
SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair
2021 - 2022 Regular Session

SB 2 (Bradford) - Peace officers: certification: civil rights

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Urgency: No

Hearing Date: May 10, 2021

Policy Vote: PUB. S. 4 - 0, JUD. 7 - 2

Mandate: Yes

Consultant: Shaun Naidu

Bill Summary: SB 2 would establish new standards and processes to investigate and determine peace officer fitness and to certify and decertify such officers. It also would establish a new standard for establishing liability, eliminate the application of certain governmental immunities, and allow wrongful death actions under the Tom Bane Civil Rights Act (Bane Act).

Fiscal Impact:

- Commission on Peace Officer Standards and Training (POST): The commission reports one-time costs of \$650,000 and ongoing costs ranging between \$28.3 million and \$37.2 million annually. In large part, costs are associated with increased personnel required for investigations, complaint intake, data collection, information reporting, certification processing, and administrative functions (ranging from \$19 million to \$26 million annually); facility expansion of its current location and obtaining additional office space in the Bay Area and southern California (estimated at about \$5.75 million annually); travel requirements for staff (estimated between \$3 million and \$5 million annually); equipment costs (at about \$350,000 annually); and costs related to the Advisory Board (of about \$145,000 annually). Personnel estimates by POST are based on the Division conducting 1,200 decertification investigations a year, and costs likely would rise if markedly more investigations are required.

Ongoing costs, either wholly or to a large extent, would be offset by fees that POST would be able to charge to administer the mandates in this bill. For example, presuming about 100,000 peace officers in the state would be subject to the certification scheme that would be established by SB 2, the annual certification fee alone, set at the statutory cap of \$250, would generate about \$25 million. While the payment of fees ultimately would be the responsibility of each peace officer, as a practical matter, they likely would be covered by their employing agency. Consequently, the fees likely would be added state costs for state entities that employ peace officers who would be subject to the certification requirement of this bill. While POST would be able to charge fees for certifications that it issues starting on January 1, 2022, it is likely that the commission would, at least initially, need to use its existing operating budget or receive a General Fund appropriation to begin its work under this measure before it is able to collect fee revenue. (General Fund, fees)

- California Highway Patrol (CHP): To the extent that CHP covers the costs of the certification fees for its peace officers, it anticipates initial costs of \$4.18 million with ongoing annual costs of \$2.09 million. The department also reports the likely need to hire 2.0 additional Attorney VI and 2.0 Senior Legal Analysts, at an annual

ongoing cost of \$600,000 (exclusive of benefits), for workload related to the elimination of qualified immunity under the Bane Act. (Special fund*)

- Department of Corrections and Rehabilitation (CDCR): Significant ongoing annual workload costs, necessitating new personnel, ranging from the hundreds of thousands of dollars to the millions of dollars to CDCR to report to POST within seven days the occurrence of specified incidents that could lead to the revocation of an officer's certification, including any complaint, charge, allegation, or investigation into the conduct of a peace officer that could render the certification of the officer subject to revocation. The department employs over 28,000 peace officers and receives a significant number of complaints against its officers every week. Additionally, CDCR is not equipped to provide an outside agency with all of the complaints that it receives. Doing so likely would require significant one-time infrastructure costs to establish such a process. (General Fund)
- Department of Justice (DOJ): Unknown, potentially-significant workload costs. For a similar bill from a prior session, costs for the department were in the low hundreds of thousands of dollars annually with higher initial costs during the first few years. Any litigation costs borne by DOJ related to the representation of a state agency due to the elimination of immunity under the Bane Act would be recoverable through charges to the client state departments. Collectively, however, these litigation cost could be significant, potentially in the hundreds of thousands of dollars annually.
- Other state entities: Costs would vary, from minor and absorbable (for those agencies that employ a small number of peace officers) to tens of thousands of dollars each year (e.g., the Department of Insurance) to the low hundreds of thousands of dollars annually (e.g., the University of California with approximately 470 peace officers).
- Loss of immunity, lower standard: Unknown, potentially major costs in the millions of dollars annually across state departments to the extent that the elimination of immunity for state employers in the Bane Act or the change of elements under the act would lead to additional and/or higher awards of damages and settlements by state departments and entities that employ peace officers or custodial officers than otherwise would happen under existing law.
- Information reporting by local agencies: Unknown, potentially-major costs in the aggregate to local jurisdictions to provide specified information to POST under SB 2. Actual costs to each jurisdiction would depend on a number of factors, including the number of peace officers employed by the agency, the rate of officer turnover, and how many officers are subject to an investigation that would prompt reporting by this measure. These costs likely would be reimbursable by the state, the extent of which would be determined by the Commission on State Mandates. Considering that there are over 500 local law enforcement agencies across the state, costs to comply with this measure could be in the hundreds of thousands of dollars in the aggregate at a minimum. (General Fund, local funds)
- Courts: Unknown, potentially-significant workload cost pressures to the courts to the extent that the ability to bring wrongful death claims, the elimination of the specific

intent requirement, and/or the inapplicability of specified immunity provisions under the Bane Act result in additional or lengthier cases that would not have been filed or taken as long under existing law. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations. For illustrative purposes, the Governor's proposed 2021-2022 budget would appropriate \$118.3 million from the General Fund to backfill continued reduction in fine and fee revenue for trial court operations. (General Fund**)

*Motor Vehicle Account, State Transportation Fund

**Trial Court Trust Fund

Background: To become a peace officer of a California public entity, existing law sets specified minimum standards. Specifically, the person must be at least age 18; be a U.S. citizen or permanent resident who is eligible and has applied for citizenship (A CHP officer must be a U.S. citizen at the time of appointment.); be a graduate of an accredited or approved U.S. high school or its equivalent; pass a reading and writing assessment; pass an assessment of oral communication skills; not have a felony conviction and must undergo a criminal history background check, as specified; undergo a thorough background review based on the person's personal history; undergo medical and psychological evaluations by licensed physicians and psychologists to ensure the person is free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

Additionally, existing law requires POST to set minimum standards for the recruitment and training of peace officers, develop training courses and curriculum, and establish a professional certificate program that awards different levels of certification based on training, education, experience, and other relevant prerequisites. The commission may cancel a certificate that was awarded in error or fraudulently obtained; however, POST is prohibited from canceling a properly-issued certificate.

According to the analysis of this bill by the Senate Committee on Judiciary:

The Bane Act provides a right of action against a person who interferes with the rights of an individual afforded by the United States and California constitutions, and other federal and state laws, whether or not the person was acting under color of law, a difference between it and Section 1983[, the federal law that provides a cause of action for redress against state and local officials who, "under color of any statute, ordinance, regulation, custom, or usage," deprive a person of any rights, privileges, or immunities secured by the Constitution and laws]. An action can be brought by the Attorney General or any district attorney or city attorney in California for injunctive and other equitable relief, "in order to protect the peaceable exercise or enjoyment of the right or rights secured." The prosecuting entity may also seek a civil penalty of \$25,000 to be assessed individually against each person violating this law. Such penalties are provided to the individuals whose rights are determined to have been violated.

The individual whose rights were violated is also authorized to bring an action on their own behalf for damages, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including “appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct.” In many cases, Bane Act claims are asserted alongside Section 1983 claims when a person alleges their rights have been violated by a governmental actor.

The Bane Act states that the interference, or attempted interference, with an individual’s rights must be by “threat, intimidation, or coercion.” Similar to Section 1983, the courts have interpreted the Bane Act in such a way that injured plaintiffs have a high hurdle to clear in order to establish civil rights claims.

In interpreting the statute, California courts have ruled that the “act of interference with a constitutional right must itself be deliberate or spiteful,” that “where coercion is inherent in the constitutional violation alleged ... the statutory requirement of ‘threats, intimidation, or coercion’ is not met; the statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself,” and with respect to unlawful arrests, that “the egregiousness required by [the Bane Act] is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee’s right.” Additionally, courts have held that wrongful death actions may not be pursued under the Bane Act and that claims under the act are “subject to the various statutory immunities that protect governmental defendants from liability even when they are found to have committed civil rights violations.” (See the analysis of this bill by the Senate Committee on Judiciary for the citations.)

Proposed Law: With respect to peace officer fitness, certification, and decertification, this bill would:

- Disqualify a person from being employed as a peace officer if that person has been any of the following:
 - Convicted of, or been adjudicated to have committed crimes against public justice, including falsifying records, bribery, or perjury.
 - Certified as a peace officer by POST and has surrendered that certification, had that certification revoked by POST, or has been denied certification.
 - Previously employed in law enforcement in any state, U.S. territory, or the federal government whose name is listed in the national decertification index.
 - Engaged in “serious misconduct,” as that term is defined, that would have resulted in their certification being revoked by the state.
- Require POST to adopt by regulation a definition of “serious misconduct” to serve as the criteria to be considered for ineligibility for, or revocation of, certification. It would require the definition to include the following:
 - Dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting or investigation of misconduct by a peace officer.
 - Abuses of power, including intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest.
 - Physical abuse, including unauthorized use of force.
 - Sexual assault, as specified.
 - Demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or

other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner.

- Violation of the law or other acts that are inconsistent with an officer's obligation to uphold the law or respect the rights of members of the public.
- Participation in a law enforcement gang or other organization that engages in a pattern of rogue on-duty behavior that violates the law or fundamental principles of professional policing, including, but not limited to, unlawful detention, use of excessive force, falsifying police reports, fabricating evidence, targeting persons for enforcement based solely on protected characteristics of those persons, theft, use of alcohol or drugs while on duty, protection of other members from disciplinary actions, and retaliation against other officers who threaten or interfere with the activities of the group.
- Failing to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to the provisions of this bill.
- Grant POST the power to investigate and determine the fitness of any person to serve as a peace officer in California and to audit any law enforcement agency that employs peace officers without cause at any time by creating and empowering a new division.
- Create the Peace Officer Standards Accountability Division (Division) within POST to investigate and prosecute proceedings to take action against a peace officer's certification.
- Require the Division to review and investigate grounds for decertification and make findings as to whether the grounds for action against an officer's certification exist.
- Require the Division to notify the officer who is subject to decertification of the Division's findings and allow the officer to request review.
- Create the Peace Officer Standards Accountability Advisory Board (Advisory Board), which would be made up of nine members with specified backgrounds, with seven appointments by the Governor and one appointment each by the Speaker of the Assembly and the Senate Committee on Rules.
- Require the Advisory Board hold public meetings to review the findings after an investigation made by the Division and to make a recommendation to POST.
- Requires law enforcement agencies to report to POST all of the following:
 - The employment, appointment, or separation from employment of a peace officer.
 - Any complaint, charge, allegation, or investigation into the conduct of a peace officer that could render the certification of the officer subject to revocation.
 - Findings of civil oversight entities.
 - Civil judgements that could affect the officer's certification.
- Require each agency, in cases of separation from employment or appointment of an officer, to execute under penalty of perjury an affidavit-of-separation form adopted by POST describing the reason for the separation.
- Declare that certificates or proof of eligibility awarded by POST are the property of POST and would allow POST to revoke a proof of eligibility or certificate on grounds including the use of excessive force, sexual assault, making a false arrest, or participating in a law enforcement gang.
- Require law enforcement agencies employ only peace officers with current, valid certification or pending certification.

- Direct POST to issue or deny certification, including a basic certificate or proof of eligibility to a peace officer.
- Require POST to issue a proof of eligibility or basic certificate to persons employed as a peace officers on January 1, 2022, who are eligible but who have not applied for a certification.
- Require the renewal of proof of eligibility or basic certification at least every two years.
- Require POST assess a fee of up to \$300 for the initial issuance of a basic certificate or proof of eligibility, of up to \$50 for renewal of an expiring basic certificate or proof of eligibility, and of up to \$250 for the annual certification fee for costs incident to the administration of the certification program, investigations of officer misconduct, and adjudication of certification revocations.
- Allow POST to determine other necessary fees for the processing of other transactions related to the certification program and to set and adjust fees, but the fees may not exceed the reasonable regulatory cost to POST of administering the certification program.
- Create the Peace Officer Certification Fund, a continuously appropriated fund, for deposit of the fees and to be used for administering the certification program.
- Require all records related to the revocation of a peace officer's certification be public.
- Require records of an investigation to be retained for 30 years, except as specified.

Related to the Bane Act, this bill would:

- Provide that the threat, intimidation, or coercion required by the act need not be separate or independent from, and may be inherent in, any interference or attempted interference with a right.
- Provide that a person bringing suit need not prove that a person being sued had specific intent to interfere or attempt to interfere with a right secured by the Constitution or law. It would provide that intentional conduct to interfere or attempt to interfere with a constitutional right or right granted by law or deliberate indifference or reckless disregard for such a right that interferes or attempts to interfere with that right, is sufficient to prove a violation of this provision by threat, intimidation, or coercion. It would specify that a person acts "intentionally" when the person acts with general intent or a conscious objective to engage in particular conduct.
- Allow a cause of action under the act for the death of a person to be asserted by specified persons described in existing law.
- Eliminate the application of specified immunity provisions to a Bane Act claim brought against any peace officer or custodial officer, as described, or directly against a public entity that employs a peace officer or custodial officer.
- Clarify that specified indemnification provisions continue to apply to Bane Act claims against current or former public employees.

Related Legislation: AB 17 (Cooper, 2021-2022 Reg. Sess.) would establish the Peace Officer Standards Accountability Board, which would provide recommendations to the Commission on Peace Officer Standards and Training relating to officer retention; expand the authority of the Commission on Peace Officer Standards and Training; and add standards relating to the certification of officers and officer retirement/resignation. AB 17 is pending in the Assembly Committee on Public Safety.

AB 26 (Holden, 2021-2022 Reg. Sess.) would disqualify from becoming a peace officer any person who has been found by a law enforcement agency that employs them to either have used excessive force that resulted in great bodily injury or the death of a member of the public or have failed to intercede in that incident. It would provide for the discipline of an officer who fails to intercede when witnessing excessive force. AB 26 is pending on the Suspense File of the Assembly Committee on Appropriations.

AB 60 (Salas, 2021-2022 Reg. Sess.) would add criteria disqualifying individuals from serving as a peace officer; establish the Peace Officer Standards Accountability Board, which would provide recommendations to POST relating to officer retention; expand the authority of POST; and add standards relating to the certification of officers and officer retirement/resignation. AB 60 is pending in the Assembly Committee on Public Safety.

AB 718 (Cunningham, 2021-2022 Reg. Sess.) would require investigations into allegations that a law enforcement officer engaged in certain conduct, such as discharging a firearm or using force that resulted in death or great bodily injury, be completed regardless of whether the officer voluntarily separates from the agency before the investigation is completed. AB 718 is pending referral in the Senate.

AB 958 (Gipson, 2021-2022 Reg. Sess.) would restrict participation in law enforcement "cliques," as defined, and would require law enforcement agencies to institute policies banning law enforcement cliques. AB 958 is pending in the Assembly Committee on Appropriations.

SB 731 (Bradford, 2019-2020 Reg. Sess.) would have established the Peace Officer Standards Accountability Board, which would develop and carry out procedures for revoking a law enforcement officer's certification under specified circumstances; added criteria prohibiting an individual from serving as a law enforcement officer; and added circumstances in which police officer records are subject to public disclosure. SB 731 was not voted upon on the Assembly floor.

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