

**Opinion No. 63-129**

September 25, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mrs. Betty Lujan Acting Director Social Security Division Public Employees' Retirement Association Santa Fe, New Mexico

**QUESTION**

**FACTS**

On July 30, 1962, the Attorney General's Office, in an informal opinion, advised you that substitute teachers are not covered by social security under an agreement whereby part-time positions are excluded -- a part-time position being defined as one which does not require more than 150 hours of duty in a calendar quarter.

In view of recent correspondence from the Social Security Administration you ask us to review the opinion rendered earlier.

**QUESTION**

Are substitute teachers excluded from social security coverage under an agreement whereby part-time positions are exempt?

**ANSWER**

yes.

**OPINION**

**{\*287} ANALYSIS**

We will state initially that under Section 208 of "Coverage Under Agreements," including the example therein, as propounded by the Social Security Administration, the position of substitute teacher is a part-time position.

Now, however, the Social Security Administration has advanced what we consider a rather novel argument that substitute teachers are covered. The Social Security Administration has stated that "although the law permits the exclusion of services rendered in part-time positions, where a substitute renders services in a regular full-time position the services of the substitute are not excluded even though he or she may work less than full time."

As we understand this contention, it is that by virtue of substituting for, or filling-in for, a regular contract teacher, tenured or otherwise, the substitute teacher is, during that time, holding the **position** of regular certificated contract teacher.

Not only do we disagree with this contention in principle, but we find that it would not be permissible under the rules of the State Board of Education, approved and issued in January, 1962.

We are advised that in New Mexico we have five types of teachers' certificates. First is the standard certificate which indicates that the holder is fully certified as qualified to perform the duties endorsed upon the certificate according to the certification requirements in effect at the time the certificate was issued.

Second is the sub-standard renewable certificate. This certificate is issued to teachers who hold a degree from a regionally or New Mexico accredited institution and who partially meet certification {288} requirements. This certificate is renewable on a year-to-year basis as a sub-standard certificate and may be renewed until such time as certification requirements are met. This certificate is renewed on a showing of eight semester hours credit earned annually at a regionally or New Mexico accredited institution. All credit must be earned in areas applicable toward meeting requirements for a standard certificate.

The third certificate is sub-standard and non-renewable. This certificate is issued only after the opening of a school term upon the express request of the employing authority. The sub-standard non-renewable certificate is valid only for the school requesting the certificate. This type of certificate is issued only to teachers having 90 or more hours of college credit at a regionally or New Mexico accredited institution.

The fourth and fifth type of certificates are issued to substitute teachers. Substitute teachers' certificates are issued by the Office of Certification of the State Department of Education at the request of the superintendent of schools. Substitute teachers **must** be paid at a lower rate than the regular contract teachers for whom they are filling-in. No substitute teacher is allowed to teach more than sixty days in any one class as a fill-in for a regular contract teacher. Substitute teachers' certificates are valid for use only in the administrative unit for which they have been requested and they are valid for one year only.

The fifth type of certificate is designated as a continuing substitute teachers' certificate. It is issued only to teachers who have substituted in a single class for sixty days. Before the certificate is issued the employing authority must verify to the Office of Certification that it has been unable to replace the substitute teacher with a properly certified teacher and must request a continuing substitute teacher's certificate for the substitute teacher. Any substitute teacher who receives a continuing substitute teacher's certificate must present evidence of having earned sixty or more semester hours of college credit from a regionally or New Mexico accredited institution.

We see then that substitute teachers hold positions **entirely separate and distinct** from the position of the regular contract teacher for whom they are filling in. Rather than being unusual, our research indicates that this is true in most states. In the case of **State ex rel. Schroder v. School Directors**, Wis., 274 N.W. 301, a person who had the qualifications to teach as required by state law, but who, because of lack of certain qualifications required by the city school board, was offered and accepted a **position** as a substitute teacher, and served as such for three and one-half years. The Court held that she did not thereby acquire the **status** of permanent teacher.

A substitute teacher is not entitled to the benefits of the Teachers' Tenure Act and where a teacher, qualified only to act as a substitute, is inadvertently given a regular teacher's contract, such contract is invalid. **Antel v. McDonald School District**, Pa., 71 D.C. 216 (1949). The Court points out that the qualifications of substitutes has been left to the discretion of school officials while this is not so in the case of regular teachers.

In the case of **Schulz v. State Board of Education**, N.J., 40 A. 2d 663 (1945), the argument was advanced that since a statute said "all teachers," substitute teachers were included within its terms. The Court rejected this contention saying,

{\*289} "The conception that the classification 'teacher', as used in the school law and in school practice is not comprehensive of the classification 'substitute teacher' has support in our statutes, in school practices and decisions, and in the opinion of the courts."

The Court said that the substitute teacher's employment was just that -- substitute teacher.

The Court further stated as follows:

"It cannot be soundly argued that the classification of substitute teachers separately from teachers is a distinction without a difference, or that the distinction is a frivolous reason for withholding various beneficial incidents, including that of tenure, from substitute teachers."

Recognizing that all substitute teachers may not be of the aptitude desired for regular teaching positions, but who may, nevertheless, be acceptable for fill-in work, the Court said that "there is substance in the distinction" between substitute teacher and regular teacher. Likewise the New York Court has flatly stated that "a substitute is not a regular teacher." **Winkel v. Teachers' Retirement System of New York**, 149 N.Y.S. 2d 443 (1956).

In a statement which is most appropriate in this state, the New Jersey Court said ( **Gordon v. State Board of Education**, 40 A. 2d 670 (1945)):

"Respondent, as we have seen, was hired as a substitute teacher and was paid as such at the rate of \$ 5 for each 5 1/2 hour day of actual employment. Her assignment was

from day to day. The department was under no obligation to offer, or the respondent to accept, any of those assignments. Each day represents a separate contract. No such irregularity of engagement and no such opportunity to determine not to do the day's work rests with a regular teacher. The assignment might consist of merely hours and not a full day, or of a full day and a fraction, or it might be continued over a week or longer. That service was without seniority, without paid vacations and without the benefit of scheduled increases or increases of any character, without steady employment even at the per diem rate. . . ."

The Court in holding that a substitute teacher was not a teacher said:

"She performed **teaching services** for which she was entitled to be, and was, paid; but that did not bring her within the **classification** of a teacher. She was a substitute teacher, specifically so employed by the superintendent of schools in accordance with the practice."

The Social Security Administration apparently says that while a substitute teacher may not be a regular certificated contract teacher, the substitute, while filling-in for the regular teacher, occupies the **position** of the one for whom she is substituting. Court decisions are to the contrary. As the Court said in **State ex rel. Ging v. Board of Education of City of Duluth**, Minn., 7 N.W. 2d 544 (1942):

"We see no alternative than to follow 'common and approved usage' and to define a teacher's position as his **relative place, rank, or standing in the school system.**" (Emphasis added)

{\*290} This was reiterated in **Frisk v. Board of Education of City of Duluth**, Minn., 75 N.W. 2d 504 (1956) wherein the Court stated that "position" refers to rank, grade, or station in the school system. See **Anderson v. Board of Education**, Cal. 15 P. 2d 774 (1932).

Certainly in New Mexico at least the substitute teacher does **not** have the relative place, rank, grade or standing in the school system that the person for whom she fills-in has. **Walsh v. Board of Trustees**, Cal., 37 P. 2d 700; **Mitchell v. Board of Trustees of Visalia Union High School**, Cal., 42 P. 2d 397; **Commonwealth ex rel. Hetrick v. School District of City of Sunbury**, Pa., 6 A. 2d 279.

This office expressly reaffirms the opinion given you on this question in July of 1962.

By: Oliver E. Payne

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