

Date of Hearing: June 23, 2021

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT
Jim Cooper, Chair
SB 206 (McGuire) – As Amended March 25, 2021

SENATE VOTE: 39-0

SUBJECT: Firefighters Procedural Bill of Rights Act

SUMMARY: Makes changes to the Firefighters Procedural Bill of Rights (FBOR) Act relating to the definition of “firefighter,” and clarifies to whom the FBOR Act applies. Specifically, **this bill:**

- 1) Modifies the definition of “firefighter” to include a firefighter employed by the Department Forestry and Fire Protection (CAL FIRE) holding a temporary appointment to a firefighter position and employed as a seasonal firefighter.
- 2) Maintains that inmates of a state or local or correctional agency, as provided, who performs firefighting related duties are excluded from the definition of “firefighter.”
- 3) Excludes an employee who has not successfully completed the probationary period established by the employer as a condition of employment; however, an employee holding a temporary appointment to a firefighter position by CAL FIRE and employed as a seasonal firefighter must be deemed to have successfully completed the requisite probationary period if CAL FIRE employs the firefighter in the same classification for a second temporary appointment immediately subsequent to the first.

EXISTING LAW:

- 1) Provides firefighters, pursuant to the FBOR Act, with enhanced procedural rights in relation to political activity, interrogation, punitive action, and administrative appeals.¹
- 2) Defines, under the FBOR Act, “firefighter” 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.
- 3) Excludes from the FBOR Act’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 (POBOR) Act.

¹ Sections 3250 through 3262 of the Government Code.

- 4) Excludes from the FBOR Act's protections any employee that has not completed a probationary period established by the employer as a condition of employment.
- 5) 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.²
- 6) 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.

- 7) 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. State employee-employer relations are governed by the Ralph C. Dills Act.
- 8) Requires, pursuant to Section 1 of Article VII of the California Constitution, 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.
- 9) Authorizes temporary appointments, as specified, but prohibits any temporary employee from working more than 9 months in any 12-month period.³
- 10) Requires permanent employees appointed to the civil service to serve probationary periods.
- 11) Excludes, pursuant to California Constitution, inmates in correctional facilities from the civil service.⁴
- 12) Authorizes the California Department of Corrections and Rehabilitation (CDCR) to require prisoners to work, as specified; authorizes any state or federal agency to cause prisoners to

² Section 19570 of the Government Code.

³ Section 5 of Article VII of the California Constitution, and Section 19058 of the Government Code.

⁴ Section 4(j) of Article VII of the California Constitution.

work, as specified, and permits the CDCR to enter into contracts to facilitate the required employment of prisoners.⁵

- 13) Requires the Director of the CDCR 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.⁶
- 14) 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.⁷

FISCAL EFFECT: According to the Senate Appropriations Committee, CAL FIRE indicates that it would incur first-year costs of \$2.6 million, and \$2.3 million annually thereafter for additional staff and equipment to implement this bill.

In addition, the analysis of this bill by the Senate Appropriations Committee states that, CAL FIRE hired 2,580 temporary, seasonal firefighters in 2020, and the department proposes to add another 500 as part of the 2021-22 budget. Overall, CAL FIRE notes that this bill would result in a 30 percent increase in the number of employees provided extended rights and access to an evidentiary hearing. The precise number of additional evidentiary hearings/appeals that would be filed as a result of the bill cannot be determined in advance. If the department provided full appeal rights for all permanent, seasonal, and limited-term employees, it anticipates an increase of 38 adverse actions and 20 potential appeals annually, based on the additional employee eligibility. Moreover, the bill would result in increased workload related to the administrative investigation process, which is required in order to appropriately determine if any alleged behavioral or performance deficiencies are sustained. Overall, CAL FIRE estimates that it would require 10 additional staff to administer the bill's provisions.

COMMENTS: 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.

"Seasonal firefighters may only serve up to 9 months per year due to their temporary classification, and many seasonal firefighters work seasonally for multiple years, sometimes upwards of 10 years or more. 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

⁵ Sections 2701 and 2780 of the Penal Code.

⁶ Sections 2781 and 2787, *ibid.*

⁷ Sections 883, 884, and 1760.4 of the Welfare and Institutions Code.

the Governor’s 2021 Budget Proposal, it is more crucial than ever to protect these frontline heroes.”

The author concludes by stating that, “[This bill] will allow temporary and seasonal firefighters to be included in the protections provided in the [FBOR Act] passed in 2017, which grants firefighters access to a full and fair appeal process after being terminated, protection from unreasonable interrogation, protection from unwarranted searches of their personal property, and being forced to take a polygraph test. All these protections currently apply to only full-time firefighters. 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.”

1) Dual Referral

This is also referred to the Assembly Committee on Judiciary.

2) Brief History and Summary of the FBOR Act

The FBOR Act is modeled similarly to the Public Safety Officers Procedural Bill of Rights Act (commonly referred to as the Peace Officers Bill of Rights (POBOR)). In 2007, the Legislature enacted the FBOR Act which affords firefighters enhanced employment rights not generally available to other public employees because: (a) firefighters are often called to render aid in hostile emergency conditions that are rife with conflict and confrontation; (b) in providing lifesaving services to the public, firefighters are subject to numerous job safety procedures and protocols, which are compromised or altered at times, in a highly charged atmosphere of critical incident stressors, and (c) firefighters who trust their instincts in these volatile situations are deserving of due process rights and protections should those circumstances arise.⁸

The FBOR Act applies to the State, and any city (including charter city⁹); county; city and county; municipal corporation; public district; charter city; or public authority located in whole or in part within the state that provides or has authority to provide firefighting, police, ambulance, medical, or other emergency services;¹⁰ and, establishes specific requirements for administrative investigations and discipline of firefighters, and protects the right of firefighters to engage in political activity.¹¹

a) Covered Employees and the Extent of Coverage

⁸ Sections 1(a) through 1(c) of Chapter 591, Statutes of 2007 (Assembly Bill 220, Bass).

⁹ *International Association of Firefighters, Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179. Relying on prior decisions in *Baggett v. Gates* (1982) 32 Cal.3d 128 and *County of Riverside* (2003) 30 Cal.4th 278, the court decided that the FBOR Act is a procedural statute that does not violate the home rule provision of the Constitution and therefore applies to a charter city.

¹⁰ Sections 3251(b), and 53101 of the Government Code, respectively.

¹¹ The FBOR Act provides, however, that except whenever on duty or in uniform, a firefighter must not be prohibited from engaging, or be coerced or required to engage, in political activity. In addition, a firefighter must not be prohibited from seeking election to, or serving as a member of, the governing board of a school district, or any local agency where the firefighter is not employed (Section 3252(b) of the Government Code).

Generally, the FBOR Act applies to firefighters of many ranks employed by public agencies, including those who are paramedics or emergency medical technicians, except those otherwise expressly excluded by statute or judicial interpretation.¹² The rights and protections afforded by the FBOR Act only apply to a firefighter “during events and circumstances involving the performance of the firefighter’s official duties.”¹³

The FBOR Act also covers matters involving disciplinary investigations (i.e., interrogations, the procedural requirements for interrogations, and other supervisory acts, disclosure of investigative materials, reassignment, and privacy), discipline (i.e., notice and a statute of limitations), administrative appeals, and personnel files.

b) Employees Specifically Exempted From Coverage

The FBOR Act specifically exempts employees who are covered by the POBOR such as some arson investigators;¹⁴ firefighters who have not successfully completed the probationary period established by the employer as a condition of employment;¹⁵ and, inmates who perform firefighter related duties.¹⁶ In addition, the FBOR Act is silent as to whether volunteer firefighters are covered by its provisions.

3) Temporary and Seasonal Firefighters: Existing Law Is Ambiguous As To Whether The FBOR Act Applies To This Classification

The Senate Committee on Judiciary’s analysis of this bill states that, “[The FBOR Act’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 [FBOR Act] language that poses a conundrum: are temporary, seasonal firefighters *excluded* from [FBOR] protections because they have not completed a probationary period? Or are they *covered* by [the FBOR] because they have no probationary period to complete?

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

¹² In *Corley v. San Bernardino County Fire Protection District* (2018) 21 Cal.App.5th 390, the court opined that the term “fire chief” under Section 3254(c) of the FBOR Act refers only to an agency’s lead fire chief and not other classifications of chiefs within an agency such as “deputy chiefs,” “assistant chiefs,” or “division chiefs.”

¹³ Section 3262 of the Government Code.

¹⁴ Section 830.37 of the Penal Code, and Section 3251(a) of the Government Code.

¹⁵ Section 3251 (a) of the Government Code; however, probationary firefighters retain rights under the Meyers - Miliias-Brown Act.

¹⁶ *Ibid.*

a) Committee Staff Comment

Committee staff agrees with the assessment of this bill as articulated in the Senate Committee on Judiciary's analysis; the questions posed by that committee as to the ambiguity in existing law relating to the applicability of the FBOR Act to temporary, seasonal firefighters, and the clarification proposed by this bill that would resolve the ambiguity under existing law.

4) Currently Pending and Directly Relevant Litigation

In ongoing litigation¹⁷, 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 based on a claim that CAL FIRE violated the employee's rights under the FBOR Act. The court disagreed with the complainant and ruled that because the complainant had never successfully "completed" a probationary period – having never had one at all – the threshold to qualify for FBOR protections had not been met. The matter is now pending review before California's Third District Court of Appeal.

a) Committee's Historical View Relating to Legislation That May Interfere With Pending Legal Matters

Similar to other policy committees of the Legislature, this committee has expressed hesitation regarding bills, or withheld hearing bills, that are a pending subject of litigation, and which may interfere with that litigation. This view, similar to other policy committees of the Legislature, is due to that 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 of the judicial branch that would offend or intrude upon the independence of the judicial branch.

b) Limited and Rare Cause for Consideration of an Exception

The aforementioned concerns do not appear to be at issue in this particular situation as passage of this bill would operate prospectively; whereas, the subject of the litigation involves matters that predate this bill. Should this bill become law prior to the final adjudication of the merits of the pending legal action, it is reasonably possible that this bill may serve as evidence, or at least an indicia, that the FBOR Act did not cover temporary seasonal firefighters. The affected seasonal, temporary firefighter who brought the legal cause of action could be afforded rights and protections under the FBOR Act *after* becoming reemployed as a public employee firefighter, and subject to existing laws at that time.

¹⁷ 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.

REGISTERED SUPPORT / OPPOSITION:

Support

CAL FIRE, Local 2881

California Labor Federation, AFL-CIO

California Professional Firefighters

United Public Employees

Opposition

None on file.

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