

**OPINION NO. 2013-024****Syllabus:**

2013-024

1. The Ohio Retirement Study Council has the authority to commission an actuarial study for the purposes of determining a change to the mitigating rate for alternative retirement plans for employees at public institutions of higher education pursuant to R.C. 3305.06(D) and R.C. 171.07.
2. The Ohio Retirement Study Council's authority under R.C. 3305.06(D) and R.C. 171.07 is limited by R.C. 3305.061, which prohibits the mitigating rate for alternative retirement plans for employees at public institutions of higher education who otherwise would be subject to the State Teachers Retirement System from exceeding the mitigating rate for State Teachers Retirement System defined contribution plans.
3. Pursuant to R.C. 3305.061, the mitigating rate for alternative retirement plans for employees at public institutions of higher education who otherwise would be subject to the State Teachers Retirement System may change by operation of law when the State Teachers Retirement Board adjusts the mitigating rate for State Teachers Retirement System defined contribution plans.

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**To: Lynn R. Wachtmann, Chairman, Ohio Retirement Study Council,  
Columbus, Ohio**

**By: Michael DeWine, Ohio Attorney General, July 17, 2013**

We have received your request for an opinion regarding an adjustment to the mitigating rate for alternative retirement plans (ARPs) undertaken pursuant to R.C. 3305.06(D) and R.C. 171.07. Specifically you ask, which entity has the authority to change the mitigating rate for ARPs referred to in R.C. 3305.06(D) and R.C. 171.07, the State Teachers Retirement Board (STRB) or the Ohio Retirement Study Council (ORSC)? Before answering your question, it is helpful to give some background information on ORSC, the State Teachers Retirement System (STRS) and STRB, and ARPs.

**The Ohio Retirement Study Council**

The Revised Code establishes a number of state retirement systems, includ-

ing the Public Employees Retirement System (PERS), R.C. Chapter 145, the Police and Fire Pension Fund (PFPF), R.C. Chapter 742, STRS, R.C. Chapter 3307, the School Employees Retirement System (SERS), R.C. Chapter 3309, and the Highway Patrol Retirement System (HPRS), R.C. Chapter 5505. ORSC, created pursuant to R.C. Chapter 171, performs certain oversight of these retirement systems. *See generally* R.C. 171.01 (defining “state retirement systems”); R.C. 171.03 (listing the powers of ORSC).

ORSC membership consists of three members of the Senate, three members of the House of Representatives, three members appointed by the Governor, and five ex officio members who do not have the right to vote. R.C. 171.01; *see* 1994 Op. Att’y Gen. No. 94-016, at 2-74 (generally describing the functions of ORSC). The powers and duties of ORSC are prescribed by statute. R.C. 171.03-.04. ORSC must, among other things, make an impartial review from time to time of all laws governing the administration and financing of the state retirement systems and recommend to the General Assembly changes ORSC finds desirable with respect to allowances and benefits, sound financing, the prudent investment of funds, and the improvement of the language, structure, and organization of the laws. R.C. 171.04(A). ORSC may request the Auditor of State to perform a financial or special audit of a state retirement system. R.C. 171.03(G). ORSC studies all proposed changes in the state retirement system laws and reports to the General Assembly on their probable cost, actuarial implications, and desirability as a matter of public policy. R.C. 171.04(C).

#### **State Teachers Retirement System; State Teachers Retirement Board**

STRS is a retirement system “established for the teachers of the public schools of the state.” R.C. 3307.03. It includes several funds managed by STRB for the payment of retirement allowances and other benefits. *Id.* Each teacher participating in STRS contributes a certain percentage of the teacher’s compensation to STRS. R.C. 3307.26. Likewise, each employer pays to STRS an “employer contribution,” which is an annual payment of a certain percentage of the earnable compensation of all members.<sup>1</sup> R.C. 3307.28; 2004 Op. Att’y Gen. No. 2004-043, at 2-371.

STRS consists of a defined benefit plan, R.C. 3307.50-.79, and a defined

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<sup>1</sup> A State Teachers Retirement Systems (STRS) “member” is 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), respectively, and all disability benefit recipients as defined in R.C. 3307.50, with certain exceptions. R.C. 3307.01(C). A “contributor” is any person who has an account in the teachers’ savings fund or defined contribution fund, but does not mean a member or retiree’s surviving spouse with an account in an STRS defined contribution plan. R.C. 3307.01(D).

contribution plan, R.C. 3307.80-.89.<sup>2</sup> R.C. 3307.01. Under the STRS defined benefit plan, teachers make contributions to STRS, but the amount of the accrued benefit at retirement is not dependent upon those contributions. *Thompson v. Thompson*, 196 Ohio App. 3d 764, 2011-Ohio-6286, 965 N.E.2d 377, ¶37 (Franklin County). Instead, “STRS determines the monthly accrued benefit using a formula that takes into account the member’s years of service, the retirement percentage accumulated during those years, and final average salary.” *Id.*; R.C. 3307.58. For teachers participating in the STRS defined benefit plan, a teacher’s contributions are deposited in the teachers’ savings fund. R.C. 3307.26(B). The employer contributions are deposited into the employers’ trust fund.<sup>3</sup> R.C. 3307.28.

Under the defined contribution plan, STRB establishes an individual account for each participating member and benefits are based solely on the amounts that have accumulated in that account. R.C. 3307.81. For teachers participating in an STRS defined contribution plan, both teacher and employer contributions are deposited in the defined contribution fund. R.C. 3307.26(B); R.C. 3307.28. Deducted from the employer contribution in a defined contribution plan, however, is the amount transferred under R.C. 3307.84, which we will describe next. R.C. 3307.28.

The Revised Code establishes a procedure to mitigate, or lessen, the negative financial impact that STRS defined contribution plans have on STRS as a whole. R.C. 3307.84 states:

For each member participating in an STRS defined contribution plan, [STRS] may transfer to the employers’ trust fund a portion of the

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<sup>2</sup> Generally, a defined benefit plan is “a pension plan whereby the member’s benefit is defined by a plan formula that provides for the payment of a monthly check for life upon the member’s retirement.” *Thompson v. Thompson*, 196 Ohio App. 3d 764, 2011-Ohio-6286, 965 N.E.2d 377, ¶29 (Franklin County). “[T]he amount of a member’s contribution (if any) to a defined benefit plan plays no role in the computation of the value of the benefit. Rather, the value is determined from a formula that incorporates variables such as the member’s age, service credit, and highest salary at retirement.” *Id.* A defined contribution plan, on the other hand, is a plan “such as a 401(k) plan, profit sharing plan, money purchase plan, thrift plan, or employee stock option plan.” *Id.* “In a defined contribution plan, the employee and/or employer contributes to the employee’s account and the value of the plan is the account balance.” *Id.*

<sup>3</sup> R.C. 3307.14(B) defines “employers’ trust fund.” This is the fund “to which the employer contribution made on behalf of a teacher participating in the STRS defined benefit plan shall be credited and in which shall be accumulated the reserves held in trust for the payment of all pensions or other benefits” provided by certain provisions of the Revised Code “to teachers retiring or receiving disability benefits in the future or to their qualified beneficiaries, and from which the reserves for such pensions and other benefits shall be transferred to the annuity and pension reserve fund and to the survivors’ benefit fund.” R.C. 3307.14(B).

employer contribution required under [R.C. 3307.28]. if [STRB] elects to make a transfer under this section, the portion transferred shall not exceed the percentage of compensation of members described in this section for whom the contributions are being made that is determined by [STRB's] actuary to be necessary to mitigate any negative financial impact on [STRS] of the participation of members in an STRS defined contribution plan. The remainder shall be credited as provided in [R.C. 3307.28].

[STRB] may have prepared, at intervals determined by [STRB], an actuarial study to determine whether a transfer under this section is necessary to reflect a change in the level of the negative financial impact resulting from participation of members in an STRS defined contribution plan. [STRB] shall increase or decrease the percentage transferred, if any, under this section to reflect the amount needed to mitigate the negative financial impact, if any, on the system based on the actuarial study. An increase or decrease in the percentage transferred shall take effect on a date determined by [STRB].

If a transfer under this section is made, the system shall make the transfer until the unfunded actuarial accrued liability for all benefits, except health care benefits provided under [R.C. 3307.39] and benefit increases provided to members and former members participating in the STRS defined benefit plan after July 13, 2000, is fully amortized, as determined by the annual actuarial valuation prepared under [R.C. 3307.51].

In other words, STRS is permitted to transfer to the employers' trust fund a portion of the employer contribution for each member participating in an STRS defined contribution plan. If STRB elects to make this transfer, the amount transferred must be a percentage of compensation of members contributing to defined contribution plans determined by STRB's actuary and may not be more than necessary to mitigate any negative financial impact on STRS attributed to the participation of members in an STRS defined contribution plan. For purposes of this opinion, we will refer to this percentage as the "mitigating rate for STRS defined contribution plans." STRB may have an actuarial study prepared to determine whether a transfer under R.C. 3307.84 is necessary. STRB shall increase or decrease the percentage transferred to reflect the amount needed to mitigate the negative financial impact on STRS, based on the actuarial study. Any increase or decrease in the percentage transferred must take effect on a date determined by STRB. The statute goes on to describe how long the transfers under R.C. 3307.84 will continue.

#### **Alternative Retirement Plans**

R.C. Chapter 3305 establishes ARPs. ARPs are retirement plans that provide "eligible employees" the opportunity to participate in a retirement plan other than one administered by PERS, STRS, or SERS that would otherwise cover that employee. R.C. 3305.01; R.C. 3305.02. An "eligible employee" is a person employed as a full-time employee at a public institution of higher education. R.C. 3305.01(C). A "public institution of higher education" is a state university as

defined in R.C. 3345.011, the Northeast Ohio Medical University, or a university branch, technical college, state community college, community college, or municipal university established or operating under certain sections of the Revised Code. R.C. 3305.01(A).

ARPs under R.C. Chapter 3305 are defined contribution plans and provide retirement and if applicable, death benefits through investment options. R.C. 3305.02. The board of trustees of each public institution of higher education is required to adopt an ARP under R.C. Chapter 3305. R.C. 3305.04(A). Eligible employees of a public institution of higher education may make an election to participate in an ARP. R.C. 3305.05(B). The election must be made in writing and is irrevocable while the eligible employee continues to be employed. R.C. 3305.05(C). After an eligible employee elects to participate in an ARP, a certified copy of the election must be filed with the state retirement system to which, apart from the election, the employee's employment would be subject. R.C. 3305.05(C)(1); *see also* 2B Ohio Admin. Code 145-1-43; 5A Ohio Admin. Code 3307-5-01; 5A Ohio Admin. Code 3309-1-56.

Each electing employee must contribute a percentage of his compensation to the provider of the investment option the employee selects. R.C. 3305.06(A). This percentage is the same percentage the electing employee would have otherwise been required to contribute to the pertinent state retirement system had the employee not elected to participate in the ARP; this percentage shall not be less than three percent. R.C. 3305.06(A). Each public institution of higher education employing an electing employee also shall contribute a percentage of the employee's compensation to the provider of the investment option that is equal to the percentage that the public institution of higher education would otherwise contribute on behalf of that employee to the state retirement system that would cover that employee's position. R.C. 3305.06(B).

The Revised Code establishes a procedure to mitigate, or lessen, the negative financial impact ARPs have on PERS, STRS, and SERS. R.C. 171.07 states:

[ORSC] shall cause an independent actuarial study to be completed and submitted to the Ohio board of regents by July 1, 2002, and by the first day of July of every third year thereafter. The study shall determine any necessary adjustments in contributions under [R.C. 3305.06] to reflect any changes in the level of the negative financial impact on [PERS], [STRS], and [SERS] resulting from the establishment of the [ARP].

In other words, R.C. 171.07 requires that every third year, ORSC will cause an independent actuarial study to be completed and submitted to the Ohio Board of Regents.<sup>4</sup> This study will determine necessary adjustments in contributions under R.C. 3305.06 to reflect changes in the level of negative financial impact on the applicable state retirement system resulting from the establishment of the ARP.

<sup>4</sup> The Ohio Board of Regents is created pursuant to R.C. Chapter 3333. It consists of nine members appointed by the Governor with advice and consent of the Senate, who shall be residents of the state with an interest in and knowledge of higher

R.C. 3305.06 states in pertinent part:

(D) Each public institution of higher education employing an electing employee shall contribute on behalf of that employee to the state retirement system that otherwise applies to the electing employee's position a percentage of the electing employee's compensation to mitigate any negative financial impact of the alternative retirement program on the state retirement system. The percentage shall be six per cent, except that the percentage may be adjusted by the [ORSC] to reflect the determinations made by actuarial studies conducted under [R.C. 171.07]. Any adjustment shall become effective on the first day of the second month following submission of the actuarial study to the Ohio board of regents under section [R.C. 171.07].

Contributions on behalf of an electing employee shall continue in accordance with this division until the occurrence of the following:

(1) If the electing employee would be subject to [R.C. Chapter 145] had the employee not made an election pursuant to [R.C. 3305.05 or R.C. 3305.051], until the unfunded actuarial accrued liability for all benefits, except health care benefits provided under [R.C. 145.58 or R.C. 145.584] and benefit increases provided after March 31, 1997, is fully amortized, as determined by the annual actuarial valuation prepared under [R.C. 145.22];

(2) If the electing employee would be subject to [R.C. Chapter 3307] had the employee not made an election pursuant to [R.C. 3305.05] or [R.C. 3305.051], until the unfunded actuarial accrued liability for all benefits, except health care benefits provided under [R.C. 3307.39] and benefit increases provided after March 31, 1997, is fully amortized, as determined by the annual actuarial valuation prepared under [R.C. 3307.51];

(3) If the electing employee would be subject to [R.C. Chapter 3309] had the employee not made an election pursuant to [R.C. 3305.05 or R.C. 3305.051], until the unfunded actuarial accrued liability for all benefits, except health care benefits provided under [R.C. 3309.375 or R.C. 3309.69] and benefit increases provided after March 31, 1997, is

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education. R.C. 3333.01. The Governor, with advice and consent of the Senate, appoints the chancellor of the Ohio Board of Regents who serves at the pleasure of the Governor, and the Governor prescribes the chancellor's duties in addition to those prescribed by law. R.C. 3333.03(A). The chancellor is to be qualified by training and experience to understand the problems and needs of the state in the field of higher education and to devise programs, plans, and methods of solving those problems and meeting those needs. R.C. 3333.03(D). The Ohio Board of Regents designates the entities that are eligible to provide investment options under alternative retirement plans (ARPs) at public institutions of higher education and accepts and reviews applications from those entities seeking to be vendors. R.C. 3305.03.

fully amortized, as determined by the annual actuarial valuation prepared under [R.C. 3309.21].

This means that each public institution of higher education that employs an employee electing an ARP must contribute on behalf of that employee to the state retirement system that otherwise applies to the electing employee's position. The contribution must be a percentage of that employee's compensation and is provided to mitigate any negative financial impact of the ARP on the state retirement system. The percentage of compensation contributed is six percent, but that percentage may be adjusted by ORSC to reflect the determinations made by the actuarial studies conducted under R.C. 171.07. For purposes of this opinion, we will refer to this percentage as the "mitigating rate for ARPs." Adjustments to this rate become effective on the first day of the second month following submission of the actuarial study to the Ohio Board of Regents, specified in R.C. 171.07. R.C. 3305.06(D)(1)-(3) specify how long the contributions under R.C. 3305.06(D) will continue.

R.C. 3305.061, however, imposes a limitation on the mitigating rate for ARPs. It states:

Notwithstanding [R.C. 171.07] and [R.C. 3305.06(D)], the percentage of an electing employee's compensation contributed by a public institution of higher education under [R.C. 3305.06(D)] shall not exceed the percentage of compensation transferred under [R.C. 145.87, R.C. 3307.84, or R.C. 3309.88], as appropriate, by the state retirement system that otherwise applies to the electing employee's position. A change in the percentage of compensation contributed under [R.C. 3305.06(D)], as required by this section, shall take effect on the same day a change in the percentage of compensation takes effect under [R.C. 145.87, R.C. 3307.84, or R.C. 3309.88], as appropriate.

Pursuant to R.C. 3305.061, therefore, the percentage of an electing employee's compensation that is contributed by a public institution of higher education to the applicable state retirement system to mitigate any negative financial impact on that state retirement system from the effect of the ARP shall not be greater than the percentage of compensation transferred under R.C. 145.87, R.C. 3307.84, or R.C. 3309.88 that is contributed to the applicable state retirement system to mitigate any negative financial impact from the effect of the state retirement systems' defined contribution plans. Stated differently, the mitigating rate for ARPs shall not be greater than the mitigating rate for PERS, STRS, or SERS defined contribution plans. A change in the mitigating rate for ARPs, as required by R.C. 3305.061, takes effect on the same day as a change in the mitigating rate for PERS, STRS, or SERS defined contribution plans.

**ORSC's Actuarial Study Determines the Mitigating Rate for ARPs, but Is Limited by R.C. 3305.061**

Now that we have discussed the background of ORSC, STRS and STRB, and ARPs, we will turn to your question. We begin with the plain language of the statute. "Where the wording of a statute is clear and unambiguous, [the] only task

is to give effect to the words used.” *State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994). “[W]ords and phrases in a statute must be read in context of the whole statute.” *Commerce & Indus. Ins. Co. v. City of Toledo*, 45 Ohio St. 3d 96, 102, 543 N.E.2d 1188 (1989). “In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective.” R.C. 1.47(B). “The different sections and parts of sections of the same legislative enactment should if possible be so interpreted as to harmonize and give effect to each and all.” *State ex rel. Myers v. Indus. Comm’n*, 105 Ohio St. 103, 136 N.E. 896 (1922) (syllabus, paragraph 1). Finally, “words in statutes should not be construed to be redundant, nor should any words be ignored.” *East Ohio Gas Co. v. Pub. Util. Comm’n*, 39 Ohio St. 3d 295, 299, 530 N.E.2d 875 (1988).

Under R.C. 171.07, “[ORSC] shall cause an independent actuarial study to be completed and submitted to the [Ohio Board of Regents] by July 1, 2002, and by the first day of July of every third year thereafter.” (Emphasis added.) The statute goes on to say that this study “shall determine any necessary adjustments” in contributions under R.C. 3305.06 to reflect any changes in the level of the negative financial impact on the applicable retirement systems resulting from the establishment of the ARP. R.C. 171.07 (emphasis added). The plain language of R.C. 171.07 thus makes it clear that ORSC commissions the actuarial study and that the actuarial study itself determines adjustments in the mitigating rate for ARPs described in R.C. 3305.06.

The plain language of R.C. 3305.06(D) likewise indicates that the results of the actuarial study in R.C. 171.07 determine the mitigating rate for ARPs. R.C. 3305.06(D) states that the mitigating rate for ARPs “may be adjusted by [ORSC] to reflect the determinations made by actuarial studies conducted under [R.C. 171.07].” (Emphasis added.) Thus, based on the plain language of the statute, ORSC may adjust the mitigating rate, but only to reflect the determination made by the actuarial studies. In other words, ORSC may not change the mitigating rate for ARPs at will, but only on the basis of what is stated in the actuarial study commissioned under R.C. 171.07. The adjustments made pursuant to R.C. 3305.06(D) become effective on the first day of the second month following submission of the actuarial study to the Ohio Board of Regents under R.C. 171.07.

The preceding discussion details the usual course to be taken to change the mitigating rate for ARPs for employees of public institutions of higher education, pursuant to R.C. 171.07 and R.C. 3305.06(D). R.C. 3305.061, however, limits ORSC’s exercise of its authority under these sections. R.C. 3305.061 addresses changes to be made to the mitigating rate for ARPs “notwithstanding” R.C. 171.07 and R.C. 3305.06(D). When the mitigating rate for ARPs changes in accordance with R.C. 3305.061, that change occurs regardless of what is stated in R.C. 171.07 and R.C. 3305.06(D).

R.C. 3305.061 states that the mitigating rate for ARPs prescribed in R.C. 3305.06(D) “shall not exceed the percentage of compensation transferred under [R.C. 145.87, R.C. 3307.84, or R.C. 3309.88].” R.C. 145.87, R.C. 3307.84, and R.C. 3309.88 refer to the mitigating rate for the PERS defined contribution plans,

the mitigating rate for the STRS defined contribution plans, and the mitigating rate for the SERS defined contribution plans, respectively.<sup>5</sup> Based on the plain language of R.C. 3305.061, the mitigating rate for an ARP selected by an employee of a public institution of higher education who otherwise would be subject to STRS cannot exceed the mitigating rate for the STRS defined contribution plans, set forth in R.C. 3307.84.

R.C. 3305.061 also states that “[a] change in the percentage of compensation contributed under [R.C. 3305.06(D)], *as required by this section*, shall take effect on the same day a change in the percentage of compensation takes effect under [R.C. 145.87, R.C. 3307.84, or R.C. 3309.88], as appropriate.” R.C. 3305.061 (emphasis added). In other words, when the mitigating rate for ARPs under R.C. 3305.06(D) for employees of public institutions of higher education who otherwise would be subject to STRS changes because the mitigating rate for STRS defined contribution plans changes under R.C. 3307.84, *as required by* R.C. 3305.061, that change to the mitigating rate for those ARPs will take effect on the same day that changes to the mitigating rate for STRS defined contribution plans take effect. The language “as required by this section” refers to changes in the mitigating rate for ARPs under R.C. 3305.06(D) that occur as required by R.C. 3305.061. Thus, when the mitigating rate for STRS defined contribution plans changes based on action by STRB so that it dips below the mitigating rate for ARPs for employees of public institutions of higher education who otherwise would be subject to STRS, the mitigating rate for those ARPs must adjust downward. The new mitigating rate for those ARPs will be the same as the mitigating rate for STRS defined contribution plans so that the mitigating rate for those ARPs will “not exceed” the mitigating rate for STRS defined contribution plans. Because R.C. 3305.061 states that it applies “notwithstanding,” or in spite of, R.C. 171.07 and R.C. 3305.06, the fact that those sections give ORSC the authority to commission a study for the purposes of changing the mitigating rate for ARPs is not a consideration when adjusting the mitigating rate for ARPs as required by R.C. 3305.061.

R.C. 3305.061 does not state explicitly which entity has authority to make the adjustment to the mitigating rate for ARPs required by that section. The language that states such a change to the mitigating rate for ARPs “shall take effect on the same day a change in the percentage of compensation takes effect under [R.C. 3307.84],” implies that the change occurs by operation of law. Once STRB changes the mitigating rate for its defined contribution plans under R.C. 3307.84 to be below the mitigating rate for ARPs under R.C. 3305.06(D) for employees of public institutions of higher education who otherwise would be subject to STRS, the mitigating rate for those ARPs adjusts to the same level as the mitigating rate

<sup>5</sup> Because your request only asks about the authority of STRB to change the mitigating rate for ARPs, this opinion will only address how the STRS statute, R.C. 3307.84, affects the mitigating rate for ARPs for employees at public institutions of higher education who otherwise would be subject to STRS. It does not address how R.C. 145.87 or R.C. 3309.88 affect the mitigating rate for ARPs for employees who otherwise would have been subject to PERS or SERS.

for the STRS defined contribution plans by operation of R.C. 3305.061. ORSC then has the opportunity to submit an actuarial study in accordance with the triennial schedule set forth in R.C. 171.07 to adjust the mitigating rate for those ARPs down further or keep it the same. Due to the language in R.C. 3305.061, a change to the mitigating rate for ARPs for employees of public institutions of higher education who otherwise would be subject to STRS that will be higher than the mitigating rate for STRS defined contribution plans is prohibited.

#### **Conclusions**

For the reasons discussed above, it is my opinion, and you are hereby advised that:

1. The Ohio Retirement Study Council has the authority to commission an actuarial study for the purposes of determining a change to the mitigating rate for alternative retirement plans for employees at public institutions of higher education pursuant to R.C. 3305.06(D) and R.C. 171.07.
2. The Ohio Retirement Study Council's authority under R.C. 3305.06(D) and R.C. 171.07 is limited by R.C. 3305.061, which prohibits the mitigating rate for alternative retirement plans for employees at public institutions of higher education who otherwise would be subject to the State Teachers Retirement System from exceeding the mitigating rate for State Teachers Retirement System defined contribution plans.
3. Pursuant to R.C. 3305.061, the mitigating rate for alternative retirement plans for employees at public institutions of higher education who otherwise would be subject to the State Teachers Retirement System may change by operation of law when the State Teachers Retirement Board adjusts the mitigating rate for State Teachers Retirement System defined contribution plans.