

OPINION NO. 82-071**Syllabus:**

A county appointing authority, township, regional planning commission, general health district, or public library may assume and pay to the public employees retirement system the employee contributions set forth in R.C. 145.47, R.C. 145.301, R.C. 145.29, R.C. 145.291, R.C. 145.293, R.C. 145.295, or R.C. 145.31.

To: James R. Unger, Stark County Prosecuting Attorney, Canton, Ohio
By: William J. Brown, Attorney General, September 28, 1982

I have before me your request for an opinion as follows:

1. In light of your opinion in 78-OAG-049 and 79-OAG-001, can an employer "pick up" part or all of an employee's contribution to the Public Employees Retirement System?
2. Can the same employer "pick up" an employee's payment for the purchase of military service credit to the Public Employees Retirement System?
3. Can that same employer "pick up" the cost of back payment to P.E.R.S. where the employee is eligible to purchase P.E.R.S. credit?

From your letter of request, and a subsequent telephone conversation, I understand that the term "employee", as used in your request, includes all employees of county and township government, employees of a regional planning commission, general health district and public libraries, including school district libraries.

Essentially, your request concerns the ability of certain public employers to assume and pay (or "pick up") contributions to PERS on behalf of their employees when such contributions are normally the statutory duty of the employee. The contributions involved concern the employee's share of contributions pursuant to R.C. 145.47, employee purchase of military service credit pursuant to R.C. 145.301, and employee purchase of prior service credit pursuant to R.C. 145.29, R.C. 145.291, R.C. 145.293, R.C. 145.295, or R.C. 145.31.

It is my understanding that the motivation for employers to "pick up" these contributions is found in federal tax law. Under 26 U.S.C. §414(h)(2), when a governmental employer, see 26 U.S.C. §414(d), picks up employee contributions to a pension plan qualified under 26 U.S.C. §§401(a) and 501(a) (as PERS is), such contributions are treated as employer contributions, even though they may be designated under state law as employee contributions. See 1979 Op. Att'y Gen. No. 79-001; 1978 Op. Att'y Gen. 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.

It is well-settled that the term "compensation" includes both wages and fringe benefits. State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); 1981 Op. Att'y Gen. No. 81-052. Therefore, whether employee "pick ups" are viewed as salary or as fringe benefits, they are a form of compensation. See Op. No. 79-001; Op. No. 78-049. See also Joint School District No. 1 v. United States, 577 F.2d 1089 (7th Cir. 1978). Further, a public employer, which has the authority to fix the compensation of its employees, may provide fringe benefits in addition to those to which an employee is statutorily entitled, absent constricting statutory authority. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); Op. No. 81-052, at 2-202 ("[i]f an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit"). Each of the public employers about which you have inquired has the authority to fix the compensation of its employees.¹ Such employers may, therefore, "pick up" contributions to PERS on behalf of their employees, unless their power to do so is statutorily restricted.

There is no state statute which expressly restricts the authority of public employers to "pick up" their employees' contributions to PERS. R.C. 145.47 reads in part: "Each public employee who is a member of the public employees retirement system shall contribute eight per cent of his earnable salary or compensation to the employees' savings fund. . . ." (Emphasis added.) I opined in Op. No. 78-049 and Op. No. 79-001, concerning employee contributions to STRS and SERS, that statutory language nearly identical to that found in R.C. 145.47 requiring employees to contribute a percentage of their compensation to their retirement fund did not restrict an employer's authority to "pick up" these payments for the benefit of his employees. As the Internal Revenue Code governs the tax status of employee "pick up" plans, an employer must qualify such plans with the Internal Revenue Service prior to institution of such plans in order to assure that such plans will receive favorable tax treatment. Employers should review Rev. Rul. 36, 1981-1 C.B. 255, Rev. Rul. 35, 1981-1 C.B. 255, and Rev. Rul. 462, 1977-2 C.B. 358 which establish the parameters of permissible "pick up" programs.

I have also considered the question whether R.C. 145.71 through R.C. 145.73 constrict the authority of public employers to "pick up" employee contributions pursuant to R.C. 145.47, since such contributions are characterized generally as deferred compensation. Op. No. 79-001. The General Assembly has provided for a program whereby a public employee may defer portions of his compensation under R.C. 145.71 through R.C. 145.73. These sections establish a Deferred Compensation Program to be administered in compliance with 26 U.S.C. §457. This federal statute authorizes a public employer to establish a non-qualified money purchase plan separate and distinct from the provisions of 26 U.S.C. §414 relating to qualified defined benefit plans. Thus, R.C. 145.71 through R.C. 145.73 do not

¹It should be borne in mind that while boards of township trustees, regional planning commissions; boards of health of general health districts, and the boards of library trustees have the authority to fix the compensation of their employees, see, e.g., R.C. 505.031; R.C. 507.02, R.C. 507.021; R.C. 713.21; R.C. 3709.16; R.C. 3375.40(G), boards of county commissioners do not have the authority to fix the compensation of all county employees. County commissioners are empowered to fix the compensation of certain county employees. See R.C. 305.17. The compensation of other employees, however, is fixed by the county officer, board, department, or other county authority for which the employee performs his services. See, e.g., R.C. 309.06; R.C. 340.03. See also Ebert v. Stark County Board of Mental Retardation; 1980 Op. Att'y Gen. No. 80-063. The following discussion and conclusions, therefore, apply to each county officer, department, and board with the power to compensate its employees, as well as to township trustees, regional planning commissions, boards of health of general health districts, and boards of library trustees.

constrict the authority of public employers to "pick up" employee contributions pursuant to R.C. 145.47.

Just as there are no state statutory restrictions upon employers assuming and paying employee contributions pursuant to R.C. 145.47, there are no such restrictions upon the assumption and payment of employee contributions pursuant to R.C. 145.301, R.C. 145.29, R.C. 145.291, R.C. 145.293, R.C. 145.295, or R.C. 145.31. Under these latter sections, an employee and member of PERS may "purchase" additional service credit for specifically delineated employment pursuant to the prerequisites of these statutes. There are no corresponding employer payments upon such service. By making the payments to PERS on behalf of the employee, an employer is providing additional compensation in the form of a fringe benefit to the employee.

Of course, not all employees will be eligible for employer "pick ups" under these sections. For example, only those employees who served in the military and who are eligible to purchase military service credit pursuant to R.C. 145.301 will benefit from an employer's plan to "pick up" these contributions. "Any distinction in benefits awarded by [a governmental employer] must, however, comport with the equal protection guarantees of Ohio Const. art. I, §2 and the fourteenth amendment of the United States Constitution (footnote omitted)." 1981 Op. Att'y Gen. No. 81-082, at 2-323. See 1982 Op. Att'y Gen. No. 82-006. In order to comport with equal protection, there must be a reasonable basis for granting a benefit to one classification of employees and not to another classification. Op. No. 81-082. Although such a determination is ultimately a judicial one, it would appear reasonable for an employer to grant additional benefits to employees who have served in the military, or who have other prior public service.

Further, implicit in your question concerning the payment of "purchase" service credit contributions is whether such payments will receive the same tax treatment under 26 U.S.C. §414(h)(2) given mandatory contributions "picked up" pursuant to R.C. 145.47. While "purchase" contributions may fall within the language of the federal statute, it appears that the Internal Revenue Service has not addressed the issue of voluntary payments to pension plans. Since I am constrained from rendering opinions as to federal law, I must advise you that in the event a public employer wishes to "pick up" "purchase" contributions, such employer must qualify such program with the Internal Revenue Service prior to the institution of the program if the employer wishes to provide its employees with tax benefits as well as a fringe benefit. As noted previously, employers may wish to review Rev. Rul. 36, 1981-1 C.B. 255, Rev. Rul. 35, 1981-1 C.B. 255, and Rev. Rul. 462, 1977-2 C.B. 358 which establish the parameters of permissible "pick up" programs.

In conclusion, it is my opinion, and you are advised, that a county appointing authority, township, regional planning commission, general health district, or public library may assume and pay to the public employees retirement system the employee contributions set forth in R.C. 145.47, R.C. 145.301, R.C. 145.29, R.C. 145.291, R.C. 145.293, R.C. 145.295, or R.C. 145.31.