Senate Engrossed House Bill

FILED
KEN BENNETT
SECRETARY OF STATE

State of Arizona
House of Representatives
Fiftieth Legislature
Second Regular Session
2012

CHAPTER 276

HOUSE BILL 2723

AN ACT

AMENDING SECTION 38-1101, ARIZONA REVISED STATUTES; RELATING TO LAW ENFORCEMENT OFFICERS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 38-1101, Arizona Revised Statutes, is amended to read:

38-1101. Law enforcement officers; probation officers; right to representation; right to evidence on appeal; change of hearing officer or administrative law judge; burden of proof; polygraph examinations; definitions

A. If an employer interviews a law enforcement officer or probation officer and the employer reasonably believes that the interview could result in dismissal, demotion or suspension or if the law enforcement officer or probation officer reasonably believes the investigation could result in a dismissal, demotion or suspension:

1. The law enforcement officer or probation officer may request to have a representative of the officer present at no cost to the employer during the interview. The law enforcement officer or probation officer shall select a representative who is available on reasonable notice so that the interview is not unreasonably delayed. The representative shall participate in the interview only as an observer. Unless agreed to by the employer, the representative shall be from the same agency and shall not be an attorney except that if a representative from the same agency is not reasonably available, with the employer's permission, the law enforcement officer's or probation officer's representative may be from the law enforcement officer's or probation officer's professional membership organization. The law enforcement officer or probation officer shall be permitted reasonable breaks of limited duration during any interview for telephonic or in person consultation with others, including an attorney, who are immediately available. An employer shall not discipline, retaliate against or threaten to retaliate against a law enforcement officer or probation officer for requesting that a representative be present or for acting as the representative of a law enforcement officer or probation officer pursuant to this paragraph.

2. Before the commencement of any interview described in this section, the employer shall provide the law enforcement officer or probation officer with a written notice informing the officer of the alleged facts that are the basis of the investigation, the specific nature of the investigation, the officer's status in the investigation, all known allegations of misconduct that are the reason for the interview and the officer's right to have a representative present at the interview. The notice shall include copies of all complaints that contain the alleged facts that are reasonably available, except for copies of complaints that involve matters pursuant to federal laws under the jurisdiction of the equal employment opportunity commission.

3. After an employer completes an investigation of a law enforcement officer or probation officer if the employer seeks disciplinary action at the request of the law enforcement officer or probation officer, the employer shall provide a basic summary of any discipline ordered against any other law

enforcement officer or probation officer of generally similar rank and experience employed by the employer within the previous two years for the same or a similar violation. As an alternative, the employer may provide file copies of the relevant disciplinary cases. The employer shall not take final action and the employer shall not schedule the hearing until the basic summary or file copies are provided to the law enforcement officer or probation officer. This paragraph does not apply if court rule prohibits the release of file copies of disciplinary cases.

4. The employer may require the law enforcement officer or probation officer to submit to a polygraph examination if the officer makes a statement to the employer during the investigation that differs from other information relating to the investigation that is known to the employer and reconciling that difference is necessary to complete the investigation. If a polygraph examination is administered pursuant to this paragraph, the employer or the person administering the polygraph examination shall make an audio recording of the complete polygraph procedure and provide a copy of the recording to the law enforcement officer or probation officer.

5. The law enforcement officer or probation officer, at the conclusion of the interview, is entitled to a period of time to consult with the officer's representative and may make a statement not to exceed five minutes addressing specific facts or policies that are related to the interview.

B. The results of a polygraph examination in an investigation shall not be the basis for disciplinary action unless other evidence or information exists.

C. Subsection A of this section does not require the employer to either:

1. Stop an interview to issue another notice for allegations based on information provided by the law enforcement officer or probation officer during the interview.

2. Disclose any fact to the law enforcement officer or probation officer or the law enforcement officer's or probation officer's representative that would impede the investigation.

D. Subsection A, paragraphs 1 and 2 of this section do not apply to an interview of a law enforcement officer or probation officer that is:

1. In the normal course of duty, counseling or instruction or an informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other law enforcement officer or probation officer.

2. Preliminary questioning to determine the scope of the allegations or if an investigation is necessary.

3. Conducted in the course of a criminal investigation.

4. Conducted in the course of a polygraph examination.

E. In any appeal of a disciplinary action by a law enforcement officer or probation officer, the parties shall exchange copies of all relevant documents and a list of all witnesses pursuant to the following time periods and requirements:

1. Within three business days after the employer's receipt of a written request from the law enforcement officer or probation officer for a copy of the investigative file that is accompanied by a copy of the filed notice of appeal, the employer shall provide a complete copy of the investigative file as well as the names and home or work mailing addresses of all persons interviewed during the course of the investigation.

~~2. No later than five business days before the appeal hearing, or, if the appeal hearing is scheduled more than twenty days after the notice of appeal, no later than ten business days before the appeal hearing, the employer and the law enforcement officer or probation officer shall exchange copies of any documents that may be introduced at the hearing and that have not previously been disclosed.~~

~~3. No later than five business days before the appeal hearing, or, if the appeal hearing is scheduled more than twenty days after the notice of appeal, no later than ten business days before the appeal hearing, the employer and the law enforcement officer or probation officer shall exchange the names of all witnesses who may be called to testify.~~

2. NO LATER THAN TEN BUSINESS DAYS BEFORE THE APPEAL HEARING, THE PARTIES SHALL PRODUCE AND SERVE ON EVERY PARTY THE FOLLOWING INFORMATION:

(a) THE NAME OF EACH WITNESS WHOM THE DISCLOSING PARTY EXPECTS TO CALL AT THE APPEAL HEARING, WITH A DESIGNATION OF THE SUBJECT MATTER OF WHICH EACH WITNESS MIGHT BE CALLED TO TESTIFY. A witness may be interviewed at the discretion of the witness. The parties shall not interfere with any decision of a witness regarding whether to be interviewed. An employer shall not discipline, retaliate against or threaten to retaliate against any witness for agreeing to be interviewed or for testifying or providing evidence in the appeal.

(b) THE NAME AND CONTACT INFORMATION OF EACH PERSON WHO HAS GIVEN STATEMENTS, WHETHER WRITTEN OR RECORDED, SIGNED OR UNSIGNED, REGARDING MATTERS RELEVANT TO THE NOTICE OF DISCIPLINE AND THE CUSTODIAN OF THE COPIES OF THOSE STATEMENTS.

(c) THE COPIES OF ANY DOCUMENTS THAT MAY BE INTRODUCED AT THE HEARING AND THAT HAVE NOT PREVIOUSLY BEEN DISCLOSED.

F. It is unlawful for a person to disseminate information that is disclosed pursuant to subsection E of this section to any person other than the parties to the appeal and their lawful representatives for purposes of the appeal of the disciplinary action. This subsection does not prohibit the use of the information in the hearing or disclosure pursuant to title 39, chapter 1, article 2.

G. FAILURE TO COMPLY WITH THE REQUIREMENTS OF SUBSECTION A, PARAGRAPH 1 OF THIS SECTION OR SUBSECTION E OR F OF THIS SECTION SHALL RESULT IN THE EXCLUSION OF THE WITNESS, EVIDENCE OR TESTIMONY, UNLESS THE FAILURE TO COMPLY IS OF EXCUSABLE NEGLECT.

~~G.~~ H. The employer or the law enforcement officer or probation officer may seek a determination by the hearing officer, administrative law

judge or appeals board hearing the appeal regarding any evidence that the employer or the law enforcement officer or probation officer believes should not be disclosed pursuant to subsection E of this section because the risk of harm involved in disclosure outweighs any usefulness of the disclosure in the hearing. In determining whether evidence will be disclosed, the hearing officer, administrative law judge or appeals board may perform an in camera review of the evidence and may disclose the material subject to any restriction on the disclosure, including the closing of the hearing or the sealing of the records, that the hearing officer, administrative law judge or appeals board finds necessary under the circumstances.

~~H.~~ I. In any appeal of a disciplinary action by a law enforcement officer or probation officer in which a single hearing officer or administrative law judge has been appointed to conduct the appeal hearing, the law enforcement officer or probation officer or the employer may request a change of hearing officer or administrative law judge. In cases before the office of administrative hearings or if the employer is a county, city or town on the first request of a party, the request shall be granted. A city or town with a population of less than sixty-five thousand persons or a county with a population of less than two hundred fifty thousand persons must provide for an alternate hearing officer by means of an interagency agreement with another city, town or county. If the law enforcement officer or probation officer is the party that requested the alternate hearing officer, the law enforcement officer or probation officer shall reimburse the city, town or county for one-half of any additional expenses incurred by the city, town or county in procuring the alternate hearing officer under the interagency agreement. If an alternate hearing officer is requested by means of an interagency agreement, the hearing officer shall provide to the law enforcement officer or probation officer or employer the option of continuing the hearing for an additional ten days. Any subsequent requests may be granted only on a showing that a fair and impartial hearing cannot be obtained due to the prejudice of the assigned hearing officer or administrative law judge. The supervisor or supervising body of the hearing officer or administrative law judge shall decide whether a showing of prejudice has been made.

~~I. A party who violates subsection A, paragraph 1 of this section, or subsection E or F of this section, unless the violation is harmless, shall not be permitted to use that evidence at the hearing, except on a showing of good cause. The hearing officer or administrative law judge, on a showing of good cause, may grant the opposing party a continuance, otherwise limit the use of the evidence or make such other order as may be appropriate.~~

J. The burden of proof in an appeal of a disciplinary action by a law enforcement officer or probation officer shall be on the employer.

K. Except where a statute or ordinance makes the administrative evidentiary hearing the final administrative determination, an employer or a person acting on behalf of an employer may amend, modify, reject or reverse a

decision made by a hearing officer, administrative law judge or appeals board after a hearing where the law enforcement officer or probation officer and the employer have been equally allowed to call and examine witnesses, cross-examine witnesses, provide documentary evidence and otherwise fully participate in the hearing if the decision was arbitrary or without reasonable justification and the employer or person acting on behalf of the employer states the reason for the amendment, modification, rejection or reversal.

L. An employer shall not include in that portion of the personnel file of a law enforcement officer or probation officer that is available for public inspection and copying any information about an investigation until the investigation is complete or the employer has discontinued the investigation. If the law enforcement officer or probation officer has timely appealed a disciplinary action, the investigation is not complete until the conclusion of the appeal process.

M. This section does not preempt agreements that supplant, revise or otherwise alter the provisions of this section, including preexisting agreements between the employer and the law enforcement officer or probation officer or the law enforcement officer's or probation officer's lawful representative association.

N. Notwithstanding section 39-123, all data and reports from a polygraph examination of a law enforcement officer or probation officer are confidential and may only be used for employment, certification or reactivation of certification purposes or the administrative matter for which a polygraph was administered, including other ancillary matters. All other uses are prohibited.

O. Except for a preemployment polygraph in which an applicant was not hired or in the case of an active investigation or an appeal, the data and reports from a polygraph examination of a law enforcement officer or probation officer shall be destroyed as soon as practicable three years after the date of appointment or employment but not more than ninety days after that date.

P. For the purposes of this section:

1. "Appeal" means a hearing before a state or local merit board, a civil service board, an administrative law judge or a hearing officer.

2. "Disciplinary action" means the dismissal, demotion or suspension for more than eight hours of a law enforcement officer or probation officer that is authorized by statute, charter or ordinance and that is subject to a hearing or other procedure by a local merit board, a civil service board, an administrative law judge or a hearing officer.

3. "Investigative file" means the law enforcement agency's complete report and any attachments detailing the incidents leading to the disciplinary action.

4. "Law enforcement officer" means:

(a) An individual, other than a probationary employee, who is certified by the Arizona peace officer standards and training board, other than a person employed by a multi-county water conservation district.

(b) A detention officer or correction officer, other than a probationary employee, who is employed by this state or a political subdivision of this state.

5. "Probation officer" means a probation officer or surveillance officer, other than a probationary employee, who is employed by this state or a political subdivision of this state.

APPROVED BY THE GOVERNOR APRIL 17, 2012.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 17, 2012.

Passed the House February 29, 20 12

by the following vote: 54 Ayes,

0 Nays, 5 Not Voting 1 vacant

Speaker of the House

Chief Clerk of the House

Passed the Senate April 5, 20 12

by the following vote: 29 Ayes,

0 Nays, 1 Not Voting

President of the Senate

Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill received by the Governor this

_____ day of _____, 20_____

at _____ o'clock _____M.

_____
Secretary to the Governor

Approved this _____ day of

_____

at _____ o'clock _____M.

_____
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill received by the Secretary of State

this _____ day of _____, 20_____

at _____ o'clock _____M.

_____
Secretary of State

H.B. 2723

HOUSE CONCURS IN SENATE AMENDMENTS AND FINAL PASSAGE

April 12, 2012,

by the following vote: 50 Ayes,

0 Nays, 9 Not Voting

1 Vacant

Speaker of the House

Cheryl Laube

Chief Clerk of the House

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill was received by the Governor this

12 day of April, 2012,

at 1:20 o'clock P M.

Secretary to the Governor

Approved this 17th day of

April, 2012,

at 11:21 o'clock A. M.

Jan K. Brewer

Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State

this 17th day of April, 2012,

at 3:36 o'clock P M.

Ken Bennett

Secretary of State

H.B. 2723