OPINION NO. 86-041

Syllabus:

1. Prior to the enactment of Am. H.B. 502, 116th Gen. A. (1986) (eff. April 24, 1986), a fringe benefit paid for by an employer on behalf of an employee was not subject to contributions to either the State Teachers Retirement System or the School Employees Retirement System where the amount paid was not, at the time paid, subject to the employee's possession and control, unless the payment for such benefit was the statutory duty of the employee.

2. Pursuant to R.C. 3307.01(V) and R.C. 3309.01(V), as enacted in Am. H.B. 502, 116th Gen. A. (1986) (eff. April 24, 1986), compensation upon which contributions to the State Teachers Retirement System and the School Employees Retirement System, respectively, are based does not include amounts paid by the employer to provide health insurance for the member or his family or amounts paid by the employer to the member in lieu of providing such insurance.

3. To the extent that contributions were paid to the State Teachers Retirement System or the School Employees Retirement System upon amounts which were not includable in a member's compensation, the portion of the contributions attributable to such amounts is subject to refund to the school board and member which made such contributions.

To: Jeffrey M. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 25, 1986

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

1. Is a wage increase in lieu of increased fringe benefits made to an employee of a board of education subject to public school employees retirement system and state teachers retirement system contributions from the board of education and its employees under O.R.C. 3309.47, [3307.51], or any other statutory authority?

2. In the event the above described wage increase is not subject to such contributions are the school employees retirement system and the state teachers retirement system required to refund to the board of education and its [employees] contributions made [by] the board and its employees which were calculated by including such a wage increase?

Your first question concerns a resolution adopted by a board of education which grants its employees a wage increase in lieu of increased fringe benefits whereby each employee has the option of having such increase used by the employer to pay for additional medical insurance premiums or receiving the increase as a cash payment. The resolution became effective for the 1984-1985 school year, and I am assuming that it remains in effect.

The State Teachers Retirement System (STRS) and the School Employees Retirement System (SERS) are governed by R.C. Chapter 3307 and R.C. Chapter 3309, respectively. Contributions to STRS and SERS consist of two components, the employee contribution, R.C. 3307.51; R.C. 3309.47, and the employer contribution, R.C. 3307.53; R.C. 3309.49.

The legislature recently enacted Am. H.B. 502, 116th Gen. A. (1986) (eff. April 24, 1986), which made various changes in the statutes governing the state retirement systems. It will, therefore, be necessary to address your questions in terms of the law governing contributions to the retirement systems prior to April 24, 1986, and after such date.

Immediately prior to the enactment of Am. H.B. 502, employee contributions to STRS were based on the member's "earned compensation," R.C. 3307.51 (1983-1984 Ohio Laws, Part I, 1296 (Am. Sub. S.B. 378, eff. April 4, 1985)), and employer contributions to STRS were based on the member's "earnable compensation," R.C. 3307.53 (1975-1976 Ohio Laws, Part II, 2091, 2197 (Am. Sub. H.B. 268, eff., in part, Aug. 20, 1976)). Similarly, employee contributions to SERS were based on "all compensation" of the member, R.C. 3309.47 (Am. Sub. H.B. 268 at 2225), and the employer contributions were calculated as a percentage of the member's "earnable compensation," R.C. 3309.49 (Am. Sub. H.B. 268 at 2226). Until the enactment of Am. H.B. 502, however, there was no statutory definition of the term "compensation," as used in R.C. Chapter 3307 or R.C. Chapter 3309.[1] I note, however, that SERS has promulgated a rule, 3 Ohio Admin. Code 3309-1-02, effective December 24, 1976, which states: "In accordance with [G.C. 7896-109 (now R.C. 3309.47)], 'earnable compensation' shall be deemed, for the purposes of this Act, as that compensation received in monies, or equivalent, by an employee for services, and shall not include the cost of materials or equipment used in rendering such services." (Emphasis added.)

Several opinions of my predecessor which were rendered prior to the enactment of Am. H.B. 502 offer some guidance as to the basis upon which contributions to the state retirement systems were to be made. In 1979 Op. Att'y Gen. No. 79-001, my predecesor determined that an employer's "pick up"[2] of

---

[1] Prior to their amendment in Am. H.B. 502, 116th Gen. A. (1986) (eff. April 24, 1986), R.C. 3307.51 and R.C. 3309.47 set forth certain items upon which contributions would not be withheld. R.C. 3307.51 (1983-1984 Ohio Laws, Part I, 1296 (Am. Sub. S.B. 378, eff. April 4, 1985)) ("[c]ontributions shall not be withheld on pay for (1) unused or converted sick leave, (2) vacation pay covering concurrent periods for which other salary, compensation, or benefits under [R.C. Chapter 3307] are paid, or (3) any other extra compensation or terminal pay which may be paid for services not actually rendered"); R.C. 3309.47 (1975-1976 Ohio Laws, Part II, 2091, 2225 (Am. Sub. H.B. 268, eff., in part, Aug. 20, 1976)) ("[c]ontributions shall not be withheld on any terminal pay which includes unused or converted sick leave pay, vacation pay paid for concurrent periods for which salary or compensation is paid, or any other extra compensation which may be paid for the year preceding retirement").

[2] See generally 1986 Op. Att'y Gen. No. 86-025 (discussing the two methods by which an employer may pick up an employee's contribution to a state retirement system).

employee contributions to STRS or SERS was not includable in an employee's final average salary for purposes of retirement benefit calculations. Op. No. 79-001 addresses the definition of "final average salary" set forth in R.C. 3309.01(K) which stated in part: "'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" (emphasis added). Am. Sub. H.B. 268 at 2198. The terms "annual earnings" and "compensation," as used in R.C. 3309.01(K), appear to have the same meaning, see 1982 Op. Att'y Gen. No. 82-097, and the opinion specifically examines the meaning of the term "annual earnings," stating at 2-3:

> 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.

Thus, Op. No. 79-001 sets forth the general rule that a fringe benefit paid for by an employer on behalf of an employee and which was not, at the time paid, subject to the employee's possession and control was not includable in an employee's "annual earnings." Cf. 1962 Op. Att'y Gen. No. 3462, p. 957 at 965 ("compensation or earnable compensation [for purposes of R.C. Chapters 3307 and 3309] is presently, and has apparently always been, determined upon the total amount of compensation payable to the employee regardless of whether such employee authorizes a deduction from such compensation for the payment of hospitalization, insurance, annuity or the like"). Op. No. 79-001 concludes, therefore, that employer pick ups of employee contributions to SERS were analogous to employer paid fringe benefits and not part of "annual earnings" and, thus, not part of the basis of contributions.

In Op. No. 82-097 my predecessor had occasion to reexamine the conclusions reached in Op. No. 79-001, and overruled Op. No. 79-001 to the extent that Op. No. 79-001 concludes that "pick ups" are not includable in final average salary. While Op. No. 79-001 relied upon whether money paid for a benefit was subject to an employee's possession and control in determining whether such money was subject to contributions, Op. No. 82-097 refined this standard and concluded that an amount paid by an employer on behalf of an employee would be included in final average salary even though it was not subject to an employee's possession and control, if the payment was ordinarily the statutory responsibility of the employee and if the amount was part of the basis upon which the employee's contribution was calculated. Op. No. 82-097, thus, overruled Op. No. 79-001, in part, and concluded: "Where an employee's earnings, or basis of his contribution to the State Teachers Retirement System, include the amount of the employee's contribution, whether paid by the employee or 'picked up' by the employer, then such 'pick up' may be included in computing final average salary." (Syllabus.)

Whether the benefit plan about which you ask was, prior to the enactment of Am. H.B. 502, a component of compensation

depends, therefore, upon the structure of the particular plan. Such a determination may best be made by the retirement systems to which contributions were to be made.

I now turn to the portion of your question dealing with the law as it currently reads. Pursuant to R.C. 3307.51, each teacher who is a member of STRS "shall contribute eight per cent of his earned compensation to the teachers' savings fund....Such contribution shall be deducted by the employer on each payroll in an amount equal to the applicable per cent of such [contributor's] paid compensation for such payroll period...." (Emphasis added.) Concerning the employer's contribution, R.C. 3307.53 states in part: "Each employer shall pay annually to the employers' trust fund an amount certified by the secretary which shall be a certain per cent of the earnable compensation of all members, and which shall be known as the 'employer contribution.'" (Emphasis added.) Pursuant to R.C. 3307.51 and R.C. 3307.53, therefore, contributions to STRS are based upon a member's compensation.

In Am. H.B. 502, the General Assembly adopted a definition of the term "compensation" for purposes of R.C. Chapter 3307. R.C. 3307.01(V), as enacted by Am. H.B. 502, defines "compensation," as that term is used in R.C. Chapter 3307, as follows:

> (1) Except as otherwise provided in this division, "compensation" means all salary, wages, and other earnings paid to a member by reason of his employment including compensation paid pursuant to a supplemental contract. Such salary, wages, and other earnings shall be determined prior to determination of the amount required to be contributed to the teachers' savings fund under [R.C. 3307.51] and without regard to whether any of such salary, wages, or other earnings are treated as deferred income for federal income tax purposes.
>
> (2) Compensation does not include any of the following:
>
> ...
>
> (d) amounts paid by the employer to provide life insurance, sickness, accident, endowment, health, medical, hospital, dental, or surgical coverage, or other insurance for the member or his family or amounts paid by the employer to the member in lieu of providing such insurance.... (Emphasis added.)

Since the benefit plan about which you ask offers a specified amount of money to be received as a cash payment or to be used by the employer to purchase increased medical insurance coverage, it appears that such amount of money comes within the exclusion from compensation set forth in R.C. 3307.01(V)(2)(d), and, as such, is not subject to contributions to STRS pursuant to R.C. 3307.51 or R.C. 3307.53.

Similar provisions for members of SERS are set forth in R.C. Chapter 3309. Pursuant to R.C. 3309.47:

> Each member of the school employees retirement system shall contribute eight per cent of his compensation to the employees' savings fund, except that the school employees retirement board may raise the contribution rate to a rate not greater than ten per cent of compensation.
>
> The contributions by the direction of the school employees retirement board shall be deducted by the

> employer from the compensation of each contributor on each payroll of such contributor for each payroll period and shall be an amount equal to the required per cent of such contributor's compensation. (Emphasis added.)

R.C. 3309.49 states: "Each employer shall pay annually to the employers' trust fund an amount certified by the secretary which shall be a certain per cent of the earnable compensation of all employees, and which shall be known as the 'employer contribution.'" (Emphasis added.) Thus, as with STRS, contributions to SERS are based upon a member's compensation which is defined in R.C. 3309.01(V) in language which is, in pertinent part, identical to that of R.C. 3307.01(V).[3] I conclude, therefore, for the reasons set forth above, that the amounts paid under the optional benefit plan about which you ask, either as cash payments to the employee or for the purchase of medical insurance coverage by the employer on behalf of the employee, are not currently includable in compensation for purposes of R.C. Chapter 3309, and are, thus, not subject to contributions to SERS under R.C. 3309.47 or R.C. 3309.49.

Your second question asks whether STRS and SERS are required to refund contributions made on the amounts paid under the benefit option plan you describe if such amounts are not subject to contributions to those retirement systems.

Since allowable contributions to STRS and SERS have been set by statute, R.C. 3307.51, R.C. 3307.53, R.C. 3309.47, and R.C. 3309.49, in the event that contributions were paid on amounts which should not have been included in an employee's compensation, neither STRS nor SERS had authority to accept such contributions. Cf. 1933 Op. Att'y Gen. No. 1246, vol. II, p. 1163 (the duties and powers of the State Teachers Retirement Board are governed by statute; the Board is without authority to grant retirement allowances or other benefits to members in any manner other than as authorized by statute). See generally In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982). Neither R.C. Chapter 3307 nor R.C. Chapter 3309 directly addresses the Boards' powers or duties with respect to contributions made in excess of those authorized by statute. Since SERS and STRS are without authority to accept such contributions, however, it appears that such contributions are subject to refund by the systems.

---

[3] As set forth above, SERS adopted 3 Ohio Admin. Code 3309-1-02 which defines "earnable compensation," in part, as, "that compensation received in monies, or equivalent." Since SERS is a creature of statute, cf. In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982) (STRS is a creature of statute), it possesses only such rule-making power as is delegated to it by the legislature. Thus, a rule adopted by the board, if in conflict with a statute, must fall. See Athens Home Telephone Co. v. Peck, 158 Ohio St. 557, 110 N.E.2d 571 (1953) (rule-making authority of administrative agencies). See generally R.C. 3309.01(V)(3) (authorizing SERS to "determine by rule whether any form of earnings not enumerated in [R.C. 3309.01(V)] is to be included in compensation") (enacted in Am. H.B. 502). Rule 3309-1-02 became effective on December 24, 1976, prior to the enactment of R.C. 3309.01(V), and, thus, to the extent that it conflicts with the definition of compensation set forth in R.C. 3309.01(V), appears to be no longer valid.

It is, therefore, my opinion, and you are advised, that:

1. Prior to the enactment of Am. H.B. 502, 116th Gen. A. (1986) (eff. April 24, 1986), a fringe benefit paid for by an employer on behalf of an employee was not subject to contributions to either the State Teachers Retirement System or the School Employees Retirement System where the amount paid was not, at the time paid, subject to the employee's possession and control, unless the payment for such benefit was the statutory duty of the employee.

2. Pursuant to R.C. 3307.01(V) and R.C. 3309.01(V), as enacted in Am. H.B. 502, 116th Gen. A. (1986) (eff. April 24, 1986), compensation upon which contributions to the State Teachers Retirement System and the School Employees Retirement System, respectively, are based does not include amounts paid by the employer to provide health insurance for the member or his family or amounts paid by the employer to the member in lieu of providing such insurance.

3. To the extent that contributions were paid to the State Teachers Retirement System or the School Employees Retirement System upon amounts which were not includable in a member's compensation, the portion of the contributions attributable to such amounts is subject to refund to the school board and member which made such contributions.