

FIREFIGHTERS' PENSION COMMITTEE

ENTITLEMENT TO ILL-HEALTH RETIREMENT

Paper submitted by CFOA

Ian Hayton (CFOA) has provided the attached paper as a basis for discussion.

DCLG

FIREFIGHTERS' PENSIONS COMMITTEE ENTITLEMENT TO AN ILL HEALTH AWARD

1 PURPOSE

1.1 The purpose of this paper is:

- (i) to facilitate discussion with members of the Firefighters' Pensions Committee on the ill-health retirement provisions in the Firefighters' Pension Scheme Order 1992 (S.I. 1992/129); and
- (ii) to seek members' views on the most appropriate way forward.

2 INTRODUCTION

2.1 The Fire Brigades Union (FBU), and other staff side representative bodies, are currently in dispute with the Department of Communities and Local Government (CLG) over the ill health pension provisions in the Firefighters' Pension Scheme Order 1992 (S.I. 1992/129), associated guidance issued by the department for Communities and Local Government (CLG), and the Guidance for Independent Qualified Medical Practitioners (IQMP). Specifically, the matter relates to CLG's interpretation of the regulations relating to the linkage between ill health pension awards to permanent disablement from engaging in firefighting and performing other duties appropriate to the role.

2.2 The staff side representative bodies have raised concerns with CLG and sought support from CFOA and individual Chief Fire Officers in relation to the ill-health retirement provisions, the application, by FRA's, of redeployment, and impact of the employment provision of dismissal due to capability.

2.3 Currently, the Pension Scheme's test in assessing the circumstances where a regular firefighter ought to retire on the grounds that he/she is permanently disabled under Rule A15 is whether he/she is permanently disabled for firefighting and for performing other duties appropriate to the role. The latest guidance, issued by CLG in 2006, identifies that "other duties" appropriate to the role encompasses all the elements of the Firefighters' role map. Firefighters who, through medical evaluation, fail to meet an ill health criterion are ineligible for an ill-health pension award. Consequently, Fire Authorities' who disregard that medical determination and exercise their discretion by authorising a pension payment may be deemed to be acting ultra vires.

The alternative to dismissal from the Service is redeployment to other duties, as appropriate to the respective role. This is, however, dependent on the availability of other suitable employment. In other words, it depends upon having a number of 'non-operational' posts and/or 'Green Book' posts available. The absence of alternative equivalent employment leaves the Fire Authority with no alternative other than to dismiss the individual on capability grounds.

The issue of pension entitlement does not arise to those individuals who do not satisfy an eligibility condition for permanent disablement and/or who have not attained the age of 50 and have not completed 25 years' pensionable service.

3 BACKGROUND

3.1 Prior to the changes contained within the Firemen's Pension Scheme (Amendment) Order 2004, a Fire and Rescue Authority (FRA) had limited discretion other than to compulsorily retire a firefighter who was permanently disabled for firefighting.

3.2 The Firemen's Pension Scheme (Amendment) Order 2004 changed the definition of firefighter allowing members who were unfit for operational firefighting duties to remain in the pension scheme if they undertake roles other than fighting fires, provided there is no break in continuity of appointment.

Consequently if a FRA are of the view that the retention of a firefighter would be of value to the service, redeployment to other duties, as appropriate to the role of a firefighter, should be considered and would be allowable under FPS rules. ***If the FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with an ill-health award.***

3.3 Against this background Fire Service Circular 30/2004, issued by the Secretary of State, maintained the requirement to engage in firefighting for admission to the FPS but, once admitted, should health problems cause a firefighter to be unfit for firefighting yet still capable of performing other duties appropriate to the role as a firefighter, he/she would not be dismissed on health grounds if the fire and rescue authority are of the view that his/her retention would be of value to the service and the authority require the firefighter to continue to perform those other duties.

- 3.4 Firefighters Pension Scheme Circular 11/2006 was issued by the Secretary of State revising the guidance given in FSC 30/2004. The latest guidance specified that the definition of "regular firefighter" included a requirement to engage in firefighting and to perform other duties as appropriate to his role as a firefighter (other than, or in addition to, engaging in firefighting). ***The test in assessing if a regular firefighter ought to retire on the grounds that he is permanently disabled under Rule A15 is whether he is permanently disabled for firefighting and for performing other duties appropriate to the role.***
- 3.5 Firefighters' Pension Scheme Circular 8/ 2007 issued guidance to Independent Qualified Medical Practitioners setting out their role and responsibilities in relation to providing an opinion on permanent disability, fitness for regular work, qualifying injury and degree of disablement.

The extract below exemplifies the current staff side concerns:

"When the IQMP finds that although the firefighter is permanently disabled for operational firefighting duties but is capable of other duties within his/her role, the FRA will need to consider redeployment. Whether or not a job is available for the member is not a matter for the pension scheme and should not be taken into account by the IQMP when reaching his opinion.

*A firefighter is permanently disabled if he/she is medically unfit to carry out **all** the duties expected of him/her as listed in the role map for his/her role (rank). Provided the member can carry out one of the duties of the role he/she cannot be permanently unfit. The decision about permanent disablement will be specific to the role of the firefighter, so it is important for the IQMP to be familiar with the different requirements of the various roles within the Fire and Rescue Service.*

4 THE WAY FORWARD

- 4.1 CFOA'S believe the position to be that:

"A regular firefighter who is permanently disabled for the performance of the firefighting element of his current duties, but who remains fit to perform other duties appropriate to his/her role as a firefighter, is entitled to a proper determination under Part H of the question whether he/she should be medically retired under Rule A15 (with an ill health award under Rule B3) unless he/she is redeployed, without a break in continuity of employment, to a different job (in which he/she is employed by the Fire and Rescue Authority as a firefighter) to undertake other duties appropriate to his/her role apart from engaging in firefighting".

- 4.2 The associated guidance and its application combines to create a scenario where a firefighter who was deemed not to be permanently disabled because he/she was fit to do non-operational duties appropriate to the role, but for whom no such job offer was offered, would be left with neither a pension (because he/she is deemed not to be permanently disabled) nor a salary (because there is "no other duties job" available) after becoming permanently disabled from performing firefighting duties.
- 4.3 Clearly this situation was not the intention of Parliament and places FRA's in an invidious position at the point of decision making.
- 4.4 In order to resolve the matter and seek a mutually agreed way forward CFOA agreed to consider viable options (see Appendix 1). The solutions under consideration included:
- ⇒ **Support the status quo** i.e. support the *application of the test in assessing if a regular firefighter ought to retire on the grounds that he is permanently disabled under Rule A15 is whether he is permanently disabled for firefighting and for performing other duties appropriate to the role; or*
 - ⇒ **Support the status with an amendment to the IQMP Guidance** *ie. Medical test for permanent disablement to be, "A firefighter is permanently disabled if he/she is medically unfit to carry out operational firefighting duties and for performing other duties appropriate to the role but give IQMP's the discretion to apply "reasonableness" to the test for permanent disablement; or*
 - ⇒ **Support a return to the position of 2004** *i.e. where, if a FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with a lower tier ill-health award; or*
 - ⇒ **Support the position where, if a FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with a pension commensurate with their age and length of service; or**
 - ⇒ **Support the position where, if a FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with an actuarially reduced pension to take into account of early payment; or**
 - ⇒ **Support the development of a compensation provision within the Compensation Scheme Order 2006 i.e. a compromise agreement with up to 104 weeks pay**
 - ⇒ **Support the development of a compensation provision with an outsourced support programme**

5 WAY FORWARD

5.1 Currently Fire and Rescue Authorities have a limited discretion whether or not to retire a firefighter who is permanently disabled. Essentially, FRAs have an initial choice whether to redeploy or to retire having first considered "reasonable adjustments" under the Disability Discrimination Act 1995. The preferred way forward is to strengthen the FRA discretion and provide a range of solutions that could be applied dependent upon the circumstances

5.2 RECOMMENDED ACTION

5.2.1 Support the application of the test in assessing if a regular firefighter ought to retire on the grounds that he is permanently disabled under Rule A15 is whether he is permanently disabled for firefighting and for performing other duties appropriate to the role but revise the IQMP guidance to exemplify that Medical Advisors have the discretion to apply "reasonableness" to the test for permanent disablement.

5.2.2 Amend the discretion to FRA's so as to enable consideration of a number of options dependent upon the circumstances. The options would include:

- ⇒ Consideration of reasonable adjustments under the DDA
- ⇒ Consideration of redeployment
- ⇒ Consideration of ill health retirement with a lower tier ill health award
- ⇒ Consideration of a compensation provision
- ⇒ Consideration of a compromise agreement
- ⇒ Consideration of dismissal on capability grounds

5.2.3 The above course of action would necessitate the Secretary of State to issue revised pension guidance incorporating the positive elements of the previous commentary i.e. 2004 and 2006. In addition to ensure that FRAs exercise the discretion fairly, guidance would need to be provided to assist the decision making process.

FOR DISCUSSION

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TABLE 1: SUMMARY ANALYSIS OF OPTIONS

| Option | Benefits of Option | | | Weaknesses of Option | Preferred Option |
|--|--|-------------------------------|------------------------|--|------------------|
| | Strengths of Option | Efficiency Financial Position | Professional judgement | | |
| <p>1. Support the status quo i.e. support the <i>application of the test in assessing whether a regular firefighter ought to retire on the grounds that he is permanently disabled under Rule A15 is whether he is permanently disabled for firefighting and for performing other duties appropriate to the role.</i></p> | <ul style="list-style-type: none"> ⇒ Significant reduction in ill health retirements??? ⇒ Aligns to the DDA legislation ⇒ Reduces pension costs ⇒ Replicates position for those in other Local Government Schemes ⇒ Retention of trained, skilled and experienced staff | | | <ul style="list-style-type: none"> ⇒ Inflexible. Limited opportunity for the application of “reasonableness”; ⇒ Creates higher potential for employment tribunals; ⇒ Creates industrial relations unrest from staff side bodies ⇒ Increased medical appeals and associated costs ⇒ Limited redeployment opportunities that exist in the Service ⇒ Creates increased risk of equal pay claim ⇒ Potential for indirect gender discrimination ⇒ Potential for de-skilling the organisation ⇒ Limits diversity opportunities ⇒ Limited management discretion ⇒ Limited opportunity for redeployment for firefighters on retained contracts ⇒ Dependent on circumstances at point of decision | |
| <p>2. Support (1) above with an amendment to the IQMP Guidance i.e. <i>Medical test for permanent disablement to be, “A firefighter is permanently disabled if he/she is medically unfit to carry out operational firefighting duties and for performing other duties appropriate to the role” Give IQMP’s the discretion to apply “reasonableness” to the test for permanent disablement</i></p> <p>n.b. “reasonableness” will need defining by ALAMA</p> | <ul style="list-style-type: none"> ⇒ Greater scope for discretion over the circumstances in which ill health award is granted ⇒ Aligns with the principles of the DDA ⇒ Greater discretion to Management to meet the business needs ⇒ Increases flexibility | | | <ul style="list-style-type: none"> ⇒ Potential for inconsistent application ⇒ Increases accountability on the IQMPs ⇒ Increases potential for challenge under multiple grounds ⇒ Potential increase in ill health retirements ⇒ Increased cost to Pension Fund, Appeals, Management costs, etc. ⇒ Limited opportunity for redeployment for firefighters on retained contracts ⇒ Dependent on circumstances at point of decision | |

| Option | Benefits of Option | | | Weaknesses of Option | Preferred Option |
|--|---|--------------------------|------------------------|---|------------------|
| | Strengths of Option | Efficiency Gains/Savings | Professional judgement | | |
| <p>3. Support a return to the position of 2004 i.e. where, if a FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with a lower tier ill-health award</p> | <ul style="list-style-type: none"> ⇒ Staff side representative bodies support ⇒ Less need for redeployment ⇒ Reduced risk of challenge from DDA legislation ⇒ Avoids industrial relation difficulties | | | <ul style="list-style-type: none"> ⇒ CLG oppose this option ⇒ Potential increase in ill health retirements ⇒ Increase in pension costs ⇒ Potential for inconsistent application ⇒ Limited opportunity for redeployment for firefighters on retained contracts ⇒ Dependent on circumstances at point of decision | |
| <p>4a. Support the position where, if a FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with a pension commensurate with their age and length of service.</p> | <ul style="list-style-type: none"> ⇒ Opportunity for career change for staff ⇒ Reduced need for redeployment opportunities ⇒ Limits the usage of modified duties | | | <ul style="list-style-type: none"> ⇒ Significant change of legislation required i.e. currently limited by requirement of age 50 and length of service >25 years ⇒ Potential breach of wider pension legislation ⇒ Increased cost to pension fund | |
| <p>4b. Support the position where, if a FRA cannot offer other employment, fitness to perform other duties would not be relevant and the person may be retired with an actuarially reduced pension to take into account of early payment.</p> | <ul style="list-style-type: none"> ⇒ Opportunity for career change for staff ⇒ Limits the financial impact of the increased numbers in receipt of a pension ⇒ Reduced need for redeployment opportunities ⇒ Aligns to Local Government Pension Scheme | | | <ul style="list-style-type: none"> ⇒ Significant change to pension legislation ⇒ Not quick solution to achieve in the short term ⇒ Increase to pension cost | |

| Option | Benefits of Option | | | Weaknesses of Option | Preferred Option |
|---|--|--------------------------|------------------------|---|------------------|
| | Strengths of Option | Efficiency Gains/Savings | Professional judgement | | |
| 5. Support the development of a compensation provision within the Compensation Scheme Order 2006 i.e. a compromise agreement (up to 104 weeks payment) | <ul style="list-style-type: none"> ⇒ Opportunity for career change for staff ⇒ Reduced need for redeployment opportunities ⇒ No impact on the pension scheme ⇒ Reduced sick pay costs ⇒ Gives individuals some compensation for the early termination of employment ⇒ Gives management discretion ⇒ Reduces management time and costs ⇒ Mitigates unfair dismissal claims, appeals, etc ⇒ CLG support ⇒ Does not conflict with DDA ⇒ Increase diversity opportunities ⇒ Equally applicable to all firefighters regardless of contractual basis i.e. wholetime, part time or retained | | | <ul style="list-style-type: none"> ⇒ Increased costs for the FA ⇒ Defers pension payment until 60/65 years of age ⇒ Representative bodies' opposition ⇒ Increased Appeals | |
| 6. Status quo with an outsourced support programme | <ul style="list-style-type: none"> ⇒ Supports staff through the transition period ⇒ Greater scope for discretion ⇒ Aligns with the principles of the DDA ⇒ Greater discretion to Management to meet the business needs ⇒ Increases flexibility ⇒ May be combined with option 5 | | | <ul style="list-style-type: none"> ⇒ Potential for inconsistent application ⇒ Increased cost to support programme. | |