

SENATE THIRD READING
SB 206 (McGuire)
As Amended September 3, 2021
Majority vote

SUMMARY

Makes changes to the Firefighters Procedural Bill of Rights (FBOR) Act relating to temporary firefighters employed by the Department of Forestry and Fire Protection (CAL FIRE), among other provisions.

Major Provisions

- 1) Modify the definition of "firefighter" to include a firefighter employed by CAL FIRE holding a temporary appointment to a firefighter position and employed as a seasonal firefighter.
- 2) Maintain that inmates of a state of local or correctional agency who perform firefighting related duties are excluded from the definition of "firefighter."
- 3) Expressly provide that the FBOR Act applies to a temporary CAL FIRE firefighter who has commenced employment in a second consecutive fire season with CAL FIRE, even though the firefighter holding the position does not serve a probationary period.
- 4) Establish that if an investigation involves an employee of CAL FIRE holding a temporary appointment to a firefighter position, the one-year period, as described and provided, must be tolled during any period that the employee is not employed by CAL FIRE until the date the employee is rehired for a subsequent fire season.
- 5) Grant employees of CAL FIRE who are temporary firefighters certain employment rights (i.e., appeal, hearing, presentation of evidence, decision, reemployment, and reinstatement) relating to a termination of employment for cause before the State Personnel Board (SPB) and subject to the SPB's rules. More specifically:
 - a) A temporary firefighter employed by CAL FIRE must not be terminated for cause without a right to appeal the determination to the SPB, subject to the SPB's rules.
 - b) The SPB must hold a formal evidentiary hearing concerning an appeal of the termination, following the same procedures as in state civil service proceedings, and that the employee must have the burden of proof to show that the termination was not supported by a preponderance of the evidence,¹ or was implemented in bad faith.

If the SPB finds that cause for termination was not supported by a preponderance of the evidence or that the termination was made in bad faith, the employee is entitled to a decision that the termination was without fault, and the employee is entitled to reinstatement to the position that the employee held within seven days of the SPB's

¹ The standard of "preponderance of the evidence" is the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue, rather than the other. (See Black's Law Dictionary, Eight Edition.)

decision, if the fire season during which the employee was working has not ended. However, if that fire season has ended as of the date of the SPB's decision, the employee must have the right to reemployment to a new temporary appointment for the next fire season, subject to meeting minimum qualifications.

- c) Stipulate that the employee is not entitled to back pay.
- 6) Provide that these provisions must not be construed to create a property interest in any temporary firefighter's appointment to a firefighter position or permanent position within the state.
- 7) Make other conforming and technical changes for these purposes.

COMMENTS

1) 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.

The FBOR Act applies to the State, and any city (including charter city); 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; and, establishes specific requirements for administrative investigations and discipline of firefighters, and protects the right of firefighters to engage in political activity. The FBOR Act 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.

2) Currently Pending and Directly Relevant Litigation

In ongoing litigation, 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 firefighter and ruled that because the firefighter 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 appellate court review.

3) Public Employees: Due Process Rights and Employment Property Interests

The termination of employment and disciplinary matters are acutely germane to public employees and their employment. Each of these are equally important to both the employer and employee. The United States Constitution provides that "... nor shall any State deprive any

person of life, liberty, or property, without due process of law."² The California Constitution provides that "... a person may not be deprived of life, liberty, or property without due process of law..."³

In the public sector, generally, employees who have a property interest in continued employment are entitled to due process (i.e., notice and a hearing) upon a proposed termination (or deprivation) of employment. The reason that these employees have these protections is because they have successfully completed a probationary period during which they were subject to release.⁴ When permanency is acquired, "permanent" employees can be dismissed only for cause as provided by the authorizing procedures. However, due process protections are not afforded to all employees. Those who are at-will (i.e., serve at the pleasure of the appointing authority) do not have a justified expectation in continued employment. Section 2292 of the Labor Code defines an at-will position as "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." In addition, those who are probationary and non-tenured employees, also do not have a property interest in continued employment and may be released without cause during their probationary period.⁵ There are some exceptions (for example: classified school employees of school districts have a right to a pre-termination hearing if dismissed for cause or unsatisfactory performance during the school year, but not otherwise). Others who, in general, do not have such rights are temporary and substitute employees when they are hired to fill in for limited-term projects or periods.

Employees who receive written or oral reprimands are not entitled to *Skelly* rights because a reprimand, in and of itself, does not entail the loss of property. Precise due process procedures vary regarding employment termination (or deprivation) depending on statute, practice, and other factors.

4) Granting FBOR Act Protections to Temporary CAL FIRE Firefighters Who Have Not Completed the Requisite Probationary Period, But Who May Be Considered to Have Received On-The-Job Training and (Satisfactorily) Performed The Required Duty

Among other things, this bill provides that these firefighters are granted FBOR Act protections that generally are afforded to firefighters who have completed a probationary period under existing law. This bill may be viewed as allowing temporary CAL FIRE firefighters the ability to skip the proverbial line ahead of those who are not temporary, but who must complete the requisite probationary period. As prescribed by this bill, a temporary CAL FIRE firefighter who has served in that capacity – in a second consecutive fire season with CAL FIRE (considering the perennial fires or fire seasons throughout the state) – even though the person holding that person does not serve a probationary period may also be viewed as having received and performed on-the-job training (e.g., a form of probationary period), especially given the inherently dangerous nature of the work and risk of injury or death; thereby, supporting the rationale for their FBOR Act coverage.

5) Please see the respective policy committee analyses for a full discussion of this bill.

² See Fourteenth Amendment, U.S. Constitution.

³ See Section 7 of Article I.

⁴ See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194

⁵ See *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340, 346

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. [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."

Arguments in Support

The California Professional Firefighters state in part that, "[The FBOR Act] grants critically important employment protections and due process rights to firefighters regarding representation in disciplinary matters. Included in the [FBOR Act] are protections such as the right to representation before answering questions, the right to review and respond to adverse comments in personnel files, and several prohibitions on punitive or unfair behavior by employers. However, these important and hard-won protections are not available to all firefighters. Temporary or seasonal firefighters employed by [CAL FIRE] 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.

"[This bill] would make a simple and clarifying change to the Firefighters Procedural Bill of Rights Act to include seasonal or temporary firefighters in the definitions of those who are protected by the Act... to ensure that all firefighters who are risking their lives on the front lines of California's ever-expanding wildfire season have the same protections and rights to representation."

Arguments in Opposition

None on file.

FISCAL COMMENTS

According to the Assembly Appropriations Committee's analysis of this bill prior to recent amendments, this bill would result in one-time General Fund (GF) costs of \$1.1 million and ongoing GF costs of \$1 million to CAL FIRE for additional staff and equipment. One-time costs are slightly higher to purchase equipment such as computers and software for new employees.

VOTES

SENATE FLOOR: 39-0-1

YES: Allen, Archuleta, Atkins, Bates, Becker, Borgeas, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hertzberg, Hueso, Hurtado, Jones, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Nielsen, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk

ABS, ABST OR NV: Melendez

ASM PUBLIC EMPLOYMENT AND RETIREMENT: 7-0-0

YES: Cooper, Voepel, Calderon, Cooley, O'Donnell, Rodriguez, Seyarto

ASM JUDICIARY: 10-0-1

YES: Stone, Gallagher, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Maienschein, Reyes

ABS, ABST OR NV: Kiley

ASM APPROPRIATIONS: 16-0-0

YES: Lorena Gonzalez, Bigelow, Bryan, Calderon, Carrillo, Chau, Megan Dahle, Davies, Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Kalra

UPDATED

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