

## ANNEXE 3

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# A FIRE AND RESCUE AUTHORITY'S DISCRETIONARY POWERS AND DECISIONS

A fire and rescue authority, as managers of the Firefighters' Pension Scheme and the New Firefighters' Pension Scheme, are required to make certain decisions in respect of the pension rights of their firefighters and firefighters' dependants. There are also a number of discretionary powers set out in the FPS, NFPS and Compensation Scheme Rules which the fire and rescue authority may wish to exercise having regard to the circumstances of any individual case.

The first part of this Annexe lists the Rules of the FPS which require a decision to be made, or a discretionary power to be exercised. A fire and rescue authority may find the list helpful when considering whether certain powers should be delegated to officers in the interests of the efficient administration of the Schemes.

The second part of the Annexe gives a similar list in respect of the NFPS.

The third part of the Annexe gives a similar list in respect of the Firefighters' Compensation Scheme ("FCS").

The fourth part of the Annexe sets out some points which a fire and rescue authority should consider when exercising a discretion.

From time to time some of the discretions and decisions listed in this Annexe are removed, added to, or amended by Amendment Orders. The changes are indicated.

## A fire and rescue authority's discretionary powers and decisions

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### PART ONE: FIREFIGHTERS' PENSION SCHEME 1992

- Determination of eligibility for membership of the FPS. [Rule A3].
- ~~Termination of appointment at compulsory retirement age. [Rule A13]. Deleted 21.11.2005 by SI 2005/2980.~~
- ~~Extension of service beyond normal retirement age. [Rule A13(3)]. Deleted 21.11.2005 by SI 2005/2980.~~
- Compulsory retirement on grounds of efficiency. [Rule A14].
- Compulsory retirement on grounds of disablement. [Rule A15].
- Permission for Chief Fire Officer (Firemaster) to retire before attaining age 55. [Rule B1(2)(b)].
- ~~Consent for one quarter pension to be commuted in the case of a firefighter above the rank of Station Officer, retiring with an ordinary pension at age 55 or over but with less than 30 years' service. [Rule B7(5)]. Deleted 1.10.2004 by SI 2005/2980.~~
- Commutation of trivial pension. [Rule B8].
- Acceptance of condition of ~~good health~~ normal life expectancy for allocation purposes. [Rule B9(6)]. *Amendment made by SI 2004/1912 to have effect from 13.9.2004.*
- ~~Decision to deduct tax from any payment chargeable to tax under s598 of the Income and Corporation Taxes Act 1988 (repayment of contributions). [Rule B11]. Deleted 6.4.2006 by SI 2006/1810.~~
- ~~Extension of 3 month time limit for spouse to choose lump sum as part of spouse's ordinary award package. [Rule C1(6)]. Deleted 1.4.2006 by SI 1006/1810.~~
- ~~Decision to pay augmented award to spouse where specific conditions of eligibility are not met. [Rule C3(2)]. Deleted 1.4.2006 by SI 2006/1810.~~
- Discretion to increase level of spouse's or civil partner's award for such period as the fire and rescue authority think fit where firefighter and spouse or civil partner were living separately at the date of death and where normal level of benefit is reduced accordingly under FPS rules. [Rule C8(6)]. *Inclusion of reference to civil partners by SI 2005/3228 to have effect from 5.12.2005.*
- Discretion to reinstate all or part of a spouse's or civil partner's pension or gratuity for such period as the fire and rescue authority think fit following termination on marriage, remarriage, formation of a civil partnership or subsequent civil partnership. [Rule C9]. *Reference to civil partner and civil partnership added by SI 2005/3228 to have effect from 5.12.2005.*
- Award of benefit to a child aged 17 or over who has had an interruption in whole-time education or vocational training. [Rule D5(5) and (3)(b)].
- Award of benefit to a child aged 17 or over who is permanently disabled and who would not otherwise qualify for an award. [Rule D5(4)(c) and (3)(a)].

## A fire and rescue authority's discretionary powers and decisions

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### PART ONE (CONTINUED): FIREFIGHTERS' PENSION SCHEME 1992

- ~~Award of special pension to an adult dependent relative. [Rule E2(3)]. Deleted 1.4.2006 by SI 2006/1810.~~
- Award of dependent relative's gratuity to a dependent relative. [Rule E3].
- Decision to commute for a lump sum gratuity, part or all of a spouse's or civil partner's pension which is of limited amount. [Rule E5 subject to limitations in Rule E7]. *Addition of reference to civil partner added by SI 2005/3228 to have effect from 5.12.2005. Deletion of reference to gratuity with effect from 1.4.2006 by SI 2006/1810.*
- Decision to commute for a lump sum gratuity, part or all of a child's pension. [Rule E6 subject to limitations in Rule E7]. *Deletion of reference to gratuity with effect from 6.4.2006 by SI 2006/3433.*
- Decision to substitute a higher amount of child's flat rate award where neither of the child's parents is alive. [Rule E9(6)].
- Decision as to amount of pensionable service (to be set out in Certificate of Pensionable Service with notice of right of appeal). [Rule F1].
- ~~Resolution that a person is entitled to reckon as pensionable service, all or part of any period of absence from duty without pay. [Rule F2(3)]. Deleted 1.4.2006 by SI 2006/1810.~~
- Discretion that the fire and rescue authority should pay the employer's pension contributions (otherwise payable by the firefighter) due for a firefighters' period of absence without pay where the firefighter gives notice that he/she wishes to pay contributions in order that the period may count as pensionable service. [Rule F2(5)]. *Added with effect from 1.4.2006 by SI 2006/1810.*
- Extension of 6-month time limit for election to pay certain sums in order that earlier pensionable service may count on rejoining the fire and rescue service. [Rule F4(1)(c), (3)(c), 4(e) 4(d) and Rule F5(1)(c)]. *Amendment reflects changes made to Rule F4 with effect from 1.10.2004 by SI 2005/2980.*
- Extension of 12 month time limit for acceptance of "mis-selling" transfer value payment. [Rule F6A(3)(b)].
- Discretion to adjust "mis-selling" transfer value to take account of any earlier service credit. [Rule F6A(6)].
- Discretion to accept a transfer value. [Rule F7(1) subject to Rule F7(2) and (3)].
- ~~Discretion to pay a transfer value to an unapproved scheme. [Rule F9(1)]. Ceases to be an option with effect from 6.4.2006 in line with the requirements of HM Revenue and Customs tax rules for pension schemes.~~
- Extension of 6 month time limit for a former firefighter to request payment of a transfer value to another pension scheme. [Rule F9(2)].

## A fire and rescue authority's discretionary powers and decisions

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### PART ONE (CONTINUED): FIREFIGHTERS' PENSION SCHEME 1992

- Extension of 12 month time limit after leaving in which a former firefighter must be subject to a new scheme and may request a transfer value after having previously received a gratuity or repayment of pension contributions. [Rule F9(5)].
- Determination of pensionable pay. [Rule G1(1)].
- Discretion to deduct pension contributions from instalments of pay. [Rule G2(2)].
- Discretion to extend 30-day time limit in which an election to pay contributions in respect of unpaid additional maternity or adoption leave must be made. [Rule G2A(3)].
- Discretion to resolve that a firefighter's election to opt out of the FPS may not be cancelled unless the firefighter has undergone a medical examination at his/her own expense, and satisfied the fire and rescue authority as to his/her good health. [Rule G3(6) except in case of Rule F6A].
- Discretion not to accept a firefighter's election to purchase increased benefits through the payment of additional contributions unless the firefighter has undergone a medical examination at own expense and satisfied the fire and rescue authority as to his/her good health. [Rule G6(4)(b)].
- Discretion of fire and rescue authority to agree to discontinuance of payment of periodical contributions for increased benefits where satisfied that payment is causing, or likely to cause, financial hardship. [Rule ~~G7(4)~~ G7(3)]. *Amendment reflects changes made to Rule G7 with effect from 6.4.2006 by SI 2006/1810.*
- Determination, in the first instance, of entitlement to, and type of award under FPS. [Rule H1(1)].
- Requirement to use, but right to select, independent qualified medical practitioner for providing a medical opinion. [Rule H1(2)].
- Discretion to determine award without an independent medical practitioner's opinion if firefighter wilfully or negligently refuses to submit to medical examination. [Rule H1(3)].
- Requirement to reconsider, at person's request, his/her claim to an award where the fire and rescue authority do not admit the claim at all, or to its full extent. [Rule H3(1)]. *Included here because of possible link with fire and rescue authority's arrangements for Internal Dispute Resolution Procedures.*
- Discretion to pay a pension in lieu of gratuity, or increase an ill-health pension, for an injured former a serviceman injured during his forces period. [Rule I2(3), and I3(3) and I4]. *Amendment made by SI 2006/1810 with effect from 1.4.2006 when main injury provisions were moved to the separate Firefighters' Compensation Scheme.*
- ~~Discretion to pay an injury award to a whole time member of a brigade who is not a regular firefighter. [Rule J3]. Deleted by SI 2006/1810 with effect from 1.4.2006 when main injury provisions were moved to the separate Firefighters' Compensation Scheme.~~

## A fire and rescue authority's discretionary powers and decisions

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### PART ONE (CONTINUED): FIREFIGHTERS' PENSION SCHEME 1992

- ~~Discretion to review whether ill-health pensioner capable of returning to duty and discretion to terminate payments if so found. [Rule K1]. Deleted with effect from 1.4.2006 by SI 2006/1810 to reflect changes to ill-health procedures –see replacement below.~~
- Requirement to decide, at such intervals as the fire and rescue authority think proper, whether a person under age 60 and in receipt of an ill-health pension for less than 10 years has become capable of carrying out any duty appropriate to the role from which he/she retired on health grounds and, in the case of a higher tier ill-health pension, whether that person has become capable of carrying out any regular employment. [Rule K1(1) and (2)]. *Added with effect from 1.4.2006 by SI 2006/1810 to reflect changes to ill-health procedures.*
- Requirement to decide, at such intervals as the fire and rescue authority think proper, whether a person under age 60 and in receipt of a deferred pension has become capable of firefighting and performing any other duties appropriate to his former role as a firefighter. [Rule K1(3)]. *Added with effect from 1.4.2006 by SI 2006/1810 to reflect changes to ill-health procedures.*
- Requirement to decide whether to offer a person, whose ill-health pension has been reviewed under Rule K1 and who is found to be capable of performing duties appropriate to his/her former role, an offer of employment in that role. [Rule K1A(2)]. *Added with effect from 1.4.2006 by SI 2006/1810 to reflect changes to ill-health procedures.*
- ~~Discretion, 5 years after an injury award first becomes payable, to resolve that no further review of the award will take place. [Rule K2(3)]. Deleted by SI 2006/1810 with effect from 1.4.2006 when main injury provisions were moved to the separate Firefighters' Compensation Scheme.~~
- Discretion to reduce the level of an ill-health or injury pension to not less than half of the full amount where firefighter contributed to infirmity by own default. [Rule K3(1)]. *Amendment made by SI 2006/1810 with effect from 1.4.2006 when main injury provisions were moved to the separate Firefighters' Compensation Scheme.*
- Discretion to withdraw whole or part of a person's pension (other than a widow(er)'s spouse's or civil partner's award under FPS) during any period of his/her re-employment as a regular firefighter with a fire and rescue authority. [Rule K4]. *Addition of reference to civil partner to have effect from 5.12.2005.*
- Discretion to withdraw a pension in whole or in part, permanently or temporarily, on a person's conviction of certain offences. [Rule K5(1)].
- Discretion to restore, at any time and to such extent as the fire and rescue authority think fit, a pension withdrawn under Rule K5(1) to the pensioner or to apply it for the benefit of any dependant of the pensioner. [Rule K5(5)].
- Determination of intervals at which instalments of pension shall be paid. [Rule L3(1)].
- Discretion to delay payment of an award to the extent necessary for determining any question as to the fire and rescue authority's liability. [Rule L3(1)].

## A fire and rescue authority's discretionary powers and decisions

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### PART ONE (CONTINUED): FIREFIGHTERS' PENSION SCHEME 1992

- Discretion to decide an earlier payment date for survivors' benefits (~~other than an injury gratuity~~) than the date prescribed where the deceased received a gratuity, and an option to pay a gratuity in instalments rather than as a single lump sum. [Rule L3(7) and (8)].  
*Amendment made by SI 2006/1810 with effect from 1.4.2006 when main injury provisions were moved to the separate Firefighters' Compensation Scheme.*
- Discretion as to the recipient of any sum payable to a minor. [Rule L5(1)].
- Discretion as to recipient, or application, of payments due to a person incapable of managing his/her own affairs. [Rule L5(2)].
- Discretion, following death of a person, as to recipient(s) of sums less than amount specified in the Administration of Estates (Small Payments) Act 1965. [Rule L5(3)].
- Discretion to withhold sums due in respect of an award to a firefighter where there has been a loss to the funds of the fire and rescue authority as a result of fraud, theft or negligence on the part of that person in connection with his/her employment. [Rule L5(6)].
- Requirement to estimate amounts payable to, and out of, the Firefighters' Pension Fund for each financial year and discretion to submit revised information to Secretary of State. [Rule LA4]. *Added, with effect from 1.4.2006, by SI 2006/1810 on the introduction of the requirement for fire and rescue authorities to establish Firefighters' Pension Funds.*
- Discretion to deduct from an award any outstanding balance of payments in respect of previous service. [Schedule 6, Part 1, paragraph 1(4)].
- Discretions in respect of elections to count War Service. [Schedule 7]. *No new cases are likely.*
- Discretion to extend 14-day time limit in which a person must lodge a medical appeal, to a period not exceeding 6 months from the date of issue of the medical opinion to that person, provided the fire and rescue authority are of the opinion that the person's failure to lodge the appeal within 14 days was not due to his/her own default. [Schedule 9, Part I, paragraph 1(2)].
- Discretion to decide the fire and rescue authority's representation at Medical Appeal Board interview. [Schedule 9, Part 1, paragraph 4(5)].
- Discretion to decide whether or not to submit written evidence or a written statement to a Medical Appeal Board. [Schedule 9, Part 1, paragraph 5].
- Discretion, where Medical Appeal Board decide that a person's appeal was "frivolous, vexatious or manifestly ill-founded" to require the appellant to pay to the fire and rescue authority such sum as the authority think fit, not exceeding the fees and allowances of the specialist member of the Board. [Schedule 9, Part I, paragraph 8(2)].
- Discretion, where appellant withdraws appeal within ~~40~~ 21 working days before the date appointed for interview or medical examination, to require the appellant to pay to the fire and rescue authority such sum as the authority think fit not exceeding the Medical Appeal Board's total fees and allowances payable to the Board by the authority. [Schedule 9, Part I, paragraph 8(2A)]. *Amendment made by SI 2006/1810 with effect from 1.4.2006.*

**A fire and rescue authority's discretionary powers and decisions**

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**PART TWO: NEW FIREFIGHTERS' PENSION SCHEME 2006**

- Determination of eligibility for membership of NFPS. [Part 2, Rule 1].
- Decision, by agreement with firefighter, as to last day of membership where firefighter on unpaid leave or absent without permission on the day on which he/she leaves the Scheme. [Part 2, Rule 4].
- Resolution that an optant-out may not rejoin the Scheme unless he/she has undergone a medical examination at his/her own expense and satisfied the fire and rescue authority as to his/her good health. [Part 2, Rule 6].
- Discretion to refuse a firefighter's request for early payment of a deferred pension ("member-initiated early retirement") where this is likely to be less than the GMP at State pensionable age. [Part 3, Rule 5].
- Discretion to retire a firefighter aged 55 or over on grounds of economical, effective and efficient management of their functions ("authority-initiated early retirement"). [Part 3, Rule 6].
- Discretion to commute a small pension payable to firefighter. [Part 3, Rule 10].
- Discretion to permit a firefighter to allocate a portion of pension for a dependant other than a spouse, civil partner, or nominated partner. [Part 3, Rule 11, paragraphs 2(b) and 3].
- Acceptance of good health and normal life expectancy for allocation purposes. [Part 3, Rule 11, paragraph 6(a)].
- Discretion to withhold all or part of a survivor's pension, permanently or temporarily, where the deceased's spouse, civil partner, or nominated partner is convicted of manslaughter of the deceased. [Part 4, Rule 1, paragraph 3].
- Discretion to withhold all or part of a child's pension, permanently or temporarily, where the child is convicted of manslaughter of the deceased. [Part 4, Rule 7, paragraph 5].
- Decision to cease payment of a child's pension where the fire and rescue authority are satisfied that the child is no longer permanently disabled or the child's pension should not have been awarded. [Part 4, Rule 7, paragraph 9].
- Discretion as to recipient of death grant. [Part 5, Rule 1, paragraph 10].
- Discretion to pay part of any death grant not paid in full, to a person whose conviction for murder or manslaughter of the deceased has been quashed. [Part 5, Rule 1, paragraph 12].
- Discretion, with the agreement of the pension credit member, to commute whole of pension credit pension. [Part 6, Rule 2].
- Discretion to pay a post-retirement death grant in respect of a pension credit member to such person or persons as the fire and rescue authority think fit. [Part 6, Rule 5, paragraph 2].
- Determination, in the first instance, of entitlement to and type of award due under the NFPS. [Part 8, Rule 2, paragraph 1].

**A fire and rescue authority's discretionary powers and decisions**

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**PART TWO (CONTINUED): NEW FIREFIGHTERS' PENSION SCHEME 2006**

- Requirement to use, but right to select independent qualified medical practitioner for providing a medical opinion. [Part 8, Rule 2, paragraph 2].
- Discretion to determine award without an independent qualified medical practitioner's opinion if the firefighter wilfully or negligently fails to submit him or herself to medical examination and the medical practitioner is unable to give an opinion on the basis of medical evidence available to him/her. [Part 8, Rule 2, paragraph 6].
- Discretion to agree with person concerned that the independent qualified medical practitioner should be given the opportunity to review his/her medical opinion if new evidence is presented within appropriate time-scales. [Part 8, Rule 3, paragraph 1].
- Confirmation or revision of decision following an independent qualified medical practitioner's reconsideration of opinion. [Part 8, Rule 3, paragraphs 4 and 5].
- Discretion to extend time limit for an appeal against the authority's decision based on medical advice. [Part 8, Rule 4, paragraph 4].
- Requirement to deal with appeals under Internal Dispute Resolution Procedures. [Part 8, Rule 5]. *Mentioned here because a fire and rescue authority has certain discretions regarding those procedures but should have regard to the recommendations of the CFBAC JPC Working Party – see Annexe 12 of the Commentary.*
- Requirement to decide, at such intervals as the fire and rescue authority think proper, whether a person under State pensionable age and in receipt of an ill-health pension for less than 10 years has become capable of carrying out any duty appropriate to the role from which he/she retired on health grounds and, in the case of a higher tier ill-health pension, whether that person has become capable of carrying out any regular employment. [Part 9, Rule 1, paragraph 1].
- Requirement to decide, at such intervals as the fire and rescue authority think proper, whether a person under State pensionable who for less than 10 years has been in receipt of a deferred pension paid early on permanent disablement, has become capable of undertaking any regular employment. [Part 9, Rule 1, paragraph 2].
- Requirement to decide whether to make to a person whose ill-health pension has been reviewed under Part 9 Rule 1 and who is found to be capable of performing duties appropriate to his/her former role, an offer of employment in that role. [Part 9, Rule 3, paragraph 3(b)].
- Discretion to withdraw the whole or part of a Part 3 (personal award) pension paid to a former regular firefighter during any period of re-employment as a regular firefighter, or to a retained or volunteer firefighter during any period of re-employment as a retained or volunteer firefighter. [Part 9, Rule 3, paragraphs 1 and 2].
- Discretion to abate a pension under Part 3 (personal award) for so long as the recipient is employed in any capacity by any fire and rescue authority. [Part 9, Rule 3, paragraph 3].

**A fire and rescue authority's discretionary powers and decisions**

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**PART TWO (CONTINUED): NEW FIREFIGHTERS' PENSION SCHEME 2006**

- Discretion to disallow early payment of a deferred pension under Part 3, Rule 3, paragraph 4 because of firefighter's dismissal from the fire and rescue authority's employment. [Part 9, Rule 4].
- Discretion to withdraw pension in whole or in part, permanently or temporarily, on a person's conviction of certain offences. [Part 9, Rule 5].
- Discretion, at any time and to such extent as the fire and rescue authority think fit, to restore a pension withdrawn under Part 9, Rule 5, or to apply it for the benefit of any dependant of the pensioner. [Part 9, Rule 5, paragraph 4].
- Discretion to decide to what extent an award should be forfeited by a person who has been convicted of an offence under section 34(6) of the Fire and Rescue Services Act 2004 (acts or omissions for purposes of obtaining awards or other sums). [Part 9, Rule 6].
- Decision as to the amount of qualifying service which a firefighter may reckon. [Part 10, Rule 1]
- Decision as to the amount of pensionable service a firefighter may reckon. [Part 10, Rules 2 and 3].
- Discretion that the fire and rescue authority should pay the employer's pension contributions (otherwise payable by the firefighter) due for a firefighter's unpaid period of absence where the firefighter gives notice that he/she wishes to pay contributions in order that the period may count as pensionable service. [Part 10, Rule 4, paragraph 3].
- Determination of pensionable pay. [Part 11, Rule 1]
- Discretion to deduct pension contributions from each instalment of pensionable pay as it becomes due (or by any other method of payment that may be agreed between the fire and rescue authority and the member). [Part 11, Rule 3, paragraph 2].
- Discretion to extend the time limit in which an election to pay pension contributions in respect of unpaid additional maternity or adoption leave must be made. [Part 11, Rule 4, paragraph 3].
- Discretion to deduct contributions in respect of unpaid additional maternity or adoption leave from the death grant payable under Part 5 if the member dies without giving notice within the election time limit that he/she wishes to pay such contributions. [Part 11, Rule 4, paragraph 6].
- Discretion to allow a part-time regular firefighter to purchase pro rated additional service. [Part 11, Rule 5, paragraph 5].
- Discretion to allow a retained or volunteer firefighter to purchase additional service. [Part 11, Rule 5, paragraph 6].
- Discretion to agree to a firefighter member's request to discontinue payment of additional contributions to purchase service provide this is solely on the grounds of the member's financial circumstances. [Part 11, Rule 8, paragraph 1].

**A fire and rescue authority's discretionary powers and decisions**

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**PART TWO (CONTINUED): NEW FIREFIGHTERS' PENSION SCHEME 2006**

- Decision as regards timing of recommencement of payment of additional contributions to purchase service where agreed with member that discontinuance should be no greater than 6 months. [Part 11, Rule 8, paragraph 2].
- Discretion to extend time limit for the payment of contributions in respect of periods of unpaid service or absence. [Part 11, Rule 9, paragraph 4(c)].
- Selection of "the guarantee date" for statement of cash equivalent transfer value entitlement. [Part 12, Rule 3, paragraphs 1 and 2].
- Discretion to charge member for third or subsequent statement of cash equivalent transfer value entitlement requested within any 12 month period. [Part 12, Rule 3, paragraph 6].
- Discretion to extend the one-year time limit for an application for a transfer payment into the NFPS from another pension arrangement. [Part 12, Rule 9, paragraph 2].
- Discretion to accept a transfer value. [Part 12, Rule 10, paragraph 1, subject to paragraph 3].
- Determination, if so required by the firefighter, of accuracy of information contained in certificate of pensionable service to be supplied on firefighter's transfer to another English fire and rescue authority – the determination to be decided via Internal Dispute Resolution Procedures set up by authority. [Part 12, Rule 12, paragraphs 3 to 5].
- Discretion to extend 12-month time limit for acceptance of "mis-selling" transfer value payment. [Part 12, Rule 14, paragraph 3].
- Discretion to adjust "mis-selling" transfer value to take account of any earlier service credit. [Part 12, Rule 14, paragraph 6].
- Requirement to estimate amounts payable to, and out of, the Firefighters' Pension Fund for each financial year and discretion to submit revised information to Secretary of State. [Part 13, Rule 4, paragraphs 3 and 4].
- Discretion to delay payment of an award to the extent necessary for determining any question as to the fire and rescue authority's liability. [Part 14, Rule 3, paragraph 2(a)].
- Discretion to pay an award at other reasonable intervals if impracticable to pay at the standard monthly periods. [Part 14, Rule 3, paragraph 2(b)].
- Discretion to recover all or part of an overpayment following a pensioner's death of which the fire and rescue authority were not informed (possibly by making an off-set against any other awards payable under the NFPS in respect of the deceased). [Part 14, Rule 3, paragraph 5].
- Discretion as to recipient of any sum payable to a minor. [Part 14, Rule 5, paragraph 1].
- Discretion as to recipient, or application, of payments due to a person incapable of managing his/her own affairs. [Part 14, Rule 5, paragraph 2].

**A fire and rescue authority's discretionary powers and decisions**

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**PART TWO (CONTINUED): NEW FIREFIGHTERS' PENSION SCHEME 2006**

- Discretion, following the death of a person, as to recipient(s) of sums less than the amount specified in the Administration of Estates (Small Payments) Act 1965. [Part 14, Rule 6, paragraph 1].
- Discretion to withhold sums due in respect of an award to a firefighter where there has been a loss to the funds of the fire and rescue authority as a result of fraud, theft or negligence on the part of that person in connection with his/her employment. [Part 14, Rule 6, paragraphs 4 to 6].
- Discretion to require a person who is or may be entitled to a pension or a lump sum under the NFPS to provide the fire and rescue authority with supporting evidence as to identity and to continuing entitlement to any payment under the Scheme, and discretion to withhold the whole or part of any amount due where a person fails to comply with this requirement. [Part 15, Rule 3].
- Decision as to date of issue of annual benefit statements and relevant date for the pension illustration. [Part 15, Rule 4].
- Discretion to extend 28 day time limit in which a person must lodge a medical appeal to a period not exceeding 6 months from the date of issue of the documents under Part 8, Rule 4, paragraph 4, provided the authority are of the opinion that the person's failure to lodge the appeal within the 28 days was not due to his/her own default. [Annex 2, paragraph 1(2)].
- Discretion to decide fire and rescue authority's representative at Medical Appeal Board interview. [Annex 2, paragraph 6(5)].
- Discretion to decide whether or not to submit written evidence or a written statement to Medical Appeal Board. [Annex 2, paragraph 7(1)].
- Discretion, where Medical Appeal Board decide that a person's appeal was "frivolous, vexatious or manifestly ill-founded", to require the appellant to pay to the fire and rescue authority such sum as the authority think fit, not exceeding the total amount of fees and allowances payable by the authority to the Board under Annex 2, paragraph 9(1). [Annex 2 paragraph 10(2)].
- Discretion, where appellant withdraws appeal less than 22 working days before the date appointed for interview or medical examination, to require the appellant to pay to the fire and rescue authority such sum as they think fit, not exceeding the Medical Appeal Board's total amount of fees and allowances payable to the Board by the authority under Annex 2, paragraph 9(1). [Annex 2, paragraph 10(3)]

**A fire and rescue authority's discretionary powers and decisions**

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**PART THREE: FIREFIGHTERS' COMPENSATION SCHEME 2006**

- Discretion to reduce compensation for death or permanent incapacity while on duty if the firefighter's serious and culpable negligence or misconduct contributed in any material respect to the circumstances in which the injury was sustained; the reduction may be of such amount as the fire and rescue authority consider appropriate. [Part 2, Rule 3, paragraph 6].
- Discretion to commute small compensatory pension for a lump sum. [Part 2, Rule 4].
- Discretion to pay augmented award to spouse or civil partner where specific conditions of eligibility are not met. [Part 3, Rule 2, paragraph 2 (b) and (c)].
- Discretion to increase, for such period as the fire and authority think fit, the level of spouse's or civil partner's special or augmented award where firefighter and spouse or civil partner were living apart at the date of death and the normal level of benefit is reduced under FCS rules. [Part 3, Rule 4, paragraphs 6 and 7]. *This does not apply to members of the NFPS 2006, nor to firefighters appointed on or after 6.4.2006 who have opted out of the NFPS – because the "living apart" limitation would not apply.*
- Discretion to reinstate all or part of a spouse's or civil partner's special or augmented award for such period as the authority think fit following the termination of award on marriage, remarriage, formation of a civil partnership or subsequent civil partnership. [Part 3, Rule 5, paragraphs 1 and 2]. *This does not apply to members of the NFPS 2006, nor to firefighters appointed on or after 6.4.2006 who have opted out of the NFPS – because the post-retirement marriage/civil partnership limitation would not apply.*
- Decision to cease payment of a child's pension where the fire and rescue authority are satisfied that the child is no longer permanently disabled or the child's pension should not have been awarded. [Part 4, Rule 3, paragraph 5(c)].
- Discretion to award an adult dependent relative's special pension for such period(s) as the fire and rescue authority may determine. [Part 5, Rule 1].
- Discretion to award a dependent relative's gratuity. [Part 5, Rule 2, paragraph 3].
- Discretion, with the consent of the person entitled to the award, to commute for a lump sum a small pension awarded to a surviving spouse or civil partner. [Part 5, Rule 3].
- Discretion, with the consent of the child, surviving parent or guardian, to commute for a lump sum a small pension awarded to a child. [Part 5, Rule 4].
- Determination, in the first instance, of entitlement to, and type of, award under FCS. [Part 6, Rule 1].
- Requirement to use, but right to select independent qualified medical practitioner for providing a medical opinion. [Part 6, Rule 1]
- Discretion to decide award without an independent qualified medical practitioner's opinion if a person wilfully or negligently refuses to submit to medical examination. [Part 6, Rule 1].

**A fire and rescue authority's discretionary powers and decisions**

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**PART THREE (CONTINUED): FIREFIGHTERS' COMPENSATION SCHEME 2006**

- Requirement to reconsider, at person's request, his/her claim to an award where the fire and rescue authority do not admit the claim at all, or to its full extent. [Part 6, Rule 3]. *Included here because of possible link with fire and rescue authority's arrangements for Internal Dispute Resolution Procedures; the fire and rescue authority has certain discretions regarding those procedures but should have regard to the recommendations of the CFBAC JPC Working Party – see Annexe 12 of the Commentary.*
- Discretion to increase an award for a serviceman who, at the end of his/her forces period, is permanently disabled by a qualifying injury or injury Received during his/her forces period. [Part 7, Rule 2]. *This applies in respect of those covered by the FPS 1992.*
- Discretion to increase dependants' benefits under the FPS 1992 to the level of a flat-rate award if a serviceman dies from the effects of an injury received during his/her forces period or a qualifying injury. [Part 7, Rule 3]. *This applies in respect of those covered by the FPS 1992.*
- Discretion to increase an award to a reservist who is permanently disabled as a result of an injury received during his/her forces period or a qualifying injury. [Part 7A, Rule 2]. *This applies in respect of those covered by the NFPS 2006.*
- Discretion to increase dependants' benefits if a reservist dies from the effects of an injury received during his/her forces period or a qualifying injury. [Part 7A, Rule 3]. *This applies in respect of those covered by the NFPS 2006.*
- Discretion to pay an injury award to or in respect of an employee of a fire and rescue authority who is not a firefighter but who has to retire, or dies, as a result of an injury received without his/her own default while in attendance at a fire in the execution of duties as an employee of the authority. [Part 8, Rule 1].
- Discretion to decide intervals at which a person's degree of disablement should be reviewed. [Part 9, Rule 1, paragraph 1].
- Discretion, 5 years after an injury pension first becomes payable, to resolve that no further review of degree of disablement should take place. [Part 9, Rule 1 paragraph 3].
- Discretion to reduce the level of an injury award to not less than half of the full amount where a person contributed to the infirmity by his/her own default. [Part 9, Rule 2]
- Discretion to withdraw the whole or part of a person's pension (other than a spouse's or civil partner's award) during any period of re-employment as a firefighter with a fire and rescue authority. [Part 9, Rule 3]
- Discretion to withdraw a pension in whole or in part, permanently or temporarily, on a person's conviction of certain offences. [Part 9, Rule 4, paragraphs 1 to 3].
- Discretion to restore at any time and to such extent as the fire and rescue authority think fit, a pension withdrawn under Part 9, Rule 4, paragraphs 1 to 3, to the pensioner or to apply it for the benefit of any dependant of the pensioner. [Part 9, Rule 4, paragraph 4]

**A fire and rescue authority's discretionary powers and decisions**

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**PART THREE (CONTINUED): FIREFIGHTERS' COMPENSATION SCHEME 2006**

- Discretion to decide to what extent an award should be forfeited by a person who has been convicted of an offence under section 34(6) of the Fire and Rescue Services Act 2004 (acts or omissions for the purposes of obtaining awards or other sums). [Part 9, Rule 5]
- Decision as to responsibility for payment of awards in respect of a qualifying injury where person employed by more than one fire and rescue authority and injury relates to more than one employment. [Part 10, Rule 1 and Rule 3].
- Determination of intervals at which instalments of injury pension should be paid. [Part 10, Rule 2, paragraph 1].
- Discretion to delay payment of an award to the extent necessary for determining any questions of the fire and rescue authority's liability. [Part 10, Rule 2, paragraph 1].
- Discretion to pay a gratuity in instalments, rather than as a lump sum, of such reasonable amounts and over such reasonable period as the fire and rescue authority think fit. [Part 10, Rule 2, paragraph 7].
- Discretion to extend the 14-day time limit in which a person must lodge a medical appeal, to a period not exceeding 6 months from the date of issue of the medical opinion to the person, provided the fire and rescue authority are of the opinion that the person's failure to lodge the appeal within 14 days was not due to his/her own default. [Schedule 5, paragraph 1(2)]
- Discretion to decide fire and rescue authority's representation at Medical Appeal Board interview. [Schedule 5, paragraph 5(5)]
- Discretion to decide whether or not to submit written evidence or a written statement to Medical Appeal Board. [Schedule 5, paragraph 6(1)]
- Discretion, where Medical Appeal Board decide that a person's appeal was "frivolous, vexatious or manifestly ill-founded" to require the appellant to pay the fire and rescue authority such sum as the authority think fit, not exceeding the fees and allowances of the specialist member of the Board. [Schedule 5, paragraph 9].
- Discretion, where appellant withdraws appeal within 21 working days before the date appointed for interview or medical examination, to require the appellant to pay to the fire and rescue authority such sum as the authority think fit, not exceeding the Board's total fees and allowances. [Schedule 5, paragraph 9(3)].

## A fire and rescue authority's discretionary powers and decisions

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### PART FOUR: POINTS A FIRE AND RESCUE AUTHORITY SHOULD CONSIDER WHEN EXERCISING A DISCRETION

#### Avoid "fettering" of discretion

It is generally agreed that it is unlawful for an authority to fetter its discretion by agreeing or contracting to exercise a discretion in a particular way without consideration of individual circumstances or to proceed on the basis of usual practice.

A fire and rescue authority should ensure, through their legal advisers, that they are applying discretions reasonably and that discretions are not being fettered.

#### Views of Pensions Ombudsman

Although a FPS member or dependant cannot appeal to Crown Court (Sheriff Court) under Rule H3 against a decision made by a fire and rescue authority in the exercise of discretionary powers, a dispute or a complaint alleging injustice can be taken to the Pensions Ombudsman. It may also be possible to raise the issue under Internal Dispute Resolution Procedures. (See Annexe 12 for routes of appeal which lie outside the main provisions of the Firemen's Pension Scheme Order 1992.)

Fire and rescue authorities may wish to consider the following extract from the Annual Report of the Pensions Ombudsman 2000 – 2001, where the Ombudsman refers to the way in which he would approach such cases. Dr Julian Farrand, QC, who was the Ombudsman at that time, says:

"The courts have, in a number of cases (most noticeably *Edge v Pensions Ombudsman* [2000] Ch 602), considered the extent to which I may interfere with the exercise of discretion by trustees. In *Edge*, the Court of Appeal spoke of:

" . . . the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power; that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest – whether that of employers, current employees or pensioners – over others. The preference will be the result of a proper exercise of the discretionary power."

This formulation is akin to *Wednesbury* reasonableness required in the public law context when reaching a decision – and of course in many of the cases which reach me the decision maker is in fact a public body in its capacity as employer or manager of a pension scheme."

#### Wednesbury reasonableness

Dr Farrand, in the above extract, refers to "*Wednesbury* reasonableness". The expression derived from the principles in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948].

These principles are as follows.

**A fire and rescue authority's discretionary powers and decisions**

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**PART FOUR (CONTINUED): POINTS A FIRE AND RESCUE AUTHORITY SHOULD CONSIDER WHEN EXERCISING A DISCRETION**

When exercising discretions –

- (a) these powers must be exercised reasonably having regard to the fiduciary duty owed to tax payers of the borough/district/county;
- (b) these powers may not be used for an ulterior motive, for instance to use them for a purpose for which they were not intended; and
- (c) regard must be given to all the relevant factors, disregarding irrelevant factors, and the cost to tax payers must be balanced against the benefits to the employer in deciding whether to adopt these powers.

**Views of TPAS**

In their Annual report 2000/2001, TPAS – The Pensions Advisory Service – referred to Edge v. Pensions Ombudsman.

"Case law, in particular Edge v. Pensions Ombudsman, has established that decisions and discretions are unlikely to be successfully challenged if they are taken in accordance with the following principles:

- the correct questions are asked
- all relevant factors are taken into account
- the applicable rules or regulations are correctly interpreted
- the decision arrived at is not perverse, i.e. it should not be a decision that no other reasonable body of trustees could be expected to reach."