

OPINION NO. 89-057**Syllabus:**

1. The term "immediate family" as used in R.C. 5126.03 includes mothers-in-law and sons-in-law.
2. A member of a county board of mental retardation and developmental disabilities who, subsequent to appointment to such board, becomes an immediate family member of another board member, is in violation of R.C. 5126.03(A)(2) and subject to the removal provisions of R.C. 5126.04.
3. The appointing authority of each member of a county board of mental retardation and developmental disabilities who is charged with a violation of R.C. 5126.03(A)(2) must be supplied, by the county board, with written notice of the board member's violation and such appointing authority is required to afford the board member an opportunity for a hearing, determine whether a violation of R.C. 5126.03(A)(2) exists and discharge a board member found in violation of R.C. 5126.03(A)(2).
4. A "year" as used in R.C. 5126.04 covers the time period from January 1 to December 31.
5. A county board of mental retardation and developmental disabilities must supply written notice to each board member failing to attend at least one in-service training session each year.

6. An appointing authority has a mandatory duty to remove a member of a county board of mental retardation and developmental disabilities upon determining after a hearing that such board member failed to attend at least one in-service training session each year.

To: Richard L. Ross, Morgan County Prosecuting Attorney, McConnellsville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 26, 1989

I have before me your request for my opinion concerning the qualifications and removal of members of a county board of Mental Retardation and Developmental Disabilities (county MR/DD board). Based upon the information provided, I have restated your questions as follows:

1. Does the term "immediate family" as used in R.C. 5126.03 include mothers-in-law and sons-in-law?
2. Does R.C. 5126.03(A)(2) apply to an individual who was not a member of the immediate family of a county MR/DD board member when appointed to such county MR/DD board, but who subsequently becomes such family member?
3. If the answer to question two above is yes, which county MR/DD board member is required to leave such county MR/DD board?
4. Does a "year" as used in R.C. 5126.04, commence at the time of appointment of a county MR/DD board member and terminate twelve months thereafter or does it cover the calendar period from January 1 to December 31?
5. Is a county MR/DD board required to supply a county MR/DD board member with notice of his failure to attend at least one in-service training session each year?
6. Is an appointing authority required to remove a county MR/DD board member who fails to attend at least one in-service training session each year, or are there circumstances which justify a failure to attend an in-service training session?

The first question listed above asks whether the term "immediate family" as used in R.C. 5126.03 includes mothers-in-law and sons-in-law. R.C. 5126.03, which prohibits members of an immediate family from serving on the same county MR/DD board, provides in part that "[a]s used in this section, "immediate family" means parents, brothers, sisters, spouses, sons, daughters, *mothers-in-law*, fathers-in-law, brothers-in-law, sisters-in-law, *sons-in-law*, and daughters-in-law." (Emphasis added.) The language of R.C. 5126.03 expressly includes mothers-in-law and sons-in-law within the definition of immediate family. Therefore, immediate family as used in R.C. 5126.03 includes mothers-in-law and sons-in-law.

Your second question asks whether R.C. 5126.03(A)(2) applies to an individual who was not a member of the immediate family of a county MR/DD board member when appointed to such county MR/DD board, but who subsequently becomes such family member. R.C. 5126.03(A)(2), which contains the prohibition against immediate family members serving on the same county MR/DD board, provides that "[t]he following individuals shall not serve as members of county boards of mental retardation and developmental disabilities...Members of the immediate family of another board member." Clearly, R.C. 5126.03(A)(2) is a requirement which must be met before an individual can be appointed to a county MR/DD board. It has been held that a requirement for a public office not only applies at the commencement of a term, but also during the occupancy of the office. *See State of Ohio ex rel. v. ORR*, 61 Ohio St. 384, 385, 56 N.E. 14, 15 (1899) ("a member of council must be a resident of his ward, not only when elected, but also that he must remain such resident"); *accord State ex rel. Boda v. Brown*, 157 Ohio St. 368, 373,

105 N.E.2d 643, 646 (1952). Therefore, I conclude that a county MR/DD board member who, subsequent to his appointment to such county MR/DD board, becomes an immediate family member of another county MR/DD board member is in violation of R.C. 5126.03(A)(2) and subject to the removal provisions of R.C. 5126.04.

You also ask if the answer to question two above is yes, which county MR/DD board member is required to be removed from such county MR/DD board. R.C. 5126.04, which sets forth the procedures for removing a county MR/DD board member, provides in part:

The board shall supply the board member and his appointing authority with written notice of the charges against the member. *The appointing authority* shall afford the member an opportunity for a hearing, in accordance with procedures it adopts, and *shall, upon determining that the charges are accurate, remove the member* and appoint another person to complete the member's term. (Emphasis added.)

R.C. 5126.04, thus, places a mandatory duty upon an appointing authority¹ to remove a county MR/DD board member after a hearing and determination that a charge against such board member is accurate. Furthermore, the removal provisions of R.C. 5126.04 require that the county MR/DD board "supply the board member and his appointing authority with written notice of the charges against the member." This provision of the Revised Code is supplemented by 9 Ohio Admin. Code 5123:2-1-02(J), which provides in part that "[t]he county board shall adopt a policy and procedure for submitting to the appointing authority, notification of a county board member(s) [sic] action requiring removal. This policy shall include:...Removal for a violation of division (A), (B), (C) or (D) of section [5126.03] of the Revised Code." Generally, an administrative rule supplementing a statutory provision is given the force and effect of law. *See e.g., Parfitt v. Correctional Facility*, 62 Ohio St. 2d 434, 436, 406 N.E.2d 528, 530 (1980) ("[r]ules issued by administrative agencies pursuant to statutory authority have the force and effect of law"), *cert. denied*, 449 U.S. 1061 (1980). Therefore, the county MR/DD board must supply the appointing authority of both county MR/DD board members, who subsequent to their appointments become members of the same immediate family, with written notice of the board members' violation of R.C. 5126.03(A)(2).

Additionally, R.C. 5126.04 requires that the appointing authority afford the county MR/DD board member an opportunity for a hearing at which time a determination of the accuracy of the charges will be made by the appointing authority. Thus, the General Assembly has statutorily mandated that an appointing authority must determine after a hearing whether a county MR/DD board member is part of the immediate family of another board member and thereby subject to the mandatory removal provisions of R.C. 5126.04. Whether a particular county MR/DD board member is an immediate family member of another board member depends upon the facts surrounding the familial relationship between the board members at the time of the hearing. Factual determinations cannot be made by means of an Ohio Attorney General opinion. 1988 Op. Att'y Gen. No. 88-008; 1983 Op. Att'y Gen. No. 83-057 at 2-232 ("[t]his office is not equipped to serve as a fact-finding body;...I shall not attempt to make final determinations where issues of fact are involved").

Therefore, I conclude that each county MR/DD board member, who after appointment to the board becomes a member of the immediate family of another board member, is in violation of R.C. 5126.03(A)(2) and subject to the removal provisions of R.C. 5126.04. The appointing authority of each board member charged with a violation of R.C. 5126.03(A)(2) must be supplied by the county board with written notice of the board member's violation of R.C. 5126.03(A)(2) and such

¹ A county board of mental retardation and developmental disabilities consists of seven members, five of whom are appointed by the board of county commissioners and two of whom are appointed by the probate judge of the county. R.C. 5126.02.

appointing authority is required to afford the board member an opportunity for a hearing, determine whether a violation of R.C. 5126.03(A)(2) exists and discharge a board member found in violation of R.C. 5126.03(A)(2).

Question number four asks whether a "year," as used in R.C. 5126.04, commences at the time of appointment of a county MR/DD board member and terminates twelve months thereafter or covers the calendar period from January 1 to December 31. R.C. 5126.04 provides that "[a] board member shall be removed from the board by the appointing authority for...failure to attend at least one in-service training session *each year*." (Emphasis added.) Although R.C. 5126.04 makes no mention of what period of time is covered by the phrase "each year," 9 Ohio Admin. Code 5123:2-1-02(I) provides that "[e]ach *calendar year* each county board members [sic] shall attend at least one in-service training session..." (Emphasis added.) It is generally recognized that an administrative rule has the effect of a statute. *Meyers v. State Lottery Comm.*, 34 Ohio App. 3d 232, 234, 517 N.E.2d 1029, 1031 (Lucas County 1986) ("[a]n Ohio Administrative Code section is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly. It has the force and effect of a statute itself"); *Adams v. Ohio Dept. of Health*, 5 Ohio Op. 3d 148, 151, 356 N.E.2d 324, 327 (Montgomery County 1976) ("[v]alid rules promulgated by an administrative body have the force and effect of law, and constitute a part of the law of the state"). Thus, the phrase "each year" as used in R.C. 5126.04 denotes a calendar year. A calendar year is the time period from January 1 through December 31. *State ex rel. Gareau v. Stillman*, 18 Ohio St. 2d 63, 65, 247 N.E.2d 461, 462 (1969) ("the words 'calendar year' designate a period of time from January 1 through December 31"). Thus, I conclude that a "year" as used in R.C. 5126.04 covers the time period from January 1 to December 31.

The fifth question you ask is whether a county MR/DD board is required to supply a county MR/DD board member with notice of his failure to attend at least one in-service training session each year. R.C. 5126.04, which states when a county MR/DD board member is subject to removal, provides in part that "[a] board member shall be removed from the board by the appointing authority for...failure to attend at least one in-service training session each year." R.C. 5126.04 further provides that "[t]he board *shall* supply the board member and his appointing authority with written *notice* of the charges against the member." (Emphasis added.) Generally, "shall" is interpreted as imposing a mandatory duty. *Dorrian v. Scioto Conserv. Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 (1971). Therefore, a county MR/DD board has a mandatory duty to supply a county MR/DD board member with written notice of his failure to attend at least one in-service training session each year.

Your final question asks whether an appointing authority is required to remove a county MR/DD board member who fails to attend at least one in-service training session each year, or are there circumstances which justify a failure to attend an in-service training session. R.C. 5126.04, which sets forth the procedures for removing a county MR/DD board member, imposes a mandatory duty upon an appointing authority to remove a county MR/DD board member upon determining, after a hearing, that a charge against such board member is accurate. The removal provision of R.C. 5126.04 contains no exceptions to the mandatory duty imposed upon an appointing authority to remove a county MR/DD board member for failure to attend an in-service training session each year. Thus, if the charge against the county MR/DD board member is the failure to attend at least one in-service training session each year, the appointing authority is required to remove such board member after a hearing where such charge is determined to be accurate. I have no authority to read exceptions into the removal provision of R.C. 5126.04. See *Lima v. Cemetery Association*, 42 Ohio St. 128 (1884); 1988 Op. Att'y Gen. No. 88-007 at 2-21 ("[b]ecause R.C. 126.30 makes no exception to its terms for state agencies that receive funding from the federal government, I conclude that BDD must comply with the requirements set forth therein"); 1981 Op. Att'y Gen. No. 81-101 at 2-386 ("where the legislature has so clearly indicated its intent that community mental health board members are not to serve as employees of a contract agency, I have no authority to read in exceptions to the prohibition"). Therefore, I conclude that an appointing authority has a mandatory duty to remove a county MR/DD board member upon determining after a hearing that such board member failed to attend at least one in-service training session each year.

Therefore, it is my opinion, and you are hereby advised, that:

1. The term "immediate family" as used in R.C. 5126.03 includes mothers-in-law and sons-in-law.
2. A member of a county board of mental retardation and developmental disabilities who, subsequent to appointment to such board, becomes an immediate family member of another board member, is in violation of R.C. 5126.03(A)(2) and subject to the removal provisions of R.C. 5126.04.
3. The appointing authority of each member of a county board of mental retardation and developmental disabilities who is charged with a violation of R.C. 5126.03(A)(2) must be supplied, by the county board, with written notice of the board member's violation and such appointing authority is required to afford the board member an opportunity for a hearing, determine whether a violation of R.C. 5126.03(A)(2) exists and discharge a board member found in violation of R.C. 5126.03(A)(2).
4. A "year" as used in R.C. 5126.04 covers the time period from January 1 to December 31.
5. A county board of mental retardation and developmental disabilities must supply written notice to each board member failing to attend at least one in-service training session each year.
6. An appointing authority has a mandatory duty to remove a member of a county board of mental retardation and developmental disabilities upon determining after a hearing that such board member failed to attend at least one in-service training session each year.