OPINION NO. 82-097

Syllabus:

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. (1979 Op. Att'y Gen. No. 79-001, overruled in part.)

To: James L. Sublett, Executive Director, State Teachers Retirement System, Columbus, Ohio
By: William J. Brown, Attorney General, November 15, 1982

I have before me your request for my opinion which states:

> If an employer and employees agree that the employees' contribution to State Teachers Retirement System, as set forth in R.C. 3307.51, is "picked up" in part or whole by the employer, as permitted in 1978 Op. Att'y Gen. No. 78-049, can that amount be considered as part of "final average salary" for purposes of R.C. 3307.01(J)?

You have raised this question in light of 1979 Op. Att'y Gen. No. 79-001 and subsequent Internal Revenue Service rulings which may affect this prior opinion.

I have had occasion to discuss "pick ups" in two prior opinions. In 1978 Op. Att'y Gen. No. 78-049, I opined that an employer may "pick up" part or all of the teacher contributions required to be made to the State Teachers Retirement System (STRS) pursuant to R.C. 3307.51. Further, in 1979 Op. Att'y Gen. No. 79-001, I opined that an employer may "pick up" part or all of a school employee's contribution required to be made to the School Employees Retirement System (SERS) pursuant to R.C. 3309.47. In addition, I concluded that such employer paid portion of the employee's contribution is not subject to retirement contributions nor inclusion in computations of final average salary.

As a matter of initial reference the characterization of "pick ups" concerns the ability of employers to assume and pay (or "pick up") contributions to retirement systems on behalf of their employees when such contributions are

authorized by federal statute. Under 26 U.S.C. §414(h)(2), when a governmental employer picks up employee contributions, such contributions are treated as employer contributions, even though they may be designated under state law as employee contributions. See Op. No. 79-001; Op. No. 78-049. Accordingly, the contributions are excludable from the employee's wages for purpose of income tax withholding, 26 U.S.C. §3401(a)(12)(A), and from the employee's gross income until such funds are distributed to the employee, 26 U.S.C. §402. See Rev. Rul. 36, 1981-1 C.B. 255; Rev. Rul 35, 1981-1 C.B. 255; Rev. Rul. 462, 1977-2 C.B. 358.

Your specific question is whether it is proper to include in final average salary that portion of a teacher's salary which is his contribution to STRS and has been "picked up" by an employer. "Final average salary" is defined for purposes of R.C. Chapter 3307 in R.C. 3307.01(J), in relevant part, as: "the sum of the annual earnings for the three highest years of compensation for which contributions were made by the member, divided by three." Contributions are made by a member as provided in R.C. 3307.51 which states that the member is to "contribute eight per cent of his earned compensation." Therefore, if the "pick up" is includable in "annual earnings" or "earned compensation" it is includable in final average salary.

The terms "annual earnings" or "earned compensation" to which the statutes refer traditionally includes the employee contribution. For example, a teacher earning $10,000 is required to contribute eight percent of this amout or $800 to STRS, thus, netting the employee $9,200. Based upon such contribution and pursuant to R.C. 3307.01(J) the teacher's earnings for purposes of STRS is $10,000. The result is no different when the employer "picks up" the teacher's contribution inasmuch as the eight percent has been calculated on the earnings which includes the contribution itself. Utilizing the same $10,000 example as before, $800 "picked up" by the employer rather than the employee still results in an eight percent contribution based upon $10,000. Therefore, where the basis of contributions, i.e., earnings, includes the employee's contribution, whether paid by the employee or "picked up" by the employer, then such earnings may be used for final average salary calculations.[1] Inasmuch as the employee's contribution is derived ultimately from his salary under state law he should not be penalized for the mode of payment of that salary, i.e., whether his contribution is deducted from his salary or whether his contribution is "picked up" by his employer.

The foregoing conclusion is in conflict with the opinion rendered in 1979 Op. Att'y Gen. No. 79-001 that "pick ups" are exluded from final average salary. Such opinion, however, was rendered prior to the issuance of Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), defining compensation, and the issuance of Internal Revenue Service rulings cited earlier clarifying the types of permissible "pick up" plans. Therefore, Op. No. 79-001 is overruled to the extent that it concludes that "pick ups" are excluded from final average salary.

In conclusion, it is my opinion, and you are advised, that where an employee's earnings, or basis of his contributions 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. (1979 Op. Att'y Gen. No. 79-001 overruled in part.)

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[1]Certain restrictions are placed upon defined benefit plan retirement systems in computing final average salary by the Internal Revenue Code. See 26 U.S.C. §415; Rev. Rul. 481, 1975-2 C.B. 188; Rev. Rul 13, 1959-1 C.B. 83. As I cannot opine upon federal law, you should obtain a determination from the Internal Revenue Service as to federal constraints on including "pick ups" in final average salary.