

A guide to the
**FIREFIGHTERS PROCEDURAL
BILL OF RIGHTS ACT**



Prepared for CAL FIRE Local 2881 by:

Gary Messing, CAL FIRE Local 2881 Chief Legal Counsel/Partner
Jason Jasmine, Partner

FIREFIGHTERS PROCEDURAL BILL OF RIGHTS ACT

Government Code § 3250

This chapter shall be known, and may be cited, as the **Firefighters Procedural Bill of Rights Act (FFBOR)**.

Definitions

- “**Firefighter**” means 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, but does **not** include **probationary** employees or inmates performing firefighting duties.
 - Does the act cover volunteers? Seasonal firefighters?
Limited term firefighters?
 - If an employee is both a firefighter and a peace officer, does FFBOR or Public Safety Officers Procedural Bill of Rights Act (POBR) apply?

Government Code § 3251

Definitions

continued

- **“Punitive action”** means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.
 - *White v. County of Sacramento* (1982) 31 Cal.3d 676 – “For purposes of punishment” only modifies the word “transfer.”
 - *McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975 – Transfer resulting in loss of pay is per se punitive.
 - *Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250 – Permanent employee on probation in new position is entitled to administrative appeal from demotion (and corresponding salary decrease).
 - *Otto v. Los Angeles Unified School District* (2001) 89 Cal.App.4th 985 – “May lead to ...” (Includes a “summary of conference” memo which warned of possible future disciplinary action).
 - *Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447 – Routine negative evaluations are not punitive action.
 - *Leonard v. City of Los Angeles* (9th Cir. 2016) 2016 WL 6212008, 669 Fed.Appx. 912 (citable but not designated for publication) – Reassignment and non-promotion is not punitive action when passing a psychological exam is a requirement for appointment under POBR and FFBOR.
 - *Perez v. Westminster* (2016) 5 Cal.App.5th 358 – Removal from SWAT, honor guard and failure to assign trainees not punitive action under POBR (§ 3303).

Government Code § 3252

Political Activity

Unless a firefighter is on duty or in uniform, he or she may not be prohibited from engaging or coerced/required to engage in **political activity**, nor shall a firefighter be prohibited from **seeking election** to the board of any city, county, district, or agency where the firefighter is not employed.

Interrogation

- When any firefighter is **under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency, that could lead to punitive action**, the interrogation shall be conducted under the following conditions:
 - *CCPOA v. State of California* (2000) 82 Cal.App.4th 294 – Questions by an outside agency can trigger the protections listed below. In this case, witnesses were told by a commanding officer that they must answer questions being asked by the Attorney General's Office or be suspended. The targets of the investigation were told they must answer the Attorney General's questions or be immediately arrested.
 - *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th 1506 – Any inquiry into sanctionable conduct triggers the protections listed below. The inquiry need not be a formal investigation.
 - *Paterson v. City of Los Angeles* (2009) 95 Cal.Rptr.3d 333 – Even if an officer is exonerated, POBR rights apply to the underlying investigation as the investigation was one which *while it was being conducted* “could lead to punitive action.”

Government Code § 3253(a)

Interrogation

continued

- 1) Conducted at a **reasonable hour**
- 2) Conducted **on-duty**, unless there is an imminent public safety threat
- 3) If conducted **off-duty**, Firefighter must be **compensated**
- 4) **No loss of compensation** for missing work while being interrogated
 - [What about seasonal employees?]

Government Code § 3253(b)-(d)

Interrogation

continued

- A Firefighter under investigation shall be informed of the **person in charge** of the interrogation, have no more than **two interrogators** at one time, and **be informed of the nature** of the investigation prior to any interrogation.
- The interrogation shall be for a **reasonable period of time**, and the Firefighter must be allowed **reasonable breaks**.
- *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th 1506 – Statements obtained in violation of these rules, even in an informal investigation, can be suppressed. (Labio drove by fatal accident in a marked patrol vehicle to a doughnut shop. He was questioned without being advised that he was under investigation, without being advised of his Miranda rights. If he were informed he might have taped the discussion and requested a representative).
- *Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445. – Requirement that police officers be notified of the nature of the investigation prior to any interrogation must allow time to meaningfully consult with a representative of his/her choosing. The Court suggests meaningful consultation includes the need for enough specificity in the allegations to adequately prepare.
- *Perez v. Los Angeles Community College District* (2014) PERB Decision No. 2404 – Burden is on the employer to justify a blanket admonition not to discuss investigation with other employees as interference with the right to represent oneself under applicable bargaining laws.

Government Code § 3253(e)

Criminal Immunity

Before the employer can compel a Firefighter to respond to incriminating questions, the employer “shall provide to, **and obtain from**, an employee a **formal grant of immunity** from criminal prosecution, in writing.” If a grant of immunity is obtained, the Firefighter must be informed that the failure to answer questions may result in punitive action. The Firefighter shall not be subjected to offensive language or threats of punitive action.

- This provision was a response to a Court of Appeal decision. In *Spielbauer v. County of Santa Clara* (2007) 53 Cal.Rptr.3d 357, the Court of Appeal decision had threatened to turn a long line of cases on its head by holding that an employee has a constitutional right to remain silent unless given an express grant of immunity. The California Supreme Court subsequently granted review and agreed with our position, expressed in our amicus curiae brief filed with the California Supreme Court, that while employees can be ordered to respond to questions during an administrative investigation (and can be punished for refusal to answer those questions), the use of those statements in any criminal proceeding is forbidden, without any need to obtain a formal grant of immunity.
- *Lybarger*-type warning as under POBR is superseded by this section. See *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.
- While this section appears to require a formal grant of immunity, the language is ambiguous.

Government Code § 3253(e)

Criminal Immunity

continued

- *Garrity v. New Jersey* (1967) 385 U.S. 493 – The seminal case overturning peace officer convictions that had been based in part on the officers' own statements given after being told that if they refused to answer questions they would be terminated. The U.S. Supreme Court held that the threat of removal from public office rendered the resulting statements involuntary and therefore inadmissible in the state criminal proceedings.
- *United States v. Smith* (11th Cir. 2016) 821 F.3d 1293 – A required written report of a critical incident is protected if clearly ordered.
- Also, this section differs from the POBR, and raises the question of whether the POBR or the FFBOR would prevail where the employee is both a Firefighter and a Peace Officer.
- Opinion of Kamala D. Harris (2014) 97 Cal.Op.Att'y Gen. 34 (page 4) – Firefighters who have law enforcement as their primary duty are excluded from FFBOR when “acting in that capacity.”

Government Code § 3253(e)(2)

Media

A Firefighter's **photograph and contact information** shall not be given to the media, nor shall the Firefighter be subjected to visits by the media without express written consent of the Firefighter.

Government Code § 3253(f)

Coerced Statements (Lybarger Immunity)

A statement made during interrogation by a Firefighter under threat of punitive action **shall not be admissible** in any subsequent judicial proceeding, **except** when:

- 1) The department is seeking **civil service sanctions** against any firefighter, including disciplinary action brought under Section 19572.
- 2) The Firefighter or his or her association has brought a **civil or administrative action, arising out of a disciplinary action.**

Government Code § 3253(g)

Recorded Statements

The interrogation of a Firefighter may be **recorded**, and the Firefighter may bring his or her own recording device. The Firefighter shall have **access** to any recording prior to any further interrogation. The firefighter is **entitled to a transcribed copy of any notes made by a stenographer or any reports or complaints made by investigators or other person**, except those portions that are required by law to be kept confidential. Confidential notes or reports shall not be entered in the firefighter's personnel file.

- *Pasadena POA v. City of Pasadena* (1990) 51 Cal.3d 564 – No pre-interrogation discovery. However, a transcript or tape of the employee's own prior interrogation is available at any follow-up interrogation. No right to complaints and reports until receipt of Skelly package.
- *Santa Ana Police Officers Association v. City of Santa Ana* (2017) 13 Cal.App.5th 317 – An officer is also entitled to the notes, reports, or complaints prior to a follow-up interrogation.
- *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324 – Department did not have to provide officer with materials used in investigation if he was cleared of all charges, and such materials could not be used for personnel purposes. In such circumstances all that must be provided is a summary of complaints and the identity of the complainants. This is so due to the fact that the officer was exonerated and Department's regulations prohibited the use of such materials in making personnel decisions.

Government Code § 3253(h)

Miranda Rights

If, prior to or during the interrogation of a firefighter, it is contemplated that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

- [See Criminal Immunity – § 3253(e) and Lybarger Immunity - § 3253(f)]

Government Code § 3253(i)

Right to Representation

Whenever an interrogation may result in punitive action against a firefighter, that firefighter shall have the right to a **representative of his or her choice** present at all times during the interrogation.

The representative shall not be a person subject to the same investigation. The representative shall **not be required to disclose**, or be subject to any punitive action for refusing to disclose, any information received from the firefighter under investigation for **non-criminal matters**.

This **does not apply to counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other firefighter.**

- *Titus v. Civil Service Commission* (1982) 130 Cal.App.3d 357 – Attorney-client privilege vs. Police Officer's law enforcement duties. (Discharge of Lieutenant, who was also an attorney, upheld where he refused, due to attorney-client privilege, to disclose name and identity of individual possessing dynamite).
- *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 – Although this section purports to exclude representation for "counseling" this case held that in some (unusual) circumstances, right to representation exists for counseling under bargaining laws when (for example) the issue is highly emotional and contentious.
- *Upland POA v. City of Upland* (2003) 111 Cal.App.4th 1294 – Employee entitled to a "reasonably available representative of his or her choice." Court also implied a "mutually agreeable time." In this case, it was held that the representative (who was a lawyer) was only entitled to reschedule the interrogation once.
- *Quezada v. City of Los Angeles* (2014) 222 Cal.App.4th 993. Officers had no right to postpone interrogation due to the seriousness of the charge (firing weapon while off-duty and drunk) even though officers were awake for 24 hours, intoxicated, hung over, and chosen representative unavailable.
- See *Ellins and Perez*. §§ 3253(b)-(d).

Government Code § 3253(j)

Assignments

A firefighter shall not be loaned or temporarily reassigned to a location or duty assignment if a firefighter in his or her department would **not normally** be sent to that location or would not normally be given that duty assignment **under similar circumstances**.

- *Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111. (Being assigned to a desk job was normal for officers involved in shootings, until the officers are cleared by a psychiatrist).

Government Code § 3254(a)

Punitive Action

- A firefighter **shall not** be subjected to or threatened with **punitive action**, or denied promotion, because of the **lawful exercise of the rights** granted **under this Act**, or under **any** existing administrative grievance procedure.
- [Court v. PERB/Arbitration? See § 3260.]

Punitive Action (Administrative Appeal)

- Punitive action or denial of promotion on grounds other than merit shall not be undertaken against any non-probationary firefighter without providing the firefighter with an **opportunity** for **administrative appeal**.
 - *Butler v. County of Los Angeles* (1981) 116 Cal.App.3d 633 – Opportunity for appeal comes after action is taken.
 - *James v. City of Coronado* (2003) 106 Cal.App.4th 905 – For some discipline, hearing need not be a “due process hearing,” unless there is a loss of pay.
 - *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322 – Due Process (property interest). (Removal from SWAT, with a pay reduction, entitled officer to full evidentiary appeal).
 - *Orange County Employees Association v. County of Orange* (1988) 205 Cal.App.3d 1289 – No appeal from transfer for “deficiency in performance.”
 - But, transfers that do not result in loss of pay and are not for purposes of punishment do not trigger right to appeal. (*Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136.)
 - Demotion with corresponding salary decrease is punitive. (*Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250 – Permanent employee on probation in new position is entitled to administrative appeal from demotion and corresponding salary decrease.)
 - Note that while punitive action *may* be taken against public employees for misconduct committed while on unpaid leave (*Negron v. Los Angeles County Civil Service Commission* (2015) 240 Cal.App.4th 874), as will be discussed below, the rights and protections under the Firefighters Procedural Bill of Rights Act only apply to a firefighter during events and circumstances involving the performance of his or her official duties.

Government Code § 3254(c)

Punitive Action (Fire Chief)

- A fire chief shall not be removed without **written notice and an opportunity for administrative appeal**. Nothing in this subdivision shall be construed to create a **property interest**, if one does not otherwise exist by rule or law, in the job of fire chief.
- Establish record – name clearing hearing.
Binkley v. City of Long Beach (1993) 16 Cal.App.4th 1795.
- Impartial hearing officer required –
Gray v. City of Gustine (1990)
224 Cal.App.3d 621.
- Who is a “fire chief” in CAL FIRE? A Unit Chief? An Assistant Chief? A Battalion Chief? How about outside CAL FIRE? A Battalion Chief? An Assistant or Deputy Chief?

Government Code § 3254(d)

Punitive Action (Limitations Period)

- Punitive action or denial of promotion on grounds other than merit shall not be undertaken if the investigation of an allegation is not completed within one year of discovery, if the discovery of the act, omission, or other misconduct occurred on or after January 1, 2008. If it is determined that discipline may be taken, the investigation must be completed and the firefighter must be notified of the proposed disciplinary action within one year, except in any of the following circumstances:
 - *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069 – Upholds one-year statute of limitations. While the one-year statute of limitations is still applicable, the California Supreme Court, in *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, held that the analogous section of the POBR merely requires that the public agency must notify the employee that it has decided that it might take some type of disciplinary action against the officer for certain, specified misconduct. Notice of the specific level of discipline to be imposed is no longer required.
 - *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46 – Officer’s allegedly false denial of charges during administrative interview did not constitute a separate offense of untruthfulness for the purposes of extending the statute of limitations.
 - *CCPOA v. SPB* (2007) 147 Cal.App.4th 797 – Extensive lying during administrative interview can constitute a separate offense triggering a new one year statute of limitations period. (Unlike *Alameida*, the charges were only a few months past the statute of limitations period, so memories were still fresh. Additionally, the dishonesty was not simply a denial of charges, but concerned a variety of issues regarding the investigation).
 - *Melkonians v. Los Angeles County Civil Service Commission* (2009) 174 Cal.App.4th 1159 – SOL to bring a punitive action against an employee for one set of allegations was tolled during the period of time the officer had been terminated (and was appealing) his termination for other alleged misconduct.

Government Code § 3254(d)

Punitive Action (Limitations Period. Exceptions.)

- 1) If the firefighter waives the one-year time period, the period shall be tolled for the time specified in the **written waiver**.
- 2) If the allegation of misconduct is also the subject of a **criminal investigation** or prosecution, the time during which the criminal investigation or prosecution is pending shall toll the one-year time period.
- 3) If the investigation is **multijurisdictional** and requires a reasonable **extension** for coordination of the involved agencies.
 - *Huelsse v. County of Santa Clara* (May 7, 2010) WL 1828616 (unpublished opinion) – The SOL for punitive action against an officer is tolled during a pending criminal investigation of another officer for conduct related to the conduct that is the subject of the punitive action.
 - *Department of Corrections and Rehabilitation v. SPB* (2016) 247 Cal.App.4th 700 (Iqbal) – Statute of limitations is tolled even when criminal investigation is conducted internally.

Government Code § 3254(d)(e)

Punitive Action (Limitations Period. Exceptions.)

continued

- 4) If the investigation involves an employee who is **incapacitated or unavailable**.
 - 5) If the investigation involves a matter in **civil litigation** where the firefighter is named as a **defendant**, the one-year time period shall be **tolled** while that civil action is pending.
 - 6) If the investigation involves a matter in criminal litigation in which the **complainant is a criminal defendant**, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution
 - 7) If the investigation involves an allegation of workers' compensation fraud by the firefighter.
 - *CDCR v. SPB (Moya)* (2013) 215 Cal.App.4th 1101 – SOL does not apply if the investigation involves an allegation of workers' compensation fraud.
- (e) If Skelly or grievance procedures required or used, time limits will not be governed or limited by this chapter.

Government Code § 3254(f)

Punitive Action (Notification Period)

- If the **employing department or licensing or certifying agency** [includes EMT Certification, Paramedics License, etc.] decides to impose discipline, that agency shall notify the firefighter in writing of its decision to impose discipline **within 30 days of its decision, but not less than 48 hours prior** to imposing the discipline.
- Due process requires a pre-disciplinary hearing, and an evidentiary appeal after imposition of the discipline. *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. However, in the case of short term suspensions (generally 5 days or less), no pre-disciplinary hearing is required – rather the hearing may occur shortly after the imposition of the penalty. *Ng v. State Personnel Board* (1977) 68 Cal.App.3d 600; *Civil Service Association, Local 400 v. City and County of San Francisco* (1978) 79 Cal.3d 540.
- *Neves v. California Department of Corrections and Rehabilitation* (2012) 203 Cal.App.4th 61 – Public safety officer was properly notified of intent to impose disciplinary action where he received notice of adverse action within 30 days of the decision to impose the action. This leads to situations where as long as the employee is notified that some discipline will be imposed within the 1-year period of limitations, the Department has an additional 30-days to notify the employee of *what* that discipline might be.

Government Code § 3254(g)

Punitive Action (Reopening of Investigation)

- An investigation may be reopened after the one-year limitations period if:
 - 1) Significant **new evidence** has been discovered that is likely to affect the outcome of the investigation, **and**
 - 2) The evidence could **not reasonably have been discovered** in the normal course of investigation **or** the evidence resulted from the **firefighter's pre-disciplinary response**.

Administrative Appeals (APA)

- Administrative appeals “shall be conducted in conformance with the rules and procedures adopted by the employing department or licensing or certifying agency, that are in accordance with the California Administrative Procedure Act (APA).”
- Or by arbitration if set forth in an MOU.
- An Amendment to the FFBOR provides that if an MOU provides for binding arbitration of administrative appeals, the arbitrator shall serve as the “hearing officer” in accordance with the APA. However, an MOU with binding arbitration does not control the process for administrative appeals with licensing or certifying agencies. Such appeals must adhere to the requirements of the APA.
- *Siebert v. City of San Jose* (2016) 247 Cal.App.4th 1027 – The APA requires hearing by an ALJ.
- CAL FIRE Local 2881 disciplinary appeals (as well as the disciplinary appeals of all other firefighters employed by the State of California, including those in the CCPOA and CSLEA-represented bargaining units) are not governed by the MOU, but rather by the SPB disciplinary appeals process, which has rules that appear to be consistent with the APA.
- Many local jurisdictions also already have Civil Service Commissions and procedures when tend to be in accordance with the APA.

Government Code § 3255

Personnel Files (Adverse Comments)

- A firefighter shall not have any adverse comments entered in a **personnel file** (or any other file used for personnel purposes), without the firefighter having **first read and signed** the instrument containing the adverse comment indicating he or she is aware of the comment. If the firefighter has read the instrument and **refuses to sign it**, that fact shall be **noted** on the document, signed or initialed by the firefighter, and then the entry may be made.
- *Miller v. Chico Unified School District* (1979) 24 Cal.3d 703 – Under the Education Code, any file used for personnel purposes is a personnel file.
- *Sacramento POA v. Venegas* (2002) 101 Cal.App.4th 916 – An index card regarding an allegation of neglect of duty is an adverse comment.
- *Brutsch v. City of Los Angeles* (1992) Cal.App.4th 354 – Employer is not required to disclose negative comments made in connection with a civil service promotional exam.
- *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378 – The first California Supreme Court decision interpreting the FFBOR, this case held that daily logs kept by a Fire Captain were NOT subject to the FFBOR requirement allowing a firefighters the opportunity to review and comment because (according to the Court) they were not used for personnel purposes but to refresh the memory of the Fire Captain.
- *White v. County of Los Angeles* (2016) 2016 WL 2910095 – Adverse comments in confidential memoranda leading to a fitness for duty exam are subject to POBR right to review and respond.

Government Code § 3256

Personnel Files (Response to Adverse Comments)

- A firefighter shall have **30 days** within which to file a **written response** to any adverse comment entered in his or her personnel file. The written response shall be attached to, and shall accompany, the adverse comment.
 - While routine negative evaluations are not punitive action (*Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447), there is still a right to respond – but not to appeal.

Government Code § 3256.5(a)

Personnel Files (Inspection)

- Employers must keep Firefighters' personnel files. Firefighters have the right to **inspect** their personnel files within a **reasonable period** of time after making a request, during normal business hours, with **no loss of compensation**.

Personnel Files (Inspection)

continued

- If a firefighter believes that any material is mistakenly or unlawfully placed in their personnel file, the firefighter may request, in writing, that the **mistaken or unlawful** portion be **corrected or deleted**. Within 30 calendar days of the request, the employer shall either grant the request or notify the firefighter of the refusal to grant the request. If the employer refuses to grant the request, the employer shall state, **in writing, the reasons for refusing the request**, and that statement shall become part of the personnel file.
- *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419 – Despite the confidentiality of peace officer personnel records under Penal Code sections 832.5 and 832.7, no remedy is set forth in the statutes, so there is no right to bring a private lawsuit for disclosure of confidential personnel records. [See also, *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607]
- *Barber v. California Dept. of Corrections and Rehabilitation* (2012) 203 Cal.App.4th 638 – Because POBR rights were only intended to apply during employment, after termination the right to inspect a personnel file ends.

Government Code § 3257

“Lie Detector”

A Firefighter cannot be compelled to submit to a **lie detector test**, and refusal to submit cannot be noted or used against the Firefighter.

- *Estes v. City of Grover City* (1978) 82 Cal.App.3d 509 – Establishes an exclusionary rule.
- *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275 – Even voluntary exams are not admissible.
- *Los Angeles Police Protective League v. City of Los Angeles* (1995) 35 Cal.App.4th 1535 – No prohibition on use of lie detector for screening peace officers under POBR for voluntary transfer to sensitive assignments.

Government Code § 3258

Disclosure of Assets

A Firefighter cannot be required or requested to disclose his or her **assets, income, or debts** unless required under state law or pursuant to court order.

- [This is more restrictive than POBR (Gov. Code section 3308), which provides that a Department can require or request disclosure when required under state law or court order AND/OR when the information “tends to indicate a conflict of interest with respect to the performance of his official duties, or is necessary for the Department to ascertain the desirability of assigning the officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered.”]

Government Code § 3259

Locker Search

Your employer cannot search your **locker or other space for storage** unless you are **present**, or you **consent**, or you have been notified that a search will be conducted, or unless a valid search warrant has been obtained.

- *O'Connor v. Ortega* (1987) 480 U.S. 709. – Establishes standards for “reasonable expectations of privacy” under the 4th Amendment to the U.S. Constitution.
- *Delia v. City of Rialto* (9th Cir. 2010) 621 F.3d 1069 – Compelled search of firefighter’s home during internal affairs investigation violates 4th Amendment. Thus, an employee has a constitutional right, in the course of an internal affairs investigation, not to be ordered (under the threat of discipline) to consent to a warrantless search of the employee’s home. (Note that this case arose pre-FFBOR).

Is a telephone or computer “other space for storage”?

- See *Quon v. City of Ontario* (2010) 560 U.S. 746 – U.S. Supreme Court held City Police Officer had a reasonable expectation of privacy in his text messages. However, Court held that searches conducted for non-investigatory, work-related purposes or for the investigation of work-related misconduct, a government employer’s warrantless search is reasonable if 1) it’s justified at its inception; and 2) the measures adopted are reasonably related to the objective of the search and not excessively intrusive.
- See also *Larios v. Lunardi* (2016) 2016 WL 6679874 – Court held that CHP officer had a reasonable expectation of privacy in his personal cellphone, despite having used it at times for work with the permission of his government employer, AND even in the face of notice that any work product would have to be turned over to the state
- See also *Penal Code 1546 et. seq. – California Electronic Communications Privacy Act (2015)*
- But see *City of San Jose v. Superior Court of Santa Clara County* (2017) CA Supreme Ct. S218066 – CA Supreme Court held that communication about public business or on a personal account may be subject to disclosure requirements under the California Public Records Act (CPRA)

Government Code § 3260

Enforcement of this Act

- It is unlawful for the employer to deny or refuse any Firefighter the rights and protections of this Act, and a Firefighter or association may file a **lawsuit in superior court alleging violations of this Act**.
- The superior court can render **injunctive** or other extraordinary relief to remedy the violation(s) and to prevent future violations of a like or similar nature. This can include an injunction prohibiting the department from **taking any punitive action** against the Firefighter.
- *Mounger v. Gates* (1987) 193 Cal.App.3d 1248 – No exhaustion of administrative remedies is required.
- *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020 – Rights may be waived by individual employees during employment as part of a disciplinary settlement agreement.
- *Mitchel v. City of Santa Rosa* (2011) 2011 WL 6807553, 476 Fed.Appx. 661 (citable but not designated for publication) – Although POBR (and, by extension the FFBOR) grants initial jurisdiction to State courts, this does not vest *exclusive* jurisdiction over such claims in the courts.
- *Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363 – Exclusion of statements that could impact the outcome of a disciplinary case.

Government Code § 3260

Enforcement of this Act

continued

- If the court finds that a **department maliciously** violated any provision of the Act with the **intent to injure** the firefighter, the department shall be liable for a **civil penalty** of up to **\$25,000**, for each violation, in addition to **actual damages** established, to be awarded to the firefighter whose right or protection was denied and for **reasonable attorney's fees** as may be determined by the court.
- A court can also issue sanctions and award attorneys fees and expenses against a party filing an action under these sections, if it finds that the action was frivolous or brought in bad faith.

Government Code § 3261

Mutual Aid Agreements

Nothing in this chapter shall in any way be construed to limit the ability of any employing department, licensing or certifying agency, or any firefighter to fulfill mutual aid agreements with other jurisdictions or agencies, and this chapter shall not be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where that activity is deemed necessary or desirable by the jurisdictions or agencies involved.

Government Code § 3262

Applicability

The rights and protections under the Firefighters Procedural Bill of Rights Act “only apply to a firefighter during events and circumstances involving the performance of his or her official duties or during events and circumstances giving rise to disciplinary cause or reason pursuant to Section 1799.112 of the Health and Safety Code or giving rise to disciplinary action pursuant to subsection (d) of Section 1797.194 of the Health and Safety Code.”

- The amendment (underlined above) to this section expands the rights only of firefighter EMT-Paramedics to cover discipline of an EMT-Paramedic based on conduct related to the “qualifications, functions, and duties of a paramedic” if it is evidence of a threat to health or safety, regardless of whether it is on or off-duty.

- Does this apply to acts only in the course and scope of employment? Would these rights and protections apply to, for example, on-duty, but non work-related activities, like sexual harassment?
- *Siebert v. City of San Jose* (2016) 247 Cal.App.4th 1027 – FFBOR covers acts and misconduct alleged to have occurred while firefighter is engaged in the performance of duty. Here, FFBOR rights covered allegations of sexually explicit e-mails sent on duty to an under-age female.
- Opinion of Kamala D. Harris (2014) 97 Cal.Op.Att’y Gen. 34 (page 4) – Firefighters who have law enforcement as their primary duty are excluded from FFBOR when “acting in that capacity.”



Contact Us



GARY MESSING
CAL FIRE Local 2881 Chief
Legal Counsel / Partner
Sacramento Office
916.446.5297
gary@majlabor.com



JASON JASMINE
Partner
Sacramento Office
916.446.5297
jason@majlabor.com

www.majlabor.com