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REFERENCE TITLE: public employees; information disclosure

State of Arizona
House of Representatives
Forty-fifth Legislature
Second Regular Session
2002

HB 2695

Introduced by
Representatives Graf, Cardamone, Brimhall, Senator Petersen:
Representatives Farnsworth, Foster, Laughter

AN ACT

AMENDING SECTIONS 38-531, 38-532 AND 41-785, ARIZONA REVISED STATUTES;
RELATING TO DISCLOSURE OF INFORMATION BY PUBLIC EMPLOYEES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 38-531, Arizona Revised Statutes, is amended to
3 read:
4 38-531. Definitions
5 In this article, unless the context otherwise requires:
6 1. "CONTRIBUTING FACTOR" MEANS ANY FACTOR THAT, ALONE OR IN CONNECTION
7 WITH OTHER FACTORS, AFFECTS A PERSONNEL ACTION.
8 ~~1.~~ 2. "Employee" means an officer or employee of this state or any of
9 its departments, commissions, agencies or boards. Employee includes
10 employees and officers of community college districts, school districts and
11 counties of this state but does not include officers or employees of a
12 municipal corporation established for the purpose of reclamation and
13 distribution of water and the generation of electricity.
14 ~~2.~~ 3. "Former employee" means an employee who was dismissed OR IS
15 OTHERWISE NO LONGER SERVING AS AN EMPLOYEE.
16 ~~3.~~ 4. "Personnel action" means ANY DISCRIMINATORY ACTION INCLUDING,
17 BUT NOT LIMITED TO:
18 ~~(a) Appointment.~~
19 ~~(b) Promotion.~~
20 (a) FAILURE TO APPOINT.
21 (b) FAILURE TO PROMOTE.
22 (c) Disciplinary or corrective action.
23 (d) Detail, transfer or reassignment.
24 (e) Suspension, demotion or dismissal.
25 (f) Reinstatement.
26 (g) Restoration.
27 (h) Reemployment.
28 (i) Performance evaluation.
29 (j) Decision concerning pay, benefits or awards.
30 (k) Elimination of the employee's position without a reduction in
31 force by reason of lack of monies or work.
32 (l) Other significant change in duties or responsibilities which is
33 inconsistent with the employee's salary or grade level.
34 5. "PROTECTED ACTIVITY" MEANS THE DISCLOSURE OF OR REFUSAL TO VIOLATE
35 ANY LAW, RULE OR REGULATION.
36 ~~4.~~ 6. "Public body" means ANY OF THE FOLLOWING:
37 (a) The attorney general. ~~;~~
38 (b) The legislature. ~~;~~
39 (c) The governor. ~~;~~
40 (d) A federal, state or local law enforcement agency. ~~;~~
41 (e) The county attorney. ~~;~~
42 (f) The governing board of a community college district or school
43 district. ~~;~~ ~~the~~
44 (g) COUNTY MANAGERS OR A COUNTY board of supervisors. ~~of a county or~~
45 ~~an agency director.~~

1 (h) A DEAN, PRESIDENT OR CHANCELLOR OF A COMMUNITY COLLEGE.

2 (i) A DIRECTOR, DEPUTY DIRECTOR, CHIEF ADMINISTRATIVE OFFICER OR CHIEF
3 ADMINISTRATIVE OFFICER'S DESIGNEE OF AN EMPLOYING AGENCY OF THIS STATE OR ANY
4 OF ITS DEPARTMENTS, COMMISSIONS, AGENCIES OR BOARDS.

5 ~~5-~~ 7. "Reprisal" means to take a personnel action the result of which
6 is adverse to an employee.

7 Sec. 2. Section 38-532, Arizona Revised Statutes, is amended to read:
8 38-532. Prohibited personnel practice; violation;
9 reinstatement; exceptions

10 A. It is a prohibited personnel practice for THIS STATE OR ANY OF ITS
11 DEPARTMENTS, COMMISSIONS, AGENCIES OR BOARDS, COMMUNITY COLLEGE DISTRICTS,
12 SCHOOL DISTRICTS, COUNTIES OR an employee who has ~~control over~~ AUTHORITY TO
13 TAKE, DIRECT OTHERS TO TAKE, RECOMMEND, APPROVE OR IMPROPERLY INFLUENCE
14 personnel actions to take reprisal against an employee ~~for a disclosure of~~
15 BECAUSE THE EMPLOYEE REFUSES TO VIOLATE ANY LAW, RULE OR REGULATION OR MAKES
16 ANY DISCLOSURE, IS PERCEIVED TO HAVE MADE ANY DISCLOSURE OR IS ABOUT TO
17 DISCLOSE OR MAY DISCLOSE ANY information of a matter of public concern ~~by the~~
18 ~~employee~~ THAT IS NOT SPECIFICALLY PROHIBITED BY STATUTE to a public body
19 which the employee reasonably believes evidences:

20 1. A violation of any law, RULE OR REGULATION.

21 2. Mismanagement, a gross waste of monies, ~~or~~ an abuse of authority OR
22 A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY.

23 B. IF DISCLOSURE TO THE PUBLIC IS SPECIFICALLY PROHIBITED BY STATUTE,
24 the disclosure by an employee to a public body alleging a violation of law,
25 RULE OR REGULATION, mismanagement, gross waste of monies, ~~or~~ abuse of
26 authority OR A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY
27 shall be in writing ~~and shall~~ OR AS AUTHORIZED BY STATUTE. A DISCLOSURE NOT
28 PROHIBITED BY STATUTE MAY BE IN WRITING OR MAY BE IN ORAL STATEMENTS MADE
29 DIRECTLY TO AND NOT MERELY IN THE PRESENCE OF A PUBLIC BODY OR OFFICER ACTING
30 IN THE PUBLIC BODY'S OR OFFICER'S OFFICIAL CAPACITY OR AT A PUBLIC HEARING OR
31 PROCEEDING. IF THE PUBLIC BODY OR OFFICER TO WHOM THE ORAL DISCLOSURE IS
32 MADE REQUESTS THE EMPLOYEE TO SUBMIT A WRITTEN SUMMARY OF THE ORAL
33 DISCLOSURE, THE EMPLOYEE SHALL SUBMIT A WRITTEN SUMMARY OF THE ORAL
34 DISCLOSURE WITHIN TEN WORKING DAYS AFTER THE DATE OF THE ORAL DISCLOSURE. AN
35 ORAL DISCLOSURE THAT IS CONTAINED IN A RECORDED TRANSCRIPT OF STATEMENTS MADE
36 AT A PUBLIC HEARING OR OPEN MEETING OR EXECUTIVE SESSION HELD BY A PUBLIC
37 BODY OR OFFICER CONSTITUTES A WRITTEN DISCLOSURE UNDER THIS SUBSECTION.

38 C. A DISCLOSURE UNDER THIS SECTION SHOULD contain the following
39 information:

40 1. The date of the disclosure.

41 2. The name of the employee making the disclosure.

42 3. The nature of the alleged violation of law, RULE OR REGULATION,
43 mismanagement, gross waste of monies, ~~or~~ abuse of authority OR SUBSTANTIAL
44 AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY.

1 4. If possible, the date or range of dates on which the alleged
2 violation of law, **RULE OR REGULATION**, mismanagement, gross waste of monies,
3 ~~or~~ abuse of authority **OR SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR**
4 **SAFETY** occurred.

5 ~~C. An employee who knowingly commits a prohibited personnel practice
6 shall be ordered by the state personnel board, a community college district
7 governing board, a school district governing board or other appropriate
8 independent personnel board established or authorized pursuant to section
9 38-534 to pay a civil penalty of up to five thousand dollars to the state
10 general fund, a county general fund, a community college district
11 unrestricted general fund or a school district maintenance and operation
12 fund, whichever is appropriate. The employee who committed the prohibited
13 personnel practice, not the governmental entity, shall pay the civil penalty.
14 Upon a finding that an employee committed a prohibited personnel practice,
15 the employer shall take appropriate disciplinary action including dismissal.~~

16 **D. FAILURE TO PROVIDE ALL OF THE INFORMATION PRESCRIBED IN SUBSECTION
17 B OR C OF THIS SECTION DOES NOT DISQUALIFY AN EMPLOYEE OR FORMER EMPLOYEE
18 FROM THE PROTECTIONS PROVIDED BY THIS ARTICLE IF, ON REQUEST, THE EMPLOYEE OR
19 FORMER EMPLOYEE PROVIDES SUFFICIENT INFORMATION TO ALLOW A PUBLIC BODY OR
20 OFFICER TO ASCERTAIN THE INFORMATION PRESCRIBED IN SUBSECTION C OF THIS
21 SECTION.**

22 **E. EACH PUBLIC BODY SHALL POST AND KEEP POSTED IN CONSPICUOUS PLACES
23 ON THE PUBLIC BODY'S PREMISES A NOTICE ADVISING PUBLIC EMPLOYEES OF THE
24 EXISTENCE OF THIS ARTICLE. THE NOTICES WHEN POSTED CONSTITUTE SUFFICIENT
25 NOTICE TO PUBLIC EMPLOYEES OF THE EXISTENCE OF THE PROCESS FOR DISCLOSING
26 INFORMATION AND THE RIGHT TO DISCLOSE INFORMATION WITHOUT THE FEAR OF
27 RETRIBUTION. THE NOTICE SHALL:**

28 **1. INSTRUCT THAT A VIOLATION OF ANY LAW, RULE OR REGULATION,
29 MISMANAGEMENT, GROSS WASTE OF MONIES, ABUSE OF AUTHORITY OR SUBSTANTIAL AND
30 SPECIFIC DANGER TO THE PUBLIC HEALTH OR SAFETY MAY BE DISCLOSED.**

31 **2. EXPLAIN HOW TO MAKE A DISCLOSURE AND WHAT THE DISCLOSURE NEEDS TO
32 INCLUDE.**

33 **3. IDENTIFY THE PUBLIC BODIES THAT ARE AUTHORIZED TO RECEIVE A WRITTEN
34 DISCLOSURE AND THE OFFICER WHO IS AUTHORIZED TO RECEIVE AN ORAL DISCLOSURE.**

35 **F. COMPLIANCE WITH THIS ARTICLE SHALL BE A CRITICAL ELEMENT FOR THE
36 PERFORMANCE STANDARDS OF ALL OFFICIALS WITH AUTHORITY TO TAKE A PERSONNEL
37 ACTION. ON A FINDING BY A COURT, THE STATE PERSONNEL BOARD, A COMMUNITY
38 COLLEGE DISTRICT GOVERNING BOARD, A SCHOOL DISTRICT GOVERNING BOARD, AN
39 ARBITRATOR OR AN APPROPRIATE INDEPENDENT PERSONNEL BOARD ESTABLISHED OR
40 AUTHORIZED PURSUANT TO SECTION 38-534 THAT DETERMINES THERE ARE VIOLATIONS OF
41 THIS ARTICLE, SHALL DOCUMENT THE FINDING IN THE PERFORMANCE APPRAISAL FOR ANY
42 RELEVANT OFFICIAL.**

1 ~~D.~~ G. An employee or former employee against whom a prohibited
2 personnel practice is committed may recover attorney fees, costs, back pay,
3 general and special damages and full reinstatement for any reprisal resulting
4 from the prohibited personnel practice as determined by the court OR OTHER
5 FORUM SPECIFIED IN SUBSECTION K OF THIS SECTION. RELIEF ORDERED BY THE COURT
6 OR OTHER FORUM MAY INCLUDE PREFERENCE FOR TRANSFER TO AN AVAILABLE OR THE
7 NEXT AVAILABLE AGENCY POSITION OF THE SAME STATUS AND TENURE THAT IS CHOSEN
8 AND VOLUNTARILY APPLIED FOR BY THE EMPLOYEE WHO HAS PREVAILED.

9 ~~E.~~ H. An employee, ~~does~~ THIS STATE OR ANY OF ITS DEPARTMENTS,
10 COMMISSIONS, AGENCIES OR BOARDS, COMMUNITY COLLEGE DISTRICTS, SCHOOL
11 DISTRICTS OR COUNTIES DO not commit a prohibited personnel practice if ~~he~~
12 ~~takes~~ THE EMPLOYEE, THIS STATE OR ANY OF ITS DEPARTMENTS, COMMISSIONS,
13 AGENCIES OR BOARDS, COMMUNITY COLLEGE DISTRICTS, SCHOOL DISTRICTS OR COUNTIES
14 TAKE reprisal against ~~an~~ ANOTHER employee ~~if that~~ FOR ANY OF THE FOLLOWING
15 REASONS:

16 1. THE employee discloses information in a manner prohibited by ~~law~~
17 STATUTE. ~~or~~

18 2. The ~~materials~~ DISCLOSED MATERIAL or information ~~are~~ IS prescribed
19 as confidential by ~~law~~ STATUTE UNLESS DISCLOSED AS PROVIDED IN SUBSECTION B
20 OF THIS SECTION.

21 3. BASED ON A FINDING BY CLEAR AND CONVINCING EVIDENCE, THE PERSONNEL
22 ACTION WAS TAKEN BECAUSE OF LEGITIMATE NONDISCRIMINATORY REASONS THAT ARE NOT
23 RELATED TO THE DISCLOSURE.

24 ~~F.~~ I. This section may not be used as a defense in a disciplinary
25 action where the employee is being disciplined for cause pursuant to section
26 41-770, except in a hearing on a complaint brought pursuant to this section
27 by an employee or former employee who believes ~~he~~ THE EMPLOYEE OR FORMER
28 EMPLOYEE has been the subject of a prohibited personnel practice as
29 prescribed in this section as the result of a disclosure of information AS
30 PROVIDED IN THIS ARTICLE.

31 ~~G.~~ J. On request or at any time an employee alleges reprisal, an
32 employer shall provide an employee who is subject to disciplinary or
33 corrective action, suspension, demotion or dismissal with a copy of this
34 section.

35 ~~H.~~ K. If an employee or former employee believes that a personnel
36 action taken against ~~him~~ THE EMPLOYEE OR FORMER EMPLOYEE is the result of ~~his~~
37 THE EMPLOYEE'S OR FORMER EMPLOYEE'S disclosure of information under this
38 section OR THE PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN THE DECISION
39 RESULTING IN A PROHIBITED PERSONNEL PRACTICE AGAINST THE EMPLOYEE OR FORMER
40 EMPLOYEE, ~~he~~ THE EMPLOYEE OR FORMER EMPLOYEE may make a complaint, AS
41 APPLICABLE, to ONLY ONE OF THE FOLLOWING:

42 1. THE STATE PERSONNEL BOARD UNLESS THE EMPLOYEE OR FORMER EMPLOYEE IS
43 EMPLOYED WITH A COMMUNITY COLLEGE DISTRICT, SCHOOL DISTRICT OR COUNTY.

1 2. An appropriate independent personnel board, if one is established
2 or authorized pursuant to section 38-534, or to a community college district
3 governing board or A school district governing board. If an independent
4 personnel board has not been established or authorized, or if a school
5 district governing board, ~~or a~~ community college district governing board OR
6 COUNTY does not hear and decide personnel matters brought pursuant to this
7 section, the employee or former employee may make a complaint to the state
8 personnel board.

9 3. AN ARBITRATOR THAT IS SELECTED BY MUTUAL CONSENT.

10 4. THE SUPERIOR COURT FOR A TRIAL DE NOVO, EXCEPT THAT THE EMPLOYEE
11 MAY APPEAL ANY DECISION PURSUANT TO SUBSECTION M OF THIS SECTION.

12 L. A complaint made pursuant to ~~this~~ subsection K OF THIS SECTION
13 shall be made within ten WORKING days of the effective date of the PERSONNEL
14 action taken against ~~him~~ THE EMPLOYEE OR FORMER EMPLOYEE. The state
15 personnel board, a school district governing board, a community college
16 DISTRICT governing board or ~~other~~ AN appropriate independent personnel board
17 ESTABLISHED OR AUTHORIZED PURSUANT TO SECTION 38-534 ~~shall~~, pursuant to the
18 rules governing appeals under section 41-785, SHALL make a determination
19 concerning:

20 1. The validity of the complaint.

21 2. Whether a prohibited personnel practice was committed against the
22 employee or former employee as a result of disclosure of information by the
23 employee or former employee OR WHETHER THE PROTECTED ACTIVITY WAS A
24 CONTRIBUTING FACTOR IN THE DECISION RESULTING IN A PROHIBITED PERSONNEL
25 PRACTICE AGAINST THE EMPLOYEE OR FORMER EMPLOYEE.

26 ~~I.~~ M. If A COURT, the state personnel board, a community college
27 district governing board, a school district governing board, AN ARBITRATOR or
28 ~~other~~ AN appropriate independent personnel board established or authorized
29 pursuant to section 38-534 determines that a prohibited personnel practice
30 was committed as a result of disclosure of information by the employee or
31 former employee OR THE DISCLOSURE WAS A CONTRIBUTING FACTOR IN THE DECISION
32 TO TAKE A PROHIBITED PERSONNEL PRACTICE AGAINST THE EMPLOYEE OR FORMER
33 EMPLOYEE, it shall rescind the personnel action and order that all lost pay
34 and benefits be returned to the employee or former employee. The employee,
35 ~~OR former employee, employee alleged to have committed a prohibited personnel
36 practice pursuant to subsection A of this section~~ AGAINST WHOM A PROHIBITED
37 PERSONNEL PRACTICE IS ALLEGED TO HAVE BEEN TAKEN or THE employer may appeal
38 the decision of the state personnel board, a community college district
39 governing board, a school district governing board, AN ARBITRATOR or ~~other~~ AN
40 appropriate independent personnel board established or authorized pursuant to
41 section 38-534 to the superior court ~~as provided in~~ PURSUANT TO title 12,
42 chapter 7, article 6. Notwithstanding section 12-910, an appeal to the
43 superior court under this subsection shall be tried de novo.

1 specified charges in writing when the action is taken. Such appeal shall be
2 in writing and must state specific facts relating directly to the charges on
3 which the appeal is based and shall be heard by the personnel board within
4 thirty days after its receipt. The personnel board shall provide the
5 employing agency with a copy of the appeal not less than twenty days in
6 advance of the hearing.

7 B. Hearings on such appeals shall be open to the public, except in
8 cases where the employee requests a confidential hearing, and shall be
9 informal with technical rules of evidence not applying to the proceedings
10 except the rule of privilege recognized by law. Both the employee and the
11 employing agency shall be notified of any hearing or meeting date not less
12 than twenty days in advance of the hearing or not less than ten days in
13 advance of a meeting and may select representatives of their choosing,
14 present and cross-examine witnesses and give evidence before the personnel
15 board. The personnel board may appoint a hearing officer to conduct the
16 hearing and take evidence on behalf of the board and exercise the rights
17 prescribed by section 12-2212. The personnel board shall prepare an official
18 record of the hearing, including all testimony recorded manually or by
19 mechanical device, and exhibits. Either party may request that the record be
20 transcribed. If a party requests that the record be transcribed, an entity,
21 other than the personnel board, selected by the requesting party shall
22 transcribe the record at the cost of the requesting party. If the
23 disciplinary hearing would involve evidence the state is prevented by law
24 from disclosing, then a confidential hearing upon the state's request shall
25 be granted.

26 C. The board may reverse an agency's action on appeal only if the
27 board finds the action to be arbitrary, capricious or otherwise contrary to
28 law.

29 D. The board may reduce the disciplinary penalty chosen by an agency
30 only if the board finds the penalty to be excessive or made for reasons that
31 are arbitrary, capricious or otherwise contrary to law.

32 E. Within forty-five days after the conclusion of the hearing, the
33 board shall enter its decision and shall at the same time send a copy of the
34 decision by certified mail to the employing agency and to the employee at the
35 employee's address as given at the hearing or to a representative designated
36 by the employee to receive a copy of the decision.

37 F. Any party may appeal the decision of the board pursuant to title
38 12, chapter 7, article 6 to the superior court in the employee's county of
39 residence on one or more of the following grounds, that the order was:

- 40 1. Founded on or contained error of law which shall specifically
41 include error of construction or application of any pertinent rules.
- 42 2. Unsupported by any evidence as disclosed by the entire record.
- 43 3. Materially affected by unlawful procedure.
- 44 4. Based on A violation of any constitutional provision.
- 45 5. Arbitrary or capricious.

1 6. THE RESULT OF A PROHIBITED PERSONNEL PRACTICE.

2 G. AN appeal shall be available to the court of appeals from the order
3 of the superior court pursuant to title 12, chapter 7, article 6 as in other
4 civil cases.

5 H. An employee may ~~represent himself~~ BE SELF-REPRESENTED or MAY
6 designate a representative, not necessarily an attorney, before any board
7 hearing or any quasi-judicial hearing held pursuant to this section providing
8 that no fee may be charged for any services rendered in connection with such
9 hearing by any such designated representative who is not an attorney admitted
10 to practice.

11 Sec. 4. Legislative findings and purpose

12 Consistent with the federal code of ethics for government service and
13 the code of ethics for state and other public body service, the legislature
14 finds and declares that state employees have a duty to lawfully report fraud
15 or other violations of law, rule or regulation, waste, mismanagement, abuse
16 of authority, substantial and specific dangers to public health or safety or
17 other violations of the public trust, and the right to act on that duty
18 without fear of retribution. The legislature further finds and declares that
19 public servants best serve the public interest when they can be candid and
20 honest without reservation in conducting the public's business.