FPBOR beginning with that second season.

Though this is a clever solution to the problem, it contains a potential ambiguity of its own because the phrase "fire season" is not defined in the FPBOR. The matter is all the more fraught now that wildfires have begun to crop up throughout the year. To avoid any possibility of future disputes over the point, therefore, the author proposes replacing the phrase "fire season" with "temporary appointment." This should clarify more precisely when a temporary, seasonal firefighter qualifies for FPBOR rights.

A mock-up of this proposed amendment is attached to this analysis.

6. Arguments in support of the bill

According to the author:

As California faces longer and longer fire seasons every year, it is only becoming more crucial to take care of the important service members who are putting their lives on the line to fight fires. [...] Over 4 million acres of California land burned in 2020 alone due to devastating wildfires. As these threats become increasingly common, the State depends more and more on seasonal firefighters, with 350 additional hired in 2020 and funding to hire 640 in the Governor's 2021 Budget Proposal [...]. Seasonal firefighters are on the frontline, protecting Californians from the devastating fires that continue to ravage our State. It is past time for the State to protect them, as much as they protect us.

In support, California Professional Firefighters writes:

[FPBOR's] important and hard-won protections are not available to all 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 [...] 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.

In further support of the bill, CalFIRE Local 2881 writes:

As hard as these seasonal firefighters work, they do not qualify under the Firefighters Procedural Bill of Rights Act, which means that they can be dismissed virtually without consequence at any time. This legislation would allow temporary, seasonal firefighters to have an evidentiary hearing in response to a dismissal. Presently, the standard response is a meeting with the person who has fired them and there is very little recourse in terms of mounting a defense to protect their integrity and their future with CAL FIRE.

**SUPPORT**

CAL FIRE Local 2881

California Labor Federation

California Professional Firefighters

United Public Employees

**OPPOSITION**

None received.

**RELATED LEGISLATION**

Pending legislation: None known.

Prior legislation:

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

AB 220 (Bass, Ch. 591, Stats. 2007) established the Firefighter Procedural Bill of Rights.

**PRIOR VOTES:**

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

\*\*\*\*\*

**Amended Mock-up for 2021-2022 SB-206 (McGuire (S))**

**Mock-up based on Version Number 98 - Amended Senate 3/15/21**

AMENDED IN SENATE MARCH 15, 2021

CALIFORNIA LEGISLATURE— 2021–2022 REGULAR SESSION

SENATE BILL        No. 206

Introduced by Senator McGuire

(Coauthors: Senators Dahle and Limón)

(Coauthors: Assembly Members Flora and Wood)

January 11, 2021

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 3251 of the Government Code is amended to read:

**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. “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~~temporary appointment 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.