



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-045

August 28, 2015

Roger A. Norman
Legislative Auditor
500 Woodlane Street, Suite 172
Little Rock, Arkansas 72201-1099

Dear Mr. Norman:

This is my opinion on your questions about the law governing state agency hiring of a constitutional officer's spouse. It will be helpful before setting out your questions regarding this law to first outline the background information you provided.

BACKGROUND

Generally, a state agency's hiring of a current constitutional officer's spouse must be approved by (1) the Governor and (2) the Joint Budget Committee or Legislative Council.¹

Approval is not required, however, if the spouse's "entry salary does not exceed the amount prescribed by Level 4 of Grade 13 of the state compensation plan found in § 21-5-209."²

The state compensation plan referred to was replaced in 2009.³ The replacement plan is codified at § 21-5-209, as was the old plan. Thus there is still a "state

¹ See Ark. Code Ann. § 21-1-402(b) (Supp. 2013).

² Ark. Code Ann. § 21-1-407 (Repl. 2004). The 1999 act adding this Code section referred to "Level 4 of Grade 13 of the state compensation plan found in § 21-5-209 *as now or hereafter amended.*" Act 34 of 1999, § 7 (emphasis added). The italicized language is not codified.

³ See Act 688 of 2009, §7, codified, as was the prior plan, at Ark. Code Ann. § 21-5-209. The current version appears in the 2013 supplement to volume 21.

compensation plan” to be found in that code section. But the plan found there now has no “Level 4” or “Grade 13.” “There is not a direct correlation of old and new grades. [For example,] Grade 17 in the current pay plan is not equal to a Grade C117 on the new pay plan.”⁴

In asking job candidates about this law and others, state agencies use a form⁵ promulgated by the Department of Finance and Administration (“DF&A”), which has rulemaking authority in this area.⁶ The form asks whether the person is a constitutional officer’s spouse and, if so, whether the “expected salary” is more than \$37,649, which is the amount that corresponded to the old pay plan’s level 4, grade 13, just before the new pay plan took effect in 2009.⁷ The form advises state-agency recruiters that executive and legislative approvals are required to hire a person who answers both questions “yes,” but not one who answers the salary question “no.”⁸

You state that a constitutional officer’s spouse accepted part-time state employment at an annual salary less than \$37,649 but at a rate of pay that would result in an annual salary of more than \$37,649 if the spouse worked full time. The approvals were not obtained.

QUESTIONS

You ask in essence what “the amount prescribed by Level 4 of Grade 13 of the state compensation plan found in § 21-5-209” and “entry salary” mean in these circumstances. Your inquiry encompasses two issues: (1) whether \$37,649 is “the amount prescribed by Level 4 of Grade 13 of the state compensation plan found in § 21-5-209,” and (2) whether the amount a person would earn annually working full time should be deemed to be his “entry salary” for purposes of the statute,

⁴ Bureau of Legislative Research Personnel Review Section, *2007-2008 Pay Plan Study* 17 (2008).

⁵ Department of Finance and Administration, *Employee Disclosure/Certification and Employment of Family Members Form*, Question 4 (2015).

⁶ See Ark. Code Ann. § 21-1-404 (Repl. 2004).

⁷ See Act 688 of 2009, §7.

⁸ As reflected in the form, employment of one who is a constitutional officer’s spouse and already a state employee is, however, subject to executive and legislative approvals in some circumstances regardless of the salary amount. See Ark. Code Ann. § 21-1-402(d)(1).

notwithstanding that his actual, part-time annual pay is less than the statutory threshold.

RESPONSE

In my opinion, \$37,649 is the appropriate amount. While I am unable to give an unequivocal answer to the question concerning part-time work, in my opinion it is more likely than not that “entry salary” refers to the amount a state employee initially earns working full time or, with respect to a part-time employee, the amount he would earn in a year were he to work full time at the rate he is paid for his part-time work. Legislative clarification is warranted on this issue.

DISCUSSION

I. “Amount prescribed by Level 4 of Grade 13”

I conclude, for the following reasons, that when Ark. Code Ann. § 21-1-407 refers to “a salary that does not exceed the amount prescribed by Level 4 of Grade 13,” the salary threshold being referred to is \$37,649.

First, courts generally defer to a statutory interpretation adopted by the regulatory agency responsible for administering and enforcing the statute,⁹ particularly where the administrative interpretation is of longstanding¹⁰ or where the statute is ambiguous.¹¹ In such a case, the administrative interpretation will not be disregarded unless it is clearly wrong.¹² Here, DF&A’s interpretation – as evidenced by the form – has been consistent since the old pay plan was replaced in 2009. While the statute may or may not be formally ambiguous in the legal sense, it unquestionably does not provide an express answer on its face. Accordingly, I believe a court would defer to DF&A’s interpretation—namely, that \$37,649 is the salary threshold above which the approval outlined above is required.

⁹ See, e.g., *Matter of Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1991); *Arkansas Dept. of Human Services v. Greene Acres Nursing Homes, Inc.*, 296 Ark. 475, 757 S.W.2d 563 (1988).

¹⁰ See, e.g., *Pledger v. Boyd*, 304 Ark. 91, 799 S.W.2d 807 (1990).

¹¹ See, e.g., *Leathers v. W.S. Compton Co., Inc.*, 316 Ark. 10, 870 S.W.2d 710 (1994).

¹² See, e.g., *id.*; *Pledger*, *supra* note 10.

Second, there really is no plausible alternative interpretation available. The only possibilities, in my view, are that the language means: (1) \$37,649; (2) \$37,649 as adjusted for inflation or in some other manner; or (3) nothing at all (due to the pay plan's replacement and the absence of any "Level 4 of Grade 13" in current law). Possibilities (2) and (3) are, in my estimation, quite unlikely. Only by speculation could one read an inflation or similar adjustment into the law. The pay plan's details are not relevant to the law at issue except regarding the exception to the approval requirement. So there is no reason to think the General Assembly meant to abolish the approval requirement – or perhaps make it universal – by the exceptionally indirect method of changing the pay plan. Because the other two possibilities are so unlikely, the first must be correct.

II. The Meaning of the Term "Entry Salary"

Approval is only required if the "entry salary" is more than \$37,649. But the term "entry salary" is not defined, whether by the law governing state employment generally, nor by the laws establishing the approval requirements. The term only appears in one other code section, where it refers to pay levels specified in the compensation plan.¹³

Pay levels in the compensation plan are clearly annual salary amounts for full-time work.¹⁴ Yet state law contemplates that some state employees will be part-time state and that they may be paid a percentage of a compensation-plan amount equal to the percentage of full time they work.¹⁵

A person's salary can be thought of annually or hourly. The foregoing section of this opinion makes it clear that, *annually*, the salary threshold for seeking approval is \$37,649. A full-time employee who is paid \$37,649 *annually* is being paid half as much—on an hourly basis—as a half-time employee who is paid \$37,649 annually. So if the full-time employee must seek approval, then the part-time employee must also seek approval if his actual *hourly* rate-of-pay, when multiplied

¹³ Ark. Code Ann. § 21-5-212(a) (Supp. 2013).

¹⁴ See, e.g., Ark. Code Ann. §§ 21-5-101(b)(1)(C) (Supp. 2013) (referring to "maximum *annual* salary that may be paid for the grade" appearing in the pay plan) (emphasis added); 21-5-208(a)(2) (Supp. 2013) (referring to the pay plan as providing "maximum *annual* salary rates") (emphasis added); 21-5-101(b)(2) ("maximum annual salary authorized is for *full-time* employment") (emphasis added).

¹⁵ See, e.g., Ark. Code Ann. §§ 21-5-106(a)(1)(C) (Supp. 2013) and 21-5-1101(b)(2) (Supp. 2013) (part-time state employees may receive recognition payments and merit pay increases "on a pro rata basis").

by 2,080 (i.e. the total number of work hours in a full-time employee's year) exceeds \$37,649.

Therefore, approval must be obtained under two scenarios: (1) the employee's *annual* pay exceeds \$37,649; or (2) the employee's *hourly* pay exceeds \$18.10 ($\$37,649/2080 = \18.10).

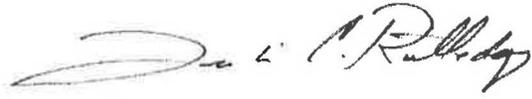
My conclusion is consistent with the purpose apparently underlying the approval requirement and the exception. The approval requirement likely was enacted to require executive and legislative review and approval of hirings that might appear to be based on factors other than the spouse's job qualifications. The exception acknowledges the fact that hirings at relatively low rates of pay are not likely to give a significant appearance of impropriety, and therefore need not be subject to oversight at the highest levels. But it is easy enough to imagine an egregious "low-salary" case – one where the spouse's annual pay is just less than \$37,649, and his duty hours are just greater than zero – that clearly calls for oversight. The fact that a person works part time is not relevant, in my view, to whether his hiring may give an appearance of impropriety, particularly when the person's pay per unit of time worked is relatively high.

In my opinion, then, the exception to the approval requirement is not available to a person who is to be paid for part-time work an annual amount greater than the amount a level 4, grade 13, state employee would be paid pro rata for working the same percentage full time.

I recognize that the statute does not expressly address part-time work or pay and that my conclusion is not the only one that could reasonably be reached. The form discussed above does not ask whether the work is to be full- or part-time, and that omission is some evidence that DF&A has not to date affirmatively adopted the interpretation I suggest here. This opinion should not be read to suggest that DF&A should have done so or, until now, has had any occasion to do so. Neither should this opinion be read to suggest any wrongdoing on the part of the constitutional-officer spouse you describe or the hiring agency. To the contrary, the facts you provide indicate that the agency used the appropriate form and the person hired answered the form's questions truthfully. Because the law's meaning is not necessarily apparent on its face and because compliance with the law is a matter of great public interest, legislative clarification of this issue would be beneficial.

Roger A. Norman
Legislative Auditor
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Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge". The signature is written in a cursive style with a large initial "L" and "R".

LESLIE RUTLEDGE
Attorney General

LR/JMB:cyh