Annex A - FOI Ref. CR21515

From: Police Negotiating Board Staff Side (covers Police Federation, Police Superintendents Association and Chief Police Officers' Association)

Date: 23/02/11

Guidance on Reviews of Police Injury Pensions

Thank you for your letter of 7 January enclosing the draft guidance for our comments.

While we are grateful for the opportunity to comment on the guidance, we should emphasise at the outset that Staff Side is unlikely to be in a position to agree it. We anticipate that if, following Laws, police authorities continue to organise reviews which result in the reduction of degree of disablement figures further litigation is likely and the courts will have to determine the correct approach in the context of individual cases.

We set out comments on the detail below but as a general point, we consider that the guidance should focus on explaining the limitations on the scope of reviews following the decision in Laws.
Introduction

As the PIBR 2011 are imminent, it will be necessary for any guidance to explain that the PIBR 2006 will still apply to future reviews of existing pensioners.

1.2 This paragraph sits rather oddly in the introduction. Overall we consider that it would be better for the guidance to focus on the implications of the recent cases culminating in Laws and to do so in a more clearly structured way, beginning with the wording of the relevant regulations and then setting out as briefly as possible the way in which a review should be carried out.

We consider any suggestion of "re-assessment" is wrong. The police authority's argument that it was open to the PMAB to arrive at their own assessment under Regulation 37(1) by a process of reasoning which may involve a frank departure from earlier clinical judgments was rejected by the Court of Appeal in Laws.

While we agree that the last sentence is correct, the implications of Laws go significantly further. Laws U held that finality "must include the essential judgment or judgments on which the decision is based".

2.1 The heading here is "reason for review". This implies that this section is intended to explain the extent of the police authority's duty to consider a review. However, this paragraph seems to focus more on the reason for a change.

We note the reference to "changes in circumstances and evidence" since the last assessment. We are concerned that without further explanation this is not helpful and that the reference to "evidence" is potentially significantly misleading. It might be thought to imply that if additional medical evidence comes forward to suggest that the initial decision was not correct it could be

changed. We consider that that would be contrary to the clear endorsement of finality in Laws.

2.2 It is here stated:

"The process for doing so, as set out in the Regulations, is for the police authority, at suitable intervals, to refer to the SMP the same question as it asked on the first (and any subsequent) occasion, namely the degree of the person's disablement and to consider whether, in the light of the SMP's decision, "the degree of the pensioner's disablement has substantially altered"."

However Laws U in Laws states:

"So much is surely confirmed by the terms of Regulation 37(1) under which the police authority (via the SM P/Board) are to "consider whether the degree of the pensioner's disablement has altered". The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty - the *only* duty - is to decide whether, since then, there has been a change: "substantially altered", in the words of the Regulation. The focus is not merely on the outturn figure, but on the *substance* of the degree of disablement". (our underlining)

There is a clear statement that the issue for the SMP is whether there has been a change, but as drafted the guidance focuses on degree of disablement alone.

2.3 While we note the introductory reference to this being the approach at the outset, we are concerned that inclusion of this paragraph in guidance on reviews runs a real risk of confusing SMPs into understanding that this approach also applies on a review.

2.4 It is stated that "In some cases that distinction may not have practical effect because the person's disablement will have arisen entirely as a result of the duty injury". We consider this is conflating two separate issues. Apportionment is not appropriate just because a factor other than the duty injury contributed to the disablement, it is only appropriate if the other factor had independently already affected earning capacity.

2.5 The first sentence reads:

"Any review of an injury pension is limited to an assessment of a person's degree of disablement, with a view to establishing whether the degree of disablement has substantially altered so that the pension should be revised accordingly."

This seems to us to be the reverse of the finding of Laws U, quoted at point 2.2 above.

The second sentence is in line with the recent cases, but at odds with the first sentence and the position at 2.2.

3.2 Are you confident that recommending a different approach on the basis of age is:

(a)compliant with the age discrimination provisions - particularly in the light of the abolition of the default retirement age; and
(b)consistent with the Pensions Ombudsman's decision in Ayres?

5.1 As indicated above, it is not just the decision, but the reasoning that was found to be final in Laws. Furthermore it is all aspects of the decision, not just in relation to disablement.

We are not sure that meaning of the reference to any change "in any of the circumstances which underlay the original decision" will be readily understood.

5.2 While we understand the difficulty in relation to cases where the previous reasoning is not clear we are not convinced that it is appropriate or possible for an SMP "to reach a view, *on the balance of probabilities,* on what had informed the original/review decision".

5.3 We are concerned that this paragraph may encourage a belief that a final decision can be overturned, when that is not the case. What do you consider could be done?

5.4 Are you confident that the reference to age will not contravene the age discrimination provisions - particularly in the light of the abolition of the default retirement age?

What do you mean by a change to the labour market?

5.5 In such a case what is considered to be the correct approach? For example, if a pensioner has a degree of disablement in band 3 because of a duty injury and then has a further injury in retirement which would prevent them working to the same (but no greater extent) what would the impact be?

5.6 We do not agree this approach. The point is similar to that at 2.4 above. Apportionment would only be appropriate where the other factor had already had an impact on earning capacity. As the judge commented in Crocker:

"I do not consider that the question of apportionment should be answered by trying to attribute a share of the loss of earning capacity to any underlying condition which, on its own, had not, or did not, cause a loss of earning capacity. The loss should be attributed wholly to the duty injury which, albeit because of that underlying condition, has directly caused the loss of earning capacity." [para 55]

We do not consider that this restriction is limited to cases of underlying condition.

5.8 We are concerned that as with the reference to "the circumstances which underlay the original decision" in 5.1 the meaning of the reference to "the facts of the case" is not clear.

5.9 This seems to imply that if there has been a change to the underlying circumstances, the review can be conducted from scratch. The SMP/PMAB are

still bound by the findings of the earlier medical authority.

5.10 We repeat the concern expressed in relation to 5.2 above.

Section 6 appears to be missing.

7.1 We refer again to the comment of Laws U quoted at point 2.2 above. The SMP's focus is on whether there has been a change, s/he is not to assess degree of disablement and then compare.

Annex A

3 The reference to the broad bands is at odds with the mathematical approach ("a direct comparison" of earnings) in the remainder of the annex.

4 Laws U appears to cast doubt on this not involving any labour market assessment. In overturning the first instance decision that the Claimant's obtaining a law degree was irrelevant he commented:

> "I would venture the opinion that, unless there are then further facts now unknown to us, [the impact of the law degree on degree of disablement] is likely to be modest. While of course her gaining the degree demonstrates a level of intellectual ability as well as determination on the claimant's part, unless it has concrete results in terms of actual iob prospects (and the degree is not, of course, a professional qualification) its effect on her earning capacity seems to me to be largely speculative." (our underlining)

The underlined words clearly imply that actual job prospects are key.

8 The labour market point is also relevant here.

In addition, the implication of the last sentence is that e.g. the duty on employers to make reasonable adjustments is not relevant. Is that correct?

9 We are not convinced that the approach in relation to overtime and pensionable earnings is appropriate in what is an assessment of earning capacity.

12 As the Ombudsman emphasised in Ayres, the regulations focus on earnings capacity, rather than intention to work. Police officers can work beyond CRA, so why is it appropriate to discount at this point? There is no provision for it within the PIBR.

13 The same point arises here as well.

14 In order that we can consider the position further, can you direct us to the research to which you refer in your letter.

16 In the light of the Ombudsman's decision in Ayres and the abolition of the default retirement age, we do not consider that this approach is sustainable.

17 The same point arises.

18 We consider it important here to emphasise that, particularly in the sentence

"The SMP therefore needs to discount the effect of a non-qualifying injury and any other cause whether classified as an injury or not - e.g. a non-duty injury, and injury received through default, or some other cause" the focus is on a cause of a loss of earning capacity not a cause of disablement.
We consider that further discussion of these issues at a technical working group would be helpful.

From: National Association of Retired Police Officers (NARPO)

Date: 10/02/11

Introduction

The National Association of Retired Police Officers (NARPO) is pleased to have the opportunity to respond to the draft of a circular on 'Guidance on Reviews of Police Injury Awards' recently produced by the Home Office. Before commenting on the draft of the circular itself, we would like to put the whole question of injury awards, as we see them, into context.

A Brief History of Injury Award Reviews

An injury award is granted to a former police officer as a recompense for an injury received in the execution of his duty. In general terms, the award is for life but the level of that award is not guaranteed for life, as the award is subject to review by the Police Authority of the officer's former force. The legislation requires Police Authorities to review those on injury awards 'at such intervals as may be suitable'. This time period is clearly not defined in the relevant regulations and Police Authorities have, in the past, used a great deal of individual discretion as to how regularly those reviews should take place. Over the immediate recent past, the courts have taken the view, which we have been advocating for some time, that in respect of reviews each case needs to be considered in its own individual circumstances and this we believe includes in respect of the regularity of reviews.

What is clear about reviews, and the one area where there was a unanimity of attitude amongst Police Authorities, is that prior to 2000 no forces were reviewing those on this award as a matter of policy at state retirement age. This we believe was in recognition that, as well as loss of 'earnings' associated with an early retirement on injury grounds, those affected by an injury on duty, in many cases, also lost the opportunity to accrue a full police pension and/or a further pension entitlement from post police service work.

A few but no more than a handful of forces began to look at the possibility of automatically reviewing those on injury awards at 'retirement' ages, including state retirement age, in the early years of this century. By 2004, only a handful of forces had adopted any practice of reviewing those on injury awards at retirement ages, in particular, at state retirement age but despite this the Home Office chose to produce the circular 46/2004, which advocated this practice.

Despite the fact that this circular has been advocating a change in 'policy' for all forces in England and Wales, still some 7 years after its publication only a minority of forces have adopted the recommendations. One major force, the Metropolitan Police, which had been looking at this policy prior to 2004, actually decided in 2006 to adopt the policy but not to make it retrospective in respect of state retirement age, indicating that all those who had retired with an injury prior to the policy change decision would not be affected by the new policy. All this has led all those in receipt of this award, whose age was in excess of or approaching state pension age, to believe that their injury award level had been set for the rest of their lives. For those over state retirement age this view was further supported by the fact that the Home Office itself recommended that reviews at an age over 65 years should be exceptional.

Home Office Circular 46/2004

It is our view that Home Office Circular 46/2004 was issued against the overwhelming policies of all forces within England and Wales. It was one stated aim of the Home Office that the intention of the circular was to seek a more uniform application of policy in respect of injury award reviews at retirement ages. It has not only failed in that aim but the Home Office actually

released the document at a time when, apart from a very small minority of forces, there was a uniform application of the regulations in respect of the issues addressed in the circular. The circular was released against the overwhelming practice of the day.
We have therefore been drawn to the conclusion that the real reason for the circular was financial savings. This has in fact shown itself in the adoption of the recommended 'policy' from force to force. As the Home Office will be aware many of those forces which did adopt the 'policy' did so some years after the issue of the circular with Chief Constables making the case on the basis of 'financial' savings. Northumbria is a good example in this respect, where the report to the Police Authority made the case for additional staff to operate the policy with losses being predicted in the early years to pay for the additional staff but savings being made in future years from the pockets of injured former police officers. The report to the Police Authority predicted savings on all those over 65 years of age thus, in our view, unlawfully prejudging the review process.
Other forces have followed the argument of financial savings in attempts to introduce 'age' related reviews.
Home Office Circular 46/2004 was not the only initiative that the Home Office took to influence Police Authorities' policies towards injury awards in the early part of this century. A drive to see 'medical' retirements as a last rather than a first resort was agreed through the police national consultation machinery. In addition there was a national agreement with police staff associations to look at the provisions on the injury award legislation more generally. This, aligned to the splitting of pensions and injury award regulations consequential on the 'A' Day provisions on pensions included in the Government Budget program in 2006 drew further attention to injury award provisions and a clear misunderstanding amongst, in particular, police human resource personnel, that legislative change required more regular reviews. It seems to us that at that time the Home Office was also advocating that forces reviewed those on this award at more regular intervals.
We believe that this situation has caused significant problems both for those in receipt of the award and for forces. We also believe that circular 46/2004 created a situation where some forces interpretation of the circular led to a significant maladministration of the police injury benefits scheme. In addition there has been a hardening of attitudes towards those in receipt of this award as a direct result of the developments to which we have referred, which has led to significant challenges of process in the Courts and elsewhere in several forces. We believe that this whole process has been due to a desire to save money on behalf of the Home Office and forces and it has created an imbalance between the expectations and rights of the individual unfairly in favour of the public purse in a significant number of forces in England and Wales.

Draft Circular – Guidance on reviews of Police Injury Awards

To say that we are disappointed with the new draft circular would be a spectacular understatement. We note that the circular claims to reflect recent case law on this subject but we believe it not only fails to reflect all recent case law but has been very selective in its interpretation of case law, both new and old, to the detriment of those in receipt of an injury award. It also fails to take into account recent Pension Ombudsman decisions and any of the points NARPO has raised with the Home Office and Police Authorities in the past.
It is our view that the circular will encourage further maladministration of the scheme. We are drawn to the conclusion that it has been written after consultation with the Attendance Management Group solely, a forum which is entirely made up of police management and administrative representatives, and that those within that group with the least sympathy and concern for those injured whilst serving their communities have had the greatest say in the document. In this respect it is particularly disappointing to note that the Home Office have failed to take into account the views of the Pension Ombudsman. We are aware that some within

the Attendance Management Group give little consideration to these decided cases but it is clear not only from the AYRES case but others since, including recent decisions, that the Ombudsman believes it inappropriate to use 'age' as a trigger for reviews and continues to believe that automatic reduction to Band 1 at state retirement age is at the least a maladministration of the scheme. He continues to assert that the SMP/PMAB cannot assume 'no earning capacity' at state retirement age.

We have, during recent months, been particularly concerned that the Home Office have been acting almost at the direction of some of those forces that have the worst record of maladministration of this benefit to the serious detriment of a fair process for those affected. The suspension of the Police Medical Appeals Process at a time when the Appeals Board was finding in favour of our members is a further example of that attitude, so in some respect we should not have been surprised by the contents of this draft document.

We also believe that the circular overcomplicates many of the issues it tries to explain, errs in favour of the Police Authority/Force in its limited interpretation of the regulations and case law and suggests a much too great a role for Force Human Resource Departments in the process than was ever envisaged by the original legislation. In addition it fails to make clear that a 'review' of the degree of disablement is a matter for the Selected Medical Practitioner (SMP), that a review should normally be a face to face examination/interview conducted by the SMP and that a paper consideration does not amount to a 'review' and is unlikely to meet the requirements of the legislation. These are all points we have raised in the past and we believe that Age Discrimination legislation and the recent case law has strengthen our position on these matters but in any event we believe that following a simple agreed procedure that firmly establishes the primacy of the role of the SMP in what is clearly a quasi judicial role, is more likely to avoid the continuing legal challenges that have become a feature of this process, which is fundamentally a 'medical' assessment of individual current work capability. We are sure that the imposition of Human Resource Departments early in the procedure tends to complicate the process and can lead to the SMP simply rubber stamping a decision effectively made by a member of that department. The over complication of the process not only leads to a higher chance of legal challenge but also greatly increases the bureaucracy involved leading to higher costs.

We are disappointed that the circular does not in any way seek to advise those forces, which have in our view clearly failed to comply with a proper procedure in their original interpretation of Circular 46/2004, to revisit and re-assess those whom they have treated so poorly in the past. We are drawn to the conclusion that the circular can only be seen as a green light to put cost savings ahead of the fair and reasonable treatment of, in particular, older infirm former police offices injured protecting their local communities, who have not only a reasonable expectation resultant from previous national and local policies in respect of their current assessment but have also come to rely on the income they receive from the injury benefit scheme and have no option other than to adjust their lifestyles when they loose that income.

We are further concerned that some forces in the past have looked upon Circular 46/2004 as a direction and have been implementing the 'advice' in a way that has ignored the basic requirements of the legislation. We are concerned that this will be the attitude of some in the future and we are disappointed that the new circular does not make it absolutely clear that the regulations take precedence over the circular. A further concern is that, at a time when new 'Injury Benefit Regulations' are about to be enacted, the circular does not make it absolutely clear that the new regulations will not apply to those already in receipt of an injury award prior to the commencement date of the new provisions. We note that neither the old nor the new regulations contain the term 'cogent reasons', yet the Home Office continue to use this term in the circular.

Conclusion

We would ask the Home Office to consider a comprehensive rewrite of this circular taking into account the points we have raised before considering circulation. NARPO are convinced that the circular is likely to foster further maladministration of the Police Injury Benefit Scheme leading to a greater level of dispute, including in the Courts and with the Pension Ombudsman, between those in receipt of this award and forces throughout England and Wales.
We have provided some more specific comments on the circular on a section by section basis at Appendix A.

Appendix A – Injury Award Circular

1. Introduction
Despite the fact that the introduction to the Guidance refers to recent case law, NARPO do not believe that the Guidance is a fair reflection of recent and past case law. For example it clearly throughout ignores recent Pension Ombudsman decisions, which favour many in receipt of this award.
2. Reasons for review…
2.1 We see no reason for the inclusion of the comment starting 'and the interests….'to end of paragraph.
The role of the SMP on review is simply to consider whether the loss of earning capacity resultant from the duty injury has changed. The inclusion of further comment suggests some degree of 'public finance' consideration which is clearly not a matter for the SMP.
2.2 This section does not explain well the relevant regulatory position.
As we have indicated in our response document, many force personnel responsible for injury award reviews were explaining the reason for the force 'change of policy' on review timings as directly consequential on 'new' legislation. It is clear that the 2006 Regulations to which you have referred are 'new' but not new in content. In fact they are a direct consequence of the 'A' Day changes featured in the Budget 2006. If you intend to include the reference to the 2006 regulations, an explanation that they are 'no different' in content to the 1987 provisions would be helpful and avoid further confusion.
In addition, as new Injury Benefit Regulations are due in 2011, it should also be made clear that the 'new' 2011 regulations will not apply to those in receipt of an injury award at the time the new regulations come into force but they will continue to be subject to the 2006 provisions.
2.4 There is a poor overall explanation of the assessment process in this section. It over complicates the issues without being precise about the actual process. The issue surely is the requirement of the SMP to assess the individual's current earning capacity resultant from their overall medical condition offset, in appropriate cases, by the impact of any none duty related matters on that earning capacity. Fundamentally the SMP is asked to decide what the person could actually earn taking into account the effects of the qualifying injury.
3. When to Review
3.1 The suggestion of regular reviews of all those on injury awards dictated by a specific time period is not within the spirit of current case law, which in our view seeks an individual approach to each case based on the circumstances of each case. A recommendation by the SMP of future review requirements based on individual case by case assessment is likely to meet those legal requirements better. Additionally, regular timetabled reviews of all cases increases unnecessarily administrative costs.
4. Procedure for Reviews
4.2, 4.3, 4.4
We do not believe that a 'paper shift' can be a review although we do see some value in a cursory paper shift to determine the value of putting the individual through a review process. This could

however largely be avoided if the SMP made realistic recommendations for future reviews based on the evidence and medical conditions in each individual case.
Any 'paper shift' should be just that and should not attempt to influence the position of the SMP or direct the SMP towards a particular view.
4.5 Whilst we do not contest that a questionnaire addressing the issues at bullet points one to three can be used in a review process, we are concerned that the SMP alone should see and take a view on the medical evidence. We believe this is clearly a role for the SMP not non- medically qualified members of human resource departments.
We are also concerned that some forces will be tempted to extend the questions in the questionnaire to include questions that are not directly relevant to the process.
4.6 The requirement for additional medical evidence is we believe a matter for the SMP.
4.8 We do not support that an individual application needs to be supported by an endorsement from a doctor. We are unsure exactly what this means and are not convinced G.P.s or those in receipt of the award will understand the precise nature of this requirement either. In any case many G.P.s do not understand the injury award schemes and some are likely to charge for the endorsement. The cost of specialist opinion is beyond most of those on injury awards. We see this as a clear disincentive to seek a review, which cannot be justified against a background, which would show little or no abuse of the system on the part of individuals seeking a review as very few in receipt of this award request reviews.

5. Assessing whether there has been a change in the degree of disablement

5.2 Although the circular concedes that the original/last decision of the SMP/PMAB is final, the way this section is written appears to invite the SMP/PMAB to challenge this at a review. It is also too complicated an explanation. We would concede that the SMP/PMAB on review would need to be acquainted with the nature of the original duty injury but cannot challenge the original SMP/PMAB decision. We further believe that the courts are seeking to see a line drawn after the latest review and a SMP/PMAB should be dissuaded from looking beyond that review other than to understand the nature of the duty injury and the original SMP view of that injury.
5.3 We totally disagree the sentiments of this paragraph. This appears to be a clear invitation to the SMP to either duck difficult cases or to seek to challenge recent court rulings. It is in our view one example of how the circular attempts to put the Police Authority position ahead of fair and reasonable treatment. It also risks further litigation and further complications to what was intended to be a relatively simple process. The SMP should decide current earning capacity without the interference of the Human Resource Department on the basis of the evidence before him or her.
5.4 We believe that the mention of age at bullet point 3 is discriminatory.
We are unclear of what is meant by 'a change in the labour market'. In any case it is not a good reflection of TURNER, which refers to 'new jobs available since the last review'. The term 'labour market' does in our view have a wider meaning than simply 'skills and qualification requirements' but includes the additional factor of 'job availability'. If a 'job availability' factor were used to assess those on injury awards then it is clear the actual job prospects of most on injury awards would be fairly low.
5.5, 5.6, 5.7 These are all issue which would need to be determined during the review by the SMP/PMAB. It does however appear to be another example of how the circular seeks to 'advise' on how to reduce awards. In this section is not made clear that the courts appear to be moving in a direction that seeks the SMP/PMAB take heed of the views of the SMP/PMAB at previous/latest review.
5.9 We consider that the SMP should assess the reasonable level of remuneration related to an individual's particular work capability. This would involve identify a specific job that the individual was capable of doing, including whether that would be full or part time, commensurate with their current skills, occupational qualifications and medical condition.
5.10 The first bullet point is not well drafted and could explain the situation better.

At this point the circular jumps from 5.10 to 7.

7. Outcome of review

7.2 We are unsure why you have included the final sentence in this paragraph. We understand that normal practice is to reduce the benefit from the date of the SMP decision and pay back underpayment if the appeal is successful. Although there may be some who would contest this view, we do believe it more sensible than to continue paying at old level and trying to recoup overpayment following an unsuccessful appeal.

Annex A

4. The comment 'this is not a labour market assessment' may be true but it contradicts comments at 5.4 in the body of the guidance.

5. We would prefer the term 'occupational' qualifications.

The comment 'what kind of employment..' does not adequately reflect the decision in TURNER that 'only those jobs not available at any previous review should be considered'. We would also see the sequence of events to be as it appears to be portrayed in this paragraph. That is the SMP identifies a 'job' the individual is capable of doing before seeking assistance from the HR Department, which should be limited to assisting with an appropriate 'wage' for the identified 'job'.

6. We would prefer that the term 'the specific job identified by the SMP.' Whilst we acknowledge that the SMP may take new employment into consideration in any review, the length of time and record of the individual in work should also be considered as some 'attempts' to continue in employment may prove impossible, for medical reasons, in the longer term.

9. Fairness must dictate that if jobs with a London Weighting element are considered as part of any review procedure in respect of outside jobs, then London Weighting should be taken into account in respect of 'police wage' irrespective of whether the individual was formerly in receipt of London Weighting.

10. We are unsure of what is meant by the final sentence in this paragraph but would argue that 'commissions' are not a fair reflection of earning capacity as they are not guaranteed.

14 A and B. The term 'cogent reason' does not feature in any of the relevant legislation either previous or proposed. It created very real problems in Circular 46/2004 and has never been satisfactorily defined by the Home Office. Its continued use is bound to create further confusion and possible challenge.

We are also concerned that there appears to be an attempt to get the lowest level of comparator of 'earning capacity' for those at retirement age. It is clear that the median will be lower than the mean.

15.Using figures for 'all employed' rather than just those in full time employment will further reduce this comparator figure, whilst full time equivalent 'earning capacity' is likely to be used for those being reviewed. This is a clear disadvantage to those subject to review, likely to result in an overall reduction in banding and again a proposal very much in favour of Police Authorities.

16. There is a clear assumption of no earning capacity at 65. We believe that this is likely to be discriminatory and ignores the Pension Ombudsman view as express in AYRES and others. If Police Authorities follow this advice it is likely to result in legal challenge and/or complaints to the Ombudsman.

17. Quotes legislation which is not in line with current Government policy as the default retirement age is likely to disappear shortly. In addition, more people are working beyond state retirement age. We strongly believe that to assume that former officers can be taken as 'not economically active' is also contrary to ANTON and AYRES.

We also believe that a correct procedure for those reviewed at retirement ages would normally include a face to face interview with the SMP.

Apportionment

18, 19 20, 21, 22 Whilst we agree the points raised at paragraph 18 in respect of the Administrative Court views on procedure, we think that the annex over emphasises the question

of apportionment and we are drawn to the conclusion that SMPs are being pressured to consider these matters with a view to reduction in the degree of disablement and subsequently cost savings. It is in our view a further example of the imbalance towards the Police Authority position advocated in the Guidance, which in our view will lead to a less than fair procedure.

From: Association of Police Authorities (APA)

Date: 14/02/11

Police Injury Awards consultation

The following material responds to Home Office consultation on proposed changes to legislation and guidance dealing with police injury benefits.
The material is a straight compilation of (substantively) unedited responses by individual police authorities to the consultation and contains no additional analysis or comment by the APA.
Having been loosely involved in discussions about changes to injury benefits for some time, the APA is comfortable with the Home Office proposals.
We would, however, appreciate, for the benefit of two responding police authorities and ourselves, clarification of the rationale for distinguishing between normal and abnormal routes of travel to and from work represented by regulation 7(2)(b)(i).

1. South Wales Police Authority

In response to GEM 139/2011 I can respond as follows on behalf of Gwent and South Wales Police Authorities. Having carefully considered the proposed regulations and guidance we are supportive of them as presented and indeed we feel they are long overdue. Hopefully this will assist Police Authorities and SMP's to deal with ill health retirements and any subsequent appeals.

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2. Cheshire Police Authority

Further to GEM 139, please find below comments from Cheshire Police Authority on the above regulations.

Overall, the draft appears to be reasonable apart from the following 2 points:

1. Point 2 relating to Regulation 7 (2) (b) (i)
he received the injury while on a journey necessary to enable him to report for duty at, or return home from, a place of duty other than his usual place of duty.

This needs clarification, it seems officers who receive an injury whilst on a journey from home to their normal place of work and return will not qualify for an award and this is supported. However, if they are on a journey from home in order to report to work, at a place of duty which is not their normal place of work, they would qualify. All journeys from home to work and return regardless of where the place of work is should be excluded.

2. Point 5 relating to pre-existing medical conditions 10 (2)
A qualifying injury shall not be regarded as having caused or substantially contributed to disablement, death or a condition for which treatment is being received if —

(a) the person concerned had a pre-existing medical condition which rendered him liable to suffer disablement or death or to require treatment in hospital at any time; and

(b) the injury was not received in the course of operational duties.

Clarification needs to be sought as to whether point (b) is referring to the pre existing medical condition or the qualifying injury.

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3. Greater Manchester Police Authority

On behalf of Greater Manchester Police Authority I would agree that the new draft Police (Injury Benefit) Regulations 2011 appear to satisfactorily reflect the package of proposed reforms and that the revised draft guidance on reviews of police injury pensions seeks to clarify the position relating to police injury pension reviews given the decisions in recent cases and would appear to provide a firmer framework for forces/police authorities to conduct reviews.

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4. Derbyshire Police Authority

Consultations – The Police Injury Benefit Regulations 2011
- Guidance on Reviews of Police Injury Pensions

The Derbyshire Police Authority and Derbyshire Constabulary have considered the proposed new Police Injury Benefit Regulations and the proposed Guidance on Reviews of Police Injury Pensions and have the following comments to make in response to the drafts:-
Guidance on Reviews of Police Injury Pensions

Clause 4.7 refers to an obligation on the SMP to examine the former Officer where the SMP is of the view that the loss of earnings capacity may have substantially changed – we would welcome some clarification to be incorporated in the wording that if the Officer refuses to submit to the examination this will not preclude the banding being altered. Whilst there is reference in Regulation 33 of the 2006 Regulations to what happens where an Officer refuses to be examined this specifically relates to examinations required under Regulations 30, 31 and 31. Clarification that this would also apply where an examination is required under a review would avoid future ambiguity.
The requirement for a review request from the Officer to have to be supported by the Officer's Doctor is welcomed as this may save resources in reviewing requests which have little merit.
With regards to the proposed alternative drafts for clause 14 of the guidance it is suggested that option 14A i.e. taking the median earnings for the appropriate age group, would be preferable. This method is more age specific and does not take account of exceptionally high or low earnings and would therefore give a more accurate indication of the true effect of the Officer's reduced earning capacity.

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5. Dorset Police Authority

Draft Guidance on Reviews of Police Injury Pensions

Age 65 Reviews

Paragraph 3.2 makes reference in quite general terms to possible exceptions to making the age 65/SPA review the last. There is a danger that different interpretations by individual police authorities will inevitably result in inconsistencies between forces. We strongly suggest that the Home Office consider putting in place suitable additional support measures designed to ensure that information sharing and consistency of approach is applied and that best practice is identified.

We appreciate that it is intended that the new regulations (and the associated draft guidance) would apply to all new claims for an injury award which are made once the regulations have come into force. However, in the interests of clarity, we consider it important for the Home Office to offer additional guidance about previous age 65 decisions/appeals and how these should now be managed in the light of the new regulations.

Degree of disablement and reviews

In the interest of consistency, it would be extremely useful if a standard template could be created for use by SMPs as a means to record and evidence their decision making process when reviewing the degree of disablement. This would provide a more structured basis for decision making, but would also potentially provide an important basis for further consideration in the event of an appeal against an SMP's decision.

Degree of disablement after compulsory retirement age

Our preference would be to introduce the 'median' earnings ASHE figure which better recognises age differences. In the interests of consistency and to avoid potential discrimination claims, we strongly urge this basis for determining a person's earning capacity is mandated in the guidance.
Other feedback
If not already done, the Authority recommends that feedback (both on the draft regulations and the draft guidance) is specifically sought from both the National Attendance Management Forum and ALAMA.

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6. Devon and Cornwall Police Authority

Devon and Cornwall Police Authority makes the following comment in relation to the consultation on new injury award legislation and guidance.

In terms of the guidance:

Point 4.5. Talks about current and recent employment – this should also state income, otherwise this will have to be determined at a later stage, which would be inefficient.

Point 12 of Annex 1 - October – doesn't state which year.

From: Association of Chief Police Officers (ACPO)

Date: 14/02/11

Guidance on Reviews of Police Injury Pensions

Thank you for the opportunity to comment on the guidance for practitioners on exercising the duty to review police injury pensions, under regulation 27 of the Police (Injury Benefit) Regulations 2006. We have consulted widely with forces on this subject to inform our response and generally the Guidance is welcomed together with requests for its speedy publication.
More specifically, clarification on the following points would be welcomed:

- That the decision on an officer's permanent disability and that it was due to an injury on duty is final and should not be revisited by the SMP in their review as this clarifies the role of the SMP
- That the review should be limited to an assessment of the officer's degree of disablement to establish if it has altered

Paragraph 3.1 – reviews should be carried out 'at least every 5 years' Some forces questioned whether this was too binding on authorities and that discretion should be allowed to consider, based on medical advice, the frequency of reviews or whether it is appropriate to continuing reviewing.
Paragraph 3.2 – "once a former officer reaches the age of 65 he or she will have reached the State Pension Age irrespective of gender". State Pension Age will rise to 66 in the years 2018 to 2020.
Paragraph 4.2 – further explanation requested on what a paper sift should entail
Paragraph 4.9 – can this refer to an officer's request for a review being directed to the Police Authority's nominated representative as well as the Chief Executive of the Police Authority as in reality this is often the case
Annex A – agree that establishing earnings capacity should not include overtime and other allowances
14A – preference for use of national median earnings
16 – Changes in the default retirement age (DRA) or does this apply to police officers. Legality of using age only – or is this covered by using median earnings?

From: Gloucestershire Police

Date: 21/02/11

Dear Pauline,

Further to ACPO comments, my comments are as follows:
1. The Statutory (default) Retirement Age of 65 is being removed on 1 October 2011, therefore I am unclear as to why the age of 65 is still being used in the *Guidance on Reviews of Police Injury Pensions* (Annex A, page 1).
2. Annex A of the Draft Guidance continues to use the term *Degree of Disablement*, rather than the new term of *Loss of Earnings Capacity* as set out in the new Draft Regulations. Is it that the Guidance is to apply to officers retired under the 1987 or 2006 Pension Regulations only? If this is the case, will guidance be issued for Injury Awards and Injury reviews under the new Police (Injury Benefit) Regulations 2011?
3. Linked to point 2 above, Annex A of the Guidance refers to a different table to the one contained in Schedule 4 of the draft Police (Injury Benefit) Regulations 2011. It is not therefore clear which one to use.
Please may I suggest that these points are clarified in the final Guidance and Regulations.

From: National Attendance Management Forum

Date: 10/02/11

The following comments have been made by members of the National Attendance Management Forum in relation to the guidance on the reviews of police injury awards.

Title – Should read as Guidance on Police '**Injury Awards'**, and not 'injury pensions' as the term award is used in Regulation 11, 30, Schedule 3 and the title for 'Part 5' when the term pension is introduced.

1.2 It is only the decision that the permanent disablement found by the original SMP was **caused** by an injury on duty which is final. The disablement or its permanence may have ceased since then and this is a relevant consideration for the reviewing SMP to consider. On a review, the question is what, if any, change has there been in the degree of disablement found by the original SMP to have been caused by police duty. The range is 0 - 100%. If the medical condition found by the original SMP to have been permanently disabling is no longer permanent or disabling, the loss of earnings capacity attributable to a permanent disablement which no longer exists has to be nil.

2.3(i) The word injury should be replaced with the word disablement

2.3(ii) "The SMP should then assess earnings capacity taking into account only any adverse impact attributable to the qualifying injury on duty, discounting all other causes of loss of earnings capacity."

2.3(iii) "If necessary the SMP should then apportion to remove the effect of non duty causes on earnings capacity, e.g., two or more permanently disabling conditions not all of which are caused by police duty or permanent disablement(s) which is(are) only partly caused by police duty."

3.1 There are concerns about the word "may" in the fourth line. An SMP or PMAB ought not to fetter the Police Authority's discretion to undertake a review. The law may change, which may make a review appropriate in circumstances in which it wasn't previously. Also an injury on duty review is not just a medical assessment and other non-medical/legal factors are important in determining degree of disablement.

3.2 Penury is not a relevant factor for earnings capacity.

4.4 Recommend deleting references to HR & OHU departments and always refer to the Police Authority.

4.5 In line 2, include the words *'such things as'* after *'short questionnaire with'…*

4.7 An examination is not always appropriate and an officer should not have a right to one - they are expensive. If the former officer has had a limb amputated as a result of police duty, a further medical examination may not tell the doctor something he doesn't already know. In cases where there is any doubt regarding the medical condition an examination or the provision of additional information should be considered.

Also, if the former officer denies access to GP records, the SMP may consider these records "necessary" without needing to meet the officer face-to-face. If that is the case, Regulation 33 will apply (refusal to be medically examined).

Additional Passage re Refusal to be Medically Examined

"If a former officer fails to comply with any step the SMP considers necessary, the SMP should inform the Police Authority and take no further action. The SMP should not respond to any pressure by either the former officer or the Police Authority to proceed with the determination in circumstances where a step the SMP considers necessary to

undertake an accurate assessment has not been taken."

5.4 Recommend removing the term *'labour market'* and replace with *'availability of suitable jobs'*. Case law states that this process is not a labour market assessment. (para 42. South Wales Police Authority v Anton (ex parte Crocker) 2003. CO/505/2003. Suggest adding the following text at the beginning:

"If an earlier SMP has apportioned, there has been ....."
Suggest deleting the current text and replace it with:

"a change in the jobs available"

5.5 – add to the end of final line…disability *'but only if apportionment for the non police related disability was undertaken when the SMP made his original decision'*. (See Northumbria Police and Industrial & Organisational Health, March 2010, CO/13518/2009).

This is confused. Unless there has been an apportionment from the outset, medical conditions unrelated to the qualifying injury on duty are as irrelevant at the time the award is granted as they are at the time of any review - so why mention them?

5.6 – Unless case law dictates otherwise, references to apportionment need to be made in light of the fact that this process must be undertaken when an SMP makes their original decision. Only re-apportioning the percentage that each disability contributes to the overall degree of disability can transpire on review.

5.6 and 5.7 Need to make clear that apportionment is available at the time of grant but can only be considered at the point of review if it was considered at the time the award was granted.

Annex A

The drafting could be tightened up to clarify when the granting and when the reviewing (or both) of an award is being contemplated.

Paragraph 5. – In line 4 after …qualifying injury, add '*and reasonable adjustments that a theoretical employer may be legally obliged to consider'.*

The following text should be added to the end of the paragraph:

"....as a result of the qualifying injury."

Paragraph 6 - After the word "qualifications" on the 10th line of the paragraph the following sentence should be added:

"Whilst current employment may not reflect earnings capacity, it may provide the SMP with information about current function

Between Paragraphs 7 & 8

A new paragraph is needed containing the following text:

"Whether an officer who has not been medically retired is entitled to an injury award is uncertain. Where Police Authorities consider that a former officer who has not been medically retired is entitled to an injury, they should be given an award in the "slight" banding as the injury on duty has caused no loss of earnings capacity. But for the former officer's decision to leave police service, they could still be earning their police officer salary,

so their loss of earning capacity attributable to police duty is nil (0 - 25%)." (note this could be 0-10% under additional banding being recommended)
Paragraph 11. As the guidance is intended only for reviews of injury awards, the words *'In the case of an after-appearing injury , or'* seem irrelevant as this matter would only be considered at the time of the original application for an award.
Paragraph 14 – see separate report covering the preferred 14A. (as amended)
Paragraphs 18to 22 – These paragraphs need to be rewritten in line with legislation. Reference should be made to *R (on the application of South Wales Police Authority) -v- The Medical Referee (Dr David Anton) and another* (*Anton*). We believe the draft Guidance, which appears to have been cut and pasted from the previous guidance misrepresents the judgment in *Anton*. There is an opportunity now to give a correct representation. Some SMP's have queried the meaning of 'discounting' within Anton – the confusion is over whether this means discounting by removal or discounting by reducing. It would be helpful to rewrite the paragraphs covering apportionment to provide a clearer understanding.

"Apportionment and Discounting"

The Administrative Court has made it clear that all medical conditions other than the qualifying injury on duty must be ignored. This has been referred to as "discounting". For former officers who have not reached the compulsory retirement age for their rank, it is assumed that their healthy-self could still earn their former police officer salary (Earnings A). For former officers who have exceeded what would have been their compulsory retirement age, the SMP must take as their starting point the former officer's skills and abilities assuming they have no health problems whatsoever. This may be artificial, particularly where the individual has significant health problems unrelated to police duty.
The earnings capacity of the healthy, uninjured individual officer is then assessed (Earnings A). The next step is to assess what the impact of the qualifying injury on duty has on Earnings. The earnings capacity of the former officer taking account of any health deficits attributable to the qualifying injury on duty must be assessed - ignoring all other health issues (Earnings B). The percentage difference between Earnings B and A is the degree of disablement attributable to police duty (C). For the majority of cases, Earnings A will be either the former officer's police officer salary or National Average Earnings for the relevant age group as measured by "ASHE". (see our separate response regarding appropriate comparators)

Apportionment is appropriate where the permanent disablement attributable to police duty has more than one cause, one or more of which are unrelated to police duty. The SMP must assess what percentage of the permanent disablement is attributable to police duty (D) and what percentage is attributable to other causes(E). (C) should then be reduced by the percentage attributable to none-duty causes (E). Apportionment between the two causes is only appropriate if both causes, independently of the other, would have caused permanent disablement.
As the guidance relates only to reviews of awards, these paragraphs need to reflect the fact that the SMP will have considered apportionment when the award was first granted. Re-assessment of the percentage that each component makes to the whole loss may require adjustment.
Medical Appeals
The facility in Part H of the Police Pension Regulations for 'Further reference to a medical authority' provides a helpful mechanism which can often enable a decision that is the subject of an appeal to be resolved by mutual consent internally, thereby avoiding the costs and

delays caused by a reference to a Police Medical Appeal Board. We consider it important for this facility to continue to be available and suggest clarification is sought from the Home Office to confirm that the internal resolution process will still be available to Police Authorities for both initial requests and injury related income supplement reviews.

Degree of disablement and reviews

In the interest of consistency, it would be extremely useful if a standard template could be created for use by SMP's as a means to record and evidence their decision making process when reviewing the degree of disablement.

This would provide a more structured basis for decision making, but would also potentially provide an important basis for further consideration in the event of an appeal against an SMP's decision.

It is agreed that each case for review on the degree of disablement should be judged on its own merits but this appears to contradict the advice that the age 65 years review should normally be the last one. This may be the case in the majority of instances but has to be based on the merits of the case as in pre 65 reviews.

From: Members of Association of Local Authority Medical Advisers (ALAMA)

Date: 07/01/11

The trouble with 5.5 is "the loss of earning capacity would be apportioned between the different causes". They need to word that paragraph very carefully, and very differently if the intention is not to disadvantage officers who have subsequent serious illness. You may recall that this point was discussed in the Forum a while ago, and some SMPs took the view that the effect of a subsequent injury could substantially alter the apportionment and therefore the level of award.

2.5 Any review of an injury pension is limited to an assessment of a person's degree of disablement, with a view to establishing whether the degree of disablement has substantially altered so that the pension should be revised accordingly. The SMP must not start from scratch in assessing the degree of disablement but must concentrate on the extent, if any, to which the degree of disablement has altered since the last occasion when it fell to be considered.

This is illogical. In order to assess the degree to which the disablement has changed the SMP has to assess the degree of disablement from scratch. ie
- what would the earnings capacity be without the disablement (A), what is the earnings capacity with the disablement (B), A-B = the degree of disablement. Is that about the same as previously assessed? If not, the change is substantial. Obviously the SMP doesn't start from scratch as to whether or not there's permanent disablement and whether or not there was an injury on duty, but that's not what the draft is saying. If we don't go through the full process of working out the degree of disablement we can't calculate a difference and can't tell if it has changed substantially.

4.7 Where appropriate, <snip>

· the former officer denies access to the GP; or

Should be "the former officer denies access to any medical record or report which the SMP considers essential to the consideration of the case" - why restrict it to the GP only, and in any case, we don't want access to the GP (knock, knock, hello Dr Smith, nice to meet you), we want access to the GP's records. Highly relevant given the recent question on the Forum!!

Most of 5.2 strikes me as being tosh. It doesn't matter how the degree of disablement was assessed first time round. The question is "has it changed?"
To me the process is that I have a figure of m%. I look at the case - without the disablement Joe is qualified to work as a full-time solicitor, having taken a law degree and been an articled clerk since leaving the police. However, the lack of a couple of legs means that the best he could manage is half time. As a half-time solicitor he could reasonable earn £x,000 pounds. His police pay, duly adjusted etc would be £y,000 His loss of earnings capacity is y,000-x,000 / y,000 = n%. If m is approximately the same as n there's no substantial change. It does not matter how m was calculated - in any case, the method used is not something for debate - it is a

previous decision and is final. The only tricky bit is where there was apportionment first time round as that is relevant to the review decision.

5.5 Equally, there may be cases where the overall loss of earning capacity remains unaltered but some other factor, such as the severity of a medical condition unconnected to police service, has altered to the extent that it can no longer be said that an individual's earning capacity is affected to the same degree by the qualifying injury. In such cases, as part of the reassessment process, the loss of earning capacity would be apportioned between the different causes so that only the loss of earning capacity resulting from the duty injury can inform the reassessment of degree of disability.

That is the fly in the ointment. Police officer is rightly receiving an injury award with an assessment of, say, 95%. Subsequently comes off his mobility scooter when struck by a passing blue light police car and breaks neck. Subsequent inquiry finds that the driver of said police car was not negligent. Quadriplegic. Permanently. Completely unable to work. Clearly, the original injury makes no contribution to his current degree of disablement. On the basis of section 5.5 he loses most of his injury award.
As the police driver was not negligent, there's no claim for damages against the driver or his Force.

Para 2.4 I'm not sure but perhaps this paragraph does obfuscates a relatively clear concept?
4.8 "A request by a former officer for a review must be made in writing to the Chief Executive of the police authority and must be supported by the former officer's doctor."
The GP is unlikely to say no, BUT maybe by making the officer so some work it may cut down the frivolous ones.

5.1 "The original decision of the SMP resulting in the injury award is final"……,
I understand the need for this but have refused to deal with cases where the initial decision was so perverse as to be ridiculous. I don't know what happened to the case after that.

"It is important to note that this course of action is recommended, not with the intention of reopening the original/review decision, but rather to provide a benchmark, on the basis of what the SMP assesses are more likely than not to have been the circumstances applying at the time of the earlier decision, against which changes can be assessed." Pardon?!
Para 5.5 This will not arise if you are considering the qualifying injury in isolation which in my view you should. So for example if you have lost a leg in a qualifying incident then your mobility is impaired and this can be assessed. If you have lost the other in a later separate accident that can be ignored. I believe it would be wrong so say that the person could not walk and 50% was due to a qualifying injury when the qualifying injury leads to this disability in any case. I will be interested to see if I am wrong

Annex A paara 16 - Does this need to be changed so that the removal of the state retirement age does not render this obsolete?

Para 22 "The suggested test is the question: Would there have been a loss of

earning capacity but for the injury?”

Should this read **has** there been a loss of earnings capacity? We tend to look for evidence of e.g. previous sickness absence to back up such an apportionment but this appears to imply that we can try to guess whether there might have been a problem in the future. This is notoriously inaccurate, most obviously demonstrated in legal reports on back injuries

From: Surrey Police Authority

Date: 14/02/11

Surrey Police Authority welcomes the greater clarity that is proposed in the above documents regarding police injury awards, but there are three points we wish to raise.

Firstly, there is the matter of the award of costs in determined appeals that have been heard by the PMAB. Currently it is only where appellant's claims can be shown to have been "vexatious or frivolous", that an award of costs may be granted. This Authority would suggest that a lower test of "serious chance of success" should instead be substituted to prevent applicants being encouraged, particularly by no-win, no fee lawyers, from taking cases to appeal, which while not being vexatious or frivolous, still have no realistic prospect of being allowed by the Board. In the current climate of substantial reductions in central government funding being visited on the police service, it is important that all parties to an appeal take account of the serious cost to the public purse that is incurred when cases with no real prospect of success move to the appeal stage. The test that this Authority proposes would require appellants to make a careful evaluation of their chances of success, but would not be so harsh as to dissuade individuals with a serious case that needs to be considered from having access to the PMAB.

The second point to make is that the Authority is concerned that both the documents on which views are sought envisage a large role being played by Police Authorities, presumably by a number of individual members taking part in decision review panels. With government proposals to create elected Police & Crime Commissioners in May 2012, it is difficult to see how one person could fulfil all the roles currently carried out by police authority members, particularly when the PCC will have such a wide range of other duties that s/he will need to personally carry out. Perhaps the proposed Regulations should mention that further revision will be needed if and when PCC's come into effect.

My third point relates to the section within the Guidance on Review of Police Injury Pensions. The view of this Authority is that the paragraphs relating to the movement of pensioners into the lowest band of award at age 65 is still not clear enough, particularly as this section follows on directly from the section which gives advice on how to calculate loss of earnings when the individual gets to either 60 or 65. Perhaps this section could be clarified further to ensure that confusion in this sensitive area does not arise.

From: Sussex Police

Date: 08/02/11

The guidance on the 2006 regs does, we feel, help clarify what we do, although the requirement for ongoing reviews is labour intensive.

Further, we seem to be trying to continue to operate in the same way and just 'update' what we do from learning in the courts. We'd suggest that a complete overhaul is undertaken and perhaps a change in direction. As the review process is time consuming (both administratively and in clinical terms), costly and seems to attract frequent legal challenge (often from the same individuals on an ongoing basis!), would it be possible to change how awards are made? For example, at the point of award, an assessment could be made of loss of earning capacity up to NRD, attributable to the injury, and a lump sum is paid. The officer concerned is then responsible for buying their own pension with that lump sum or indeed for using it in another way - either way they are compensated for the loss of earnings caused through an injury on duty. The initial award could be appealed within a short window after the award is made but there would be no further reviews either on the request of the officer or on initiation by the Force. The award would be made in full and final settlement.

If we are to continue as we are then we have concerns about consistency of practice between Forces - the fact that different Forces adopt different approaches means we are more likely to see legal challenge. Also, although we at Sussex would adopt the Home Office guidance we would like reassurance that we can do so with confidence in its legal efficacy.

More specifically we'd comment as follows:

<u>Guidance on 2006 Regs:</u>

We feel we need clarity on whether or not the PMAB will take the guidance into account when deciding matters on appeal. This relates to our comment about legal efficacy

The guidance is helpful in that it provides much needed clarity on certain issues, in particular, it emphasises what factors the the SMP should, and shouldn't consider in assessing the cause and level of award.

The requirement for reviews at least every 5 years - there may be circumstances where this is superfluous so can we build in provision for exceptional circumstances for not doing reviews until last one at state retirement age?

The exceptions to making the age 65/last review are vague, open to interpretation and challenge. Para 5.3 - It's good that legal advice needs to be taken where there's doubt over the original SMP conclusion but this contradicts the earlier description of what the SMP's remit is and is very much open to challenge. We feel this needs to be much tighter for the sake of consistency and fair case management.

Annex A 14 a and b - we would like the term 'cogent reason' defined as it is very open to interpretation.
We have a preference in Annex A for 14b simply because it is not age related and although there is an agreement to hold NRD at 65 even in the light of the legislation arriving in October 2011, the less exposure to potential age discrimination claims the better.

It appears the guidance removes the controversial automatic reduction to band 1 at age 65 but recommends that Forces undertake a review at this stage and use a different set of earnings related benchmarks - have we understood this correctly?

From: Police consultant

Date: 26/01/11

Peter - Just for info to assist you at NAMF.

In a case recently won at PMAB re over 65's Board accepted only 4% of people in that age group work full-time and therefore could not support using the ASHE figure for workers of all ages. So they used median for full and part-time workers in the age group 65-69, which had the effect of reducing the ASHE comparator by around 2/3rds.

That would support your para in the guidance (14a) - I will explain Boards reasoning in more detail on Friday. I think the Board was happier using figures for all persons who undertake paid work in the age group albeit only 11% total of the age group who actually work. (4% full-time and 7% part-time) Obviously any other case has to be assessed individually because there will be occasions where some pensioners would still need to be assessed under ASHE if they have retained the generic skills etc and still wish to work for example. I would anticipate that the NAMF will support this para.

Re 14(b) I think the adding on of OT, bonus payments etc was unsustainable for the obvious reason that you are not assessing like for like so it is sensible to make no mention of the add-ons. I've never had a problem arguing for the basic ASHE figures at Boards.

Overall I can't see too many issues from the Regs and guidance..... just need clarity on the travelling aspects and resolving the comparator issues.

From: Police Authority lawyer

Date: 04/02/11

Here are my comments on the draft HO Guidance as discussed at the last Southern FMA group.

1.2

It is only the decision that the permanent disablement found by the original SMP was **caused** by an iod which is final. The disablement or its permanence may have ceased since then and this is a relevant consideration for the reviewing SMP to consider. On a review, the question is what, if any, change has there been in the degree of disablement found by the original SMP to have been caused by police duty. The range is 0 - 100%. If the medical condition found by the original SMP to have been permanently disabling is no longer permanent or disabling, the loss of earnings capacity attributable to a permanent disablement which no longer exists is nil = 0 - 25%.

2.3 (i)

In my view the word injury should be replaced with the word disablement

2.3 (ii)

"The SMP should then assess earnings capacity taking into account only any adverse impact attributable to the qualifying injury on duty, discounting all other causes of loss of earnings capacity."

2.3(iii)

"If necessary the SMP should then apportion to remove the effect of non duty causes on earnings capacity, eg, two or more permanently disabling conditions not all of which are caused by police duty or permanent disablement(s) which is(are) only partly caused by police duty."

3.1

I have concerns about the word "may" in the fourth line. This is a dangerous place to go in any event. AN SMP or PMAB ought not to fetter the Police Authority's discretion to undertake a review. The law may change, which may make a review appropriate in circumstances in which it wasn't previously. Also an iod review is not just a medical assessment, other, non-medical/legal factors are important in determining degree of disablement.

3.2 Bullet Point 1

Penury is not a relevant factor for earnings capacity. NB there is nothing stopping a former officer from requesting a review if they consider their degree of disablement has ceased.

4.4

I would delete references to HR & OHU departments and stick with Police Authority - here and elsewhere (eg 4.5).

4.7

An examination is not always appropriate and an officer should not have a right to one - they are expensive. If the former officer has had a limb amputed as a result of police duty, a further medivcal examination may not tell the doctor something he doesn't already know.

Also, if the former officer denies access to GP records, the SMP may consider these records "necessary" without needing to meet the officer face-to-face. If that is the case, Regulation 33 will apply (refusal to be medically examined).

Additional Passage re Refusal to be Medically Examined

"If a former officer fails to comply with any step the SMP considers necessary, the SMP should inform the Police Authority and take no further action. The SMP should not respond to any pressure by either the former officer or the Police Authority to proceed with the determination in circumstances where a step the SMP considers necessary has not been taken."

5.3

The legal position is clear here, I think and there ought not to be a need to refer the matter to HR & Legal. After the word "payment" in line 3, I would delete the rest of the text and replace it with:

"(....),they are nevertheless bound by the disablement found by the original SMP to have been caused by police duty, even if the earlier SMP was wrong."

5.4 Second Bullet Point

I would add the following text at the beginning:

"If an earlier SMP has apportioned, there has been ....."

5,4 Fourth Bullet Point

I would delete the current text and replace it with:

"a change in the jobs available"

5.5

This is confused. Unless there has been an apportionment from the outset, medical conditions unrelated to the qualifying injury on duty are as irrelevant at the time the award is granted as they are at the time of any review - so why mention them?

5.6 and 5.7

Need to make clear that apportionment is available at the time of grant but can only be considered at the point of review if it was considered at the time the award was granted.

5.9 Bullet Point 1

Replace the word "injured" (2nd line) with "disabled".

5.9 Bullet Point 2

Replace the current text with:

"establish whether the disablement found by the original SMP still exists and if it does, whether it is permanent and if so, identify the occupational restrictions, if any, imposed by that permanent disablement"

Annex A

The drafting could be tightened up to clarify when the granting and when the reviewing (or both) of an award is being contemplated.

Paragraph 5

I would add the following text to the end of the paragraph:

"....as a result of the qualifying injury."

Paragraph 6

After the word "qualifications" on the penultimate line on the first page paragraph 6 straddles I would add the following sentence:

"Whilst current employment may not reflect earnings capacity, it may provide the SMP with information about current function

Between Paragraphs 7 & 8

A new paragraph is needed containing the following text:

"Whether an officer who has not been medically retired is entitled to an injury award is uncertain. Where Police Authorities consider that a former officer who has not been medically retired is entitled to an injury, they should be given an award in the "slight" banding as the injury on duty has caused no loss of earnings capacity. But for the former officer's decision to leave police service,, they could still be earning their opolice officer salary, so their loss of earning capacity attributable to police duty is nil (=0 - 25%)."

Paragraph 14B

Delete 14B. The median is a far more accurate measure as it ignores the influence of non-representative extremes.

Paragraph 18 to 22

These paragraphs need to be re-written to get the law right

"Apportionment and Discounting"

18 The Administrative Court has made it clear that all medical conditions other than the qualifying injury on duty must be ignored. This has been referred to as "discounting". For former officers who have not reached the compulsory retirement age for their rank, it is assumed that their healthy-self could still earn their former police officer salary (Earnings A). For former officers who have exceeded what would have been their compulsory retirement age, the SMP must take as their starting point the former officer's skills and abilities assuming they have no health problems whatsoever. This may be artificial, particularly where the individual has significant health problems unrelated to police duty. The earnings capacity of the healthy, uninjured individual officer is then assessed (Earnings A). The next step is to assess what the impact of the qualifying injury on duty has on Earnings. The earnings capacity of the former officer taking account of any health deficits attributable to the qualifying injury on duty must be assessed - ignoring all other health issues (Earnings B). The percentage difference between Earnings B and A is the degree of disablement attributable to police duty (C). For the majority of cases, Earnings A will be either the former officer's police officer salary or national Average Earnings for the relevant age group as measured by "ASHE".

Apportionment is appropriate where the permanent disablement attributable to police duty has more than one cause, one or more of which are unrelated to police duty. The SMP must assess what percentage of the permanent disablement is attributable to police duty (D) and what percentage is attributable to other causes(E). (C) should then be reduced by the percentage attributable to none-duty causes (E). Apportionment between the two causes is only appropriate if both causes, independently of the other, would have caused permanent disablement.

From: Northern Ireland Policing Board

Date: 18/01/11

Tthe following are my comments of the first draft of the guidance. My comments should be taken as constructive and not a criticism who every prepared the draft.

My first impression is that the guidance is very wordy and repeative. It needs to be a lot shorter and sharper and the presentation needs to be better with different sections. When the draft is being considered by the PNB Working Party is needs to be understood that it relates to England and Wales as in many cases it does not reflect the NI process.

In your covering letter you refer to 2004 guidance but there was 2 further guidance circulars issues in 2007. This new guidance is still very vague in many areas and gives no guidance to the issue of applications for IOD from former officers over age 65. The guidance issued in 2007 states as follows:

'Applications received for injury awards from former officers who are already over 65 should not normally

be referred to the SMP for consideration'

We have a decision made in NI by a Medical Appeal Tribunal that would indicate that they consider all such cases of applications from officers over age 65 should be sent to the SMP for consideration. We regularly get applications for over 65 and we have a number holding until the revised guidance was agreed. I did ask that this be included in the guidance and would ask you to please revisit this area.

I will now comment in the various sections of the first version of the draft guidance as follows:

1.2 In this section it states '..... to enable the police authority to calculate the appropriate level of injury award'. It is the SMP or IMR who calculate the percentage IOD award. From that information , in NI, PSNI Pensions Branch use that decision to calculate the actual amount of monthly payment the former officer actually receives.

4.2 - 4.7 Neither the force Human Resource Department nor OHU have any direct involvement with the SMP nor reviews. As the PSNI pay IOD awards from the Chief Constable's budget it would be a considered a conflict of interest if the PSNI had any involvement in an assessment or review. The SMP is appointed by the Board and manage the contract. We would not undertake a paper sift and as there is no provision for this in regulations I would have concerns that any decision from such a paper sift could sustain any legal challenge.

4.8 We do not understand why the former officer needs to write to the Chief Executive nor also enclose a GP report supporting the review. Again there is no requiremenrt for this in regulations and the police pensioner would probably have to pay the GP for such a letter of endorsement. It is highly unlikely the any GP would refuse to isue a letter in support of his/her patient. We do ask for the request in writing and to complete a review form.

5.2 In order to comply with this section how long is it recommended that the SMP or PMAB (in the case of NI the IMR) papers/files are retained. Is it only the certificates and reports which require to be retained?

5.4 In the first bullet point at the end it should read ..... injury/s and resulting condition/s; I don't under stand why 3 and 4 are included. Why are age and the labour market a factor in the assessment?
5.5 This is one of many examples of being rather wordy. In the last line of the section it uses the word 'reassessment' which should read 'review'.
5.6 Again wordy.
5.8 This is incorrect. Because there may be a new police pay level of Ashe survey the SMP needs to do a calculation. Regulations state that the SMP decision should be in the form of certificate.
5.10 I don't undertsand points 1 and 2. What the SMP is assessing is the peron now!
7.1 'SMP's assessment' should be changed to 'SMP's decision'
7.2 For NI we need to change PMAB's to IMRs
Annex A
2.7 (5) If someone is in hospital for 3 weeks do they receive 100% for that 3 week period only and how is this awarded?
6. Line 3 replace 'outside job' with 'civilian job' and at line 5 replace 'salary' with 'earnings'
7. Same as 2.7 (5) above and being repetative.
8. We will be using the NI ASHE figures.
9. For NI London weighting does not apply.
11. This paragraph is not accurate and is very confusing
12 I only see the need to refer to the present CRA's
15 Again confusing
17 This refers to former officers over 65 as being no longer economically active. This could be challenged under age discrimination and there is evidence that the statement is not active and is contrary to Government policy. It

states that each case will be considered on its merits yet in 16 it stages that in the absent of a cogent reason the SMP may place the former officer in the lowest band. This I don't believe could be defended as the SMP is not conducting a review of all the evidence.

From: Further comments on above from Northern Ireland medical practitioner

Date: 18/01/11

I have read your email below and I agree with the points you raise. Below are my comments on the draft guidance and your response;
4.7 I feel that all reviews should follow the same process of face to face assessment unless there is a substantial or material reason where this is not practical. If the officer denies access to the GP or treating doctor then I would not be satisfied that I have full informed consent to assess them. In any case it is usual to request third party medical reports. Accordingly I am not sure this proposal would be ethical. I agree with you that it may not sustain legal challenge either.
4.8 Agree with your opinion entirely
5.2 – 5.7 and 5.9 and 5.10 The recommendations appear to run contrary to previous Home Office guidance and draft recommendation 2.5 and may therefore be open to legal challenge. I agree with your comments on age and labour market.
5.8 I agree with you comment
5.10 Agree with your comment
7.1 I agree with your comment
7.2 I agree with your comment
Annex A
2.7 (5) I agree with you. This seems impractical and will be difficult to implement.
4. I do not fully understand this
5. The SMP would not normally require advice from the PSNI regarding current potential earnings capacity as the SMP can form his own opinion in this regard based on ASHE, current functional capacity, previous job experience and qualification. Current projected police salary is supplied by the NIPB/ PSNI personnel department as I understand.
6. This paragraph contains advice which is contradictory. It is not necessary to consider the persons current salary into consideration. Although it the current job does provide some useful information regarding functional capacity assessment.
7. I agree with this draft recommendation up to the point where mention is made of hospital inpatient treatment. Again seems impractical and would be difficult to implement.
8. I agree with your view
9. I agree with your view
10. I was not aware that overtime payments were taken into consideration when calculating projected police salary.
11. I assume this means that the current projected rank specific salary should be used in the disablement calculation.
12. I agree with your view
15. It is for the NIPB to provide the contemporaneous ASHE figure for the purpose of the calculation. It is not for the SMP to increase or decrease this figure.

16. Previous guidance given to the SMP was that the ASHE figure should be used to calculate current and projected salary for the purpose of the calculation in officers beyond age 65.
17. I agree with your view.