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FILE NO. S-779

OFFICERS:
Appointment -
State Police

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Lyle F. Tomlinson
Chairman
State Police Merit Board
Suite 1016, Ridgely Building
Springfield, Illinois 62701

Dear Mr. Tomlinson:

I have your letter which reads:

"The State Police Merit Board rejects candidates for appointment wherein the opinion of an examining doctor hired by the Board the candidate may develop in the future disabling back or other physical ailments so that he will be unable to function as a State Police Officer. Many candidates so rejected get other medical opinions which disagree with the Board's examining doctors findings and conclusions. It has been suggested that rather than completely reject such a candidate some kind of agreement by which the candidate would waive his right to continue employment and resign, if in the future, the projected disability occurs.

> The Board would like an opinion from you as to whether such an agreement would be valid and enforceable once the candidate has served his one year probation."

The general rule is that appointment of state employees must be made in accordance with statutory provisions. (People ex rel. Polen v. Hoehler, 405 Ill. 322.) The employment of State Police Officers is governed by "AN ACT in relation to the State Police", (Ill. Rev. Stat. 1973, ch. 121, pars. 307.1 et seq.). Section 9 of said Act, (Ill. Rev. Stat. 1973, ch. 121, par. 307.9) provides in pertinent part:

> "§ 9. The appointment of State policemen shall be made from those applicants who have been certified by the Board as being qualified for appointment. * * * In addition, all persons so appointed * * * shall be required to pass successfully such mental and physical tests and examinations as may be prescribed by the Board.
>
> * * * "

Section 8 of said Act (Ill. Rev. Stat. 1973, ch. 121, par. 307.8) provides in part:

> "§ 8. Pursuant to recognized merit principles of public employment, the Board shall formulate, adopt, and put into effect rules, regulations and procedures for its

> operation and the transaction of its business. The Board shall establish a classification of ranks of the State policemen and shall set standards and qualifications for each rank.
>
> * * * "

Since the above cited provisions do not specifically answer your question, the policies underlying the Act must be examined. While section 8 of said Act, supra, gives the Board the power to establish qualifications and to adopt rules and regulations, this rule-making power clearly cannot be held to include the power to establish special conditions surrounding the appointment of certain individuals with present or prospective physical ailments. This is so for two reasons. First, under the express language of section 8, supra, the Board may only vary the standards and qualifications for appointment as among ranks and not as among individual candidates. Secondly, the policy underlying the Act, as evidenced by the language of section 8, supra, is that qualification and appointment should be in accordance with merit principles. This necessarily implies uniformity as to the standards and qualifications surrounding appointment of candidates. If the Board could vary

the standards and qualifications from individual to individual, it could effectively circumvent the policy of appointment of State Police Officers in accordance with merit principles.

In addition, the Act establishes a definite policy that if a candidate can meet all the qualifications and finally be appointed, he will be entitled to security in his employment upon completion of his 12-month probationary period and may only be removed as provided in sections 12.1, 13, and 14 of said Act. (Ill. Rev. Stat. 1973, ch. 121, pars. 307.12-1, 307.13, and 307.14.) The Act says in effect that upon appointment, all details involved in the process leading to appointment are left behind and are not to be reopened. Consequently, if a candidate develops a physical ailment subsequent to appointment, he can only be removed, in the absence of retirement or voluntary resignation, in accordance with section 14, supra, which allows removal for cause after hearing and notice.

The agreement proposed in your letter would be invalid for additional reasons. As to resignation, the right of a public officer to resign has long been recognized in Illinois. (People

ex rel. McCarthy v. Barrett, 365 Ill. 73.) However, People ex rel. O'Connor v. Harding, 224 Ill. App. 198, established the rule that, in order to be effective, a resignation must be voluntary. Harding is particularly pertinent here since it involved a resignation which was to take effect in the future. In that case, the employee, who held a position which was subject to the rules of the Chicago Civil Service Commission, had been absent from work without sufficient cause. The City Comptroller, while indicating that it was his duty to file charges with the Civil Service Commission, suggested that, if the employee would write out his resignation to take effect when he misbehaved again, he would be allowed to continue in his job. The employee then signed his resignation and delivered it to the Comptroller. Over five months later, following a short period of absence from work by the employee, the Comptroller accepted the resignation. The employee then brought an action seeking a writ of mandamus to compel his reinstatement.

In holding that the resignation was not voluntary and consequently not effective, the court said at pages 204, 205:

> "The filing of such charges, whether sustained or not, would have subjected him to serious embarrassment, inconvenience and expense. A resignation under such circumstances cannot be said to have been given by the party resigning of his own free will. Such a resignation might have been repudiated at any time."

While Harding is distinguishable in several respects from the problem presented here, the case as it deals with the voluntariness of resignations is particularly relevant. In Harding, the agreement as to resignation took place while the employee was already employed, and the employee's alternatives were to deliver his resignation or have charges filed against him with the Civil Service Commission. In order for him to retain his job, he had to submit his resignation. Here, the alternatives available to a candidate would be either to agree to resign should certain specified physical ailments develop or to refuse to so agree and consequently be denied the appointment. A resignation or an agreement to resign made as a condition of appointment would not be completely free and voluntary and, consequently, would be subject to attack under the Harding rule.

In People ex rel. Marcolin v. Ragen, 132 Ill. App. 2d 523, the latest case dealing with the issue of resignation under duress, the plaintiff brought an action seeking a writ of mandamus to compel his reinstatement as a State Police Officer. The plaintiff was under investigation for the acceptance of gratuities. Subsequently, he was suspended, and he eventually resigned. The court rejected the plaintiff's contention that his resignation was not voluntary and held that the complaint did not disclose facts which would support a finding that the resignation was a product of duress. While Ragen provides further clarification as to what constitutes sufficient duress to render a resignation ineffective, it is distinguishable from Harding on its facts. Due to its differing facts, the court in Ragen specifically found Harding to be inapplicable. Thus, Harding is still controlling as it applies to the validity of a resignation which is to become effective in the future.

As to waiver of the right to continue employment, the general rule is that any right or privilege conferred by

statute may be waived. (Dunbar v. Farnum, 109 Vt. 313, 196 A. 237.) However, one cannot waive that which is not his right at the time of waiver. (In re Irwin's Estate, 192 Okl. 334, 136 P. 2d 940.) Assuming that an agreement to waive the right to continued employment in the future would be a condition to a candidate's appointment as a State Police Officer, the candidate at that time would have neither the right to continued employment nor the protection of any statutory provision. In fact, an appointee now can be removed at the will of the Superintendent of the State Police during the first 12 months of his appointment. Only after the 12-month probationary period has expired, does an officer have the protections which are afforded by sections 13 and 14 of the Act, (Ill. Rev. Stat. 1973, ch. 121, pars. 307.13 and 307.14) as to suspensions and removals. Consequently, at the time the agreement would be made, the candidate would have no right to continued employment and, having no right in existence, the candidate would have nothing to waive. Moreover, it should be noted that waiver is subject to the same difficulty in regard to voluntariness as was mentioned above in connection with resignation.

Thus, for the above reasons, it is my opinion that an agreement whereby a candidate for appointment as a State Police Officer would waive his right to continue employment and resign if the projected disability should occur in the future would be unauthorized and unenforceable.

Very truly yours,

ATTORNEY GENERAL