
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 651 **Hearing Date:** June 21, 2016
Author: Cooper
Version: May 31, 2016
Urgency: No **Fiscal:** Yes
Consultant: JRD

Subject: *Public Safety Officers and Firefighters: Investigations and Interviews*

HISTORY

Source: Sacramento County Deputy Sheriff's Association; Los Angeles County Professional Peace Officers Association; California State Lodge, Fraternal Order of Police

Prior Legislation: SB 388 (Lieu)—vetoed, 2014
SB 313 (De León) – Ch. 779, Stats. 2013
AB 2543 (Alejo) – failed passage in Senate Public Safety, 2012
SB 638 (De León) – died in Senate Public Safety, 2011
AB 220 (Bass) – Ch. 591, Stats 2007
AB 1873 (Koretz) – Ch. 63, Stats. 2002
AB 2040 (Diaz) – Ch. 391, Stats. 2002
AB 2559 (Cardoza) – Ch. 971, Stats. 2000
AB 1016 (Hertzberg) – Ch. 25, Stats. 1998
AB 3434 (House) – Ch. 1108, Stats. 1996

Support: AFSCME, Local 685; Association for Los Angeles Deputy Sheriffs; California Association of Highway Patrolmen; CAL FIRE Local 2881; LIUNA Locals 777 & 792; Long Beach Police Officers Association; Los Angeles Police Protective League; Los Angeles County Probation Officers' Union; Orange County Deputy Sheriffs; Orange County Professional Firefighters Association, Local 3631; Riverside Sheriffs Association; Santa Ana Police Officers Association

Opposition: American Civil Liberties Union; California Association of Joint Power Authorities; California Police Chiefs Association; California State Association of Counties; California State Sheriffs' Association; Chief Probation Officers of California Rural County Representatives of California; Emergency Medical Services Administrators Association; League of California Cities

Assembly Floor Vote:

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PURPOSE

The purpose of this bill is to allow a firefighter or peace officer witness to have a representative present when questioned by their employer regarding the investigation of another peace officer or firefighter, if that interview may lead to disciplinary action against the witness, as specified.

Existing law establishes the Firefighters Procedural Bill of Rights Act (FPOR) that governs the procedures for the investigation and interrogation of a firefighter for alleged misconduct. (Government Code § 3250, et seq.) FPOR specifically provides that the interrogation of a firefighter, who is the subject of an investigation that could lead to punitive action, by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency, must be conducted in accordance with Government Code section 3253. One of the protections afforded in Government Code section 3253 is the ability to have a representative present at the interrogation. (Government Code § 3253(i).)

Existing law establishes Public Safety Officers Procedural Bill of Rights Act (POBOR) that controls how the investigation and interrogation of a public safety officer for alleged misconduct occurs. (Government Code § 3300, et seq.) POBOR provides that the interrogation of a peace officer, who is the subject of an investigation that could lead to punitive action, by his or her employer, must be conducted in accordance with Government Code section 3303. One of the protections afforded in Government Code section 3303 is the ability to have a representative present at the interrogation. (Government Code § 3303(i).)

This bill amends both FPOR and POBOR to provide a firefighter or peace officer, in an investigation on matters that may result in punitive action against a firefighter or peace officer, who is not formally under investigation but is interviewed as a witness regarding an investigation, the right to representation in the interview at the time that the witness has reasonable cause to believe that the interrogation may result in punitive action against him or her. The firefighter or peace officer may choose a representative who is reasonably available to represent the firefighter at an interview that has been reasonably scheduled and the representative shall be permitted to be present at all during the interview. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, or be subject to punitive action for refusing to disclose, any information received from the firefighter being interviewed as part of the investigation for noncriminal matters.

This bill provides that if a firefighter or peace officer requests representation in an interview and the request is denied, statements taken during the interview after the request is made shall not be used against the firefighter in a disciplinary proceeding and shall not be used in determining or imposing a punitive action against the firefighter.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee

has applied its “ROCA” policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for Legislation

According to the author:

Current law under the Police Officer’s Bill of Rights (POBR) does not specify that a witness can have representation present in an internal affairs investigation interrogation.

However, some agencies do voluntarily allow for the representation of witnesses during an internal affairs interrogation and some do not.

AB 651 seeks to clarify and continue the current practice of agencies who wish to allow, or will allow in the future, witness representation. It also seeks to clarify that the rights of cities or counties to adopt measures or ordinances formalizing and making witness representation a right, or formalizing witness representation through the collective bargaining process is allowable.

2. Effect of the Legislation

This bill would give a peace officer or firefighter *witness* the right to have a representative present when being interviewed about a co-worker's misconduct, if that interview may lead to punitive action against the witness officer. The bill further provides that if a firefighter or peace officer request representation in an interview and the request is denied, statements taken during the interview after the request is made cannot be used against the firefighter in a disciplinary proceeding and shall not be used in determining or imposing a punitive action against the firefighter.

The POBOR was enacted in 1976 and provided law enforcement officers with a variety of procedural protections. *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, explains that:

[T]he Act: (1) secures to public safety officers the right to engage in political activity, when off duty and out of uniform, and to seek election to or serve as a member of the governing board of a school district; (2) prescribes certain protections which must be afforded officers during interrogations which could lead to punitive action; (3) gives the right to review and respond in writing to adverse comments entered in an officer's personnel file; (4) provides that officers may not be compelled to submit to polygraph examinations; (5) prohibits searches of officers' personal storage spaces or lockers except under specified circumstances; (7) gives officers the right to administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit; and (8) protects officers against retaliation for the exercise of any right conferred by the Act. [Citations omitted.]

POBOR outlines specific rules that an employer has to follow when conducting an interrogation of an employee who is under investigation. Government Code section 3203(i) requires that an officer have the opportunity to have a representative, of his or her choice, at an interrogation if:

1. The officer is under investigation for misconduct; and
2. The interrogation focuses on matters that "are likely to result in punitive action."

AB 220 (Bass), Chapter 591, Statutes of 2007, created FPOR. FPOR provides firefighters, paramedics and emergency medical technicians with rights that are virtually identical to the rights provided to peace officers in POBOR. Like POBOR, FPOR establishes rules governing the interrogation of an employee who is under investigation.

Government Code section 3953(i) requires that a firefighter have the opportunity to have a representative, of his or her choice, at an interrogation if:

1. The firefighter is under investigation for misconduct, and
2. The interrogation focuses on matters that “may result in punitive action.”

AB 651 would expand the right to have a representative to peace officer and firefighter *witnesses* being interviewed about a co-worker’s misconduct, if that interview may result in punitive action against the witness.

3. Senate Bill 388 Veto Message

This bill is substantially similar to SB 388 (2014). The Governor vetoed that bill stating:

I am returning Senate Bill 388 without my signature.

This bill would allow peace officers and firefighters who have witnessed an alleged misconduct incident to have a representative present during questioning if there is a chance that the witness could become the subject of punitive action.

The need for this bill is unclear. Under current law, as soon as an employer learns during an interview that the witness is subject to punitive action, questioning must stop until a representative is provided if requested by the employee. If this doesn't happen, any information obtained can be excluded at trial.

4. Argument in Support

According to the Long Beach Police Officers Association:

This bill seeks to clarify and ensure procedural due process for peace officers and firefighters during investigations, including that witness peace officers or firefighters are entitled to the right of representation consistent with Public Safety Officers Procedural Bill of Rights (POBOR) and the Firefighters Procedural Bill of Rights (FPBOR).

The right to representation is a foundational right in POBOR and FPBOR. In many departments, peace officers and firefighters are routinely allowed representation when being questioned as a witness under the existing provisions of POBOR and FPBOR.

Unfortunately, some departments have recently interpreted Government Code Sections 3253 and 3303 in a manner to deny peace officer and firefighter representation requests. This new interpretation has not only led to reduced rights, but has also created unnecessary and costly litigation.

As a retired police captain, we applaud your sense of fairness and your willingness provide a mechanism for those without this protection to achieve it. The permissive language in this bill is not ideal from our perspective. However, we recognize it to be a rational, deliberative compromise that protects local control and management’s authority.

AB 651 will simply provide an *opportunity* for peace officers and firefighters to secure witness representation in areas where it is currently unavailable. AB 651 is not a mandate, but would require future action by a local agency or adoption via the collective bargaining process to become effective.

5. Argument in Opposition

According to the California State Sheriffs' Association:

The Public Safety Officers Procedural Bill of Rights balances the public interest in maintaining the efficiency and integrity of a law enforcement agency with a peace officer's interest in receiving fair treatment. As such, it requires certain protections when an officer faces a formal investigation into matters that are likely to result in punitive action by an employer. "Even if not criminal in nature, acts of a police officer that tend to impair the public's trust in its police department can be harmful to the department's efficiency and morale. Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough, and fair investigation." (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 568.)

This measure is similar to last year's Senate Bill 388 (Lieu), which was vetoed by the Governor. We believe this measure could ultimately interfere with a law enforcement agency's ability to discipline officers for engaging in job-related misconduct. We are further concerned that this bill will unnecessarily prolong investigations and result in increased agency costs. Discouraging officers from cooperating in investigations by encouraging representation during any questioning that may involve officer discipline could chill investigations and result in the retention of officers that have engaged in noncriminal misconduct.

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