

Date of Hearing: July 6, 2021

ASSEMBLY COMMITTEE ON JUDICIARY  
Mark Stone, Chair  
SB 76 (Nielsen) – As Amended March 22, 2021

PROPOSED CONSENT

**SENATE VOTE:** 39-0

**SUBJECT:** EXCLUDED EMPLOYEES: BINDING ARBITRATION

**KEY ISSUE:** SHOULD AN ORGANIZATION THAT REPRESENTS "EXCLUDED STATE EMPLOYEES" – PRIMARILY MANAGERIAL AND SUPERVISORY EMPLOYEES WHO ARE NOT REPRESENTED BY UNIONS – BE PERMITTED TO REQUEST BINDING ARBITRATION FOR AN AGGRIEVED EMPLOYEE IF PRIOR ADMINISTRATIVE REVIEWS HAVE NOT RESOLVED THE GRIEVANCE TO THE EMPLOYEE'S SATISFACTION?

**SYNOPSIS**

*This bill is a reintroduction of a past measure, SB 179 (Nielsen, 2019-20), which was previously heard in this Committee and passed unanimously. That bill passed the Legislature without a "no" vote, but was vetoed by the Governor. This bill is nearly identical to the previous version, as it would create the Excluded Employee Arbitration Act (EEAA). Currently, excluded state employees – primarily managerial and supervisory employees – are faced with two options when they are trying to resolve a grievance with the state. They can file a grievance with the California Department of Human Resources (CalHR) or seek redress in the superior courts. The EEAA would, until January 1, 2027, provide an additional remedy to excluded employee organizations by allowing them to request arbitration after they have filed a grievance with CalHR. The request for arbitration would be solely designated to the excluded employee organization, whereas CalHR cannot request or mandate arbitration. Additionally, this bill only allows for an arbitration request to be made if the following conditions are met: 1) The grievance has not been resolved to the employee organization's satisfaction and; 2) the grievance is in the fourth level of review, or in cases where there is not a fourth level of review, the grievance is in the third level of review. Once these conditions have been met and a written request for arbitration has been submitted to CalHR within 21 days of a decision rendered to the employee organizations grievance, the bill sets forth a process by which an arbitrator is selected between both parties. The bill would also require the non-prevailing party to pay for arbitration and the costs associated with it. This bill is sponsored by the California Correctional Supervisors Organization and the Association of California State Supervisors, and is supported by other state labor organizations who represent excluded employees. It has no opposition.*

**SUMMARY:** Creates, until January 1, 2027, the Excluded Employee Arbitration Act (EEAA) and authorizes an employee organization representing a state excluded employee, who has filed a grievance with the California Department of Human Resources (CalHR), to request arbitration of the grievance once specified conditions have been met. Specifically, **this bill:**

- 1) Authorizes an excluded employee organization to request arbitration of a grievance if all of the following conditions are met:

- a) The grievance alleges a dispute that is subject to specified procedures under the Grievance and Appeal Procedure – Excluded Employees (Title 2, California Code of Regulations, Section 599.859);
  - b) The grievance has not been resolved to the employee organization's satisfaction after either of the following, as applicable, pursuant to CalHR regulations governing grievances for excluded employees: (1) the fourth level of review; or (2) in cases where there is no fourth level of review, the third level of review; and
  - c) The employee organization requests arbitration in writing, submitted to CalHR, within 21 days of a decision rendered in either of the following, as applicable: (1) the fourth level of review; or (2) in cases where there is no fourth level of review, the third level of review.
- 2) Provides the following definitions:
- a) "Department" means the Department of Human Resources;
  - b) "Excluded employee" means an excluded employee of the state, as defined;
  - c) "Employee organization" means any organization that represents excluded employees of the State of California;
  - d) "Employer" means the State of California; and
  - e) "Arbitration" means the binding ruling that resolves an excluded employee grievance at the fifth level of the excluded employee grievance process.
- 3) Requires, after a request for arbitration is made, that CalHR and the employee organization designate a standing panel of at least 20 arbitrators to be available for arbitration.
- 4) Provides that if there are fewer than three arbitrators available, then the employee organization or the employer may obtain the names of an additional five arbitrators from the California State Mediation and Conciliation Service within the Public Employment Relations Board.
- 5) Authorizes the employee organization and the employer to consecutively strike any arbitrator from the standing panel until the name of one arbitrator is agreed upon or, if no agreement is made, the last remaining person on the panel shall be designated the arbitrator.
- 6) Requires the name of the chosen or the sole remaining arbitrator to be submitted in writing to CalHR.
- 7) Provides that if the employee organization does not submit its choice of an arbitrator within 45 days after requesting arbitration, the request for arbitration would be considered withdrawn.
- 8) Provides for the right of a party to the arbitration to have a certified shorthand reporter to transcribe the proceeding and that the transcript be the official record of the proceeding.

- 9) Requires the arbitrator to apply California law to the facts and also to issue a decision for each grievance heard during the arbitration.
- 10) Requires the decision to be based solely on the written record in the grievance, the grievance response, and the oral presentations made at the arbitration.
- 11) Makes the arbitrator's decision legally binding.
- 12) Requires the arbitrator to issue a written decision within 45 days of the conclusion of the hearing.
- 13) Requires the arbitrator to order the non-prevailing party to pay the cost of the arbitration, including the cost of a certified shorthand reporter.
- 14) Prohibits the arbitrator from ordering the excluded employee to pay the cost of the arbitration or the shorthand reporter.
- 15) Prohibits the excluded employee's representative to pass costs onto the excluded employee.
- 16) Sets forth the intent of the Legislature that: (1) state excluded employees have the right to arbitration as a fifth step to the excluded employee grievance procedure; (2) the present grievance procedure leaves too many grievances unresolved; and (3) this lack of resolution has caused more cases to be filed in California's courts, which could have been resolved at a lower level.
- 17) Sunsets the above provisions on January 1, 2027.

**EXISTING LAW:**

- 1) Establishes the Bill of Rights for State Excluded Employees, which generally provides rights for excluded employees in grievances against state employers. (Government Code Section 3525.)
- 2) Provides the following definitions:
  - a) "Employee" means a civil service employee of the State of California, which includes those state agencies, boards, and commissions as may be designated by law that employ civil service employees, except the University of California, Hastings College of the Law, and the California State University;
  - b) "Excluded employee" means all managerial employees, as defined, all confidential employees, as defined, and all supervisory employees, as defined, and all civil service employees of the Department of Human Resources, professional employees of the Department of Finance engaged in technical or analytical state budget preparation other than the auditing staff, professional employees in the Personnel/Payroll Services Division of the Controller's office engaged in technical or analytical duties in support of the state's personnel and payroll systems other than the training staff, employees of the Legislative Counsel Bureau, employees of the Bureau of State Audits, employees of the Public Employment Relations Board, conciliators employed by the California State Mediation and Conciliation Service, employees of the office of the State Chief Information Officer,

except as provided, and intermittent athletic inspectors who are employees of the State Athletic Commission;

- c) "Supervisory employee organization" means an organization that represents members who are supervisory employees, as defined;
  - d) "Excluded employee organization" means an organization that includes excluded employees of the state, as defined, and that has as one of its primary purposes representing its members in employer-employee relations; and
  - e) "State employer" or "employer," for purposes of meeting and conferring on matters relating to supervisory employer-employee relations, means the Governor or the Governor's designated representatives. (Government Code Section 3527.)
- 3) Provides excluded employee organizations the right to represent their excluded members in their employment relations, including grievances, with the State of California. (Government Code Section 3530.)
- 4) Provides that the scope of representation for supervisory employees includes all matters relating to employment conditions and supervisory employer-employee relations including wages, hours, and other terms and conditions of employment. (Government Code Section 3532.)

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

**COMMENTS:** According to the author, the excluded employee grievance system is not currently functioning at an acceptable level, as a majority of grievances are summarily denied by CalHR. Consequently, excluded employee organizations have no other choice but to turn to the superior courts or State Personnel Board, which can result in litigation that is costly and time-consuming to the state and the excluded employee organizations. *Non-excluded* employees are currently permitted to resolve grievances through arbitration, which can be done expeditiously and usually costs less than litigation. The author of this bill contends that grievances among excluded employees would rarely escalate to arbitration because state agencies would be incentivized to make equitable and just rulings, resulting in a grievance settlement.

***This bill.*** This bill would create the Excluded Employee Arbitration Act (EEAA) and would allow for an excluded employee or their representative organization to voluntarily request arbitration to CalHR as a means of resolving a grievance. Nothing in this bill would permit CalHR or any state agency from mandating that employees agree to arbitration, thus this bill would not preclude an excluded employee from petitioning a court regarding a grievance with their employer. The bill would require the arbitrator to apply California law to the facts of each grievance presented before them and the decision would be legally binding. Additionally, the bill requires the non-prevailing party to pay for the costs of arbitration. Lastly, this bill sets forth a balanced approach regarding the process by which an arbitrator is selected and also provides the right for a shorthand reporter to transcribe the proceedings. In support of the bill, the author writes:

Arbitration is a much more effective method to resolve grievances that have exhausted the normal process. Arbitration is currently an option for non-excluded employees, where it has been shown to permit problems to be resolved much more quickly than if they were elevated

to the court system. Additionally, grievances rarely escalate to arbitration among non-excluded employees – even when arbitration is requested, most grievances are settled outside of arbitration because the state agencies are incentivized to make equitable and just rulings.

Based on this track record, the arbitration process established in SB 76 can be expected to expedite grievance resolution while also saving taxpayer dollars. The loser-pays model utilized by SB 76 further incentivizes agencies to address legitimate grievances earlier in the grievance process, and similarly encourages employees to pursue only legitimate grievances.

In short, the process implemented by SB 76 is quicker and more cost-effective for both employees and the state.

***Current rights of excluded employees.*** Current law authorizes CalHR to adopt reasonable rules and regulations for the administration of employer-employee relations. CalHR has adopted regulations that set out a Grievance and Appeal Procedure for excluded employees. Under Title 2, Section 599.859 of the California Code of Regulations, supervisory employee organizations or individual supervisors may pursue resolution of disagreements over issues with their employer that fall within the jurisdiction of CalHR through a grievance procedure that typically includes an informal review and four formal levels of review by the employer according to the following timeline:

*Informal Level:* Within 5 workdays of the incident, an informal discussion between the excluded employee and the employee's supervisor or manager.

*Level 1:* If unsatisfied with the informal review, the employee may file a formal grievance within 10 workdays of the incident and the employer's designee for the first level of review must respond within 10 working days.

*Level 2:* The employee may appeal the employer's Level 1 decision within 10 workdays of receipt of the employer's response and the employer's designee for the second level of review must respond within 15 workdays.

*Level 3:* The employee may appeal the employer's Level 2 decision within 10 workdays of receipt of the employer's response and the employer's designee for the third level of review must respond within 15 workdays.

*Level 4:* The employee may appeal the employer's Level 3 decision to CalHR within 10 workdays of receipt of the employer's response and CalHR's designee for the fourth level of review must respond within 20 workdays.

Upon denial at the fourth level of review, the employee or the employee organization representing the employee may pursue a claim with the State Personnel Board, the Department of Fair Employment and Housing, or the superior court depending on the issue in dispute.

***Conditions of arbitration under this bill compared to pre-dispute forced arbitration.*** In the past, this Committee has expressed concern and skepticism regarding arbitration, especially when a party has been forced into it as a condition of employment. Forced arbitration contracts place employees into a potentially unbalanced means of resolving a grievance with their employers once an actual grievance or dispute arises. Some, if not most, arbitration contracts require an

employee to waive their right to petition a court of law for alleged employer misconduct and also allows for the employer to be the sole decider as to who the arbitrator will be in a case. Lastly, arbitrators are generally not required to apply California law to the facts presented before them. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4<sup>th</sup> 1.) The court held in that case that an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on face of award and causes substantial injustice to the parties. This bill, by contrast, raises none of these concerns.

**ARGUMENTS IN SUPPORT:** As sponsor of the bill, the California Correctional Supervisors Organization writes:

This bill would improve the excluded employee grievance process to make it effective and would result in reduced costs to the State of California as well. Currently, the excluded employee grievance system is virtually illusory for excluded employees and is functioning at an unenforceable level. Of all the grievances filed, 99% are denied because there is no consequence for the state agency to not follow the rules, and there is no objective oversight. As it stands now, the state agencies will deny all grievances because it's in their best interest and there is nowhere for the excluded employee to go, it is a closed system.

Senate Bill 76 will result in decreased costs for two reasons. First, arbitration is significantly less expensive than litigation. Second, the provisions that require the loser to pay the costs of the arbitration has the impact of incentivizing the parties to attempt to settle the grievance prior to arbitration. In other words, the countervailing savings caused by the replacement of litigation with arbitration, and the new incentives for the parties to settle grievances assures that passage of SB 76 will result in decreased costs of grievances.

Senate Bill 76 is drafted so that if the state were correct when answering important excluded employee grievances, they will not have to pay for the arbitration, the excluded employee organization would pay the cost. This provision will serve as an incentive for the parties to attempt to settle pending arbitrations.

**Related Prior Legislation:** SB 179 (Nielsen, 2019-20) was nearly identical to this bill. In his message vetoing SB 179, Governor Newsom wrote:

SB 179 would allow state employee supervisors to request binding arbitration as part of the grievance process. Current law allows managers and supervisors to pursue resolution of disagreements through a four-step grievance process and pursue a claim with the State Personnel Board. SB 179 would add a costly step to this process. Expanding the right to arbitrate to state managers and supervisors will result in increased costs not contemplated in the 2020 Budget at a time when the State is facing massive cost pressures due to the COVID-19 pandemic.

SB 950 (Nielsen 2016) was also substantially similar to this bill. In his message vetoing SB 950, then Governor Brown wrote: "This bill adds arbitration to the existing four step grievance process for state supervisors. Expanding the grievance process for the state's managers to include legally binding arbitration will reduce departments' ability to effectively manage state operations and will result in significant unbudgeted state costs."

AB 526 (Evans, 2007) was nearly identical to AB 1584, below. AB 526 died in the Assembly Committee on Appropriations.

AB 1584 (Evans, 2006) would have established the Excluded Employees Mediation Act, permitting excluded employees to request mediation after the fourth level of grievance review. AB 1584 died in the Senate Committee on Appropriations.

AB 1258 (Matthews, 2003) was nearly identical to AB 2802, below. AB 1258 died at the Assembly Desk without committee referral.

AB 2802 (Strom-Martin, 2002) would have established arbitration procedures for supervisory employees of the Department of Corrections and the California Youth Authority. AB 2802 died in the Assembly Committee on Appropriations.

SB 511 (Ayala, Chap. 1522, Stats. 1990) enacted the Excluded Employees Bill of Rights, which permits, among other things, excluded employee organizations to represent their excluded members in employment relations, including grievances, with the State.

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

Association of California State Supervisors (co-sponsor)  
California Correctional Supervisors Organization (co-sponsor)  
California Association of Professional Scientists  
Professional Engineers in California Government (PECG)

##### **Opposition**

None on file

**Analysis Prepared by:** Grant Silva and Leora Gershenzon / JUD. / (916) 319-2334