

Date of Hearing: July 6, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 206 (McGuire) – As Amended March 25, 2021

PROPOSED CONSENT

SENATE VOTE: 39-0

SUBJECT: FIREFIGHTERS PROCEDURAL BILL OF RIGHTS

KEY ISSUE: SHOULD TEMPORARY, SEASONAL FIREFIGHTERS BE PROVIDED WITH THE WORKPLACE PROTECTIONS CONTAINED IN THE FIREFIGHTERS' PROCEDURAL BILL OF RIGHTS ONCE THEY HAVE COMPLETED ONE TEMPORARY APPOINTMENT?

SYNOPSIS

The Firefighter's Procedural Bill of Rights (FPBOR) was enacted by AB 220 (Bass, Chap. 591, Stats. 2007) and prescribes rights to firefighters relating to political activity, interrogation, punitive action, and administrative appeals. The FPBOR affords firefighters enhanced employment rights not generally available to other public employees because firefighters are often called to render aid in hostile emergency conditions that are rampant with conflict and confrontation. Further, firefighters provide lifesaving services to the public, and are subject to numerous job safety procedures and protocols, in a highly charged atmosphere of critical incident stressors. The FPBOR recognized that firefighters often trust their instincts in volatile situations and are therefore deserving of due process rights and protections. However, not all firefighters qualify for the protections provided under the FPBOR. Specifically, existing law excludes firefighters who have not completed their "probationary period." As a result, a California court recently ruled that temporary, seasonal firefighters are not protected by FPBOR, because they do not have a "probationary period," and therefore cannot, according to the court, "complete" that period. This bill addresses this ambiguity by clarifying that the protections provided under the FPBOR apply to temporary, seasonal firefighters, but only beginning with their second temporary appointment immediately following successful completion of their first temporary appointment. This bill is supported by CAL FIRE, Local 2881, California Labor Federation, AFL-CIO, and California Professional Firefighters and has no known opposition.

SUMMARY: Clarifies to whom the Firefighters Procedural Bill of Rights (FPBOR) Act applies and makes other technical changes. Specifically, **this bill:**

- 1) Clarifies that the definition of "firefighter" includes a firefighter employed by the Department of Forestry and Fire Protection (CAL FIRE) holding a temporary appointment to a firefighter position and employed as a seasonal firefighter.
- 2) Excludes inmates of a state or local correctional agency who perform firefighting related duties 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.

- 4) Provides that a temporary, seasonal firefighters employed by the Department of Forestry and Fire Protection are protected by FPBOR upon successful completion of their probationary period.
- 5) Provides that a temporary, seasonal firefighter has successfully completed the requisite probationary period if the Department of Forestry and Fire Protection employs the firefighter in the same classification for a second temporary appointment immediately subsequent to the first.

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 Section 19570 *et seq.*)
- 2) Provides firefighters, pursuant to the Firefighters' Bill of Rights, with enhanced procedural rights in relation to political activity, interrogation, punitive action, and administrative appeals. (Government Code Section 3250 *et seq.*)
- 3) 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. (Government Code Section 3251 (a).)
- 4) Excludes from FPBOR'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). (Government Code Section 3251 (a).)
- 5) Excludes from FPBOR's protection any employee that has not completed a probationary period established by the employer as a condition of employment. (Government Code Section 3251 (a).)
- 6) 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 State Constitution. (California Constitution, Article VII, Section 1.)
- 7) Authorizes temporary appointments, as specified, but prohibits any temporary employee from working more than 9 months in any 12-month period. (California Constitution, Article VII, Section 5; Government Code Section 19058.)
- 8) Requires permanent employees appointed to the civil service to serve probationary periods. (Government Code Section 19171.)
- 9) Excludes inmates in correctional facilities from the civil service. (California Constitution, Article VII, Section 4(j).)
- 10) 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 work, as specified; and permits CDCR to enter into contracts to facilitate the required employment of prisoners. (Penal Code Sections 2701 and 2780.)

- 11) 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 to designate and supervise all work done by the prisoners. (Penal Code Sections 2781 and 2787.)
- 12) 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 Sections 883, 884, and 1760.4.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: The Firefighter's Procedural Bill of Rights prescribes rights to firefighters relating to political activity, interrogation, punitive action, and administrative appeals. The FPBOR affords firefighters enhanced employment rights not generally available to other public employees because firefighters are often called to render aid in hostile emergency conditions that are rampant with conflict and confrontation. The FPBOR recognized that firefighters often trust their instincts in volatile situations and are therefore deserving of due process rights and protections. However, not all firefighters qualify for the protections provided under the FPBOR. This bill addresses this ambiguity by clarifying that the protections provided under the FPBOR apply to temporary, seasonal firefighters following successful completion of their first temporary appointment. In support of this bill, the author writes:

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

SB 206 will allow temporary and seasonal firefighters to be included in the protections provided in the Firefighters Bill of Rights, 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.

Background on wildfires in California and the need for temporary, seasonal firefighters. In 2020 California broke the records set in 2017 and 2018, documenting the most destructive wildfire season to date. CAL FIRE reported that in 2020 alone, there were over 9000 wildfires

that burned more than 4.2 million acres. Despite 2020 being a record setting year, CAL FIRE recently reported that the state has already seen a 26 percent increase in wildfire activity this year compared to the same time period in 2020. Further, the agency has also seen a 58 percent increase in acres burned compared to last year. (California Department of Forestry and Fire Protection, *Fire Stats and Events* (June 17, 2021), available at <https://www.fire.ca.gov/stats-events/>.) California relies not only on full-time firefighters but also seasonal firefighters to aid in fighting wildfires. Recognizing the importance of the growing wildfire risk in California, the Governor's proposed budget allocates \$2.9 billion for CAL FIRE for the 2021-22 fiscal year. The budget further outlines that part of the \$2.9 billion includes hiring a total of 640 seasonal firefighters. (The Legislative Analyst Office, *The 2021-22 Budget: Department of Forestry and Fire Protection* (Feb, 4, 2021), available at <https://lao.ca.gov/handouts/resources/2021/CalFire-020421.pdf>.)

Background on the Firefighter's Procedural Bill of Rights. The FPBOR 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)). The Public Safety Officers Procedural Bill of Rights Act (Government Code Section 3300 *et seq.*) specifies the procedures to be followed whenever any public safety officer is subject to investigation and interrogation for alleged misconduct which may result in punitive action such as dismissal, demotion, suspension, salary reduction, written reprimand, or transfer. A public safety officer may then bring suit in superior court for alleged violations of the POBOR Act, and may obtain appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a similar nature. (Government Code Section 3309.5.)

In 2007, the Legislature enacted the FPBOR Act which, in general, specifies the procedures to be followed whenever a firefighter is subject to investigation and interrogation for alleged misconduct which may result in punitive action, such as dismissal, demotion, suspension, salary reduction, written reprimand, transfer, or even temporary reassignment. According to the FPBOR Act, a firefighter may bring suit in superior court for alleged violations of the Act, and obtain appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations. (Government Code Section 3260.) In addition, punitive action or denial of promotion on grounds other than merit may not be undertaken by any employing department or licensing or certifying agency against any firefighter who has successfully completed the probationary period without providing the firefighter with an opportunity for administrative appeal. (Government Code Section 3254.) The Act further provides that an administrative appeal instituted by a firefighter under the Act shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with the Administrative Procedures Act. (Government Code Section 3254.5.) Finally, the FPBOR provides that firefighters protected by FPBOR cannot be prevented from, or coerced into, engaging in political activity except when on duty or in uniform. (Government Code Section 3252 (a).)

Firefighters covered under the FPBOR. Currently, the FPBOR Act applies to firefighters of many ranks employed by public agencies, including those who are paramedics or emergency medical technicians. The Act however, specifically exempts employees who are covered by the POBOR such as some arson investigators (Penal Code Section 830.37) and inmates who perform firefighter related duties (Government Code Section 3251 (a)). The FPBOR also excludes any employee that has not completed a probationary period established by the employer as a condition of employment from its protections. (*Ibid.*)

This bill clarifies that temporary, seasonal firefighters are protected under the FPBOR. As stated above, the FPBOR excludes any employee that has not completed their probationary period. This language creates ambiguity in the case of temporary, seasonal firefighters. Temporary, seasonal firefighters work up to the legal maximum for public employees, which is currently nine months out of the year. (California Constitution, Article VII, Section 5, Government Code Section 19058.) Temporary, seasonal firefighters are therefore not considered permanent civil service employees, and as a result have no requirement for a probationary period. (Gov. Code Section 19171.) This bill addresses this ambiguity by clarifying that the protections provided under the FPBOR apply to temporary, seasonal firefighters, but only beginning with their second temporary appointment immediately following successful completion of their first temporary appointment.

Pending litigation surrounding this issue. This bill aims to address the question if temporary, seasonal firefighters qualify for the FPBOR's protections. This exact question is currently an issue that has been raised in a recently decided case that is 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, who has been fighting fires for three years as an employee of Cal FIRE. 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 Cal FIRE Unit Chief in charge expressed interest in reversing the termination decision. The Chief was told that he could not do so, so he limited his decision to removing the "with cause" designation from Sizemore's termination notice.

In response, 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 Cal FIRE to grant him an administrative appeal. He argued that he was entitled to such an appeal in accordance with his rights under the FPBOR.

The district court, however, disagreed. It ruled that because Sizemore had never successfully "completed" a probationary period, he did not meet the threshold to qualify for FPBOR protections. Currently temporary, seasonal firefighters do not have a probationary period. The decision is now pending review before California's Third District Court of Appeal.

Typically, this Committee is hesitant in passing legislation that could interfere with any pending litigation. This is due to the fact 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.

However, those concerns do not appear to be applicable to this bill. Most important, it is well-settled that legislation only applies prospectively unless the Legislature expressly indicates otherwise. (*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.”) It should be noted that if this bill is enacted, a party could potentially point to passage of the bill as evidence that the existing protections under the FPBOR do not apply to temporary firefighters now, because if it did, the Legislature would not need to amend it. However, existing law uses the term “any firefighter,” which is ambiguous. This bill is intended to clarify what “any firefighter” means, rather than change the law.

ARGUMENTS IN SUPPORT: Various Firefighter organizations including CAL FIRE Local 2881 write in support:

This is meaningful legislation. Seasonal firefighters are an integral part of the CAL FIRE Emergency Response Team. For a variety of reasons, these men and women choose to come back year after year to protect the lives and property of Californians during peak fire season.

These seasonal firefighters, employed by CAL FIRE, are not probationary employees. In fact, they are welcomed back each season. For example, a seasonal firefighter with six fire seasons would have four-and-a-half years of state service time.

We have needed to use these firefighters more intensely as we deal with the historic fire seasons that have ravaged California. 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.

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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