November 10, 2004

Damon F. Asbury, Executive Director
State Teachers Retirement System
275 East Broad Street
Columbus, Ohio 43215

SYLLABUS: 2004-040

1. Pursuant to R.C. 3307.01(C) and R.C. 3307.35(C), a person who retires under the State Teachers Retirement System (STRS), is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is not a member of STRS. Therefore, pursuant to R.C. 3307.05(D) and R.C. 3307.07, that person cannot vote for, be a candidate for, or serve as a contributing member of the State Teachers Retirement Board (STRB).

2. Pursuant to R.C. 3307.35(C), a person who retires under STRS, is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is employed in a position requiring that person to make contributions to STRS. Therefore, pursuant to R.C. 3307.05(E), that person cannot be a candidate for, or serve as, a retired teacher member of the STRB. However, that person is qualified under R.C. 3307.07 to vote for retired teacher members of the STRB.

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OPINION NO. 2004-040

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Dear Executive Director Asbury:

We have received your request for an opinion concerning issues arising from recent pension reform legislation. *See* Sub. S.B. 133, 125th Gen. A. (2004) (eff. Sept. 15, 2004, with certain provisions eff. on other dates).[1] You have asked: (1) whether a reemployed retiree may be a candidate for and serve as a contributing member or retired teacher member of the State Teachers Retirement Board (STRB); and (2) whether a reemployed retiree may vote for the positions of contributing member or retired teacher member of the STRB. As discussed more fully below, we conclude that a reemployed retiree is not permitted to vote for, be a candidate for, or serve as a contributing member of the STRB, or to be a candidate for or serve as a retired teacher member of the STRB. However, a reemployed retiree is qualified to vote for retired teacher members of the STRB.

Background

You have informed us that, under legislation in effect prior to the enactment of Sub. S.B. 133, it was generally established that a reemployed retiree was not permitted to be a candidate for, or serve as, either a teacher member or a retired teacher member of the STRB. You explained that reemployed retirees were ineligible for the retired teacher member seat because the terms of R.C. 3307.05(E) specifically provided that the retired teacher member must be a

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[1] Amendments enacted by Sub. S.B. 133 to sections of the Revised Code discussed in this opinion took effect on September 15, 2004, with the exception of amendments to R.C. 3307.01, which will not take effect until August 1, 2005. *See* Sub. S.B. 133, 125th Gen. A. (2004) (sec. 4, uncodified). The only portion of R.C. 3307.01 so amended is the definition of "[t]eacher," appearing in R.C. 3307.01(B), as it applies to certain employees of a public institution of higher education. That amendment will not change the analysis set forth in this opinion.

superannuate who was not otherwise employed in a position requiring contributions to STRS.[2] You explained also that reemployed retirees were ineligible for the "active" teacher member seats because superannuates are specifically excluded from the definition of member under R.C. 3307.01 and R.C. 3307.35.[3]

Sub. S.B. 133 has amended the provisions of R.C. Chapter 3307 in various respects. Accordingly, you have asked us to consider whether the same conclusions still hold, or whether the statutory amendments have changed the rights of reemployed retirees with respect to service on the STRB. You have also asked about the rights of reemployed retirees to vote for members of the STRB. You have requested prompt attention to these issues because the process for the upcoming election for members of the STRB begins on December 1, when election notices are sent to all employers and organizations representing the membership of the State Teachers Retirement System (STRS).

Authority to run for and serve as a contributing member or retired teacher member of the STRB

We address your questions by examining the relevant provisions of R.C. Chapter 3307, as recently amended by Sub. S.B. 133. Under current law, the STRB consists of eleven members, including:

> (D) Five members, known as contributing members,[4] who shall be members of the state teachers retirement system;
>
> (E) Two former members of the system, known as retired teacher members,[5] who shall be superannuates who are not otherwise employed in positions requiring them to make contributions to the system.

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[2] Prior to the amendment of R.C. 3307.05 by Sub. S.B. 133, R.C. 3307.05(E) included as a member of the State Teachers Retirement Board "[a] former member of the system, known as the retired teacher member, who shall be a superannuate and who is not otherwise employed in a position requiring the retired teacher member to make contributions to the system." Sub. S.B. 133 amended R.C. 3307.05 to change the number of retired teacher members from one to two and to change corresponding language from singular to plural, but did not otherwise change the substance of the provision.

[3] Sub. S.B. 133 did not change the definition of "[m]ember" appearing in R.C. 3307.01(C), nor did it amend R.C. 3307.35.

[4] Prior to the amendment of R.C. 3307.05 by Sub. S.B. 133, these members were known as "teacher" members.

[5] Prior to the amendment of R.C. 3307.05 by Sub. S.B. 133, there was only one retired teacher member. *See* note 2, *supra*.

R.C. 3307.05.[6]

The terms "member" and "superannuate" are both defined by statute. "Member" means any person included in the membership of STRS, which consists of all teachers and contributors as defined in R.C. 3307.01(B) and (D) and all disability benefit recipients as defined in R.C. 3307.50, with certain exceptions. R.C. 3307.01(C). Among the exceptions are superannuates, who are not considered members for purposes of R.C. Chapter 3307. *See also* R.C. 3307.35(C) (a superannuate employed as a teacher is not a member of STRS).[7]

A "[s]uperannuate" is defined as a former teacher receiving from STRS a retirement allowance under R.C. 3307.58 or 3307.59, or a former teacher receiving a benefit from a plan established under R.C. 3307.81 other than a benefit based on disability. R.C. 3307.01(M). For purposes of R.C. 3307.35 and R.C. 3307.353 (pertaining to the employment of superannuates), a superannuate also means a former teacher receiving from STRS a combined service retirement benefit paid in accordance with R.C. 3307.57, regardless of which retirement system is paying

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[6] The other members of the STRB are the Superintendent of Public Instruction (or a designee), the Treasurer of State's investment designee, and two investment expert members, one appointed by the Governor and one jointly appointed by the Speaker of the House of Representatives and the President of the Senate. R.C. 3307.05.

[7] The full text of R.C. 3307.01(C) is as follows:

> (C) "Member" means any person included in the membership of the state teachers retirement system, which shall consist of all teachers and contributors as defined in divisions (B) and (D) of this section and all disability benefit recipients, as defined in section 3307.50 of the Revised Code. However, for purposes of this chapter, the following persons shall not be considered members:
>
> (1) A student, intern, or resident who is not a member while employed part-time by a school, college, or university at which the student, intern, or resident is regularly attending classes;
>
> (2) A person denied membership pursuant to section 3307.24 of the Revised Code;
>
> (3) An other system retirant, as defined in section 3307.35 of the Revised Code, or a superannuate;
>
> (4) An individual employed in a program established pursuant to the "Job Training Partnership Act," 96 Stat. 1322 (1982), 29 U.S.C.A. 1501.

See notes 1 and 3, *supra*.

the benefit. *Id.* In general terms, then, a superannuate is a person retired under STRS, other than a person receiving a disability benefit under R.C. 3307.81.[8]

R.C. Chapter 3307 does not define "contributing" or "contributing member." It does define "[c]ontributor" as "any person who has an account in the teachers' savings fund or defined contribution fund." R.C. 3307.01(D). In common usage, "contributing" connotes a person who is currently engaged in the process of making contributions – that is, a person who is actively participating in making contributions. *See Webster's New World Dictionary* 723 (2d college ed. 1978) (defining "-ing" to mean "the act or an instance of (a specified verb)").

With regard to persons who may run for and serve as contributing members of the STRB, the statute states: "*Any member* of the state teachers retirement system, who has been nominated by a petition that is signed by five hundred or more members of the system and certified in accordance with rules adopted under section 3307.075 of the Revised Code, *shall be eligible for election as a contributing member* of the board." R.C. 3307.07 (emphasis added). It thus appears that any "member" of STRS who is properly nominated is eligible to run for and serve as a "contributing member" of the board. Therefore, anyone who comes within the definition of "[m]ember" appearing in R.C. 3307.01(C) may be a candidate for, and serve as, a contributing member of the STRB.

As noted above, the definition of "[m]ember" expressly excludes a superannuate. R.C. 3307.01(C). Further, R.C. 3307.35 states expressly that a superannuate employed as a teacher "is not a member" of STRS and "does not have any of the rights, privileges, or obligations of membership," except as provided in R.C. 3307.35. Therefore, a superannuate who is employed in a position subject to STRS is not a member of STRS and cannot be a contributing member of STRS. As a result, a superannuate employed in that sort of position is not eligible to be a candidate for, or serve as, a contributing member of the STRB.

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[8] The full text of R.C. 3307.01(M) is as follows:

> (M) "Superannuate" means both of the following:
>
> (1) A former teacher receiving from the system a retirement allowance under section 3307.58 or 3307.59 of the Revised Code;
>
> (2) A former teacher receiving a benefit from the system under a plan established under section 3307.81 of the Revised Code, except that "superannuate" does not include a former teacher who is receiving a benefit based on disability under a plan established under section 3307.81 of the Revised Code.
>
> For purposes of sections 3307.35 and 3307.353 of the Revised Code, "superannuate" also means a former teacher receiving from the system a combined service retirement benefit paid in accordance with section 3307.57 of the Revised Code, regardless of which retirement system is paying the benefit.

See note 1, *supra*.

Under the amendments enacted by Sub. S.B. 133, the term "contributing member" replaces the term "teacher member," so that the STRB members formerly known as teacher members are now known as contributing members. *See* R.C. 3307.05(D); R.C. 3307.06; R.C. 3307.061; R.C. 3307.07; R.C. 3307.071; note 4, *supra*. The change in terminology is evidently intended to reflect the fact that membership in STRS is not limited to teachers, as that word is commonly used, but rather extends to persons serving in various other capacities, as evidenced by the statutory definition of "[t]eacher" appearing in R.C. 3307.01(B).[9]

The Final Analysis of Sub. S.B. 133 (As Passed by the General Assembly) prepared by the Legislative Service Commission states that, under prior law, "[t]he board members who were current STRS members were 'teacher members' and the board member who was a retired member was the 'retired teacher member,' regardless of their actual positions" and notes that STRS membership "includes certain school administrators and university faculty members, as well as public school teachers." It goes on to state: "The act changes the term used to refer to the Board members who are current STRS members from 'teacher members' to 'contributing members'." It does not appear that the change in terminology was intended to effect any other changes.[10]

With regard to retired teacher members, R.C. 3307.07 states: *"Any retired teacher who is a superannuate and a resident of Ohio is eligible for election as a retired teacher member* of the board, if such retired teacher has been nominated by a petition that is signed by five hundred or more retired teachers, who are also superannuates, and certified in accordance with rules adopted under section 3307.075 of the Revised Code." R.C. 3307.07 (emphasis added). Therefore, to be eligible for election as a retired teacher member of the STRB, a retired teacher must be a superannuate and a resident of Ohio. As further described in R.C. 3307.05(E), the retired teacher members of the STRB must be superannuates "who are not otherwise employed in positions requiring them to make contributions to the system." In addition, no contributing member of the

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[9] The fact that membership in STRS is not limited to teachers is evident from the definition of "[t]eacher" appearing in R.C. 3307.01(B). That definition includes as a teacher any person paid from public funds and employed in the public schools of the state under any type of contract described in R.C. 3319.08 in a position for which the person must have a license issued pursuant to R.C. 3319.22 to 3319.31, thereby including superintendents, principals, and other administrators, as well as teachers. R.C. 3307.01(B)(1); *see* R.C. 3319.08; R.C. 3319.22-.31. The statutory definition of "[t]eacher" also includes certain teachers and faculty members employed in public institutions of higher education and educational employees of the Department of Education. R.C. 3307.01(B)(4) and (5); *see* note 1, *supra*.

[10] Even though the General Assembly changed "teacher member" to "contributing member," it retained the term "retired teacher member." *See* R.C. 3307.05(E); R.C. 3307.06; R.C. 3307.061; R.C. 3307.07; R.C. 3307.071.

STRB who retires while a member of the STRB is eligible to become a retired teacher member of the board for three years after the date of retirement. R.C. 3307.06(B).

Provisions governing the employment of superannuates appear in R.C. 3307.35. That statute permits a superannuate to be employed as a teacher, subject to certain requirements. R.C. 3307.35(B). A superannuate who is employed as a teacher "shall contribute to the state teachers retirement system" in accordance with R.C. 3307.26.[11] R.C. 3307.35(C); *see also* R.C. 3307.35(F) ("[c]ontributions shall be made [by a superannuate] to [STRS] from the first day of … employment"). R.C. 3307.26 is a general provision governing teachers' contributions to STRS. It requires that each teacher contribute a specified percentage of the teacher's earned compensation. It is clear, therefore, that a retiree who is reemployed in a position that is subject to STRS is required to make contributions to STRS. A person who is in that position is rendered ineligible to serve as a retired teacher member on the STRS pursuant to R.C. 3307.05(E), because the person is employed in a position requiring contributions to STRS.

Therefore, pursuant to R.C. 3307.01(C) and R.C. 3307.35(C), a person who retires under STRS, is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is not a member of STRS and, pursuant to R.C. 3307.05(D) and R.C. 3307.07, cannot be a candidate for, or serve as, a contributing member of the STRB. Further, pursuant to R.C. 3307.35(C), a person who retires under STRS, is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is employed in a position requiring that person to make contributions to STRS and, pursuant to R.C. 3307.05(E), cannot be a candidate for, or serve as, a retired teacher member of the STRB.

Authority to vote for contributing members or retired teacher members of the STRB

You have asked also whether a reemployed retiree is considered to be a member of STRS, who is eligible to vote for contributing members of the STRB, or whether a reemployed retiree is, instead, considered to be a former member and superannuate, who is eligible to vote for retired teacher members of the STRB. The provisions governing voting for members of the STRB appear in R.C. 3307.07, which states, in part: "Elected members of the board shall be elected on the basis of the total number of ballots cast by qualified voters, who shall consist of members of the system and former members of the system who are superannuates."[12] With respect to the authority to vote for particular candidates, R.C. 3307.07 provides that "members of the system and former members of the system who are superannuates shall vote respectively for

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[11] The employer is required to contribute to STRS in accordance with R.C. 3307.28 and R.C. 3307.31, which are general provisions governing the employer contribution.

[12] This sentence was not amended by Sub. S.B. 133.

contributing members and retired teacher members of the board." R.C. 3307.07.[13] Thus, members of STRS are qualified to vote for contributing members, and former members of STRS who are superannuates are qualified to vote for retired teacher members. *See also* R.C. 3307.07 (petition nominating a person for election as a contributing member must be signed by five hundred or more members of STRS; petition nominating a person for election as a retired teacher member must be signed by five hundred or more retired teachers, who are also superannuates).

As discussed above, superannuates are not members of STRS. *See* R.C. 3307.01(C)(3). Further, a superannuate who is employed as a teacher is not a member of STRS and, except as provided in R.C. 3307.35, does not have any of the rights, privileges, or obligations of membership. R.C. 3307.35(C). Therefore, superannuates who are employed in positions under STRS are not permitted to vote for contributing members.

Even as a superannuate who is employed as a teacher is not a member of STRS and lacks many of the rights, privileges, and obligations of membership, *see* R.C. 3307.35(C), a superannuate who is employed in a position under STRS remains a superannuate and, therefore, is permitted to vote for retired teacher members of the STRB. *See* R.C. 3307.01(M); R.C. 3307.07; note 8, *supra*. The restriction in R.C. 3307.05(E) against superannuates who are employed in positions requiring them to make contributions to STRS prevents those persons from serving as retired teacher members of the STRB but does not prevent those persons from voting for retired teacher members of the STRB.

Therefore, a person who retires under STRS, is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is not a member of STRS and cannot vote for contributing members of the STRB. However, a person who retires under STRS, is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is qualified under R.C. 3307.07 to vote for retired teacher members of the STRB.

Impact of Sub. S.B. 133

You have asked specifically whether the changes enacted by Sub. S.B. 133 now permit reemployed retirees to run for contributing member seats on the STRB. We conclude that they do not. The analysis set forth above discusses current statutes, as amended by Sub. S.B. 133. It finds no provisions supporting the conclusion that reemployed retirees are permitted to run for and serve in positions as contributing members of the STRB. Based upon our review, the history surrounding the enactment of Sub. S.B. 133 and analyses by the Legislative Service Commission similarly exhibit no intent to change the authority of reemployed retirees in this regard. *See* notes 1, 2, 3, 4, 5, 10, 12, and 13, *supra*.

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[13] Sub. S.B. 133 amended this sentence of R.C. 3307.07 only by changing the term "teacher members" to "contributing members" and by making the reference to "the retired teacher member" plural.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 3307.01(C) and R.C. 3307.35(C), a person who retires under the State Teachers Retirement System (STRS), is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is not a member of STRS. Therefore, pursuant to R.C. 3307.05(D) and R.C. 3307.07, that person cannot vote for, be a candidate for, or serve as a contributing member of the State Teachers Retirement Board (STRB).

2. Pursuant to R.C. 3307.35(C), a person who retires under STRS, is a superannuate, and is employed as a teacher, as defined in R.C. 3307.01(B), is employed in a position requiring that person to make contributions to STRS. Therefore, pursuant to R.C. 3307.05(E), that person cannot be a candidate for or serve as a retired teacher member of the STRB. However, that person is qualified under R.C. 3307.07 to vote for retired teacher members of the STRB.

Respectfully,

JIM PETRO
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