Note from the Attorney General's Office:

1979 Op. Att'y Gen. No. 79-001 was overruled in part by 1982 Op. Att'y Gen. No. 82-097.

OPINION NO. 79-001

Syllabus:

1. The holding of 78 OAG 049, which held that an employer is permitted to "pick up" part or all of the teacher contributions to be made to the State Teachers Retirement System, also applies to the School Employees Retirement System.

2. The School Employees Retirement System may not administratively decide to include the "pick up" payments in an employee's final average salary for purposes of retirement benefit calculations.

3. Retroactive application of a "pick up" plan may be adopted without violating R.C. §3319.081 and §3319.082 if the plan is uniformly applied to all non-teaching employees in the district.

To: James O. Brennan, Executive Director, School Employees Retirement System, Columbus, Ohio
By: William J. Brown, Attorney General, January 19, 1979

I have before me your request for my opinion on the following questions:

> 1. Does the holding of 78 OAG 049 apply to the School Employees Retirement System? In other words, can an employer "pick up" part or all of the employee contribution to the School Employees Retirement System without violating R.C. §§3309.47 or 3309.49?
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> 2. If an employer can "pick up" the employee contribution, does the School Employees Retirement Board have the authority under Ohio law to decide administratively that the employer paid portion of the required employee contribution is subject to retirement contributions so that the employer paid portion qualifies for final average salary computations?
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> 3. If the employer "pick up" is to be considered "compensation" or "earned compensation" by the School Employees Retirement System, can a school board adopt a "pick up" plan which is retroactive to July 1, 1978 without violating R.C. §§3319.081 or 3319.082?

Your first question concerns 78 OAG 049 which held that an employer is permitted to "pick up" part or all of the teacher contributions required to be made to the State Teachers Retirement System pursuant to R.C. §3307.51. Although the opinion dealt specifically with teachers, it should not be construed as permitting such a program to be instituted exclusively by the State Teachers Retirement System.

Teacher contributions to the State Teachers Retirement System are required by R.C. §3307.51, which states in relevant part:

> "Each teacher who is a member of the State Teachers Retirement System shall contribute 8% of his earned compensation to the teachers savings fund...such contribution shall be deducted by the employer in an amount equal to the applicable percentage of such contributor's paid compensation...." [Emphasis added.]

The opinion noted that the valuable consideration for employment includes not only salary, but also "fringe benefits". Since an employee's contribution to STRS under a "pick up" plan comes out of the total valuable consideration for employment, though not from salary, such a contribution is still paid "by" the employee. Considering that the language in R.C. §3309.47 is nearly identical to the language in R.C. §3307.51 and applying the same logic in interpreting R.C. §3307.51, a "pick up" plan would satisfy the requirements of SERS member contributions. Therefore, in answer to your first question, you are advised that employers and employees in the School Employees Retirement System may adopt a "pick up" plan.

The second question you have asked calls for an examination of the powers of the School Employees Retirement Board, which are enumerated in R.C. §3309.01 to §3309.99. Within these Revised Code sections the Board has been given power to adjust the percentage of employee and employer contributions required by the system, however, no section grants the Board power to alter the definition of "final average salary" upon which retirement benefits are calculated.

Furthermore, the intent of the General Assembly to exclusively control the basis upon which retirement benefits are calculated is demonstrated by its detailed definition of "final average salary" in R.C. §3309.01(K):

> "'Final average salary' means the sum of the annual earnings for the three highest years of compensation for which contributions were made by the member, divided by three. If the member has a partial year of contributing service in the year in which he terminates his employment in such partial year as at a rate of compensation which is higher than the rate of compensation for any one of the three highest years of annual earnings, the board shall substitute the compensation earned for such partial year for the compensation earned for a similar fractional portion in the lowest of the three high years of annual earnings before dividing by three. If a member has less than three years of contributing membership, the final average salary shall be the total compensation divided by the total number of years, including any fraction of a year, of contributing service."

Since it is clear that the General Assembly's definition must be followed in determining what is included in final

average salary, the term "annual earnings" must be considered. Although "annual earnings" are not defined in the Revised Code for purposes of calculating retirement benefits, in practical application the term includes an employee's salary or wages and excludes "fringe" contributions made by an employer on behalf of an employee, such as contributions for health insurance coverage and the ordinary employer's contribution to the pension systems. The distinguishing factor is that the money paid by an employer on behalf of an employee is not money that is presently reduced to the employee's possession and control. It is a "fringe benefit" rather than a component of salary, wages or earnings.

Furthermore, in order to be a part of "final average salary", a payment must be part of the annual earnings for the three highest years of compensation. A "pick up" plan is a form of deferred payment of wages. Amounts "picked up" are not present earnings to the employee because they are not presently reduced to his possession and control. The payments become earnings to the member upon distribution either by refund of contributions or in the payment of benefits. "Pick ups" are therefore not annual earnings during the three highest years of compensation, but become earnings only after the member leaves employment.

Similarly, the amount contributed to a public retirement system by an employer for the ordinary employer's contribution is not a part of annual earnings. It would be inconsistent to include in earnings the employer's "pick up" payment, while excluding the ordinary employer's contribution. Neither belong in "annual earnings".

"Pick ups" of employee contributions to a retirement system are analogous to employer paid fringe benefits such as insurance coverage and the ordinary employer contribution to SERS which are not a part of the basis of contributions or benefit calculations. If the General Assembly would like to include the value of "pick ups" in such calculations, it can do so by amending the statutes with language like that which it inserted in the deferred compensation program. R.C. §145.73(D) states in part:

> "Any income deferred under such a plan shall continue to be included as regular compensation for the purpose of computing the contributions to and benefits from the retirement system of such employee. Any sum so deferred shall not be included in the computation of any federal and state income taxes withheld on behalf of any such employee."

Your third question concerns R.C. §§3319.081 and 3319.082. Retroactive application of a "pick up" plan can be adopted without violating these sections if the plan is uniformly applied to all non-teaching employees in the entire district.