OPINION NO. 81-100

Syllabus:

1. Pursuant to R.C. 340.02 and section three (uncodified) of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), a member of a community mental health board who has a specified family member serving as a county commissioner of a county or counties served by the mental health board, or as a member or employee of the board of a contract agency, must be removed from office, even though such member was appointed prior to the effective date of Am. Sub. S.B. 160.

2. A member of a community mental health board who also serves on the board of a contract agency may be removed from office pursuant to R.C. 340.02, regardless of whether he was appointed before or after the enactment of Am. Sub. S.B. 160. (1979 Op. Att'y Gen. No. 79-049; 1970 Op. Att'y Gen. No. 70-168, overruled.)

3. A member of a community mental health board appointed prior to the effective date of Am. Sub. S.B. 160, who also serves as an employee of a contract agency, may serve out the remainder of his term, unless he has an interest in his employer's contract with the board, in which case he may be removed from office pursuant to R.C. 340.02.

To: Myers R. Kurtz, Director, Department of Mental Health, Columbus, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your predecessor's request for an opinion concerning the interpretation of R.C. 340.02, as amended by Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980). Although your predecessor requested an informal opinion, I have elected to respond formally due to the general interest in the questions presented. The particular language of R.C. 340.02 with which your predecessor was concerned reads as follows:

> No member or employee of a community mental health board shall serve as a member of the board of any agency with which the mental health board has entered [into] a contract for the provision of services or facilities. No member of a community mental health board shall be an employee of any agency with which the mental health board has entered into a contract for the provision of services or facilities. No person shall serve as a member of the mental health board whose spouse, child, parent, brother, sister, grandchild, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law serves as a member of the board of any agency with which the mental health board has entered [into] such a contract. No person shall serve as a member or employee of the community mental health board whose spouse, child, parent, brother, sister, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law serves as a county commissioner of a county or counties under the jurisdiction of the community mental health board.

(The bracketed language was added by Am. Sub. H.B. 694, 114th Gen. A. (1981) (eff. Nov. 15, 1981).) R.C. 340.02 goes on to provide:

> Any member of the board may be removed from office by the appointing authority for neglect of duty, misconduct, or malfeasance in office, and shall be removed by the appointing authority if the member's spouse, child, parent, brother, sister, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law serves as a county commissioner of a county or counties under the jurisdiction of the community mental health board or serves as a member or employee of the board of an agency with which the mental health board has entered a contract for the provision of services or facilities. The member shall be informed in writing of the charges and afforded an opportunity for a hearing.

Section three (uncodified) of Am. Sub. S.B. 160 provides in pertinent part:

> members appointed to a county board of mental retardation or a community mental health and retardation board prior to the effective date of this act shall complete the terms for which they were appointed, unless a member voluntarily relinquishes his office or is removed from office in accordance with section 340.02 or 5126.04 of the Revised Code. (Emphasis added.)

Your predecessor posed the question whether the above provisions of Am. Sub. S.B. 160 were intended to apply to community mental health board members who were appointed prior to the enactment of the law. More specifically, your predecessor expressed concern over the effect of Ohio Const. art. II, §28, R.C. 1.48, and R.C. 1.58 on R.C. 340.02 and section three of the act.

The General Assembly's intent as to the application of R.C. 340.02 appears relatively easy to discern. Section three of Am. Sub. S.B. 160 provides that a board

member appointed prior to the act shall complete his term unless he resigns or is removed in accordance with R.C. 340.02.[1] R.C. 340.02 provides that a board member may be removed for neglect of duty, misconduct, or malfeasance in office, and that he shall be removed if he has a specified family member who serves on the board of county commissioners of a county or counties served by the board, or if he has a specified family member who serves as a board member or employee of a contract agency.[2] Unless there is clear legislative intent to the contrary, "[t]he word 'shall' is usually interpreted to make the provision in which it is contained mandatory. . . ." Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 (1971) (citation omitted). See Cleveland Ry. Co. v. Brescia, 100 Ohio St. 267, 126 N.E. 51 (1919). Reading R.C. 340.02 together with section three of the act, it is apparent that the General Assembly did intend for certain provisions of R.C. 340.02, as amended, to apply to the board members appointed prior to the effective date of Am. Sub. S.B. 160. R.C. 340.02 places a mandatory duty upon the appointing authority to remove board members who have a family member who is a county commissioner or employee or member of the board of a contract agency, and section three specifies that board members appointed prior to the act are to remain in office unless they are removed pursuant to R.C. 340.02. In answer to your predecessor's question, I conclude that the General Assembly intended for the provisions of R.C. 340.02 (as amended by Am. Sub. S.B. 160), which prohibit a person from serving as a mental health board member if he has a family member who is a county commissioner of the county or counties served by the board, or if he has a family member who is an employee or board member of a contract agency, to apply to board members appointed prior to the effective date of the act. Any community mental health board member who falls within these specific conflict of interest provisions of R.C. 340.02 must be removed from office.

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[1]It is arguable that the mention of R.C. 340.02 in section three of the act is a reference to R.C. 340.02, as it read prior to the enactment of Am. Sub. S.B. 160. The earlier version of R.C. 340.02 provided for the removal of board members only on the grounds of neglect of duty, misconduct, or malfeasance in office. See 1967-68 Ohio Laws 333 (Am. H.B. 648, eff. Oct. 26, 1967). However, the reference to R.C. 5126.04 in section three of the act (the removal of members of county boards of mental retardation) must mean R.C. 5126.04, as amended by Am. Sub. S.B. 160, since R.C. 5126.04, as it read prior to the act, had nothing to do with the removal of board members, but, rather, concerned the duties of the board administrator (now superintendent). See 1967-68 Ohio Laws 1809 (Am. S.B. 169, eff. Oct. 25, 1967). (The previous R.C. 5126.04 was amended and renumbered R.C. 5126.06 by Am. Sub. S.B. 160.) Thus, in order to read section three in a consistent fashion, the reference to R.C. 340.02, as well as to R.C. 5126.04, must be with regard to the sections as they were amended by Am. Sub. S.B. 160.

[2]For some reason which I am unable to discern, the substantive conflict of interest provisions and removal provisions of R.C. 340.02 do not coincide. The first part of R.C. 340.02 prohibits a community mental health board member from serving as a board member or employee of a contract agency, from having a family member who is a board member of a contract agency, or from having a family member who is a county commissioner of a county or counties served by the board. The mandatory removal provisions apply to members who have a family member on the board of a contract agency or on the board of county commissioners of a county or counties served by the board. Specific reference to board members who are members or employees of the board of a contract agency has been omitted from the mandatory removal section of R.C. 340.02. I note also that R.C. 340.02 provides for the removal of a board member who has a family member who is an employee of a contract agency, although there is no substantive prohibition against this situation in the part of R.C. 340.02 which lists all of the other prohibited arrangements. The general discussion which immediately follows pertains to those situations covered by the mandatory removal provisions of R.C. 340.02. The situations which are not so covered are discussed later.

I turn now to the specific concerns surrounding this interpretation expressed in the letter of request. Your predecessor has questioned the effect of Ohio Const. art. II, §28 upon the interpretation of the removal provisions of Am. Sub. S.B. 160, and their effect on board members appointed prior to the effective date of the act. Art. II, §28 states in part: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts. . . ." It is not a function of this office, which is part of the executive branch of government, to opine on the constitutionality of state statutes. Rather, that is the function of the judiciary. See 1980 Op. Att'y Gen. No. 80-002. If a statute is ambiguous, this office will choose a constitutional interpretation over one which appears to be unconstitutional. See R.C. 1.47(A). See also Brotherhoods v. P.U.C., 177 Ohio St. 101, 202 N.E.2d 699 (1964). However, where a statute is clear, as in this case, this office can only advise you to act in accordance with the plain language of the statute, on the assumption that the statute is constitutional. The Department may, however, wish to initiate a declaratory judgment action or seek a legislative change to the statute.

Although this office cannot opine on the constitutionality of R.C. 340.02, as amended, I note the following pertinent factors to be considered in an analysis of R.C. 340.02 under Ohio Const. art. II, §28. Art. II, §28 prohibits the passage of a retroactive law, which has been defined as follows: " 'Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' " Weil v. Taxicabs of Cincinnati, Inc., 139 Ohio St. 198, 203, 39 N.E.2d 148, 151 (1942) (citations omitted). An example of a retroactive law is provided in the case of Fraternal Order of Police v. Hunter, 49 Ohio App. 2d 185, 360 N.E.2d 708 (Mahoning County 1975), cert. denied, 424 U.S. 977 (1976). In Hunter, the court was faced with a rule, promulgated by the Youngstown Civil Service Commission, stating that any city officer or employee not living within the Youngstown city limits was subject to dismissal. The court held that this residency requirement, as applied to those employees who had entered the classified service prior to the adoption of the rule, was a retroactive law. Thus, if board members appointed prior to the effective date of the act were removed under the conflict of interest provisions of R.C. 340.02, it would appear, under the analysis used in Hunter, that R.C. 340.02 would be operating as a retroactive law.

Before a retroactive statute will be considered unconstitutional it must impair some vested right or entitlement protected by the Constitution. Buckley v. City of Cincinnati, 63 Ohio St. 2d 42, 406 N.E.2d 1106 (1980). A retroactive statute which extinguishes a vested right is considered to result in a deprivation of property without due process of law. Fraternal Order of Police v. Hunter. A public officer or employee is deemed to have a protectable property interest in his continued employment if state law creates an expectancy of, or claim of entitlement to, continued employment. Board of Regents v. Roth, 408 U.S. 564 (1972). A property interest in employment can be created by statute, or by implied contract or other understanding. Bishop v. Wood, 426 U.S. 341 (1976); Perry v. Sindermann, 408 U.S. 593 (1972). The sufficiency of an employee's claim is determined by the nature of the guarantee created by state law. Bishop v. Wood. See Dorian v. Board of Education, 62 Ohio St. 2d 182, 404 N.E.2d 155 (1980). Although a written contract or formal grant of tenure is not necessarily essential to establish a due process interest, there must be more to a due process claim than a unilateral or subjective expectation of continued employment on the part of the officer or employee. Board of Regents v. Roth; Perry v. Sindermann; see State ex rel. Trimble v. State Board of Cosmetology, 50 Ohio St. 2d 283, 364 N.E.2d 247 (1977). Thus, in considering whether a public officer can constitutionally be removed from his position because he fails to meet qualifications imposed after his

appointment, it must be determined whether state law grants the officer an expectancy of continued employment.

Statutes which grant public employees continued employment during good behavior have been found to grant such employees a due process property interest in their employment. See Board of Regents v. Roth; Perry v. Sindermann. In Ohio, it has been held that R.C. 124.34[3] grants classified employees a right to tenure during good behavior and efficient service, and, thus, such employees have a claim of entitlement to continued employment for due process purposes. Jackson v. Kurtz, 65 Ohio App. 2d 152, 416 N.E.2d 1064 (Hamilton County 1979). See Frumkin v. Board of Trustees, 626 F.2d 19 (6th Cir. 1980) (holding that a state university professor's tenured status constituted a protected property interest); Dorian v. Board of Education (stating that public school teachers under continuing contracts had an expectation of continued employment which was protected by due process). Accordingly, in Fraternal Order of Police v. Hunter, the court held that the application of the rule requiring city employees to live within the city limits to those classified employees hired before the effective date of the rule would extinguish a vested legal relationship, and thus, would be a violation of Ohio Const. art. II, §28, as well as U.S. Const. art. I, §10 (prohibiting a state from passing a law impairing the obligation of contracts) and U.S. Const. amend. XIV, §1 (prohibiting the deprivation of property by a state without due process of law).

Employees in the unclassified service in Ohio, however, are not subject to the statutory tenure protection given to classified employees; rather, they generally serve at the pleasure of the appointing authority. Thus, it has been held that unclassified employees have no claim of entitlement to continued employment, and, accordingly, no protectable property interest. State ex rel. Trimble v. State Board of Cosmetology.

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[3] R.C. 124.34 provides in part:

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

The members of a community mental health board are in the civil service,[4] see R.C. 124.11(A)(19), and apparently are unclassified. R.C. 124.11(B) states that the classified service shall include those not specifically included in the unclassified service. Community mental health board members do not appear in R.C. 124.11(A), which lists those in the unclassified service, and thus it might appear that they are in the classified service. Upon closer examination, however, it becomes clear that board members must be in the unclassified service.

It has been held that R.C. 124.11 is not the exclusive determinant of the classified or unclassified status of a civil service position. If there is express statutory provision elsewhere in the Revised Code designating a position as classified or unclassified, or if there is language from which such designation can be implied, then that language controls over the general scheme of R.C. 124.11. Johnson v. Department of Administrative Services, 54 Ohio Misc. 7, 375 N.E.2d 1268 (C.P. Montgomery County 1977). See State ex rel. Fesler v. Green, 40 Ohio App. 400, 178 N.E. 603 (Cuyahoga County 1931). R.C. 340.02 provides for community mental health board members. Board members do not serve for an indefinite period of time, subject to good behavior and efficient service, as classified employees do. Rather, they are appointed for a temporary period, which

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[4] R.C. 124.01(A) defines "civil service" to include "all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof." This definition is carried through to R.C. 124.11 in dividing the civil service into unclassified and classified service. Thus, an initial determination must be made whether a community mental health service district is part of the state or of a county, so as to be included within the definition of "civil service," or whether it is a separate and independent political subdivision, and thus without the scope of R.C. Chapter 124.

Previous opinions of this office have not treated community mental health boards consistently. Single county boards do not appear to be independent subdivisions since they do not have the traditional governmental powers of eminent domain, taxation, and assessment. See 1978 Op. Att'y Gen. No. 78-052. Such boards are supported through property taxes levied by the board of county commissioners, see R.C. 5705.19; R.C. 5705.191; R.C. 5705.221, and by money from the Department of Mental Health. See R.C. 340.09; R.C. 340.10; R.C. 5119.62. However, while some opinions have treated board employees as county employees, see 1969 Op. Att'y Gen. No. 69-045; 1967 Op. Att'y Gen. No. 67-104, there is also authority for the proposition that community mental health boards are independent, and thus their employees are not county employees. See 1978 Op. Att'y Gen. No. 78-029. See also 1975 Op. Att'y Gen. No. 75-084.

There is a stronger argument that joint-county districts are independent subdivisions since such a service district is a subdivision for taxing purposes, R.C. 5705.01(A), and a joint board is a taxing authority, R.C. 5705.01(C). 1978 Op. Att'y Gen. No. 78-046, 1976 Op. Att'y Gen. No. 76-004, 1975 Op. Att'y Gen. No. 75-084, and 1975 Op. Att'y Gen. No. 75-014 all support the position that a joint service district is an independent entity. Op. No. 75-014 specifically concludes that board employees are not county employees. See 1969 Op. Att'y Gen. No. 69-045. But see 1967 Op. Att'y Gen. No. 67-104.

Although it appears to be far from clear whether single and joint community health service districts are independent subdivisions, or part of a county, the General Assembly has evidently determined that such districts are not independent, but rather part of one of the subdivisions listed in R.C. 124.01 and R.C. 124.11. R.C. 124.11, as amended by Am. Sub. S.B. 160, now includes executive directors, deputy directors, and program directors employed by mental health boards, and their secretaries, in the unclassified service, under division (A)(19). Since these employees have legislatively been deemed to be in the civil service, it must follow that board members and all other board employees are also in the civil service.

ends at a specific time. Although board members do have some procedural protections with regard to removal, they are not entitled to all of those safeguards accorded to classified employees. Indeed, if board members were so entitled, the removal provisions of R.C. 340.02 would be superfluous. R.C. 124.11(B) divides the classified service into the competitive class and the unskilled labor class. Clearly, board members are not in the latter class. It is also apparent that, due to the required executive ability of board members, see R.C. 340.03, it would be impracticable to determine by examination their merit and fitness, and thus board members could not be in the competitive class.[5] See State ex rel. Townsend v. Berning, 60 Ohio App. 458, 21 N.E.2d 1016 (Hamilton County 1938), aff'd, 135 Ohio St. 31, 19 N.E.2d 155 (1939). It should also be noted that board members serve without compensation, R.C. 340.02, and thus would be less in need of the protections afforded those in the classified service.

Although board members are in the unclassified service, they do have an expectancy in their continued employment, which is greater than that of those unclassified employees who serve at the pleasure of their appointing authority. Pursuant to R.C. 340.02, a board member is appointed for a term of four years (unless he holds one of the initial appointments to a board, in which case, his term may be for two years, three years, or four years, see R.C. 340.02). Although an individual has no right to an initial appointment or reappointment to the board, see Burks v. Perk, 470 F.2d 163 (6th Cir. 1972), cert. denied, 412 U.S. 905 (1973); State ex rel. Trago v. Evans, 166 Ohio St. 269, 141 N.E.2d 665 (1957); see also Board of Regents v. Roth; Perry v. Sindermann, he does have the expectation that he will serve for four years, absent some conduct which constitutes a statutory ground for removal. (Prior to the enactment of Am. Sub. S.B. 160, the sole grounds for removal were neglect of duty, misconduct, or malfeasance in office).[6] See Board

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[5]The Director of Mental Health appoints one-third of the members to the board, and the county commissioners appoint the rest. R.C. 340.02. Prior to the adoption of Am. Sub. S.B. 160, at least two board members had to be practicing physicians, one of whom had to be either a psychiatrist or pediatrician, if possible, and at least one member had to be a probate judge of a participating county, or his designee. Am. Sub. S.B. 160 amended R.C. 340.02, so that now at least one member of the board must be a psychiatrist, or if that is not possible, a practicing physician, and one member must be a mental health professional. All members must be interested in mental health programs and facilities.

[6]Even though prior to Am. Sub. S.B. 160 there was no absolute prohibition against a person who had a family member serving as a county commissioner or employee or board member of a contract agency from serving as a mental health board member, board members were subject to R.C. 2921.42(A)(1), which became effective January 1, 1974. (1971-72 Ohio Laws 1866 [Am. Sub. H.B. 511, eff. Jan. 1, 1974]). R.C. 2921.42(A)(1) prohibits a public official from actively using his authority to secure a public contract in which he, a member of his family, or business associate has an interest. See Ohio Ethics Commission, Advisory Opinion No. 80-001 (defining "a member of his family" for purposes of R.C. 2921.42). Thus, even before the enactment of Am. Sub. S.B. 160, board members would have been prohibited from voting, or otherwise acting, to approve a contract with an agency if a family member sat on the board of the contract agency, or was an employee of the contract agency, with responsibilities so as to give him an interest in the contract. See Ohio Ethics Commission, Advisory Opinion No. 80-003; Ohio Ethics Commission, Advisory Opinion No. 78-006. See also R.C. Chapter 102. Under Ohio common law, a public officer must always act in the best interest of the public and the entity he serves, without regard to private interests and concerns. See State ex rel. Taylor v. Pinney, 13 Ohio Dec. 210 (C.P. Franklin County 1902). Obviously, a board member was not permitted to act improperly towards an agency with which a family member was connected. Such action, as well as a specific violation of R.C. 2921.42(A)(1), would surely have constituted misconduct or malfeasance, and thus grounds for removal under R.C. 340.02, as it read prior to the enactment of Am. Sub. S.B. 160.

of Regents v. Roth, at 567 ("[a] nontenured teacher, similarly, is protected to some extent during his one-year term" (emphasis in original)). R.C. 340.02, in both its previous and current forms, also affords board members notice and a hearing before removal from office, which indicates that board members have a due process interest in their position for the duration of their term. See Board of Regents v. Roth. It is certainly arguable that, because board members are appointed for a four-year term, state law has created an expectancy of, or claim of entitlement to, continued employment for four years, and, thus, board members have a property interest in their position for the duration of their term, of which they may not be deprived in violation of due process of law. See Kucinich v. Forbes, 432 F. Supp. 1100, 1115 n. 21 (N.D. Ohio 1977). See also Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 655 (1853) ("the incumbent [of a public office] has an existing legal right in the office, from which the Legislature has no power to dismiss him by any direct act, or to divest him by a law prospectively adding new qualifications, for the office"); State ex rel. Peters v. McCollister, 11 Ohio 46, 50 (1841) ("the legislature have no power, by retrospective legislation, to deprive a man of an office. When a man becomes an incumbent of an office, he has a vested right in that office; and all such rights are secured by the constitution"). State ex rel. Trimble, which held that unclassified employees have no claim of entitlement to their continued employment, is distinguishable on the fact that it concerned an employee who had no set term, but rather served at the pleasure of her appointing authority. In sum, although community mental health board members are in the unclassified service, they do have an expectancy of continued employment for the term for which they were appointed, and thus, arguably may not be constitutionally removed from their positions because they do not meet qualifications imposed after their appointment, even though R.C. 340.02, as amended, and section three (uncodified) of Am. Sub. S.B. 160 would mandate their removal.

Again, I note that the above discussion of the constitutionality of R.C. 340.02 as applied to board members appointed prior to the effective date of Am. Sub. S.B. 160 is given merely as a point of information. I can only advise you to act in accordance with the clear language of R.C. 340.02, coupled with section three (uncodified) of the act, which mandates the removal of all board members who do not meet the requisite conflict of interest provisions.

Your predecessor also expressed concern over the effect of R.C. 1.48, which states that "[a] statute is presumed to be prospective unless expressly made retrospective."[7] The courts have also recognized this principle as a general rule of statutory construction. See, e.g., Smith v. Ohio Valley Insurance Co., 27 Ohio St. 2d 268, 272 N.E.2d 131 (1971); Joseph Schonthal Co. v. Village of Sylvania, 60 Ohio App. 407, 21 N.E.2d 1008 (Lucas County 1938). As discussed above, R.C. 340.02 was expressly made retroactive by section three (uncodified) of Am. Sub. S.B. 160, which states that board members appointed prior to the act are to remain in office unless they are removed pursuant to R.C. 340.02. R.C. 340.02 mandates the removal of those board members with the specified conflict of interest. Because there is express language evidencing the legislature's intention that the removal provision of R.C. 340.02 is to be applied to board members appointed prior to the effective date of the act, the presumption of prospective application is of no effect.

Your predecessor also inquired as to the effect of R.C. 1.58 on R.C. 340.02. R.C. 1.58 provides in part:

> (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
> (1) Affect the prior operation of the statute or any prior action taken thereunder;

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[7]The constitutional prohibition against retrospective laws does not apply to purely procedural or remedial statutes. See Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accorded, or incurred thereunder.

R.C. 1.58 acts as a "saving clause" as to statutes which reenact, amend, or repeal prior legislation. Am. Sub. S.B. 160 does amend R.C. 340.02, and R.C. 1.58 would appear to mandate that any prior action taken, or privilege acquired, under the previous version of R.C. 340.02 would remain unaffected by the amending language of Am. Sub. S.B. 160. However, R.C. 1.58 is merely a general rule of statutory construction, and must give way to a more specific legislative intent that the particular amending statute be applied to prior actions and privileges. See Nokes v. Nokes, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976). See also R.C. 1.51; State ex rel. Myers v. Chiarmonte, 46 Ohio St. 2d 230, 348 N.E.2d 323 (1976). As discussed above, section three of Am. Sub. S.B. 160, read together with R.C. 340.02, evidences a clear legislative intent that the removal provisions of R.C. 340.02, as amended, are to be applied to board members appointed before the section was amended, who do not meet the new conflict of interest provisions of R.C. 340.02. R.C. 1.58, a general rule of statutory construction, cannot operate to prevent the application of R.C. 340.02, as amended, to board members appointed prior to the amendment, in light of clear legislative intent to the contrary.

As noted in footnote two, supra, the mandatory removal section of R.C. 340.02 does not include the situations where a board member serves as a member or employee of the board of a contract agency, even though such arrangements are prohibited in the substantive section of R.C. 340.02. Again, section three of Am. Sub. S.B. 160 states: "members appointed to a. . .community mental health and retardation board prior to the effective date of this act shall complete the terms for which they were appointed, unless a member. . .is removed from office in accordance with section 340.02. . .of the Revised Code." There is no explicit language in the removal section of R.C. 340.02 requiring an appointing authority to remove board members who also serve as a member or employee of a board of a contract agency. Thus, it would appear, under the language of section three, that board members appointed prior to Am. Sub. S.B. 160, who serve as a board member or employee of a contract agency, could complete the terms for which they were appointed.

However, upon examining R.C. 2921.42(A)(4), which became effective January 1, 1974 (1971-72 Ohio Laws 1866 [Am. Sub. H.B. 511, eff. Jan. 1, 1974]), it becomes apparent that a person could not have been concurrently serving as a mental health board member and contract agency board member even prior to the enactment of Am. Sub. S.B. 160. R.C. 2921.42(A)(4) reads that, "[n]o public official shall knowingly. . .have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." This provision has been interpreted by the Ohio Ethics Commission, which has the authority to render advisory opinions concerning R.C. 2921.42, see R.C. 102.08, as prohibiting a public official from serving on the board of an agency which contracts with his public entity.[8] See Ohio Ethics Commission, Advisory Opinion No. 81-008; Ohio Ethics Commission, Advisory Opinion No. 81-003. Thus, a mental health board member who also serves on the board of a contract agency could be removed from the mental health board pursuant to R.C. 340.02, regardless of whether he was appointed before or after the enactment of Am. Sub. S.B. 160, since he would be in violation of R.C. 2921.42(A)(4) (a first degree misdemeanor, R.C. 2921.42(D)) and such violation could be found to constitute misconduct or malfeasance, grounds for removal under the previous, as well as the current, version of R.C. 340.02.

Pursuant to R.C. 2921.42(A)(4), a public official may also be prohibited from serving as an employee of an agency which contracts with his governmental body, if the particular circumstances indicate that he in fact has a definite, direct interest

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[8] R.C. 2921.42(B) and (C) provide possible exceptions to division (A) of R.C. 2921.42.

in his employer's contract. See Ohio Ethics Commission, Advisory Opinion No. 80-003 (stating that an employee of a closely-held family corporation owned largely by his parents is "interested" in the contracts of the corporation); Ohio Ethics Commission, Advisory Opinion No. 78-006 (indicating that an employee who had management responsibilities in a company, or owned sufficient stock, or had another interest in the profits or benefits of the company would be "interested" in the company's contracts). Previous opinions of this office have also dealt with situations in which an employee may have an interest in the contracts between his employer and the public body he serves. See 1961 Op. Att'y Gen. No. 2466, p. 494, 1956 Op. Att'y Gen. No. 6672, p. 432; 1948 Op. Att'y Gen. No. 3075, p. 197. Thus, although there was no per se prohibition against a board member being the employee of a contract agency prior to the passage of Am. Sub. S.B. 160, those employees who had a definite, direct interest in their employer's contract with a mental health board would have been prohibited from serving on the board, pursuant to R.C. 2921.42(A)(4). Again, those board members in violation of R.C. 2921.42(A)(4) could probably be removed for malfeasance or misconduct regardless of the date of their appointment to the board.

As to those board members appointed prior to Am. Sub. S.B. 160 who are employees of a contract agency, yet have no interest in their employer's contracts, it appears that they may serve out the remainder of their term pursuant to section three of Am. Sub. S.B. 160. There is no provision for their mandatory removal in R.C. 340.02, as amended, and their situation is not one which would have likely constituted malfeasance or misconduct under the previous version of R.C. 340.02.[9] Thus, those board members appointed prior to Am. Sub. S.B. 160 who are also employees of a contract agency, but who have no interest in their employer's contracts, may serve out the remainder of their term.

Of course, these board members are, nevertheless, subject to R.C. 2921.42(A)(1), and may not vote, or otherwise use their authority, to secure a contract in which their employer has an interest. ("Any of his business associates," as used in R.C. 2921.42(A)(1), has been interpreted as including an employer. Ohio Ethics Commission, Advisory Opinion No. 78-006.) See R.C. Chapter 102. A violation of R.C. 2921.42(A)(1) could well constitute misconduct or malfeasance and subject a board member to removal.

In 1970 Op. Att'y Gen. No. 70-168, my predecessor concluded that any person could serve on a board of mental health as long as there was no actual conflict of interest, and as long as he did not vote upon, or take part in board discussions upon, or otherwise participate in, matters concerning any agency with which he was connected. In 1979 Op. Att'y Gen. No. 79-049, I concluded that a person could concurrently serve as a member of a mental health board and as a member of a city board of education, even though the two boards contracted with one another. In

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[9] As noted, R.C. 340.02, as amended, contains no mandatory removal provision for a board member who is also an employee of a contract agency. This situation pertains to board members appointed both prior to, and subsequent to, the enactment of Am. Sub. S.B. 160. This dual arrangement would not appear to constitute misconduct or malfeasance on the part of members appointed prior to the act, since the prohibition did not exist at the time of their appointment, and since the prohibition is against a certain "status," as opposed to conduct. See 1981 Op. Att'y Gen. No. 81-067. The terms "malfeasance" and "misconduct" connote intentional and active wrongdoing. See Vajner v. Village of Orange, 91 Ohio L. Abs. 13, 191 N.E.2d 588 (C.P. Cuyahoga County 1963), rev'd on other grounds, 119 Ohio App. 227, 191 N.E.2d 843 (Cuyahoga County 1963). See also State ex rel. Neal v. State Civil Service Commission, 147 Ohio St. 430, 72 N.E.2d 69 (1947). However, it is possible that board members appointed after the act could be removed for misconduct or malfeasance if they are employees of a contract agency, since such a situation is now prohibited by statute. See Jackson v. Coffey, 52 Ohio St. 2d 43, 368 N.E.2d 1259 (1977).

light of the prohibitions now found in R.C. 340.02 against a mental health board member serving as a member or employee of the board of a contract agency, I now overrule Op. No. 70-168 and Op. No. 79-049.

In conclusion, it is my opinion, and you are advised, that:

1. Pursuant to R.C. 340.02 and section three (uncodified) of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), a member of a community mental health board who has a specified family member serving as a county commissioner of a county or counties served by the mental health board, or as a member or employee of the board of a contract agency, must be removed from office, even though such member was appointed prior to the effective date of Am. Sub. S.B. 160.

2. A member of a community mental health board who also serves on the board of a contract agency may be removed from office pursuant to R.C. 340.02, regardless of whether he was appointed before or after the enactment of Am. Sub. S.B. 160. (1979 Op. Att'y Gen. No. 79-049; 1970 Op. Att'y Gen. No. 70-168, overruled.)

3. A member of a community mental health board appointed prior to the effective date of Am. Sub. S.B. 160, who also serves as an employee of a contract agency, may serve out the remainder of his term, unless he has an interest in his employer's contract with the board, in which case he may be removed from office pursuant to R.C. 340.02.