

Opinion No. 58-179

August 28, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P Whittaker, Assistant Attorney General

TO: Mr. John C. Hays, Administrator, Social Security Division Public Employees Retirement Association, Santa Fe, New Mexico

QUESTION

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Are school nurses employed in positions for which they are not required by state law or regulation to have valid state teachers' or administrators' certificates in order to receive pay for their services?

CONCLUSION

Yes.

OPINION

ANALYSIS

We understand that your inquiry arises by reason of the enactment of Section 104 (f) of the 1956 amendments to the Social Security Act, which provides as follows:

"Sec. 104. * * *

Certain non-professional School District Employees

"(f) Notwithstanding the provisions of subsection (d) of section 218 of the Social Security Act, any agreement under such section entered into prior to the date of enactment of this Act by the State of Florida, Nevada, New Mexico, Minnesota, Oklahoma, Pennsylvania, Texas, Washington, or the Territory of Hawaii shall if the State or Territory concerned so requests, be modified prior to July 1, 1957, so as to apply to services performed by employees of the respective public school districts of such State or Territory who, on the date such agreement is made applicable to such services, are not in positions the incumbents of which are required by State or Territorial law or regulation to have valid State or Territorial teachers' or administrators' certificates in order to receive pay for their services. The provisions of this subsection shall not apply to services of any such employees to which any such agreement applies without regard to this subsection."

This enactment made it possible for the State of New Mexico, among others, to cover certain described employees of school districts, without referendum, by modification of its agreement with the United States entered into and approved prior to July 1 1957. We are advised that the State of New Mexico elected to take advantage of this authorization, and modifications were submitted and approved, to this end. The question now arises whether school nurses were included in the extension of social security coverage effected by such modifications, or whether school nurses can only be covered pursuant to a referendum approving such coverage.

The purpose of the enactment, as stated in the legislative history thereof, found at 3 U.S. Code Congressional & Administrative News (1956), at p. 3887, was to provide for social security coverage, prior to July 1, 1957, and without referendum, of various "non-professional" school system employees, formerly included by New Mexico and other states under teachers' retirement programs which were not well suited to the needs of such groups, the members of which tend to move back and fourth between school and non-school employment in their own fields.

The status of school nurses under modifications of New Mexico's social security agreement entered into pursuant to the authorization of Section 104 (f), supra, depends upon whether or not school nurses, under the law of the State, are properly characterized as not holding "positions the incumbents of which are required by State or Territorial law or regulation to have valid State or Territorial teachers' or administrators' certificates in order to receive pay for their services."

This office concludes that school nurses clearly do not fall in the category of those holding positions which under the law of New Mexico require teachers' or administrators' certificates.

In ordinary usage, the language of the federal statute would properly be interpreted to exclude school nurses from the category defined, in our opinion. Examination of the relevant state statutes reinforces our conclusion that school nurses are not included within the category specified. Various provisions of state law and regulation, requiring no specific reference here, deal with the qualifications or duties of such personnel as superintendent, supervisors, and principals of elementary and secondary schools. Such personnel, under currently effective regulations of the State Board of Education and the State Department of Education, clearly are classified as "administrative" personnel and are required to hold "administrative certificates". Just as clearly, school nurses are not included in this category of personnel. Are school nurses included in the category of "teachers", then, for purposes of certification? We conclude that they are not included in this group, either. No provision of law includes them in such group for certification purposes. Actually, the basic certification of the professional qualifications of school nurses is entrusted by statute to the State Department of Public Health, which is required to prescribe applicable minimum professional qualifications. (§ 12-1-4 (18 1/2), N.M.S.A., 1953). We are advised that the State Department of Education, in the exercise of its broad responsibilities for the personnel of the schools of the state, prescribes additional qualifications, emphasizing the educational, rather than the

professional, aspects of the qualifications of school nurses. In practice, we understand, a joint committee designated by the respective departments of health and education formulate the standards of qualification for school nurses which, following approval of the committee work, are then prescribed by the Department of Education in the form of regulations relating to certification. Such regulations relating to certification of school nurses are stated separately from those relating to the certification of teachers. Thus, in the understanding of those charged with administration of the law, school nurses are excluded from the category described in the federal statute above quoted. The Supreme Court of New Mexico has so treated school nurses, in holding that such employees are not included in the wording, ". . . each teacher or other employee certified as qualified to teach . . .", used in the so-called teacher tenure statutes. **Bourne vs. Board of Education of City of Roswell**, 46 N.M. 310 (1942). Although the language used in this statute has been somewhat changed, the change merely clarifies the legislative intent to exclude others than teachers from the statute (See § 73-12-13, N.M.S.A., 1953, 1957 P.S.).

For these reasons, we conclude that school nurses were included in appropriate modifications of the State's social security agreement, executed pursuant to the 1956 amendment of the federal law, quoted above.