

**OPINION NO. 2004-043****Syllabus:**

R.C. 3307.39 does not authorize the State Teachers Retirement Board to establish an employer contribution in excess of the maximum rate of fourteen percent established under R.C. 3307.28.

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**To: Damon F. Asbury, Executive Director, State Teachers Retirement System of Ohio, Columbus, Ohio**

**By: Jim Petro, Attorney General, November 24, 2004**

We have received your request for a formal opinion concerning the contributions made by employers to fund benefits under the State Teachers Retirement System of Ohio (STRS). You have asked whether an employer contribution in excess of the maximum rate established under R.C. 3307.28 may be established pursuant to R.C. 3307.39 as necessary to fund benefits under R.C. 3307.50 through R.C. 3307.79 and to fund deficiencies pursuant to divisions (A) through (F) of R.C. 3307.14. As discussed more fully below, we find no authority in R.C. 3307.39 for the establishment of an employer contribution in excess of the maximum rate established under R.C. 3307.28.

**Background**

Your question has arisen in connection with discussions about funds available to meet the costs of retiree health coverage. As you informed us, STRS was created in 1919 and provides retirement, disability, and survivor coverage, as specified in R.C. Chapter 3307, for approximately 100,000 benefit recipients and 300,000 members not yet retired. What is now numbered R.C. 3307.39 (formerly R.C. 3307.74) was enacted in the 1950s to authorize the State Teachers Retirement Board (STRB) to enter into contracts for group health coverage for benefit recipients choosing to participate in the coverage. In 1973, that section was amended to authorize the Board to expend funds of STRS to defray all or part of the costs of the group health coverage. *See* 1973 Ohio Laws, Part I, 1722, 1774 (Am. H.B. 430, eff. Nov. 20, 1973).

Language enacted in 1973 has been revised in minor respects and currently states:

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The board may contract for coverage on the basis of part or all of the cost of the coverage to be paid from appropriate funds of the state teachers retirement system. *The cost paid from the funds of the system shall be included in the employer's contribution rate provided by section 3307.28 [formerly R.C. 3307.53] of the Revised Code.*

R.C. 3307.39 (emphasis added). Your question is whether this language authorizes the establishment of an employer contribution in excess of the fourteen percent maximum currently set forth in R.C. 3307.28.

### Employer contribution

The benefits provided by STRS are funded by contributions from employees and employers. Teachers are required to contribute a minimum of eight percent of their earned compensation, and the STRB is empowered to increase that to a rate not greater than ten percent. R.C. 3307.26.

Each employer must pay the "employer contribution,"<sup>1</sup> consisting of a certain percentage of the earnable compensation of all its member employees. R.C. 3307.28. Pursuant to R.C. 3307.28, "[t]he rate per cent of the [employer] contribution shall be fixed by the actuary on the basis of the actuary's evaluation of the liabilities of the system, *not to exceed fourteen per cent*, and shall be approved by the state teachers retirement board." *Id.* (emphasis added). The statute goes on to state expressly: "The board may raise the rate per cent of the [employer] contribution to *fourteen per cent* of the earnable compensation of all members." *Id.* (emphasis added).<sup>2</sup>

Factors that the actuary must consider in fixing the rate percentage of the employer contribution (within the fourteen percent limitation established by statute) are described as follows:

The actuary shall compute the percentage of such earnable compensation, to be known as the "employer rate," required annually to fund the liability for all benefits under sections 3307.50 to 3307.79 of the Revised Code,<sup>3</sup> after deducting therefrom the benefits provided by the member's accumulated contributions, as defined in section 3307.50 of the Revised Code, deposits,

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<sup>1</sup>Pursuant to R.C. Chapter 3307.01, the term "employer contribution" has the following definition:

(H) "Employer contribution" means the amount paid by an employer, as determined by the employer rate, including the normal and deficiency rates, contributions, and funds wherever used in this chapter.

<sup>2</sup>The current maximum rate of fourteen percent replaced a lower maximum rate. See 1973 Ohio Laws, Part I, 1722, 1772 (Am. H.B. 430, eff. Nov. 13, 1973) (*inter alia*; amending R.C. 3307.53 (predecessor to R.C. 3307.28) to provide a maximum employer contribution rate of thirteen percent).

<sup>3</sup>Various benefits that STRS provides are included under R.C. 3307.50 to 3307.79. See, e.g., R.C. 3307.58 (service retirement); R.C. 3307.60 (optional benefit plans for retirants); R.C. 3307.61 (Medicare equivalent benefits); R.C. 3307.62 (disability coverage); R.C. 3307.661 (lump-sum death benefits); R.C. 3307.67 (cost-of-living increases); R.C. 3307.6911 (benefit recalculations to counter effect of inflation).

and other appropriations, and to fund any deficiencies in the funds described in divisions (A) to (F) of section 3307.14 of the Revised Code.<sup>4</sup>

R.C. 3307.28 (footnotes added). No provision of R.C. 3307.28 suggests that the employer contribution rate may ever exceed fourteen percent.

### Analysis

To address your question, we consider whether R.C. 3307.39 authorizes an employer contribution in excess of the rate established in R.C. 3307.28. R.C. 3307.39(A) authorizes the STRB to enter into agreements to provide health coverage to benefit recipients. The STRB is permitted to contract for coverage on the basis of part or all of the cost to be paid by STRS. R.C. 3307.39(A). R.C. 3307.39 states plainly that the cost of health coverage paid from the funds of STRS "shall be included in the employer's contribution rate provided by section 3307.28 of the Revised Code." *Id.* (emphasis added).

The common understanding of "included in" is that it means "contained within." See *Webster's New World Dictionary* 708, 711 (2d college ed. 1978) (defining "in" to mean "contained or enclosed by; inside; within" and defining "include" to mean "to have as part of a whole; contain; comprise"); see also R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). Thus, under the plain language of R.C. 3307.39, the cost paid by STRS for health coverage must be contained within the employer's contribution rate provided by R.C. 3307.28, which may not exceed fourteen percent.

Indeed, this is the manner in which R.C. 3307.28 has commonly been construed. See, e.g., Kimball H. Carey, *Anderson's Ohio School Law* § 7.65 (2002-03 ed.) ("[t]he employers' contribution rate is subject to a maximum of fourteen percent"); Susan C. Hastings et al., *Ohio School Law* § 11:14 (2003-2004 ed.) (the amount that each employer must pay to

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<sup>4</sup>The funds described in R.C. 3307.14(A) to (F) are funds that the STRB holds in trust to carry out its functions, namely: (A) the teachers' savings fund, holding contributions deducted from compensation of teachers and interest credited on those contributions; (B) the employers' trust fund, holding employer contributions; (C) the annuity and pension reserve fund, for the payment of annuities, pensions, and disability benefits under R.C. 3307.50-.79; (D) the survivors' benefit fund, for the payment of survivors' benefits and certain lump sum payments; (E) the expense fund, for the payment of administration and management costs of STRS; (G) the defined contribution fund, for a plan under R.C. 3307.81; and (E) the guarantee fund, which receives investment income, gifts, and bequests. The guarantee fund provides moneys to other funds in certain circumstances. See R.C. 3307.14(E) ("[a]ny deficit occurring in any other fund that will not be covered by payments to that fund, as otherwise provided in this chapter, shall be paid by transfers of amounts from the guarantee fund to such fund or funds"). In particular:

[s]hould the amount in the guarantee fund be insufficient at any time to meet the amounts payable therefrom, the amount of such deficiency, with regular interest, shall be paid by an additional employer rate of contribution as determined by the actuary and shall be approved by the board, and the amount of such additional employer contribution shall be credited to the guarantee fund.

R.C. 3307.14(E) (emphasis added).

the employers' trust fund "may not exceed fourteen per cent of the earnable compensation of all members").

The language of R.C. 3307.28 requiring the actuary, in computing the employer rate, to consider the amount required to fund the liability for all benefits under R.C. 3307.50 to 3307.79 (after deducting the benefits provided by accumulated contributions, deposits, and other appropriations) and the amount required to fund deficiencies in the funds described in R.C. 3307.14(A) to (F) does not allow the employer rate to be set at any arbitrary number selected by the actuary. Rather, that language is part of R.C. 3307.28, which states expressly that "[t]he rate per cent of the [employer] contribution shall be fixed by the actuary on the basis of the actuary's evaluation of the liabilities of the system, *not to exceed fourteen per cent*, and shall be approved by the state teachers retirement board." R.C. 3307.28 (emphasis added). Further, that language is consistent with the statute defining "[e]mployer contribution" to mean "the amount paid by an employer, as determined by *the employer rate, including the normal and deficiency rates*, contributions, and funds wherever used in this chapter." R.C. 3307.01(H) (emphasis added); see notes 1 and 4, *supra*.

As explained in your letter of request, it has been suggested that the provisions of R.C. 3307.30 and R.C. 3307.31 might be used to "demonstrate the General Assembly's commitment to requiring employers to meet the costs of retiree health care because respectively they require employers to levy taxes to meet the financial obligations imposed by Chapter 3307 of the Revised Code and direct payment of those obligations through deduction from school foundation funds prior to distributions to employers." R.C. 3307.30 states that employers who obtain funds directly by taxation "shall levy annually such additional taxes as are required to provide the additional funds necessary to meet the financial requirements imposed upon them by this chapter," and the tax must be placed before all other items except the sinking fund and interest. This provision reflects the importance of the financial requirements imposed by R.C. Chapter 3307, including the benefits provided under that chapter. However, it does not, either expressly or by implication, authorize an employer to pay an employer contribution in excess of the rate established under R.C. 3307.28. Rather, it requires the employer to provide the funds necessary to meet the financial requirements imposed by R.C. Chapter 3307, which contains the fourteen percent limitation of R.C. 3307.28.

R.C. 3307.31 governs the manner in which a board of education submits to STRS its employee and employer contributions. The statute states that the payment "shall be made" from the amount allocated under R.C. 3314.08 (payments to community schools) or R.C. Chapter 3317 (payments to school districts) prior to its distribution to individual school districts or community schools, and requires the Superintendent of Public Instruction to deduct from that amount "the entire amounts due to the system from such district or school." R.C. 3307.31. Again, the statute indicates the mandatory nature of the employer's obligation to pay STRS appropriate amounts of employer contributions. However, it does not specify what those amounts are. Rather, the required amounts are determined as provided elsewhere in R.C. Chapter 3307, and in particular through the application of the fourteen percent limitation set forth in R.C. 3307.28.

Employer contributions in excess of the maximum rate allowed under R.C. 3307.28 may be required only pursuant to authority granted by the General Assembly. For example, certain payments by employers are expressly excluded from the employer's contribution rate established under R.C. 3307.28, and therefore are not included within the fourteen percent limitation. See R.C. 3307.54 ("[n]o payment made to the state teachers retirement system under this section [retirement incentive plans] shall affect any payment required by [R.C.

3307.28]”). R.C. 3307.39 does not have language of this sort to exclude payments for health coverage from the employer’s contribution rate established under R.C. 3307.28. Rather, as discussed above, R.C. 3307.39 expressly includes those payments in the employer’s contribution rate and, accordingly, makes them subject to the fourteen percent maximum rate set forth in R.C. 3307.28.

Provisions applicable to another of Ohio’s public retirement systems—the School Employees Retirement System (SERS)—illustrate one manner in which the General Assembly has provided for additional employer contributions. Like STRS, SERS has been subject to provisions (appearing in R.C. 3309.69) authorizing the system to contract for group health insurance for benefit recipients and to include the cost paid from the funds of the system in the employer’s contribution rate, set by the applicable statute (R.C. 3309.49) at a maximum of fourteen percent. The General Assembly amended the statutory scheme by adopting R.C. 3309.491, which expressly authorizes an additional charge upon employers. See 1987-1988 Ohio Laws, Part II, 3228, 3231-33 (Am. Sub. H.B. 290, eff. Sept. 9, 1988) (*inter alia*, enacting R.C. 3309.491 and amending R.C. 3309.69). That surcharge, known as the “employer minimum compensation contribution,” is an additional amount that the employer contributes for employees whose compensation is less than the minimum annual compensation determined to be necessary to fund the cost of providing health care benefits under R.C. 3309.69. *Id.*<sup>5</sup> Subsequent legislation provided limits on the amount of that surcharge. R.C. 3309.491(B); see 1999-2000 Ohio Laws, Part V, 11392, 11419-20 (Sub. S.B. 270, eff. Apr. 9, 2001). R.C. 3309.491 now states, in relevant part:

*In addition to the employer contribution required by section 3309.49 of the Revised Code [not to exceed fourteen percent], each employer shall pay annually to the employers’ trust fund the amount certified to the employer under this division [employer minimum compensation contribution].*

R.C. 3309.491(C) (emphasis added). Further, R.C. 3309.69(B) now states expressly that “[t]he cost [of health coverage] paid from the funds of the system shall be included in the employer’s contribution rate provided by sections 3309.49 [not to exceed fourteen percent] and 3309.491 [employer minimum compensation contribution] of the Revised Code.”

The provisions governing STRS contain no analogous provisions authorizing STRS to require employer contributions in excess of fourteen percent to cover health benefits. Accordingly, STRS is not empowered to take action of that sort at the current time. However, it is clear that, if the General Assembly should wish to increase the maximum amount of the employer contribution STRS may require employers to pay, in order to provide for health coverage or for other reasons, the General Assembly may adopt legislation designed to serve that purpose, as it did with respect to SERS. See, e.g., *Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm’n*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the legislature intended a

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<sup>5</sup>The reason for the surcharge was described as follows:

SERS indicates that the underlying problem is the disproportionate number of lower wage and part-time employees. The average SERS member earns less than \$9,900 per year or approximately half of PERS members and slightly more than one third of STRS members. Thus, this provision would impose an employer surcharge on below-average salaries.

Legislative Budget Office, Fiscal Note, Am. Sub. H.B. 290 (As Enacted—Effective September 9, 1988) (May 26, 1988).

particular result, "it would not have been difficult to find language which would express that purpose").

We are aware that costs of health coverage have been escalating and that the fourteen percent maximum rate established pursuant to R.C. 3307.28 may limit the health coverage or other benefits that STRS is able to provide. We find, however, that the STRB is not empowered by existing provisions of R.C. 3307.39 to increase the employer contribution above the rate determined pursuant to R.C. 3307.28. Thus, the STRB is not empowered by R.C. 3307.39 to establish an employer contribution rate in excess of fourteen percent for purposes of funding health benefits under R.C. 3307.39, various benefits under R.C. 3307.50 through R.C. 3307.79, or fund deficiencies under divisions (A) through (F) of R.C. 3307.14.

### **Conclusion**

Therefore, it is my opinion, and you are advised, that R.C. 3307.39 does not authorize the State Teachers Retirement Board to establish an employer contribution in excess of the maximum rate of fourteen percent established under R.C. 3307.28.