



MCOLES

Michigan Commission on Law Enforcement Standards

MEMORANDUM

DATE: December 2, 2020

RE: The Separation of Service Record Creation Requirements of PA 128

I. Introduction

On January 15, 2018, the Law Enforcement Officer Separation of Service Record Act, PA 128 of 2017, MCL 28.561- MCL 28.565 (hereinafter PA 128) took effect. Under PA 128, law enforcement agencies must “maintain a record regarding the reason or reasons for, and circumstances surrounding, a separation of service” of a law enforcement officer from their agency.¹ This record is called the Separation of Service Record.

When a law enforcement agency seeks to hire a current or previously licensed law enforcement officer, PA 128 requires that it request and review the Separation of Service Record from the law enforcement officer’s former employing law enforcement agency or agencies.² The agency shall not hire the officer unless it does so.³

Upon receipt of such a request, along with a signed waiver executed by the officer, the former employing law enforcement agency must provide the Separation of Service Record. To promote transparency, PA 128 provides immunity from civil liability for good faith disclosure of the information contained in the Separation of Service Record.

The individual law enforcement officer’s rights are also protected. PA 128 allows the officer to object to information he or she believes is inaccurate and submit a written explanation that must be maintained and produced as part of the Separation of Service Record.⁴

¹ MCL 28.563.

² MCL 28.565(2).

³ MCL 28.565(4).

⁴ MCL 28.563(3).

II. The PA 128 Separation of Service Record is in Addition to the Separation Information Reporting Mandated by the MCOLES Act

Under the Michigan Commission on Law Enforcement Standards Act, 1965 PA 203, MCL 28.601, *et seq.* (hereinafter, the MCOLES Act), when a licensed law enforcement officer separates employment for any reason, the law enforcement agency must report the separation to the Michigan Commission on Law Enforcement Standards (Commission). The MCOLES Act and the administrative rules promulgated thereunder require this information to be submitted *within 3 days* of the separation and *must provide the reason for separation*.⁵

The requirement to create and maintain the Separation of Service Record under PA 128 is a separate and distinct obligation from the agency's obligation to submit the separation information which becomes part of the employment history record required by the MCOLES Act. PA 128 specifically acknowledges that the Separation of Service Record is "*[i]n addition to the employment history record required to be maintained under the Michigan commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to MCL 28.615 . . .*" [emphasis added].⁶

The Commission relies on the separation information required by the MCOLES Act and the Separation of Service Record required by PA 128 in exercising its licensing authority.

III. Compliance with PA 128

When a licensed law enforcement officer separates employment with an agency for any reason, PA 128 requires the agency to create a Separation of Service Record. Specifically, the PA 128 requires law enforcement agencies to "maintain a record regarding the reason or reasons for, **and circumstances surrounding**, a separation of service" of a law enforcement officer from their agency.⁷

1. Creating the Separation of Service Record:

Section 3 of PA 128 (MCL 28.563) sets forth the steps for creating and maintaining the Separation of Service Record:

⁵ The Commission was provided with a memorandum that more thoroughly discusses the Separation Report required by the MCOLES Act at the November 4, 2020 meeting.

⁶ MCL 28.563(1).

⁷ MCL 28.563.

- When a licensed law enforcement officer separates from a law enforcement agency, the agency must create and maintain a Separation of Service Record containing the reason or reasons for, and the circumstances surrounding, a separation of service for each law enforcement officer.
- Upon request, the agency must allow the separated officer to review the Separation of Service Record.
- If the officer disagrees with the accuracy of the contents of the Separation of Service Record, the officer can request a correction or removal of the portion of the record the officer believes is incorrect.
- If the agency and the separated officer agree to correct or remove a portion of the record, the modification is made and the record is complete.
- If they cannot agree, the separated officer may submit a written statement explaining the separating officer's position and the basis for disagreement.
- If submitted, the separating officer's written statement must be kept by the agency as part of the Separation of Service Record and provided to any prospective law enforcement agencies who request the Separation of Service Record.

2. Hiring law enforcement agency requirements when a previously licensed law enforcement officer seeks employment.

When a law enforcement agency seeks to hire a law enforcement officer who was previously separated from another agency, the officer, the former employing agency, and the prospective employing agency each have obligations under PA 128. Compliance with the Act requires:

- When making application for employment, the applicant shall provide to the prospective employing law enforcement agency a signed waiver that expressly allows the prospective employing law enforcement agency to contact the officer's *former employing law enforcement agency(s)*, to seek a copy of the Separation of Service Record.⁸
 - The prospective employing law enforcement agency is responsible for providing the waiver to the former employing law enforcement agency(s).

⁸ The waiver must be executed on a form provided by the Commission to all law enforcement agencies in this state that employ or administer oaths of office to law enforcement officers licensed under the MCOLES Act. MCL 28.565(2).

- Upon receipt of the waiver, the former employing law enforcement agency(s) shall provide the Separation of Service Record to the prospective employing law enforcement agency.
- The prospective employing law enforcement agency shall not employ the officer unless it has received the Separation of Service Record from the former employing agency(s).
- The prospective employing law enforcement agency must verify its receipt of the Separation of Service Record to MCOLES.
- Note: a prospective employing law enforcement agency's obligation to review the Separation of Service Record is in addition to its obligation under the MCOLES Act to conduct a thorough background investigation. Under the MCOLES Act, the applicant must complete a release of information and execute a background affidavit, be fingerprinted and interviewed. The prospective employing agency must review the full background investigation and verify the applicant's compliance with the licensing standards.⁹

IV. The Content of the Separation of Service Record

PA 128 compliments the MCOLES Act by imposing new and independent requirements on law enforcement agencies when hiring previously licensed law enforcement officers. The Act requires law enforcement agencies to be transparent in providing prospective employers with information on former law enforcement officer employees. PA 128 provides immunity from civil liability for disclosure,¹⁰ and protects the individual officer's rights.¹¹

a. Immunity for Law Enforcement Agencies for Good Faith Disclosure of Information

The Separation of Service Record is created and maintained by the law enforcement agency from which the officer is separating. PA 128 provides immunity to the agency for good faith disclosures. An agency is presumed to be acting in good faith unless it knowingly provides false or misleading information in the separation of service record. This immunity provision furthers the legislative intent to discourage agencies and former employees from hiding, concealing or modifying facts, and encourages the full and accurate exchange of information.

⁹ MCL 28.609(3); MCOLES Administrative Rules 28.14205-28.14207 and 28.14506-28.14508.

¹⁰ MCL 28.565.

¹¹ MCL 28.563.

b. Rights of the Individual Officer

When a law enforcement agency creates a Separation of Service Record upon the separation of an officer, the agency must allow the separating officer to review it upon request.¹² If the officer disagrees with the accuracy of the content of the record, the officer has the right to ask the agency to make changes. If there is an agreement to do so, the Separation of Service Record is modified.¹³ If there is no mutual agreement on modifications, the officer has the right to submit a written statement explaining his or her position and the basis for disagreement with the contents of the Separation of Service Record. If an officer submits additional information, it becomes a part of the Separation of Service Record and must be maintained and disclosed by the former law enforcement agency any time the Separation of Service Record is requested.¹⁴

V. Full Compliance with PA 128 Benefits The Law Enforcement Profession In Michigan

Licensing of law enforcement officers in Michigan is a core function of the Commission. The MCOLES Act and the administrative rules promulgated thereunder, set forth the statutory standards and procedures for law enforcement licensure in the State of Michigan. Before an individual can be licensed under the Act, the Commission must first determine whether that individual complies with the licensing standards.¹⁵

As an administrative agency, and pursuant to the MCOLES Act, the Commission has the authority to acquire information to determine compliance with the requirements of its statute and administrative rules.¹⁶ Under PA 128, the Commission has authority to request copies of a Separation of Service Record from either the prospective employing law enforcement agency or the former employing law enforcement agency. Sections 5(6) and 5(7) of PA 128 provide:

(6) A prospective employing law enforcement agency that receives a record maintained under section 3 from the law enforcement officer's former employing law enforcement agency or agencies shall, upon written request

¹² MCL 28.563(2).

¹³ MCL 28.563(3).

¹⁴ The rights provided by PA 128 to an individual law enforcement officer are in addition to the rights provided by the Bullard Plawecki Employee Right to Know Act, MCL 423.501 *et seq.* All parties are encouraged to carefully review Bullard Plawecki to ensure compliance.

¹⁵ MCL 28.609(4) and (5).

¹⁶ MCL 28.609 and 28.610.

from the commission, provide a copy of the record requested to the commission for the purpose of determining compliance with licensing standards and procedures under the Michigan commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.615.

(7) A law enforcement agency that is required to maintain a record under section 3 shall, upon written request from the commission, provide a copy of the record requested to the commission for the purpose of determining compliance with licensing standards and procedures under the Michigan commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.615.

The Commission relies in part on the information contained in the PA 128 Separation of Service Record in exercising its licensing authority. Without truthful information, it is impossible to make informed decisions regarding the individual's suitability to be licensed and work as a law enforcement officer.

In conducting standards compliance screening for the purpose of licensing, the Commission has discovered Separation of Service Records that contain inaccurate or inconsistent information. This is typically the result of an agreement reached in an arbitration or in lieu of arbitration after a significant period of time has elapsed from the time of separation.

Although Section 3(3) offers the separating officer the opportunity to enter into an agreement with the agency regarding the content of the record, the legislature did not intend agreements to result in inaccurate or incomplete records. If so, the intent of the PA 128 to provide access to accurate information for prospective hiring agencies who rely on these records in making crucial hiring decisions would be thwarted.

While a law enforcement agency is immune from liability for good faith – truthful – disclosures it makes in a Separation of Service Record, there is no such protection for knowingly providing false information. Subsection (5) provides:

(5) A former employing law enforcement agency that discloses information under this section in good faith after receipt of a waiver executed under subsection (1) is immune from civil liability for the disclosure. A former employing law enforcement agency is presumed to be acting in good faith at the time of a disclosure under this section unless a preponderance of the evidence establishes 1 or more of the following:

(a) That the former employing law enforcement agency knew that the information disclosed was false or misleading.

- (b) That the former employing law enforcement agency disclosed the information with a reckless disregard for the truth.
- (c) That the disclosure was specifically prohibited by a state or federal statute

Furthermore, the rights and obligations created by PA 128 apply exclusively to law enforcement agencies and individual law enforcement officers for the purpose of licensure as a law enforcement officer. Thus, subsequent modifications to the content of the Separation of Service Record based upon settlement agreements reached as a result of an employment grievance pursuant to a collective bargaining agreement between the governmental entity that empowers and governs the law enforcement agency employer and the individual officer's union do not comply with the Act.

To ensure public safety and promote professionalism in the law enforcement community in Michigan, the law enforcement community must adhere to not only to the letter of the law – but should also adhere to the spirit of PA 128.