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December 20, 2018

**OFFICIAL OPINION 2018-12**

The Honorable Martin Carbaugh  
State Representative  
House District 81  
200 West Washington Street  
Indianapolis, IN 46204

**RE: Meaning of the word “resignation” in Indiana Code § 5-8-4-1**

Dear Representative Carbaugh:

You requested an opinion on whether under Ind. Code § 5-8-4-1 a resignation of rank is treated the same as a resignation of office.

**REQUESTOR STANDING**

Ind. Code § 4-6-2-5 contemplates that either chamber of the General Assembly may request, by resolution, an official advisory opinion of the Attorney General as to the constitutionality of an existing or proposed legislative enactment. The final clause of that same statutory provision grants to the Attorney General the discretion to render (or decline to render) opinions sought by individual state legislators about other matters, including questions of statutory interpretation having statewide significance and which are likely to recur while evading judicial review.

**QUESTION PRESENTED**

Is a resignation in rank a “resignation” as that term is used in Ind. Code § 5-8-4-1?

**BRIEF ANSWER**

No. Ind. Code § 5-8-4 *et seq.* establishes a statutory protocol for the unconditional relinquishment of an office which then creates a vacancy. A resignation in rank is essentially a voluntary demotion and does not create a vacancy in office.

## BACKGROUND

A firefighter with the rank of Captain in the Fort Wayne Fire Department (“Department”) sent an e-mail to the Chief of the Department informing him that “[he] would like to return as a private immediately.” Shortly after sending the message, the firefighter changed his mind and attempted to rescind his action. The Chief treated the firefighter’s e-mail as a request for reassignment. The firefighter on the other hand considered his e-mail to have been a formal resignation.<sup>1</sup> The question then arose as to who had the authority to consider the firefighter’s request to reconsider his action. According to the Department, assignments for duty are within the purview of the Chief whereas in the view of the firefighter, the reconsideration of a formal resignation comes under the jurisdiction of the Fire Merit Commission.<sup>2</sup>

## ANALYSIS

In relevant part, IC § 5-8-4-1 provides that “[w]hensoever any . . . employee . . . of any . . . department . . . of any city . . . shall submit in writing his . . . resignation. . . with the proper officer, person or persons or authority of government to receive such resignation, the person so submitting such written resignation shall have no right to withdraw, rescind, annul or amend such resignation without the consent of the officer, person or persons or authority of government having power by law to fill such vacancy.” In addition, resignations are unconditional. Ind. Code § 5-8-4-2

The use of the word “resignation” as it appears in IC 5-8-4-1 & -2 is consistent with long-standing interpretation of that term. “To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment.” *Biddle v. Willard*, 10 Ind. 62, 66 (Ind. 1857). Also, “a resignation . . . must be unconditional, with intent that it shall operate as a resignation.” *State v. Huff*, 87 N.E. 141, 143 (Ind. 1909).

In addition, the legal significance of the word “vacancy” is well established.

The word “vacancy,” as applied to an office, has no technical meaning. An office . . . is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event.

*State ex rel. Carson v. Harrison*, 16 N.E. 384, 386 (Ind. 1888).

Your letter refers to a “resignation in rank” which is a phrase that does not appear in the statute. That term does appear in case law, however. In *City of Evansville v. Conley*, 661 N.E.2d 570 (Ind. Ct. App.1996), the court discussed resignations in rank by firefighters in Evansville, but in the context of that litigation the resignations in rank were voluntary demotions. The

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<sup>1</sup> The e-mail does not contain the word “resignation,” and it was not sent to the Fire Merit Commission.

<sup>2</sup> The Fire Merit Commission has already decided not to consider the firefighter’s request to rescind his resignation. See <https://www.wane.com/news/local-news/firefighter-not-reinstated-as-captain-after-taking-it-up-with-merit-commission/1220711037> (last visited October 15, 2018).

central issue in *Conley* was not whether the actions taken by the firefighters were resignations *per se*, but whether the decisions to assume lower ranks were voluntary or made under duress. The firefighters did not lose their jobs, and the resignations in rank did not create vacancies in the department.

Setting aside the question of duress, the circumstances you describe in your letter concerning the Fort Wayne firefighter are similar to those discussed in *Conley*. The firefighter voluntarily decided he wanted to remain with the Department but not with the rank or responsibilities of a Captain. His resignation in rank was essentially a voluntary demotion, which is a non-disciplinary reduction in grade. *Olejniczak v. Town of Kouts*, 651 N.E.2d 1197, 1202 (Ind. Ct. App. 1995).

### CONCLUSION

A “resignation,” as that term is used in IC § 5-8-4 *et seq.*, is a voluntary and unconditional termination of employment that creates a vacancy in an office. A resignation in rank is a voluntary demotion. By its nature, a resignation in rank is conditional on continued employment and does not create a vacancy. Resignations in rank, therefore, are not the legal equivalent of a resignation as that term is used in IC § 5-8-4 *et seq.*

SUBMITTED and  
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