

Opinion No. 2007-169

June 25, 2007

The Honorable Irma Hunter Brown
State Senator
1623 West 23rd Street
Little Rock, AR 72206-2000

Dear Senator Brown:

I am writing in response to your request for an opinion on the following questions:

1. Under Arkansas law, can state employees in the same agency with the same position and same pay grade be paid differently?
2. If so, what is the basis for allowing such a discrepancy in pay?

You have recited the following background information giving rise to these questions:

The Arkansas Department of Health and Human Services (DHHS) has multiple departments with multiple offices across Arkansas. Recently, several Central Arkansas DHHS employees discovered significant salary differences between their pay and the pay of employees in Northwest Arkansas who held the same positions with the same pay grade. Also, the Northwest Arkansas positions required less job duties and skills but paid more, while employees in other parts of Arkansas with more duties and job experience earned less money.

RESPONSE

It is apparent from the recited background that despite the general nature of your questions, you are primarily concerned regarding the pay discrepancy you have

identified with respect to certain DHHS employees. Accordingly, I will focus my opinion on that issue. I should nevertheless note that the compensation plan under the state Uniform Classification and Compensation Act, A.C.A. §§ 21-5-201 – 219 (Repl. 2004 and Supp. 2005), assigns different pay levels to the pay grade for each classified position. *See* A.C.A. § 21-5-209(d)(1), as amended by Act 375 of 2007.¹ While this obviously is a basis for setting different salaries for employees in the same agency who have the same position and pay grade, subsection 21-5-

¹ This subsection provides as follows:

The following grades and pay levels shall be the authorized compensation plan, effective July 1, 2007, for the state service for all positions of state agencies and institutions covered by this subchapter to which a classification title and salary grade have been assigned, in accordance with this subchapter and the appropriation act of the state agency or institution:

| <u>PAY GRADE</u> | <u>Level I</u> | <u>Level II</u> | <u>Level III</u> | <u>Level IV</u> |
|------------------|----------------|-----------------|------------------|-----------------|
| Grade 1 | \$13,243 | \$13,243 | \$13,243 | \$13,414 |
| Grade 2 | \$13,243 | \$15,511 | \$18,459 | \$24,549 |
| Grade 3 | \$13,667 | \$15,827 | \$18,808 | \$25,050 |
| Grade 4 | \$13,667 | \$16,140 | \$19,194 | \$25,591 |
| Grade 5 | \$13,667 | \$16,457 | \$19,582 | \$26,021 |
| Grade 6 | \$13,874 | \$16,774 | \$19,965 | \$26,599 |
| Grade 7 | \$14,164 | \$17,123 | \$20,388 | \$27,099 |
| Grade 8 | \$14,451 | \$17,474 | \$20,774 | \$27,675 |
| Grade 9 | \$14,992 | \$18,106 | \$21,543 | \$28,645 |
| Grade 10 | \$15,964 | \$19,298 | \$22,947 | \$30,513 |
| Grade 11 | \$17,010 | \$20,528 | \$24,422 | \$32,526 |
| Grade 12 | \$18,091 | \$21,861 | \$26,036 | \$34,648 |
| Grade 13 | \$19,281 | \$23,299 | \$27,722 | \$36,911 |
| Grade 14 | \$20,543 | \$24,808 | \$29,512 | \$39,320 |
| Grade 15 | \$21,875 | \$26,423 | \$31,440 | \$41,837 |
| Grade 16 | \$23,316 | \$28,142 | \$33,475 | \$44,605 |
| Grade 17 | \$24,614 | \$29,969 | \$35,652 | \$47,479 |
| Grade 18 | \$26,415 | \$31,897 | \$37,967 | \$50,570 |
| Grade 19 | \$28,182 | \$34,003 | \$40,458 | \$53,876 |
| Grade 20 | \$29,982 | \$36,214 | \$43,092 | \$57,435 |
| Grade 21 | \$31,966 | \$38,564 | \$45,863 | \$61,209 |
| Grade 22 | \$34,021 | \$41,056 | \$48,846 | \$65,055 |
| Grade 23 | \$36,220 | \$43,722 | \$52,038 | \$69,296 |
| Grade 24 | \$38,597 | \$46,564 | \$55,407 | \$73,789 |
| Grade 25 | \$41,083 | \$49,582 | \$59,021 | \$78,570 |
| Grade 26 | \$43,749 | \$52,811 | \$62,847 | \$83,708 |

A.C.A. § 21-5-209(d)(1), as amended by Act 375 of 2007. Pay increases are to be earned based upon “experience, ability, and work performance.” *Id.* at (c). *See also* A.C.A. § 21-5-101(b)(3)(A) (Repl. 2004), (part of the Regular Salary Procedures and Restrictions Act, requiring that agencies “shall take into consideration ability of the employee and length of service” when determining annual salary.)

209 applies uniformly throughout the state and is generally not a basis for a pay discrepancy affecting only employees in certain regions of the state.

With regard, specifically, to the pay discrepancy at issue involving DHHS employees in Central and Northwest Arkansas, in my opinion the basis for these salary differences is found in A.C.A. § 21-5-214. This statute authorizes special rates of pay for specific classifications due to “prevailing market rates of compensation” or “an acute shortage of qualified applicants.” It states in pertinent part:

A new appointment to positions in a state agency or institution of higher education covered by this subchapter shall not be at greater than Pay Level I unless a special rate is requested and approved as follows:

(1)(A) *A state agency or institution of higher education may request special rates of compensation for either current or prospective employees within the state agency or institution **under the following conditions:***

(i) *Prevailing market rates of compensation for a specific classification title are such that the state agency or institution is unable to competitively recruit at the entry level for the salary grade assigned to that classification;*

(ii) *An acute shortage of qualified applicants for a specific classification exists;*

(iii) *The state agency or institution desires to obtain the services of an exceptionally well-qualified applicant for a specific classification;*
or

(iv) *To meet any requirements of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.*

(B)(i) *A state agency or institution of higher education may request special rates of compensation for a specific classification due to prevailing market rates of compensation to hire new employees up to a pay level equal to fifty percent (50%) of the range between Pay*

Level II and Pay Level III of the appropriate grade with the written approval of the Chief Fiscal Officer of the State or above that level only with the approval of the Chief Fiscal Officer of the State after review by the Legislative Council for new appointments when qualified applicants cannot be obtained at Pay Level I of the assigned grade.

(ii) No special rates of compensation shall be approved under the provisions of this section unless the classification is properly reviewed and approved as a market rate classification and listed on a register of such classifications to be maintained by the Office of Personnel Management of the Division of Management Services of the Department of Finance and Administration.

(iii) The office shall file a report of all such classifications with the Legislative Council within the month following such approval.

(C)(i)(a) In all instances in which a special rate of compensation has been approved for a specific classification due to prevailing market rates of compensation or an acute shortage of qualified applicants, current employees within the state agency or institution allocated to the affected classifications of Grade 13 and below shall be adjusted to that new rate by the state agency or institution if sufficient revenues exist to do so.

(b) Current employees within the state agency or institution allocated to affected classifications of Grade 14 and above shall not be adjusted to that new rate by the state agency or institution until it has received approval to do so, when justified, by the office after seeking the review of the Legislative Council.

(ii) State agency or institution requests for special rates of compensation due to prevailing market rates or an acute shortage of qualified applicants for a specific classification may be approved up to the maximum annual rate authorized for the grade assigned to a classification.

(iii) The office shall file a report of all such classifications with the Legislative Council within the month following such approval.

* * *

(3) In all instances in which approval has been granted to a requesting state agency or institution for special rates of compensation in accordance with the provisions of this section, the Chief Fiscal Officer of the State shall report all approvals monthly to the Legislative Council[.]

A.C.A. § 21-5-214 (Supp. 2005) (emphasis added).

I am informed that such a “special rate of compensation” has been approved for certain specific classifications applicable to DHHS employees in several Northwest Arkansas counties. It is my understanding that the special rates are due to prevailing market rates or an acute shortage of qualified applicants, as contemplated by subsection 21-5-214.

I lack sufficient information to further examine these particular special rates. Please note, however, the above review and approval process. Although I am unaware of any basis for questioning the approval of the rates, you may wish to refer further questions in this regard to the Office of Personnel Management of the Division of Management Services of the Department of Finance and Administration.

Assistant Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh