OPINION NO. 83-063

Syllabus:

A probate judge who became a member of a county board of mental retardation prior to the enactment of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980) may serve on the board until the expiration of the six-year judicial term for which he was elected prior to the enactment of Am. Sub. S.B. 160.

To: Minnie Fells Johnson, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 26, 1983

I have before me your request for my opinion concerning the proper length of time for which a probate judge may serve on a county board of mental retardation and developmental disabilities. You state in your letter that the judge in question was elected to the bench in 1978, and became a member of the county board of mental retardation in 1979.

In 1979, R.C. 5126.01 read in part:

> There is hereby created in each county a county board of mental retardation consisting of seven members, five of whom shall be appointed by the board of county commissioners of the county, and the other two shall be the probate judge of the county or his delegate and one other person appointed by him. . . . Of the members first appointed, two of the five members appointed by the board of county commissioners shall be appointed for two years and three members shall be appointed for four years and the two members appointed by the probate judge shall be appointed for three years. Thereafter, all appointments shall be for a term of four years. (Emphasis added.)

1967-1968 Ohio Laws, Part I, 1807 (Am. S.B. 169, eff. Oct. 25, 1967). In light of the above provision, you wish to know whether a probate judge, appointed to a board of mental retardation in 1979, is entitled to serve on the board for six years, the length of his term as probate judge, see R.C. 2101.02, or whether his tenure on a county board of mental retardation is limited to four years.

Drawing your attention to the language quoted above that "all appointments shall be for a term of four years," I note that the statutory designation of the probate judge as a board member does not fit neatly into the concept of an "appointment." See State ex rel. Brothers v. Zellar, 7 Ohio St. 2d 109, 113, 218 N.E.2d 729, 732 (1966) ("[o]rdinarily the word, 'appoint', means to name or designate some person to hold an office. It involves a matter of choice in the selection of the person to hold the office"); State v. Squire, 39 Ohio St. 197, 199 (1883) ("[t]he word appointment, as used in statutes, generally means the designation of a person to hold an office, or trust, by an individual, or a limited number of individuals, to whom the power of selection has been delegated"); State ex rel. Louthan v. Taylor, 12 Ohio St. 130, 134 (1861) ("[t]he word appoint, when used in connection with an office, ex vi termini, implies the conferring of authority upon another. . . . [T]he language '. . .shall appoint. . .' necessarily means, that the person appointed shall be different from those who appoint"). See also 1979 Op. Att'y Gen. No. 79-086 (a public official with appointive powers may not serve in a position to which he may appoint). In this instance, there was no individual or group of individuals with the power to select a particular person to serve on the board. No element of choice of a particular person was involved. Whoever held the office of probate judge (or such person's delegate) was statutorily deemed to be a member of the board. The probate judge served on the board by virtue of his judicial position rather than by virtue of an appointment to the board.

It is apparent that the General Assembly assigned each county probate judge, as part of his duties as judge, the responsibility of either sitting on the county board of mental retardation or designating a delegate to perform that function. The fact that the responsibilities of a board member, when performed by other persons, constitute the holding of a public office to which appointment is made does not mean that the probate judge holds another public office by virtue of his performance of these duties. See State ex rel. D'Alton v. Ritchie, 97 Ohio St. 41, 119 N.E. 124 (1917); State ex rel. Hogan v. Hunt, 84 Ohio St. 143, 95 N.E. 666 (1911). See also State ex rel. Mikus v. Roberts, 15 Ohio St. 2d 253, 239 N.E.2d 660 (1968); Donahey v. State ex rel. Marshall, 101 Ohio St. 473, 129 N.E. 591 (1920). Indeed, a judge is prohibited from holding another public office by Ohio Const. art. IV, §6(B). Thus, in 1979 a probate judge was statutorily required, as part of his responsibilities as judge, to serve on the county board of mental retardation (assuming that he did not decide to designate someone to serve in his place).

Because a probate judge served on a county board by virtue of his judicial position, his tenure on the board must be deemed to have coincided with his judicial term, rather than being limited to four years. Whoever was elected to the office of probate judge was responsible for performing the duties of a board member as long as he served as judge. The judge's appointee and his delegate (if he decided not to personally serve) were limited to a three-year term, if they were initial appointments to the board, and thereafter, to four-year terms. However, if the judge served on the board himself, he was entitled, indeed required, to remain on the board for the length of his judicial tenure.[1]

---

[1] As set forth above, prior to the enactment of Am. Sub. S.B. 160, R.C. 5126.01 provided that, "[o]f the members first appointed. . .the two members appointed by the probate judge shall be appointed for three years. Thereafter, all appointments shall be for a term of four years." Thus, it could be argued that, if a probate judge served on the board, he was, in effect, his second appointment to the board, and accordingly, served, if an initial appointment, for three years, and thereafter for four years. However, in light of my conclusion above, that a probate judge did not serve on a county board of mental retardation by virtue of an appointment, I construe the language, "the two members appointed by the probate judge," to refer to the judge's appointee and his delegate, if the judge decided not to serve personally.

R.C. 5126.01 was amended and renumbered R.C. 5126.02 by Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980). R.C. 5126.02 currently reads, in part:[2]

> There is hereby created in each county a county board of mental retardation and developmental disabilities consisting of seven members, five of whom shall be appointed by the board of county commissioners of the county, and two of whom shall be appointed by the probate judge of the county.

Terms are for three years. R.C. 5126.02. Since the passage of Am. Sub. S.B. 160, a probate judge is not entitled to serve on a county board of mental retardation and developmental disabilities by virtue of his position as judge, although he must appoint two members to such board.

Section three (uncodified) of Am. Sub. S.B. 160 reads in part: "Except as otherwise provided in this section, members appointed to a county board of mental retardation. . .prior to the effective date of this act shall complete the terms for which they were appointed. . . ." Because, as discussed above, a probate judge was not appointed to the board for a four-year term, but served only by virtue of his judicial office, it is arguable that a probate judge does not fall within the scope of section three, allowing a member appointed to the board prior to October 31, 1980 to complete the term for which he was appointed. Consequently, it may be argued that probate judges were required to step down from their respective boards on October 31, 1980. However, section three also contains the following language: "The term of a probate judge or his designee on a community mental health board shall terminate on the effective date of this act." Thus, it appears that if the General Assembly had intended for the probate judge's term on the county board of mental retardation to terminate on October 31, 1980, it would have so indicated, since specific reference was made to the termination of the judge's term on a community board of mental health.[3] Thus, I must assume that a probate judge is permitted under section three to serve on the county board of mental retardation

---

[2] Since the enactment of Am. Sub. S.B. 160, R.C. 5126.02 has been amended several times, most recently in Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983). The changes effected by these amendments are, however, not relevant to the discussion of your question.

[3] I am, however, aware that a probate judge came to serve on a community board of mental health through a procedure somewhat different from the procedure by which such a judge came to serve on a county board of mental retardation. Prior to the enactment of Am. Sub. S.B. 160, R.C. 340.02 read in part:

> For each community mental health and retardation service district or joint-county district there shall be appointed a mental health and retardation board. . . . The chief of the division of mental health, with the approval of the director of mental health and mental retardation, shall appoint one-third of the members of such board, and the board of county commissioners shall appoint the remaining members of the board. In a joint-county district the chief, with the approval of the director, shall appoint one-third of the members of such board, and the county commissioners of each participating county shall appoint the remaining members to the board in as nearly as possible the same proportion as that county's share bears to the total of funds expended from all participating counties for the mental health and retardation services approved by the director.
>
> . . .[A]t least one member shall be a probate judge of a participating county or his designee. . . .
>
> Each member shall be appointed for a term of four years. . . . No member shall serve more than two consecutive terms except for the probate judge or his designee.

for as long as he would have served if Am. Sub. S.B. 160 had not been enacted. In this instance, the probate judge may serve on the county board of mental retardation until the expiration of the term for which he was elected probate judge in 1978.

In conclusion, it is my opinion, and you are advised, that a probate judge who became a member of a county board of mental retardation prior to the enactment of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980) may serve on the board until the expiration of the six-year judicial term for which he was elected prior to the enactment of Am. Sub. S.B. 160.

1974 Ohio Laws, Part II, 664 (Am. H.B. 421, eff. May 7, 1974). This provision required that either the Department of Mental Health or a participating county actually designate a probate judge to either serve on the board or designate someone to serve on the board in his place. Thus, a probate judge served on a community mental health board by virtue of a designation, as well as by virtue of his judicial office.