

State of Arizona  
House of Representatives  
Fiftieth Legislature  
First Regular Session  
2011

# HOUSE BILL 2444

AN ACT

AMENDING SECTION 38-1101, ARIZONA REVISED STATUTES; AMENDING TITLE 38, CHAPTER 8, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 38-1105; RELATING TO LAW ENFORCEMENT OFFICERS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

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

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

4 38-1101. Law enforcement officers; probation officers; right to  
5 representation; right to evidence on appeal; change  
6 of hearing officer or administrative law judge;  
7 burden of proof; polygraph examinations; definitions

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

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

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

42 3. The employer may require the law enforcement officer or probation  
43 officer to submit to a polygraph examination if the officer makes a statement  
44 to the employer during the investigation that differs from other information  
45 relating to the investigation that is known to the employer and reconciling

1 that difference is necessary to complete the investigation. If a polygraph  
2 examination is administered pursuant to this paragraph, the employer or the  
3 person administering the polygraph examination shall make an audio recording  
4 of the complete polygraph procedure and provide a copy of the recording to  
5 the law enforcement officer or probation officer.

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

10 **B. THE RESULTS OF A POLYGRAPH EXAMINATION IN AN INVESTIGATION SHALL**  
11 **NOT BE THE BASIS FOR DISCIPLINARY ACTION UNLESS OTHER EVIDENCE OR INFORMATION**  
12 **EXISTS.**

13 ~~B.~~ **C.** Subsection A **OF THIS SECTION** does not require the employer to  
14 either:

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

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

21 ~~C.~~ **D.** Subsection A, paragraphs 1 and 2 **OF THIS SECTION** do not apply  
22 to an interview of a law enforcement officer or probation officer that is:

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

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

28 3. Conducted in the course of a criminal investigation.

29 4. Conducted in the course of a polygraph examination.

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

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

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

1           3. No later than five business days before the appeal hearing, or, if  
2 the appeal hearing is scheduled more than twenty days after the notice of  
3 appeal, no later than ten business days before the appeal hearing, the  
4 employer and the law enforcement officer or probation officer shall exchange  
5 the names of all witnesses who may be called to testify. A witness may be  
6 interviewed at the discretion of the witness. The parties shall not  
7 interfere with any decision of a witness regarding whether to be interviewed.  
8 An employer shall not discipline, retaliate against or threaten to retaliate  
9 against any witness for agreeing to be interviewed or for testifying or  
10 providing evidence in the appeal.

11           ~~F.~~ F. It is unlawful for a person to disseminate information that is  
12 disclosed pursuant to subsection ~~D~~ E OF THIS SECTION to any person other  
13 than the parties to the appeal and their lawful representatives for purposes  
14 of the appeal of the disciplinary action. This subsection does not prohibit  
15 the use of the information in the hearing or disclosure pursuant to title 39,  
16 chapter 1, article 2.

17           ~~F.~~ G. The employer or the law enforcement officer or probation  
18 officer may seek a determination by the hearing officer, administrative law  
19 judge or appeals board hearing the appeal regarding any evidence that the  
20 employer or the law enforcement officer or probation officer believes should  
21 not be disclosed pursuant to subsection ~~D~~ E OF THIS SECTION because the risk  
22 of harm involved in disclosure outweighs any usefulness of the disclosure in  
23 the hearing. In determining whether evidence will be disclosed, the hearing  
24 officer, administrative law judge or appeals board may perform an in camera  
25 review of the evidence and may disclose the material subject to any  
26 restriction on the disclosure, including the closing of the hearing or the  
27 sealing of the records, that the hearing officer, administrative law judge or  
28 appeals board finds necessary under the circumstances.

29           ~~G.~~ H. In any appeal of a disciplinary action by a law enforcement  
30 officer or probation officer in which a single hearing officer or  
31 administrative law judge has been appointed to conduct the appeal hearing,  
32 the law enforcement officer or probation officer or the employer may request  
33 a change of hearing officer or administrative law judge. In cases before the  
34 office of administrative hearings or if the employer is a county with a  
35 population of two hundred fifty thousand or more persons or a city with a  
36 population of sixty-five thousand or more persons, on the first request of a  
37 party, the request shall be granted. All other requests, including any  
38 subsequent requests in cases before the office of administrative hearings or  
39 if the employer is a county with a population of two hundred fifty thousand  
40 or more persons or a city with a population of sixty-five thousand or more  
41 persons, may be granted only on a showing that a fair and impartial hearing  
42 cannot be obtained due to the prejudice of the assigned hearing officer or  
43 administrative law judge. The supervisor or supervising body of the hearing  
44 officer or administrative law judge shall decide whether a showing of  
45 prejudice has been made.

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

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

9           ~~J.~~ K. Except where a statute or ordinance makes the administrative  
10 evidentiary hearing the final administrative determination, an employer or a  
11 person acting on behalf of an employer may amend, modify, reject or reverse a  
12 decision made by a hearing officer, administrative law judge or appeals board  
13 after a hearing where the law enforcement officer or probation officer and  
14 the employer have been equally allowed to call and examine witnesses,  
15 cross-examine witnesses, provide documentary evidence and otherwise fully  
16 participate in the hearing if the decision was arbitrary or without  
17 reasonable justification and the employer or person acting on behalf of the  
18 employer states the reason for the amendment, modification, rejection or  
19 reversal.

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

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

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

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



1 ADMINISTRATIVE LAW JUDGE OR APPEALS BOARD THAT THE EMPLOYER DID NOT MAKE A  
2 GOOD FAITH EFFORT TO COMPLETE THE INVESTIGATION IN ONE HUNDRED TWENTY  
3 BUSINESS DAYS. THE SUSTAINED DISCIPLINE MAY BE CONSIDERED WHEN DETERMINING  
4 DISCIPLINE IN ANY FUTURE SUSTAINED MISCONDUCT ALLEGATION. IF THE EMPLOYER  
5 DETERMINES THAT DISCIPLINARY ACTION IS APPROPRIATE, THE EMPLOYER SHALL  
6 COMPLETE THE EMPLOYER'S INVESTIGATION AND GIVE NOTICE IN WRITING TO THE LAW  
7 ENFORCEMENT OFFICER OF THE EMPLOYER'S INTENT TO PROCEED WITH DISCIPLINARY  
8 ACTION, ALONG WITH A PROPOSAL OF THE SPECIFIC ACTION SOUGHT, INCLUDING LENGTH  
9 OF SUSPENSION, IF APPLICABLE. THE EMPLOYER SHALL MAKE A GOOD FAITH EFFORT TO  
10 PROVIDE NOTICE TO THE OFFICER WITHIN ONE HUNDRED TWENTY BUSINESS DAYS AFTER  
11 THE DATE THE EMPLOYER RECEIVED NOTICE OF THE ALLEGED MISCONDUCT EXCEPT AS  
12 FOLLOWS:

13 1. THE LIMITATIONS PERIOD MAY BE SUSPENDED FOR A PERIOD PRESCRIBED IN  
14 A WRITTEN WAIVER OF THE LIMITATION BY THE LAW ENFORCEMENT OFFICER.

15 2. THE LIMITATIONS PERIOD IS SUSPENDED DURING THE TIME THAT ANY  
16 CRIMINAL INVESTIGATION OR PROSECUTION IS PENDING IN CONNECTION WITH THE ACT,  
17 OMISSION OR OTHER ALLEGATION OF MISCONDUCT.

18 3. IF THE INVESTIGATION INVOLVES A LAW ENFORCEMENT OFFICER WHO IS  
19 INCAPACITATED OR OTHERWISE UNAVAILABLE, THE LIMITATIONS PERIOD IS SUSPENDED  
20 DURING THE PERIOD OF INCAPACITATION OR UNAVAILABILITY.

21 4. IN A MULTIJURISDICTIONAL INVESTIGATION, THE LIMITATIONS PERIOD MAY  
22 BE EXTENDED FOR A PERIOD OF TIME REASONABLY NECESSARY TO FACILITATE THE  
23 COORDINATION OF THE EMPLOYERS INVOLVED.

24 5. THE LIMITATIONS PERIOD MAY BE SUSPENDED FOR EMERGENCIES OR NATURAL  
25 DISASTERS DURING THE TIME PERIOD IN WHICH THE GOVERNOR HAS DECLARED A STATE  
26 OF EMERGENCY WITHIN THE JURISDICTIONAL BOUNDARIES OF THE CONCERNED EMPLOYER.

27 C. A LAW ENFORCEMENT OFFICER WHO PREVAILS IN AN APPEAL WHERE A  
28 TERMINATION HAS BEEN REVERSED SHALL BE AWARDED RETROACTIVE COMPENSATION FROM  
29 THE DATE OF THE OFFICER'S SEPARATION TO THE DATE OF REINSTATEMENT. THE  
30 EMPLOYER MAY EXCLUDE ANY PENALTIES DEEMED APPROPRIATE BY THE REVIEWING  
31 AUTHORITY.

32 D. THIS SECTION DOES NOT PREEMPT AGREEMENTS THAT SUPPLANT, REVISE OR  
33 OTHERWISE ALTER THE PROVISIONS OF THIS SECTION, INCLUDING PREEXISTING  
34 AGREEMENTS BETWEEN THE EMPLOYER AND THE LAW ENFORCEMENT OFFICER OR THE LAW  
35 ENFORCEMENT OFFICER'S LAWFUL REPRESENTATIVE ASSOCIATION.

36 E. FOR THE PURPOSES OF THIS SECTION, "DISCIPLINARY ACTION" AND "LAW  
37 ENFORCEMENT OFFICER" HAVE THE SAME MEANINGS PRESCRIBED IN SECTION 38-1101.