

The following information was recently provided to NYSTRS' participating employers. As a Retirement System delegate, it is important you are aware of these issues.

Delegate News

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Agreements Enabling Members to Inflate FAS Will Not Be Recognized by NYSTRS

It has come to our attention an increasing number of collective bargaining agreements are being negotiated or modified in ways which could artificially inflate an employee's final average salary (FAS), including as follows:

- Freezing all or a portion of the employees' salary increases except for those who are retiring.
- Providing salary increases of which all or a portion of the raise will be reduced through "voluntary" donations back to the district.
- Increasing the employee paid costs of health insurance stipends or creating surcharges whereby the employee's health insurance payments to the district exceed the cost of coverage and the excess will be retained by the district.

Be advised that the Retirement System considers payments resulting from provisions allowing some members to receive preferential treatment (e.g., selective bargaining), or otherwise manipulating the compensation received by members, non-pensionable. This includes provisions in Memorandums of Agreement (MOAs), which are considered addendums to the collective bargaining agreements. Salary resulting from the above or similar provisions will not be considered reportable compensation by NYSTRS and, therefore, will not be used in any benefit calculation.

[Administrative Bulletin 2008-6](#) (*Court Decisions Upholding the Retirement System's Three-Year Final Average Salary Determinations*), accessible from the [Employers Page](#) at www.nystrs.org, cites several rulings supporting the System's position that compensation available only to teachers on the eve of retirement is not reportable compensation. More recent court decisions have reaffirmed this position. Other Administrative Bulletins addressing the issue of reportable salary include:

- 2002-1 (*Termination Payments in Collective Bargaining Agreements*);
- 2003-3 (*The System's Rejection of Attempts to Convert Employer-Paid Health Insurance Premiums into Reportable Compensation*);
- 2004-6 (*Reporting of Earnings by School Districts*);
- 2007-7 (*Reporting of Summer Program Earnings*); and,
- 2011-2 (*Leaves of Absence Prior to Retirement*).

(continued)

The Retirement System is obligated by law to vigilantly guard against attempts to artificially inflate members' final average salaries as well as practices or arrangements which have that effect.

Such provisions in any modified or new collective bargaining agreement(s) have no effect on the employer's duty to report and provide accurate information to the System as required by law, the System's regulations and in conformity with the System policy. As a reminder, Section 5015.3 of the System's Rules and Regulations reads in part:

The responsibility of the employer to make reports and provide information as required by the System is nondelegable and may not be made subject to any agreement with a member, member's representative or third party. Any agreement by an employer with any member, member's representative or third party to make a report or provide information to the System in a particular manner or to withhold information which is required to be reported to the System is contrary to public policy and shall be null and void and of no effect.

Be aware that making false statements to the System is a matter of personal risk. Section 525 of the Education Law provides in pertinent part: "Any person who shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be guilty of a misdemeanor..." The System will not hesitate to bring instances of intentional fraud to the attention of the proper authorities.

NYSTRS Internal Audit staff routinely reviews contracts made between employers and System members. Audits include a review of all payments made to members and reported to the System. By law, any errors identified by the System must be corrected and appropriate action must be taken. For example, if it is determined salaries were improperly reported, and that a member's final average salary and retirement benefit were artificially inflated as a result, the benefit will be adjusted accordingly. In those instances the member will be required to repay the Retirement System any monies owed. Such situations are unfortunate, particularly where the retiring member had been counting on the inclusion of the amounts at issue to make his/her retirement financially viable, but they could have been entirely avoided, had the parties to the agreements stayed within the requirements of law.

Thank you for your cooperation. Please contact NYSTRS if you have additional questions.

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