

# RESCINDED

DE 80-05 - May 2, 1980

## Resign-To-Run Highway Patrol Officers

*To: Honorable Joy Smith, Supervisor of Elections, Levy County Courthouse, Bronson, Florida 32621*

*Prepared by: Division of Elections*

This is in response to your request for an advisory opinion from the Division of Elections pursuant to Section 106.23(2), F.S.

In your request, you set forth the following fact situation: Corporal Warren A. Hallman, of the Florida Highway Patrol, is contemplating becoming a candidate for the office of Sheriff of Levy County. In an informal response from the Division of Elections, Corporal Hallman was told, for purposes of Florida's Resign-to-Run Law, Section 99.012, F.S., that he is an "officer" and "subordinate personnel." As such, he is not only entitled to take a leave of absence from employment without pay during the period in which he seeks election to public office, but also must take such leave of absence without pay. Corporal Hallman has been told by the Department of Highway Safety and Motor Vehicles that he must resign from his position with the Florida Highway Patrol if he seeks public office.

You have requested responses from the Division of Elections on several questions concerning this matter:

1. Are Florida Highway Patrol Officers "officers" as distinguished from "employees" for purposes of Florida's Resign-to-Run Law?
2. Are Florida Highway Patrol Officers "subordinate personnel" within the meaning of Section 99.012(7), F.S.?
3. Are Florida Highway Patrol Officers entitled to take a leave of absence without pay from employment during the period in which they are seeking election to public office?
4. Is Corporal Hallman entitled to a leave of absence?

I am of the opinion that Florida Highway Patrol Officers are "officers" as distinguished from employees for purposes of the Resign-to-Run Law, I also believe Florida Highway patrol Officers are "subordinate personnel" within the meaning of Section 99.012(7), F.S. As such, for purposes of the Resign-to-Run Law, a Florida Highway Patrol Officer whose term of office, or any part thereof, runs concurrently with the term of office for which he seeks to qualify, need not Resign-to-Run for such office unless he is running against an individual who has the authority to appoint, employ, promote or otherwise supervise that Florida Highway Patrol Officer, and if that individual has qualified for reelection to that public office. If the

Florida Highway Patrol Officer is running against such an individual, he must Resign-to-Run for office. If he is not running against such an individual, he must still take a leave of absence from employment without pay during the period in which he seeks election to public office.

However, as will be discussed further, this opinion is limited to a construction of the factual situation set forth above as applies to the Resign-to-Run Law only. This opinion does not involve a construction of Section 110.233(4), F.S., which may require a Florida Highway Patrol Officer to resign his job if he seeks public or political office. Such a narrow construction is necessary because Section 106.23(2), F. S., which limits the Division of Elections' power to issue advisory opinions to matters relating to any provisions or possible violations of the Florida election laws. The election laws include Chapters 97 through 106, F.S. Therefore Florida Highway Patrol Officers should not rely upon this ruling as a decision construing Section 110.233(4), F.S.

Florida's Resign-to-Run Law requires that "No individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county, or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than ten days prior to the first day of qualifying for the office he intends to seek." Section 99.012(2), F.S. The Resign-to-Run Law has been construed to apply only to "officers," and not mere "employees." AGO 079-81. Therefore, the threshold issue in determining whether a Florida Highway Patrol Officer must comply with the Resign-to-Run Law is determining whether that individual is an "officer" or an employee. AGO 80-1.

The test for determining whether an individual is an officer or employee was set forth in AGO 80-1, citing *State ex. rel. Clyatt v. Hocker*, Judge, 22 So. 721 (Fla. 1897), and *State v. Sheats*, 83 So. 508 (Fla. 1919). In *Clyatt v. Hocker* the Florida Supreme Court stated:

"The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised in behalf of government, and not merely a transient, occasional or incidental employment. A person, in the service of government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and duties remaining, though the incumbent dies or is changed, is a public officer; every 'office' in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the law." 22 So. at 723.

In *State v. Sheats* it was stated:

"The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority. The term office embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in ones own right of

any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employee and an officer. . ." 83 So. at 509.

Under these two general definitions, Florida Highway Patrol Officers are "officers" for purposes of the Resign-to-Run Law. This conclusion is based upon a reading of Section 321, F.S., in light of the above definitions.

Section 321, F.S., establishes the office of Florida Highway Patrol Officer and states the duties, functions and powers of patrol officers. Among those powers, functions, and duties are:

1. The common law right to arrest a person who, in the presence of the arresting officer, commits a felony or commits an affray or breach of the peace constituting a misdemeanor.
2. The power to bear arms.
3. The duty to apprehend, without warrant, any person in the unlawful commission of any of the acts over which the members of the Florida Highway Patrol are given jurisdiction.
4. The authority to apply for, serve and execute search warrants, copies, and other process of the court in those matters in which patrol officers have primary responsibility.
5. The duty, function and power to patrol the state highways and regulate, control and direct the movement of traffic thereon.
6. The duty, function, and power to assist other constituted law enforcement officers of the state to quell mobs and riots, guard prisoners and police disaster areas.
7. The power to make arrests while in fresh pursuit of a person believed to have violated the traffic and other laws.
8. The power to arrest a person wanted for a felony or against whom a warrant has been issued on any charge in violation of federal, state or county laws or municipal ordinances.

Further, Section 321, F.S., declares the Florida Highway Patrol to be "...conservators of the peace and law enforcement officers of the state..." who "...shall have the same protections and immunities afforded other peace officers..."

It is obvious that Florida Highway Patrol Officers exercise a share of the sovereign power and that they are entrusted with a permanent public trust. This trust is not a transient one, it continues, though the incumbent dies or is changed. Further, the position is created by law rather than by contract. Therefore, Florida Highway Patrol Officers are "officers" for purposes of the Florida Resign-to-Run Law.

The next inquiry is whether Florida Highway Patrol Officers are "subordinate personnel" under Section 99.012(7), F.S. That subsection states:

"For the purposes of this section, no individual who is a subordinate personnel, deputy sheriff or police officer need resign pursuant to subsection (2) or subsection (3) unless such individual is seeking to qualify for a public office which is currently held by an individual who has the authority to appoint, employ, promote, or otherwise supervise that subordinate personnel,

deputy sheriff, or police officer and who has qualified as a candidate for reelection to that public office. However, any such personnel, deputy sheriff, police officer, or other such individual shall take a leave of absence without pay from his employment during the period in which he is seeking employment to public office.

Thus, if Florida Highway Patrol Officers are subordinate personnel then it follows they need not resign for purposes of the Resign-to-Run Law unless they are seeking to qualify for an office which is currently held by an individual who has the authority to appoint, employ, promote, or otherwise supervise the Florida Highway Patrol Officer and who has qualified as a candidate for reelection to that public office. They would, however, be required to take a leave of absence without pay. On the other hand, if Florida Highway Patrol Officers are not subordinate personnel then they must Resign-to-Run for office because the only exception to the requirement are set forth in Section 99.012(7), F.S.

The term "subordinate personnel" is not defined in the Florida Statutes or by any judicial decisions. To date, the only construction of the term is in AGO 079-81. In that opinion, the Attorney General concluded that subordinate personnel are appointed officers who are subject to the control and supervision of another and are not acting pursuant to their own power. AGO 079-81 also stated that the statutory provision granting the officer his power would have to be analyzed to ascertain whether he is subordinate.

A number of sections in Chapter 321, F.S., point to the conclusion that Florida Highway Patrol Officers are subordinate personnel. Section 321.02, F.S., states:

"The director of the Division of Highway Patrol of the Department of Highway Patrol and Motor Vehicles shall also be the commander of the Florida Highway Patrol. The said department shall set up and promulgate rules and regulations by which the personnel of the Florida Highway Patrol Officers shall be examined, employed, trained, located, suspended, reduced in rank, discharged, recruited, paid and pensioned, subject to civil service provisions hereafter set out."

Section 321.04(1), F.S., states, in part:

"The Department of Highway Safety and Motor Vehicles shall establish the necessary supervisory ranks within the Florida Highway Patrol to efficiently supervise and carry out the designated functions of the patrol and the department in accordance with the regulations established by the Department of Administration."

All of these sections show that Florida Highway Patrol Officers are controlled, supervised, and not acting independently pursuant to their own power. Rules dictate how an officer is examined, employed, trained, located, suspended, reduced in rank, discharged, recruited, paid and pensioned. Ranks are established for efficient supervision of the officer. Finally, officers are placed on a probationary status for one year and subject to dismissal without recourse during that period. It would be difficult to conceive of an officer that more easily fits the definition of "subordinate personnel."

Therefore, Florida Highway Patrol Officers are both officers and subordinate personnel for purposes of the Resign-to-Run Law. Consequently, if a Florida Highway Patrol Officer seeks to qualify as a candidate for another public office, the term of which or any part thereof runs concurrently with the term of office he presently holds, he need not resign from his office as a Florida Highway Patrol Officer unless he is running against an individual who has the authority to appoint, employ, promote, or otherwise supervise that Florida Highway Patrol Officer and if that individual has qualified as a candidate for reelection to that public office. If the Florida Highway Patrol Officer is running against such an individual, he must Resign-to-Run for office. If he is not running against such an individual, he must still take a leave of absence without pay during the period in which he is seeking election to the public office.

However, it must be emphasized that the above conclusions are based upon a construction of Section 99, F.S., only. The above conclusions do not consider the possible effect of Section 110, F.S., on Florida Highway Patrol Officers when seeking election to public office. That section, which may require Florida Highway Patrol Officers to resign from their position if they seek election to public office, will not be construed for purposes of an advisory opinion pursuant to Section 106.23(2), F.S., because Section 106.23(2), F.S., limits the authority of the Division of Elections to issue advisory opinions to provisions or possible violations of the election laws. Section 110, F.S., is not included in the election laws, which include Section 97 through 106, F.S. Section 97.011, F.S.

However, I do feel it appropriate to bring to your attention a recent informal opinion from the Attorney General of Florida to Chester F. Blakemore, Executive Director of Highway Safety and Motor Vehicles concerning Chapter 110, as it applies to Florida Highway Patrol Officers seeking election to local public office.

In that opinion of January 30, 1980, the Attorney General opined that members of the Florida Highway Patrol hold positions in the career service system of Florida and are therefore subject to the provisions of Section 110.233(4)(a), F.S., and Chapter 22L-13, Florida Administrative Code. Those provisions forbid state employees to hold or be a candidate for public or political office. However when authorized by their agency head and approved by the Department of Administration, as involving no interest which conflicts or activity which interferes with his state employment, an employee in the career service may be a candidate for or hold local public office. A copy of that informal opinion is attached for your convenience.

Therefore, it is the opinion of the Division of Elections that Florida Highway Patrol Officers are both "officers" and "subordinate personnel" for purposes of Florida's Resign-to-Run Law. As such, for purposes of the Resign-to-Run Law, a Florida Highway Patrol Officer whose term of office or any part thereof runs concurrently with the term of office for which he seeks to qualify, need not Resign-to-Run for such office unless he is running against an individual who has the authority to appoint, employ, promote or otherwise supervise that Florida Highway Patrol Officer and if that individual has qualified as a candidate for reelection to that public office. If the Florida Highway Patrol Officer is running against such an individual, he must Resign-to-Run for office. If he is not running against such an individual, he must still take a leave of absence from employment without pay during the period in which he seeks election to public office.