CAS-32325-J0P5

Ombudsman's Determination

Applicant	Mr S
Scheme	Police Pension Scheme (**the Scheme**)
Respondent	Dorset Police (**DP**)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by DP.

Complaint summary

2. Mr S is unhappy with the process that took place when he applied for Ill Health Early Retirement (**IHER**). He says DP did not follow the correct procedure and that there were several instances of negligence and maladministration, all of which resulted in avoidable delay and inconvenience.

Background information, including submissions from the parties

3. Mr S worked for DP and is a member of the Scheme (now in receipt of benefits).

4. In March 2017, Mr S applied for IHER. As part of an IHER application, a member is asked to supply medical evidence relating to the condition/s being assessed. As Mr S resided in France and used the healthcare provided there, most of his medical evidence was in French.

5. On 11 April 2017, Mr S wrote to the Chief Constable for DP expressing his concerns about a lack of an update on his IHER application. He was responded to on 19 April 2017 by an individual in the 'Employee Involvement and Engagement, People, Strategy and Policy Team' at DP (**the Policy Manager**), who provided an update.

6. On 21 April 2017, DP's Human Resources Officer (**the HR Officer**) emailed Mr S referring to his recent application and attached a consent form for completion. She said, once completed, she would forward this to DP's Occupational Health department (**OH**) for it to initiate the process.

7. Mr S replied the same day saying:

"I will of course complete the forms and return (is email OK?) but you must note that I have lived in France and received all my health treatment here since 2005. The system here is different from the UK. Patients keep their medical records and reports and request access to specialists. My medical conditions are fully recorded but are in French. No doubt you will need letters and opinions etc, but I am unsure how you wish to proceed."

8. On 27 April 2017, the HR Officer wrote to Mr S saying:

"Unfortunately your request is a little unusual (with regards to your medical records being in French and therefore requiring translation) and as such I have requested some advice from Occupational Health to ascertain if additional consent forms are required as your records will need to be viewed by a translator.

In addition, under normal circumstances, medical records are passed from one area of the NHS (GP surgery) to another (Occ Health) via secure internal means, I've therefore requested advice on how they require your records to be provided by you (i.e. original documents via postal service, copies or scanned documents via email?)."

9. On the same date, she wrote a letter to the NHS Occupational Health team in which she said:

"In the circumstances could you please provide an appropriate report which determines the questions set out below:

1. Is the person concerned disabled under Police Pension Regulations;

2. Is the disablement likely to be permanent.

Please refer the matter to Selected Medical Practitioner (SMP)."

10. On 28 April 2017, Mr S sent the HR Officer his signed OH consent form.

11. On 9 May 2017, the HR Officer wrote to Mr S saying:

"…I have now received information from our current Ill Health Retirement contract providers 'IMASS', that the Selected Medical Practitioner (SMP) will require them to arrange for the translation of your medical records in order for the SMP to assess and decide upon your request to access your deferred pension….In the meantime they will source the services of a 'medical translator' and obtain an approximate cost for this service (obviously this will be largely dependent on the size of your medical records but it may be helpful for you to at least have some idea of the cost involved). Unfortunately it would not be considered reasonable for [DP] to absorb this additional charge which is above our standard administrative costs payable to Occupational Health, IMASS and the SMP.

> Thank you for returning the 'consent' form, IMASS will be providing you with an additional consent form that will be required due to the use of the medical translator."

12. Mr S replied the same day saying:

> "As I do not work, have no income and am dependant on my wife's state pension, I am in no position to fund the translation of medical records, indeed, when I joined [DP] and left it, I was not told that in the event I moved country and was unwell that I would have to pay for translation in these circumstances. I can evidence my income if required.
>
> …
>
> I feel I must reiterate, I cannot pay and it cannot in all the circumstances be right and proper that you ask me to. The very nature of my request for payment of the pension early must surely be prima facie evidence of that."

13. On 22 May 2017, the HR Officer made the following points to Mr S:-

- Any related cost to the access of Mr S' medical records would fall to Mr S and not DP.
- IMASS was currently sourcing the services of a Medical Translator who it would need to vet and check the accreditation of. Once this had been completed, it would advise how Mr S should provide his medical records.
- Alternatively, Mr S could arrange for records to be translated and provide IMASS with certified copies. There might be further translation costs should the SMP request additional specialist reports.

14. On 25 May 2017, the HR Officer provided Mr S with the following update:-

- IMASS had sourced a medical translation company which was currently undergoing the required vetting process.
- As stated, IMASS had been asked to contact him direct to advise what medical information should be provided for translation. This was not something DP could advise on as this was a contracted-out process.
- Once the SMP had reviewed the medical records, they would usually require a face to face appointment prior to making their decision. The SMP might be able to proceed without this due to Mr S living abroad, but this would be their decision.

15. On the same day, Mr S replied saying, among other things, that he had provided a signed consent form to obtain his medical records and assumed nothing else was needed from him in this regard. He asked that he be told if his understanding was not correct.

16. On 31 May 2017, Mr S chased the HR Officer.

17. On 1 June 2017, the HR Officer emailed Mr S saying:

> "As per my email dated 21st April, please sign and return to me the attached Consent form for the 'release of GP Records' and consent form for 'Specialist report' as we have only received a signed Consent form for 'release of sensitive information' to date from you. Occupational Health will obtain your GP records retained in the UK and they will be forwarded to SMP via IMASS in due course..."

18. On the same date, Mr S wrote to the Policy Manager to formally complain. In summary he said:-

- He was "amazed" at the time it had taken to achieve nothing, both recently and from the outset of this claim.
- DP was not conducting this matter with the effectiveness, efficiency, and timeliness to be expected of an organisation charged with administering a pension.
- His concerns included: a lack of response, repeated inability/refusal to answer questions, lack of skill and experience of the person currently assigned to progress this matter and unacceptably slow responses to legitimate questions.
- More recently, it had taken five weeks to remind him that that he had forgotten to send two consent forms.

19. On 5 June 2017, the Policy Manager said he would arrange for the necessary forms and guidance to be sent to Mr S to invoke the Internal Dispute Resolution Procedure (**IDRP**). I understand that on 12 June 2017, Mr S completed these forms and formally submitted his complaint.

20. On 15 June 2017, the HR Manager for DP wrote to Mr S acknowledging his complaint and explained that he was the "Specified Person" (**the SP**) assigned to address the matter. He said that all future correspondence should be sent to him and not the Policy Manager.

21. Mr S replied the same day asking whether he was correct in understanding that he (the SP) would deal with his complaint and that his application would continue to be dealt with by the HR Officer.

22. On 22 June 2017, Mr S wrote to the SP saying:

> "I have today written to the Trustees concerning breaches of fiduciary duty, e.g. nil responses, by you and others.
>
> As a consequence, please note that:
>
> a. In respect of my Complaint, I will reject all and any conclusions you reach.
>
> b. In respect of my Application, please see to it that it progresses in line with

i. expectations I have previously set out, and

ii. your fiduciary duties"

Kindly provide a full update before close of play this week."

23. The SP replied confirming that the HR Officer remained his point of contact in relation to his deferred pension request. He also said that IMASS was still in the process of vetting the chosen translator. He had requested that they prioritise Mr S' case over other current deferred pension requests (but not over active members); the HR Officer would be in contact once the vetting process had been completed. He also asked Mr S to confirm whether he was withdrawing his complaint given that he intended to reject the conclusions reached.

24. On 23 June 2017, Mr S confirmed that his complaint still stood.

25. On 6 July 2017, the SP informed Mr S that IMASS had completed the vetting process for the company it would propose to use for the translation of his French medical records. However, it needed his records in order to proceed, with an appropriate signed consent (which he attached).

26. On 13 July 2017, SP wrote to Mr S clarifying that he was the nominated "specified person" for the complaint under the IDRP but, in the absence of the HR Officer, he would be overseeing the process and discussions with Mr S, IMASS and OH. Mr S forwarded his medical records the same day.

27. On 20 July 2017, the SP said to Mr S that these medical records would be forwarded to IMASS and that the translation company would be required to advise a timescale and the associated costs.

28. I understand that around this time, Mr S approached The Pensions Advisory Service (**TPAS**) for guidance on the situation.

29. On 8 August 2017, DP's Assistant Chief Constable confirmed to Mr S that the fee estimate for the translation service, quoted via IMASS, was an amount of £2,475 plus VAT. He said:

"The expected timeframe for the task is advised as 12-13 days. I appreciate that this is a very significant sum. I know your views on this issue - yet note translation is all fundamental to your application being progressed. I propose the following. Acceptance of the estimate and to proceed with the translation - so that at least your application be advanced. However, I would caveat this upon further legal advice to [DP] on this matter. Were such advice be [sic] that it is your responsibility as applicant - rather than [DP's] - then unfortunately the application could not be progressed further without you reimbursing us."

30. Mr S responded the same day saying:

"This is the most shocking, ill considered, disgusting, appalling, unreasonable, unfair, prejudicial and spiteful response/justification.

> Now you are overtly holding me to ransom over my pension application/pension unless I agree to pay one of your suppliers two thousand five hundred pounds plus Value Added Tax. Let us think about this, you are a large police force with a large pension fund to administer and a responsibility to manage and fund activities. I am one beneficiary. You need to manage your funds better.
>
> Are you honestly suggesting that it is right an [sic] proper that you insist I pay for a translation service which is mandatory to progress my application for early access to a deferred pension when (as explained several times before)
>
> 1. I am ill
> 2. I cannot work
> 3. I cannot afford to pay
> 4. I am not privy to your agreement with IMASS
> 5. The effect of your decision is to deny me the progression of my pension application and therefore my pension
> 6. You have not had the foresight to budget for such matters
>
> I cannot and would never be able to conceive of a world where in all the circumstances this would be considered justiciable…"

31. The following day, Mr S added that knowing the French language and his medical records, it was "impossible to justify such a fee," highlighting that there were three or four short letters to translate, with the rest being graphs and print outs. He suggested that Google Translate would be a viable, and free, option.

32. On 14 August 2017, Mr S wrote to the Complaint & Misconduct department within DP to complain about the professional standards deployed by the HR Officer.

33. On 17 August 2017, the SP replied to Mr S under the IDRP. In summary he said:-

- He was sorry for the delay in providing a response. Under the IDRP, DP had up to four months to provide a formal response. His main objective since receiving the complaint had been to resolve Mr S' deferred pension request as quickly as possible. In this regard, he had this week instructed IMASS to expedite the translation of his French medical records.

- Normal processes had been followed but the additional requirement to source and carry out vetting on an accredited medical translation company had regrettably caused delays. IMASS had indicated to DP that it had not previously experienced this scenario.

- It agreed that it could have better explained the process and likely timescales. Cases could take six months from start to finish. Ordinarily, DP would provide detail on the appeal process once the SMP had reached his/her decision.

- He and the HR Officer had made significant efforts to progress Mr S' application and where possible, respond to specific questions in a timely way. However, some of Mr S' expectations in this regard had been unrealistic and unachievable.

- His team did have the necessary skills and experience to perform their roles with integrity and professionalism. However, DP was also reliant on external health contractors and GPs, the latter regularly causing delays outside of DP's control.

34. On 12 September 2017, Mr S' TPAS representative informed Mr S that DP had taken the decision, in principle, to pay for the cost of the translation, despite legal advice saying that it was not required to do so. However, IMASS' provider had recently said that it might need to revise its cost estimate as some of the documents submitted were handwritten. DP was however contesting this and, if successful, it could proceed.

35. On 5 October 2017, DP informed the TPAS representative that Mr S' French medical records had been translated and were with IMASS, along with his UK medical records and other information he had sent. It added that on a strict reading of the IHER regulations, a face to face medical assessment would be required. However, as Mr S lived in France and given the time that had passed, IMASS should give a view based on the paperwork only.

36. On 24 October 2017, the TPAS representative told Mr S that DP had indicated that IMASS' doctor's preference would be to conduct a face to face assessment. DP's position was that any costs involved would normally be met by the applicant.

37. Mr S replied the same day saying that he could not come to the UK at his own expense.

38. On 17 November 2017, TPAS told Mr S that DP was willing to cover limited travel and accommodation costs – up to £300 – for him to attend the medical assessment (in the UK).

39. After several exchanges between DP and Mr S (with TPAS acting as liaison), it was agreed that Mr S would travel to the UK for the assessment via car and ferry, with the ferry trip both ways being overnight and thereby not requiring overnight accommodation. The assessment took place on 20 December 2017 and Mr S says he and the SMP, Dr Yarnley, agreed that the latter would send the former a copy of his notes prior to submitting these to DP.

40. Also around this time, Mr S became increasingly concerned that his application was not being handled in accordance with a guidance document entitled, "Police Negotiating Board (PNB) Circular 10/4" (**the Circular**), or The Police Pensions Regulations 1987 (**the Regulations**). Extracts from both documents are provided in Appendices 1 and 2.

41. On 17 January 2018, the SMP, Dr Yarnley, completed his report on Mr S' application. His assessment was that Mr S did not meet the criteria for IHER.

42. On 19 January 2018, Mr S emailed the Policy Manager and said:

> "It has become apparent that Dr Paul Yarnley (as SMP) does not hold any of the qualifications required by the Police Pension Regulations. I have checked with the GMC and he is not a specialist in any field. I am aware that the IMASS has some sort of accreditation and posed the below questions to IMASS. They have refused to answer saying I must ask you. Please can you advise/provide information specified below. Also, what regulations cover and permit the appointment of IMASS and control the quality of their service provision. This may not be a valid concern, but it would help if you could provide the link between these dots.
>
> 1. The medical qualifications of Dr Yarnley. Please highlight qualifications and expertise in relation to Occupational Health, Heart Health and Respiratory Health. Please ensure full details of all professional memberships are included.
>
> 2. The qualifications of IMASS as a company to practise in Occupational Health and the training courses schedules and accreditation provided to employees and if at all relevant, the dates Dr Yarnley completed such courses."

43. Mr S submitted his comments on the SMP's report to IMASS and on 16 February 2018, Dr Yarnley produced a second (amended) report. His main conclusion however remained, which was that Mr S' heart and lung conditions were not permanent. He said:

> "He reports significant shortness of breath, however when assessed this was not evident to the extent that he appeared to suggest. In addition, he is not exercising and therefore there is no doubt he is likely to be deconditioned and hence improved exercise tolerance would be expected.
>
> Further respiratory and cardiac function testing may allow for a more evidence based determination, however with the information provided I do not consider he meets the criteria for payment of deferred benefit."

44. Mr S subsequently expressed his concerns to DP on how the SMP's decision was reached. He said that no regard was given to the SMP's remit, the scope of his decisions or the tests set out in the Circular. He added that the SMP's reasons for denying Mr S' application were "unique & confused" and it was clear that the decision was not fairly or reasonably reached.

45. On 1 February 2018, the Policy Manager said to Mr S that IMASS had confirmed that all of their Occupational Health practitioners did meet the requirements of their contract.

46. Dissatisfied with the SMP's conduct, Mr S subsequently submitted an appeal to the Police Medical Appeal Board (**PMAB**). A hearing date of 18 July 2018 was

scheduled. Mr S also made a subject access request (**SAR**) to DP and IMASS to understand the rationale and process behind the decision reached.

47. In June 2018, Mr S submitted a letter from his respiratory consultant to DP following a recent medical examination, as well as recent test results.

48. On 22 June 2018, Mr S received a second report from the SMP. The SMP determined that Mr S' heart condition was not permanent, but that his lung condition was. As a result, the SMP reversed his initial decision and determined that Mr S met the criteria for early payment of benefits.

49. On 26 June 2018, DP asked Mr S whether he was satisfied with the SMP's decision and whether he wished to proceed with the PMAB meeting.

50. The same day, Mr S confirmed that he did not consider there was any point proceeding with the meeting, so it was cancelled. Mr S had, however, arranged accommodation and booked a flight in order to attend the meeting.

51. On 27 June 2018, DP confirmed to Mr S that it would arrange for the payment of his deferred pension benefits, with effect from the date of his original IHER request.

52. In August 2018, Mr S received a response to his SAR. However, he did not think it included all the information he had requested and, therefore, he made a second request. When DP responded to Mr S' second request, in November 2018, he thought it was still inadequate. As a result, he complained to the Information Commissioner's Office (**ICO**). The ICO determined that the DP had not complied with its obligations.

53. On 29 November 2018, Mr S complained under the Scheme's IDRP. The crux of the complaint was that DP outsourced the roles of Force Medical Advisor (**FMA**) and SMP to the NHS and IMASS respectively as independent contractors. DP and its contractors had not properly executed the IHER application process and made perverse decisions. This had caused him distress and worry, and caused him to incur avoidable expenses.

54. The SP's response to Mr S' complaint, under stage one of the IDRP on 21 March 2019, is summarised below:-

- In respect to the deprioritising of Mr S' application and whether he had exceeded his authority by doing so, this decision was within his remit given his position and responsibilities for overseeing all such requests. In prioritising serving officers, he took into consideration Force levels of long-term sickness cases and the impact of not managing these.

- DP relied heavily upon its external contractors to interpret the Regulations, PNB guidance, etc. In cases where permanency was not found there was an internal appeal option before an appeal to an independent PMAB. The fact that a decision on permanency was reached before the PMAB stage was not a unique outcome.

- It was recognised that SMPs were not necessarily experts in a particular medical discipline but were nevertheless considered sufficiently experienced to make an assessment for the purposes of the Regulations.

- In terms of the OH involvement in his case, they did not hold any pre-existing medical records for him and his English GP records were not readily available. Alongside the need to translate medical records, this meant that OH could not undertake their normal role and form an initial opinion on whether he may be considered disabled.

- The OH referral onto the SMP was the first step in the permanency consideration process. It was the role of the SMP to be the 'independent' person to make an informed assessment. This approach was both reasonable and proportionate in the circumstances and ensured a more timely initial transfer of his case to the SMP provider, as opposed to the approach of prescriptively following the PNB guidance.

- With regard to OH's role in the translation, it was not the case that they refused to carry this out but that it became more relevant and practical for IMASS to facilitate this.

- He could not comment on the tests set by Dr Yarnley. Also, it was exceptional for an FMA to propose a board of two or more doctors. IMASS had the freedom to seek more detail/specialist information before making a final decision.

- It would normally be considered unreasonable for DP to absorb certain charges, however, as an exception, DP subsequently decided to pay translation costs and also reimburse the full travel costs for Mr S' SMP appointment.

- Mr S would also be reimbursed the 178.80 euros for the cancelled return flight to attend the PMAB on 18 July 2018. Mr S had also mentioned a cancelled hotel booking but had not provided a similar receipt.

55. On 2 June 2019, Mr S contacted my Office. He said that DP's response of 21 March 2019 did not "properly, fully or logically" consider the matters complained about and sought to distribute responsibility for doing so to others for whom DP was vicariously liable.

56. On 19 July 2019, DP responded under stage two of the IDRP. Some of these points are elaborated upon in DP's position below. They were in summary:-

- Mr S had identified the redress he was seeking, this being: an unqualified apology, compensation for the harm caused and reimbursement for the unnecessary expenses incurred. However, in its letter of 17 August 2017, it provided an "appropriate" apology. A further apology was offered in its stage one IDRP response. It did not believe that an unqualified apology on all matters was warranted.

- While there was no record of a specific individual being identified as the FMA, the OH contractor did prepare his case for consideration by the SMP. His medical records were not available and there was no FMA familiar with his case.

- At paragraph 5 of the Circular, it is noted that a case passing through the whole process (including the PMAB) could last more than a year. In its letter of 17 August 2017, it stated that typically cases could take six months to resolve. Mr S' case, although not including a PMAB, took 18 months to conclude. This was largely due to the time taken to resolve issues regarding translation; the extent to which Mr S chose to challenge and pursue this issue with DP did not aid it in "managing the process as expeditiously as practicable".

- While there was no requirement to do so, it also reimbursed the travel expenses Mr S incurred in attending the SMP appointment. While the process itself could, by its nature, cause individual members concerns and anxiety, the "extended time" taken to resolve Mr S' case caused additional distress and inconvenience and, therefore, a payment £250 was warranted in recognition of this.

- Mr S had also provided evidence that he incurred 178.80 euros in air fares to attend the aborted PMAB hearing. In its stage one response, it had offered to reimburse these costs. It did not think it was obliged to do so.

Mr S' position

57. Mr S' position is as follows: -

- DP failed to properly follow the guidance outlined in the Circular and, therefore, failed to follow the correct procedure in its processing and handling of his IHER application.

- Contrary to paragraph 14 of the Circular (among others), DP failed to appoint an FMA to consider the question of whether he met the permanent disability criteria under the Regulations. In addition, although DP claimed that the FMA had insufficient evidence on which to form an assessment (hence its referral directly to the SMP), this was untrue. From evidence he had obtained under the SAR, it was apparent that the role of the FMA was outsourced to the NHS, which had refused to translate his records, therefore, DP simply referred the matter directly to the SMP. There was no indication that an FMA was ever appointed.

- The FMA's role would have been to consider the existing evidence, or request further evidence needed to satisfy the rules, set out in paragraphs 20 to 24 of the Circular, as being necessary for the SMP to properly discharge their function. It was entirely unreasonable for the NHS not to appoint an FMA and follow the rules.

- The SP exceeded his authority, and acted incorrectly and unreasonably, in deprioritising his application by prioritising the IHER applications of active members. He had no authority to do so, and this may have caused an

unreasonable and unavoidable delay in his application. The SP was not medically qualified and his job was to administer applications in the order of the date received; it was the FMA's role to decide on priority.

- DP acted incorrectly by failing to clearly instruct the NHS, which "disempowered" the SMP. On 27 April 2017, the HR Officer asked the NHS Occupational Health team to provide a report which determined whether the applicant was disabled under the Regulations and whether this was likely to be permanent. She had then said, "please refer the matter to the Selected Medical Practitioner (SMP)." The NHS did not appoint an FMA so the SMP could not benefit from the FMA's advice. This led to the SMP making a decision which he did not have the qualifications, skills, or experience to make; leading to further delays.

- Contrary to paragraphs 22 to 26 of the Circular (among others), DP not only failed to arrange for the FMA to provide an opinion on the question of disability but also failed to propose, or have the FMA propose, that a board of two or more SMPs be appointed. As his case was complex, and involved the interaction of two conditions/different medications, the onus was therefore placed on just one SMP to make an assessment, which he was unable to do.

- Contrary to paragraph 24 of the Circular (among others), DP denied him the opportunity to have sight of the medical evidence before a final decision was made by the SMP. As a result, he was not provided with the opportunity to "understand, influence or add to" his application before it was passed to an SMP for a decision.

- DP acquiesced in the SMP exceeding his remit. The SMP was only required to answer the questions set out in H1(2) of the Regulations. IMASS' response to him of 23 February 2018 was that, "Dr Yarnley is not an employee of [DP] now acting on their behalf but rather for a mutual, justiciable outcome, as per a judge." This was extraordinary and suggested that the SMP considered that he had assumed the role of judge, jury and executioner of his (Mr S') application.

- The SMP chose not to refer the matter back to the FMA, even though it was beyond his qualifications, skills, and expertise; instead, the SMP insisted on a medical examination, which, was unnecessary, as the evidence as to disability and permanence was conclusive. This led to inconvenience and expense. In addition, the SMP chose not to refer to UK medical experts to assist with his decision and disagreed with specialist doctors who had superior skills and experience. All of this was caused by DP's initial decision, which either facilitated or caused the SMP to fail, and to exceed not only his authority but his qualifications, skills, and experience.

- DP acted unreasonably by requiring him to pay the total cost of translating some medical evidence from French into English. In particular, it caused a delay of about five months, whilst it considered whether or not it was obliged to do this; it also did not allow him to become a party to the agreement between it and the

translation company, which denied him recourse in the event of a disagreement; it ignored suggestions of a compromise, for example 'Google Translate'; and, it held him "to ransom" by agreeing to pay for the translation, but also threatening not to progress his application if its own legal advice later suggested that it was not liable for such costs.

- Contrary to H1(2) of the Regulations and the Circular, DP, and various other parties, failed to provide evidence that the SMP was "duly qualified" to assess his application.

- DP failed to properly manage its relationships with third-party suppliers and, it failed to ensure that those suppliers complied with relevant rules and regulations, including the Regulations and the Circular.

- Following an ICO finding that the DP was not complying with its data protection obligations, it continued not to make full disclosure. In particular, neither the DP nor IMASS had disclosed the email, telephone or meeting notes which resulted in the SMP withdrawing a clear request for medical reports and instead deciding there was sufficient evidence that his conditions were not permanent. Such a reversal cannot have been made without reasons and discussion, and DP had failed to provide evidence of this, despite his requests.

- The SMP said and did a number of things which were so inaccurate and/or so unreasonable and unfair that an appeal to the PMAB was required. These things were said and done in the examination and reports of Dr Yarnley. Firstly, the SMP had failed to properly measure and report his pulse and breathing rates for both the walking test and stair test he conducted. These actions were unjust and delayed his application.

- Next, in his report and decision letter, the SMP reached conclusions on questions which required specialist knowledge, adopting the position of an expert on his heart condition. He was not permitted to reach conclusions without expertise or qualifications. Further, the SMP omitted to agree with the reports of specialists that said his heart and lung conditions were permanent; he instead decided to re-evaluate these conditions and reach a conclusion contrary to that known in the profession to be true.

- The SMP had stated that his FEV is "33% below reference." However, the correct translation is that his FEV is "33% of reference." The correct number was different to that which Dr Yarnley had advanced, and suggested his condition was not quite so severe. This was an error that he would not expect a similarly skilled doctor to make.

- The SMP had failed to show that his heart and lung conditions were not permanent, as required by the Regulations. The SMP did not expressly consider the permanence of his conditions, nor did he consider alternative medical treatment for his lung condition or whether there was any appropriate medical

treatment for his heart condition. Dr Yarnley had also made reference to a number of matters which fell outside the definition of “appropriate medical treatment.” Further, Section 4 of the Guidance for Selected Medical Practitioners contained within the Circular was very clear about the tests to be applied to determine disablement and whether or not the disability is permanent. Dr Yarnley chose not to follow any of these tests, opting instead to apply a unique test of whether or not he met “…the criteria for payment of deferred benefit.”

- To support the conclusions Dr Yarnley had reached, he suggested that the symptoms he [Mr S] had described did not exist. He suggested that Mr S perform the Bruce Protocol, which was unreasonable for a number of reasons.

- Dr Yarnley said cardiac and respiratory function testing would allow for a more evidence based determination, though he said he had sufficient evidence to conclude his conditions were not permanent without identifying that evidence.

- He also noted from the first SAR disclosure from IMASS that, in December 2017, Dr Yarnley had indicated to the DP on 4 January 2018 that he wanted further information from his [Mr S’] heart and lung specialists and had some questions. DP had not disclosed this email in its SAR response and neither IMASS nor DP had disclosed a response to this email. Further, neither party had disclosed any materials from 4 to 17 January 2018, on which date DP told IMASS to release the report. Something occurred between 4 and 17 January which was not being disclosed; whatever this was resulted in the SMP no longer requiring additional information.

- Dr Yarnley had also said that he [Mr S] should seek further clarification to determine whether his shortness of breath was cardiac or respiratory or a mix of both. Hence, it appeared that Dr Yarnley wished to have further reports but for reasons unknown, this desire “vanished” between the 4 and 17 January 2018. Also, the SMP’s decision was final, but he seemed not to recognise that when he suggested further clarification. A reasonable doctor would have referred him to specialists and deferred any decision until the issue was addressed to the satisfaction of experts. This was perverse, negligent, and only served to delay his application because he had to appeal.

- Dr Yarnley concluded that: “The test results supported some reduction in lung function but this does not appear to be such as would prevent him from being able to function as a police officer” He did not however specify what tests he was referring to. Dr Yarnley had earlier suggested that more tests were required and that he [Mr S] should get fit, however, here he suggested that without this, he was fit to function as a police officer. This did not make sense.

- He had suffered greatly from the stress, worry and frustration this entire matter had caused. He suffered insomnia for several months due to the intransigence of DP and perverseness of Dr Yarnley. He also started suffering from severe scalp

psoriasis. He would often become depressed and suffer mood swings from the constant undermining of, and obstacles raised during, his application.

- DP's stage two response failed to fully address his complaint.

DP's position

58. DP's position is as follows:-

- Mr S had said the stage one IDRP response did not address his complaints properly. The response provided addressed these in detail where appropriate. Further, the stage two response addressed each element of his complaint separately and in detail.

- Stage two of the IDRP process was completed within the set time limits and the requested information was provided in the response along with an apology.

- DP referred Mr S' case to its Occupational Health contractor. While there was no record of a specific individual being identified as the FMA, the contractor did prepare Mr S' case for consideration by the SMP. Mr S' medical records were unavailable due to the time that had passed and there was no FMA that was familiar with his case. As a result, there was no FMA opinion on the question of whether he was permanently disabled.

- The guidance recognised that there may be finely balanced or complex cases where the FMA may not give a view. In accordance with the guidance, it was feasible for the SMP to consider a case without FMA input. In cases involving the release of deferred benefits, it was not unusual for the information supplied to the SMP to consist of the general medical records only.

- In respect to whether the SP exceeded his authority by deprioritising his application, it was part of his role to manage this process, so it was not correct to say he exceeded his authority. Prioritisation was about the order that work should be undertaken rather than progressing certain tasks and not progressing others. The assessment made by the SP was that cases involving serving officers should be dealt with first as this could have an impact on the police service provided to the people of Dorset. He indicated that Mr S' case should be given priority over other deferred police pension requests. There was no evidence that this decision delayed consideration of Mr S' request.

- In terms of whether it had failed to clearly instruct the NHS, and disempowered the SMP, the process of referring an officer to the SMP was well known to police occupational health departments/contractors and precise, detailed instructions were not required. Further, there was no evidence that the SMP had any difficulty processing Mr S' case due to the nature of the instructions provided by DP's occupational health contractor.

- The appointment of a board of at least two SMPs was an extremely rare occurrence. As per the guidance, this was only appropriate in exceptional circumstances and was a decision for the employer; there were no grounds to warrant this approach.

- Mr S had said he was denied the opportunity to see the FMA's opinion and background before it went to the SMP for a final decision. It was accepted that there was no FMA opinion provided. Again, it was not unusual for the information supplied to the SMP to consist of the provision of medical records only.

- The role of the SMP is to act independently of DP, to make his assessment and advise DP accordingly. The actions taken by Dr Yarnley in Mr S' case were no more demanding than that required of him in any other case. Dr Yarnley is an experienced SMP who meets the requirements of the Circular (sections 11 and 12).

- Mr S had said prevarication over translation costs significantly delayed his application. It was unusual for a pensions case to involve translation costs. The situation between DP and the IMASS was resolved promptly in the communication of 3 May 2017 (IMASS was not expected to cover the cost of translation within its normal fee structure). However, the resolution of this issue between DP and Mr S took some time. This was new ground so there were a number of aspects to be explored including whether there was a legal requirement to pay, if there was sufficient budgetary provision etc. The debate around this issue took place over the period 9 May 2017 through to 12 September 2017, when Mr S was advised that DP would fund the translation cost of £2,475 + VAT.

- Mr S' input at the time did not aid a prompt resolution. Mr S had at one point said, "it was not unreasonable for DP to ask me to pay for or contribute to the costs of translation." This view was contradicted by him engaging TPAS to address this issue. He also raised issues around the legal basis for the contract for translation which further complicated this issue. There was no requirement for DP to fund this cost; section 16 of the PNB Circular required the officer to support their application with evidence of permanent disability from his or her GP or other medical practitioner.

- DP's relationships with its contractors was an internal matter between the parties concerned.

- There was no requirement for DP to demonstrate that the SMP, Dr Yarnley in this case, was suitably qualified. Further, the SMP was not required to have specialist level knowledge.

- Mr S had suggested that it was still not complying with its data protection obligations. These matters were more appropriately addressed by the ICO.

Adjudicator's Opinion

59. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by DP. The Adjudicator's findings are summarised below:-

- Mr S had said DP did not have regard to the Circular and that important aspects of his complaint were not being managed according to the Regulations or rules. He referred to paragraph 13 of the Circular specifically. The main question here was whether DP had failed to follow the correct procedure in not referring his case to an approved/identifiable FMA before it was assessed by the SMP.

- The Circular made clear reference to the FMA and defined their role in the IHER application process. It remained unclear why exactly an FMA did not form part of DP's process in respect to Mr S' application, despite both parties having a view on this. However, the Adjudicator did not agree with Mr S' suggestion that the omission of an FMA in the process caused him detriment. Whilst an FMA might have provided an initial assessment that would have guided the SMP, it was not certain that had this been done, the SMP would have made a positive decision on permanency earlier in the case. Further, one could not be certain that in general, such an outcome would have been reached earlier had an FMA been involved.

- Mr S also argued that an FMA would have most likely sought the involvement of more than one SMP having determined his case to be complex. This however was speculation. Firstly, the FMA might not have deemed that more than one SMP was necessary and, secondly, had he/she done so, it could not be known what outcome this would have led to. The Adjudicator said her approach was to identify whether failures/ maladministration had occurred, and ascertain the consequent loss (be this financial or non-financial). However, it simply was not possible to know for certain what detriment, if any, the lack of an FMA had caused to Mr S' overall application. Hence, she could not make any recommendation in respect of this.

- Mr S argued that the SP had exceeded his authority by deprioritising his application. However, neither the Circular nor the Regulations prescribed the order of priority which police authorities should deploy in their management of IHER applications. Similarly, the Circular and the Regulations did not specifically set out the precise roles which oversee the process and their specific remit. The relevant comments made in the Circular on priority and urgency were as follows:

  "5. Managers should also recognise that many cases could be concluded in much quicker time, without all stages being involved – in particular cases where permanent disablement is serious, or where the SMP assesses disablement to be only temporary. The FMA should try, wherever possible, to point out to local management and the police authority those cases that have the potential for going through quickly and those cases that are likely to need particularly careful management, if it is not to become unduly protracted.

  …

15. The FMA should recommend referral in any case where he or she considers the officer may be permanently disabled, not just where the FMA considers that the officer is permanently disabled. Where the FMA advises that the case should be referred to a SMP (see H1 [1987] and 71 [2006]), he or she should draw attention to any special or compassionate features including the need for urgency and, wherever possible, provide advice on which medical practitioner to use as the SMP and/or any specialism required. Local management should pass on the FMA's advice as quickly as possible to the police authority."

- Without a clearer statement on the point of priority or more clearly defined roles, the Adjudicator said she could not agree that the SP had exceeded his authority in making such a decision.

- Mr S had said that DP had failed to clearly instruct the NHS and had disempowered the SMP. From the information Mr S had provided, the Adjudicator's opinion was that DP's instructions were sufficiently clear. Although the initial instruction could be read to suggest that the NHS Occupational Health team was being asked to determine the two questions posed, the final sentence left no doubt that the matter should be passed to the SMP (and thereby did not need to be determined initially by the NHS Occupational Health team). As this appeared to be what had happened, and as DP had confirmed that this was its intention, in her view, no confusion was caused by the instruction.

- The Adjudicator had addressed whether this was the correct process in line with the Circular in the findings made thus far. She did not believe that there was any lack of clarity on this point. Further, she did not agree that this instruction was what led to the omission of an FMA being involved in the process, rather, it appeared that DP, for whatever reason, decided not to pursue such a route.

- Also, there was no evidence that the absence of FMA advice disempowered the SMP, placing the onus on him to answer the questions set out in H1(2) of the Regulations. Dr Yarnley would have been required to address these questions anyway and, again, there could be no certainty on whether the input of an FMA would have led him to make a different decision initially.

- On the point of the FMA, Mr S had contended that he was denied the opportunity to see the FMA's opinion and background before it went to the SMP for a final decision. The Circular was clear on this point:

  "The FMA should send copies of the opinion section and any advice on capability at the same time to the police authority and the officer. The police authority should check that the opinion and any advice on capability are set out in clear terms. The FMA should also give the officer the opportunity to request a copy of the medical background section. If the officer asks for a copy, the FMA should agree to release the medical background section unless there are medical reasons for withholding it."

- DP did not include the role of an FMA as part of its process and so, Mr S was not provided with such an opportunity. However, it was uncertain what the impact of this was. Had an FMA been involved and misconstrued Mr S' circumstances or evidence, it would be arguable that Mr S being denied such an opportunity caused him detriment, should there be evidence that the SMP was led by such a misconstruction. However, it was not possible to say whether the inclusion of this opportunity in the process would have led to a different outcome in terms of the SMP's assessment.

- Mr S has argued that DP's failure to appoint a FMA resulted in DP "demanding more of the SMP than his experiences and qualifications allowed him to deliver." Mr S was particularly concerned by comments made by IMASS which likened the SMP's role to that of a judge. The SMP's conduct, rather than comments made by IMASS, would be given greater focus, as this would allow for a more accurate analysis of whether the SMP exceeded his remit.

- In both of his February and June 2018 reports, Dr Yarnley was led by questions of whether Mr S had a disability and its permanency. This was in accordance with what the Regulations required.

- In respect to whether Dr Yarnley should have sought specialist opinions and/or sought UK medical experts to assist in his decision, as a medical professional, it would be within Dr Yarnley's remit to identify the knowledge he did understand and conversely where there were any gaps (and consequently how best to resolve these gaps). Mr S also believed that the SMP subjected him to a face to face medical examination which was entirely unnecessary, given that the specialist medical evidence was conclusive. This would have been a decision for Dr Yarnley as the appointed medical professional in the matter, and not within the Adjudicator's remit to answer.

- In regard to whether DP had prevaricated over translation costs, causing delay to Mr S' application, Mr S applied for IHER in March 2017 and it was confirmed to TPAS on 5 October 2017 that his records had been translated. In between these dates, there was little progress in advancing Mr S' application. Although DP had not previously dealt with the situation of an applicant having medical records which needed to be translated, and taking into account that the vetting of a translation company was somewhat outside of DP's control, a period of seven months to resolve the issue was disproportionate.

- Further, Mr S was entirely cooperative and prompt in returning forms and submitting evidence required. Also, although suggestions made by DP were possibly in the spirit of progressing his application, such as proceeding with the translation subject to legal advice confirming whether it should pay the costs, this was unhelpful. This left Mr S in a position where, should the legal advice not be in his favour, he would be facing a substantial bill, which he had already said he could not afford. Overall, there were avoidable delays in this period. The

avoidable delays and unhelpful suggestion highlighted would have caused unnecessary distress and inconvenience to Mr S.

- Mr S had also said that DP breached the Regulations and the Circular by failing to demonstrate that the SMP was duly qualified. Regulation H1(2) of the Regulations set out that: "Where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner…" DP had said it was satisfied that Dr Yarnley met this requirement; Mr S' argument was that it has failed to demonstrate this. It was apparent that Mr S has not been given specific responses on this point by DP or IMASS. In considering the Regulations and the Circular, the Adjudicator said she could not see that DP was required to disclose this information to the applicant (or that IMASS, as its contractor, was required to do so). In her view, DP was not in breach of its duties in this regard.

- Mr S had also said that DP "failed to have appropriate agreements, check points and/or controls" to ensure their suppliers were obeying the rules contained in the Circular and Regulations. DP's management of its suppliers was a matter between the parties, this being DP and the contractor; the Adjudicator said she would make no comment on this. Should DP's management of its contractors have led to administrative errors which affected Mr S, this would be within her remit; she had agreed that DP was responsible for the delays caused by the translation of his medical records, a matter which involved external contractors, and set out why his other claims could not be successful.

- Mr S had said that, following the ICO's finding, DP had not complied with its data protection obligations and continued to not make full disclosure. DP had not responded to the substance of this point. However, should this remain the case, DP would be expected to and should fulfil its data protection obligations.

- In respect to the element of Mr S' complaint, which was upheld, this concerning the delays in the matter of translating his medical records and DP's conduct in general, the Adjudicator said she would ordinarily recommend that DP pay Mr S £1,000 in recognition of the serious distress and inconvenience he has suffered.

- However, DP had paid Mr S' translation costs, the costs for attending the medical examination and offered to reimburse his flight for the cancelled PMAB meeting. In her view, these actions went beyond what was required of DP; neither the Regulations nor the Circular set out that such costs must be met by the police authority. It would therefore not be reasonable in the circumstances to suggest that DP make an award for Mr S' distress and inconvenience, as it had already made payments which went beyond what was required of it.

- The complaint was not upheld. DP had offered Mr S £250 in recognition of the distress and inconvenience it caused to him. It remained open to Mr S to accept or reject this.

60. DP accepted the Adjudicator's Opinion. Mr S did not accept the Adjudicator's Opinion. In addition to his previous submissions, Mr S made the following comments:-

- In respect to the background section of the Opinion and specifically the point relating to Dr Yarnley's second (amended) report, the Adjudicator had incompletely outlined the nature of the reports issued and the methods used to achieve the decision. She had instead selected a few words which cast a negative light on him and which demonstrated the incorrect logic used by the SMP to determine the permanence of his conditions.

- In respect to the letter he had submitted in June 2018 from his respiratory consultant to DP, the Adjudicator had omitted to mention that this report was identical in every respect, except for a minor improvement, to the first one supplied to the SMP at the outset of the application. The first report was used as a means to deny his application, whereas the second report was used to grant his application.

- The Adjudicator had also omitted to mention that the ICO found against DP on two occasions and demanded that it change its training and policies. This went to the heart of the probity of those responsible for processing his application.

- The Adjudicator had omitted to include any facts from pages 19 to 25 of the IDRP complaint he had made; these facts were key to his complaint of negligence arising from the acts of the SMP for which DP was liable.

- In respect to the findings section of the Opinion, the Adjudicator had failed to make a finding on his complaint that DP "failed to properly regard PNB Circular 10/4."

- In respect to his complaint that DP failed to ensure the FMA formed a proper view on disablement and permanency, the Adjudicator had implied that she believed this complaint to be founded on the absence of the FMA providing a positive finding of permanent disability. This was a mistake. This mistake was then used to conclude that there was no detriment to him because the SMP might find differently from the FMA. The Adjudicator then used hindsight to excuse the non-application of rules contained in the Circular; this was not the correct approach.

- The distinction between the roles of FMA and SMP had not been appreciated. The role of the FMA was to collate and review medical evidence, request further medical evidence if required and form an opinion to pass to the SMP. The SMP was required by the Regulations to answer the H1(2) questions only. The decisions reached by the SMP were final subject only to an appeal to the PMAB. These roles were quite distinct.

- The absence of an FMA was detrimental. This meant it was not possible for the FMA to discharge the responsibilities prescribed by the rules intended to benefit him.

- In respect of whether the SP exceeded his authority by de-prioritising Mr S' application, the Adjudicator had relied on the non-existence of regulations and rules which govern the prioritisation of cases to dismiss this complaint. As was known in law, it was not possible to legislate for all situations and it would be unwise to do so. This was "a level of detail that must be left to the Police and the Medical Profession to assess." It was also a well-known principle in Administrative Law that in exercising such authority, an administrative body must do so reasonably. His complaint was that it was unreasonable to do as they did. It was The Pensions Ombudsman's Office's (**TPO's Office**) responsibility to consider the reasonableness of actions.

- In regard to whether DP had failed to clearly instruct the NHS and disempowered the SMP, the Adjudicator had said: "the final sentence leaves no doubt that the matter should be passed to the SMP (and thereby did not need to be determined initially by the NHS Occupational Health team)". He disagreed; it was not open to the police or their contractors to excuse themselves from rules which governed the administration of pension schemes unless it was reasonable to do so. Administrative Laws and the principles and precedents arising from them made clear that public bodies must always act reasonably when making decisions.

- The Adjudicator had then concluded that there was no evidence that "the absence of FMA advice disempowered the SMP, placing the onus on him to answer the questions set out in H1(2) of the Regulations" adding that, "Dr Yarnley would have been required to address these questions anyway." The Adjudicator had misunderstood and mis-quoted this part of his complaint; he had previously detailed what he meant by "disempowering."

- The Adjudicator had also dismissed his claim that he was denied the benefit of having two specialist SMP's appointed early in the application on the basis that his assertions were speculation. This was a mistake. As he had set out, there was clear written French medical evidence and evidence in the report from the SMP which stated that the conditions and the interrelationship between them, and the medications for them, was complex. It was wrong to dismiss this as speculation.

- The Adjudicator had considered "non financial loss." This test was incorrect; it was non-financial injustice. An injustice might not amount to a loss.

- The Adjudicator had dismissed his complaint that DP had denied him the opportunity to see the FMA's opinion and background before it went to the SMP for a final decision. She had said it was it is not possible to say whether the outcome would have been different if an FMA were appointed. However, one should have been appointed, one was not; he was denied this opportunity. A mistaken binding decision would result in an appeal to the PMAB as occurred. It created unnecessary delay.

- In terms of whether DP acquiesced in the SMP exceeding his remit, he had made a specific complaint but could not identify a specific finding in relation to this. The

Adjudicator had referenced the comment he made about the role of a judge but appeared to dismiss this by making no further comment.

- In the Opinion, the Adjudicator had not guided herself on the relevant tests to be applied for arriving at a decision regarding disability and permanency given his joining date and leaving date from the Police Service. Dr Yarnley clearly misdirected himself in this regard as evidenced by his words, his reports, the requirements within the Circular, and guidance to it. Due to this mis-direction and his lack of understanding of the rules and tests to be used, he produced a poor decision. The Adjudicator must clearly state the tests to be used as defined in the Circular and the other document called 'Guidance for SMPs' contained within the Circular.

- The Adjudicator had not considered the facts which went to the heart of this case; these were clearly stated in documents he had previously provided. These facts must be included and a finding made. Further, the Adjudicator had found that it was sufficient for the SMP to merely show that he was "led" [by the questions of whether he has a disability and its permanency]. He disagreed with this finding.

- The Adjudicator had said that the SMP can ask questions to educate himself and therefore was entitled to do as he did. In general this was correct but when considering the role of the SMP this was incorrect and the Adjudicator's finding a mistake. The SMP is required to be a medical practitioner and have specific OH qualifications. The SMP is not required to be a consultant in his conditions. The SMP may ask questions for his own edification but was not qualified to question reports of experienced specialist consultants who had properly concluded the nature of, and treated his, conditions. This was done and the information was clear. If it was not, the SMP should have asked the FMA but one was not appointed. Instead, the SMP asked the police for clarification; they persuaded him to refrain from requesting the information and refused to pass the request to him [Mr S].

- Instead, the SMP chose to re-evaluate his [Mr S'] conditions, ignore expert evidence and find against him having misdirected himself. The SMP needs only to know the name of the condition. The rules required him to determine by reference to an internationally approved list of conditions whether it was regarded as a disability; COPD/Emphysema was one. The rules then required him to apply specific tests to determine whether the disability was permanent. He did not.

- In terms of DP's prevarication over translation costs, he agreed with the Adjudicator's finding that he was unable to afford large translation fees. The Adjudicator recommended an award, then in the next paragraph, negated this by saying that, as the police paid fees and expenses, he should not be paid the award. He disagreed and had several observations. The Adjudicator had recognised how distressing DP's actions were when she awarded him £1,000 but then justified her finding against him due to the absence of rules or regulations compelling DP to pay the translation and travel expenses.

- The absence of rules or regulations defining a specific course of action was not sufficient to reach a conclusion that it was reasonable to impose a fine on him of £1,000. Further, the Adjudicator had not explained the reasoning for why he should have to pay. The Adjudicator then used the same non-existence of rules to say he must pay DP £1,000. On what basis, legal or equitable, was such a judgment made?

- By its actions, DP required that the travel expenses be incurred. Had the SMP properly read and understood the fully translated documents in his possession, he would have known that his conditions were proven. Further, had the SMP exercised his responsibility to make a decision based on the evidence, there would not have been an appeal. The SMP knew he had emphysema because he said so in his report; his error was to say it was not permanent.

- The Adjudicator's finding here was in the form of a penalty imposed on him. In the same way that there was no basis for the police paying the fees, there was no basis for her fining him £1,000. This penalty opened the legal doors for the police to pursue him for the remainder of the translation costs and it was wrong that he had been exposed to this risk.

- In respect to his complaint that DP, in breach of the Regulations and the Circular, had failed to demonstrate that the SMP was duly qualified, the Adjudicator had relied on the non-existence of Regulations and rules which govern the disclosure of information to prove that the SMP was duly qualified. He did not agree that this was a valid reason to dismiss his complaint.

- Regarding whether DP failed to have appropriate agreements, check points and/ or controls to ensure its suppliers were obeying the rules contained in the Circular and Regulations, the Adjudicator had limited herself to "administrative errors." He understood that TPO's remit was wider and prior decisions frequently referred to issues of negligence amounting to maladministration.

- In respect of the ICO's finding that DP was not complying with its data protection obligations and its continuing to not make full disclosure, he had made clear reference to material withheld by DP which was relevant to the question of the SMP's ability to consider matters before him because he was exceeding his remit. This referred to DP suppressing the SMP's desire for further information and failing to pass such a request on to him [Mr S]. He had referred to the request by DP for the SMP to make a negative decision. These facts had not been considered and the Adjudicator ought to make a finding on this.

- In regard to his complaint concerning actions by the SMP giving rise to the PMAB appeal, no reference had been made to this by the Adjudicator, despite its relevance to the delays over and above those caused by the other acts complained of.

- He wished for the following to be re-appreciated. He provided written medical evidence from consultant doctors in France which confirmed he had COPD and a heart condition, both of which were permanent. Without good reason, the SMP chose to: challenge or ignore parts of it, ignore medical facts on the effectiveness of “Spireva” for COPD sufferers, and not refer the matter back to the FMA, even though the matter was beyond the SMP’s qualifications and expertise. The SMP insisted on a medical examination when the specialist medical evidence was conclusive, and subjected him [Mr S] and the police to unnecessary inconvenience and cost by having him travel to the UK for this.

- The SMP chose to re-evaluate his medical conditions by reviewing and passing unqualified opinion on them. He chose not to refer to UK medical experts to assist his decision. He chose to review and not approve the evidence of specialist doctors who had superior skills and experience, ignore PNB rules and apply a unique unknown test for permanent disability. He constructed a form of words in his first report which defied logic and achieved a perverse predetermined unfavourable outcome. He chose to request more evidence then agreed with the police to refrain from pursuing this request. He then made a final decision that COPD was not permanent, all in a telephone call where no notes were taken, forcing him [Mr S] to appeal against this injustice. The SMP then used an identical piece of evidence to that supplied from the outset as the basis to “back away from the problem." It was therefore impossible to conclude that no negligence or delay was caused by these facts.

61. The Adjudicator responded to Mr S’ comments as follows:-

- In respect of the complaint Mr S had made regarding the actions of the SMP which led to a PMAB appeal being required, many of the points Mr S had made concerned the methods, tests, or practices used by Dr Yarnley, or his analysis/application of medical knowledge. Actions relating to the SMP’s conduct and professional judgment were not within TPO’s Office’s remit.

- Mr S said, she could consider whether DP failed to question the SMP’s actions in this respect when there was clear reason that it should have. Her view was that the points that Mr S had made were highly specific and technical; these required a fair degree of medical understanding. She would not expect DP, in their role as non-medical experts, to be in a position to make these observations or put forward such challenges. There were no obvious flaws or inconsistencies in the reports in question which it was remiss of DP not to question further. She did not think DP’s acceptance of Dr Yarnley’s methods and analysis was a failure on its part.

- Her view remained that Dr Yarnley was led by questions of whether Mr S had a disability and the permanency of this. She was satisfied that the Regulations were followed correctly.

62. The complaint has now been passed to me to consider. I note the comments made by Mr S, however, I agree with the Adjudicator's Opinion.

Ombudsman's decision

63. Mr S has made a number of complaints and, as I agree with the Adjudicator's Opinion I do not intend to repeat each one of them in detail.

64. It is clear that an FMA carrying out the duties as specified in the Circular was not appointed in Mr S' case. Mr S has argued that the process set out in the Circular has not been followed and he has been disadvantaged as a result. While his first point stands, I do not find that any identifiable detriment has been caused to him by the absence of an FMA. Had an FMA been appointed, part of their role would have been to review the information which Mr S had provided, and then provide advice to the SMP to help inform their assessment. However, it does not follow that the inclusion of an FMA would have meant that the SMP would have decided in favour of Mr S' IHER application at an earlier point than he did. I do not find that DP's actions amounted to maladministration.

65. Mr S has said "it should have been easily foreseeable that imprecise instructions to the NHS might result in an incorrect course of action being taken by the NHS." However, it has not been established that an incorrect course of action was taken by the NHS Occupational Health team, or that it failed to follow the relevant rules. When the HR Officer wrote to this department, she outlined the two questions which formed part of the test for IHER under the Regulations, and requested that the matter be referred to the SMP. I am satisfied that these instructions were sufficiently clear and that they aligned with the task which the SMP was to undertake.

66. Mr S has clarified that his complaint that the SMP was "disempowered" refers to the absence of an FMA being appointed and the absence of their advice. He has said that, without this information, the onus was placed on the SMP to answer questions without the required opinion and background to the matter. He argues that there was an assumption that the SMP had the skills and experience to address the issues before him. There is no evidence, however, to suggest that the SMP omitted key information when forming his assessment, which an FMA might have drawn to his attention; or, that the SMP considered that the assessment before him was beyond his expertise.

67. Mr S has also said that DP acquiesced in the SMP exceeding his remit, and that the failure to appoint the FMA resulted in DP demanding more of the SMP than his experience and qualifications allowed him to deliver. Mr S has said that DP's decision and misconceptions by the SMP, allowed him to assume the role of judge, jury, and executioner of his application. In considering the substance of the SMP's reports, I do not agree that he exceeded his remit. The SMP's focus is the two main questions which he was required to answer. Although Mr S contends that more was demanded of the SMP than he was able to deliver, I am not aware that the SMP or DP have

suggested that this was the case, and there is no evidence that the assessment was beyond the SMP's capabilities.

68. Mr S appears to misunderstand the respective roles of the FMA and the SMP. It is the SMP's role, under Regulation H1, to decide whether a claimant is disabled and whether the disablement is likely to be permanent. The SMP's decision is final; subject to an appeal to a PMAB. The FMA has an advisory/administrative role. In Mr S' case, Dr Yarnley was required to make an independent decision as to whether he was permanently disabled; regardless of whether an FMA had been involved at an earlier stage.

69. I note that Mr S has relied heavily on the contents of the PNB Circular 10/4. The Circular is a guidance document and cannot override the Regulations. It does not have the same statutory authority as the Regulations. DP and Dr Yarnley would be expected to have regard for the contents of the Circular, but are not bound by it in the same way as they are bound by the Regulations. A failure to follow the contents of the Circular does not necessarily lead to maladministration. I do not find that, in Mr S' case, the absence of a FMA's input does amount to maladministration.

70. In respect to the SMP's reports, Mr S has stated that the SMP changed his assessment on the basis of almost identical information to that provided previously. He considers this as proof that the first assessment was flawed and the latter was correct. I have considered the SMP's first finalised report, this being the February 2018 version where Mr S' amendments were incorporated. This report was accepted by DP. I am satisfied that in making his decision, the SMP asked the correct questions as required by the Regulations. The SMP considered the reports of other medical advisers and test results relating to Mr S' condition. On the basis of the evidence considered by the SMP and his analysis of this, I see no cogent reason for DP not to have proceeded on the basis of the SMP's decision, which I do not consider contained any identifiable flaws.

71. In respect of whether the SP exceeded his authority by deprioritising Mr S' application, I consider that the matter of priority is a relevant consideration to his role. Statements made within the Circular are aligned with this approach. Mr S has said that the absence of a clearer statement on priority, either in the Circular, the Regulations, or other legislation, should not preclude a finding of wrongdoing on DP's part. I disagree, and considering the absence of an FMA's involvement, it was not unreasonable for the SP to make such decisions.

72. Although Mr S considers that the SMP carried out a face to face medical examination which was unnecessary, I consider that such a decision was a matter for the SMP's professional judgment. Regulation H4 refers to "such medical examination or … such interviews as the medical authority may consider necessary in order to enable him to make his decision." To my mind, this indicates that it is for the SMP to determine what by way of examination is necessary.

73. Mr S has made several points in relation to the techniques deployed by the SMP. I agree with the Adjudicator that the SMP's conduct is not within my remit. The SMP is accountable to his/her own professional body and the General Medical Council. It is also the case that a fair degree of medical understanding on the part of DP would be required for it to make the observations that Mr S has suggested. Mr S has disagreed, saying that expert medical evidence was provided and not considered, rules were not followed, the SMP substituted his opinion over that of experts, and the SMP was prevented from requesting further information.

74. Dealing with these points in turn, expert medical evidence was considered in the SMP's February 2018 report; this makes reference to comments made by various medical advisers: Dr Siorat, Dr Noureddine, Dr Coombes and Dr Moal. Therefore, I disagree that expert medical evidence was not considered, rather the SMP in this assessment, took a different view on the information to that of Mr S. Mr S has emphasised that specialists accepted the permanence of his heart and lung conditions but the SMP did not, and instead chose to re-valuate his conditions. It is important to note that none of these doctors had carried out the assessment that the SMP was tasked with, which was a specific test in accordance with the Regulations. This test was the focus of the SMP's assessment, hence I disagree that the SMP failed to follow the relevant rules.

75. Mr S has also said that the SMP wished to contact him for further information, but was prevented from doing so by DP. Mr S has said that neither IMASS nor DP had disclosed a response to Dr Yarnley's email of 4 January 2018, or any materials between 4 January to 17 January 2018, the latter being the date DP told IMASS to release the report. Mr S concludes that "something occurred between 4 and 17 January which was not being disclosed" which resulted in the SMP no longer requiring additional information. Mr S is making an assumption that there was further correspondence from DP between 4 and 17 January 2018 on the basis that Dr Yarnley appeared to decide to proceed without the information he had been seeking. As before, Dr Yarnley's decision was a matter for his professional judgment. It was for him to decide whether he could make a decision on the basis of the available evidence. The fact that he did so without waiting for further information does not, in and of itself, evidence any untoward interference by DP.

76. In respect to the translation of Mr S' medical records, I find that DP took longer than was reasonable, this being a period of seven months, to arrange this and agree that its conduct in this process was at times unhelpful. This would have caused Mr S serious distress and inconvenience. However, I agree that it would be disproportionate for me to direct DP to make an award for £1,000, in accordance with the serious category of our published guidance for non-financial injustice, as it has already paid for costs over and above that which it was required to.

77. Mr S has argued that the absence of any rules or regulations requiring defining a specific course of action was" not sufficient to reach a conclusion that it was reasonable to impose a fine on [him] of £1,000." However, I maintain that DP were

not required to pay the costs that it did. Importantly, such a finding does not impose any sort of “fine” on Mr S.

78. In respect of the ICO’s finding that DP has not complied with its data protection obligations and Mr S’ claim that it continues not to make full disclosure. This is a matter for the ICO.

79. I do not uphold Mr S’ complaint. DP has offered Mr S £250 in recognition of the distress and inconvenience it caused him; this remains open to Mr S to accept.

Anthony Arter

Pensions Ombudsman
13 November 2020

Appendix 1: The Police Pension Regulations 1987

Reference of medical questions

H1.—(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these Regulations shall be determined in the first instance by the police authority.

(2) Where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions—

(a) whether the person concerned is disabled;

(b) whether the disablement is likely to be permanent;

and, if they are further considering whether to grant an injury pension, shall so refer the following questions:—

(c) whether the disablement is the result of an injury received in the execution of duty, and

(d) the degree of the person's disablement;

and, if they are considering whether to revise an injury pension, shall so refer question (d) above.

(3) A police authority, if they are considering the exercise of their powers under Regulation K3 (*reduction of pension in case of default*), shall refer for decision to a duly qualified medical practitioner selected by them the question whether the person concerned has brought about or substantially contributed to the disablement by his own default.

(4) The decision of the selected medical practitioner on the questions referred to him under this Regulation shall be expressed in the form of a certificate and shall, subject to Regulations H2 and H3, be final."

Appendix 2: PNB Circular 10/4

5. A flow chart setting out the key steps in the medical retirement process is attached at Appendix A. If a case were to pass though [sic] all the stages in the chart, the entire process could last over a year. It is therefore important for the process to be managed as expeditiously as practicable by the police authority so that delays are kept to a minimum. Managers should also recognise that many cases could be concluded in much quicker time, without all stages being involved – in particular cases where permanent disablement is serious, or where the SMP assesses disablement to be only temporary. The FMA should try, wherever possible, to point out to local management and the police authority those cases that have the potential for going through quickly and those cases that are likely to need particularly careful management, if it is not to become unduly protracted…

11. It is difficult to be prescriptive about the minimum qualification an FMA should have since there are many existing FMAs with considerable experience but relatively few occupational health qualifications. New FMAs should be recruited with the minimum requirement that he or she be an Associate of the Faculty of Occupational Medicine (AFOM) or EEA equivalent and be given the opportunity quickly to build up a good knowledge of the police service and the range of duties that need to be performed.

12. Ideally, the SMP should be a Member or Fellow of the Faculty of Occupational Medicine (MFOM or FFOM), or EEA equivalent. The minimum requirement should be that he or she is an Associate of the Faculty of Occupational Medicine (AFOM) or EEA equivalent. Before appointment as SMP the police authority must provide the medical practitioner concerned with an induction programme and other training so that he or she has an understanding of what police service entails and the mechanics of the ill-health retirement process. Relevant guidance should be provided to SMPs, including this circular, which incorporates guidance specifically written for SMPs (see Appendix B). SMPs should also have access to the Home Office Guidance for Members of the Police Medical Appeal Board.

13. The Police Pensions Regulations provide that where a police authority is considering whether an officer is permanently disabled it shall refer the issue to the SMP for decision. Further guidance on the definition of permanent disablement is included in Appendix B. Requests for referral of a case to the SMP can come from one of two sources: management or the officer. An officer's request for referral may be refused only in limited circumstances – see paragraph 15.

14. Except in the case of an accident or the sudden onset of illness, the FMA will normally have seen the officer several times and have liaised with local management over the officer's condition. Although local management can normally look to the FMA to advise the force in the first instance whether there is a need to consider permanent disablement, the FMA may be asked for his or her view if there is concern about a case. Such referral to the FMA for advice is a matter of good day-to day management and will lead to a referral by the police authority to the SMP (see H1 [1987] and 71 [2006]) only where the FMA so advises.

15. The FMA should recommend referral in any case where he or she considers the officer may be permanently disabled, not just where the FMA considers that the officer is permanently disabled. Where the FMA advises that the case should be referred to a SMP (see H1 [1987] and 71 [2006]), he or she should draw attention to any special or compassionate features including the need for urgency and, wherever possible, provide advice on which medical practitioner to use as the SMP and/or any specialism required.

Local management should pass on the FMA's advice as quickly as possible to the police authority.

16. It should not normally be necessary for the officer to have to raise the issue of referral to a SMP (see H1 [1987] and 71 [2006]), since this will have been done on his or her behalf. However, there may be cases where an officer who considers that he or she is permanently disabled feels obliged to ask management that the police authority put the process into effect. The officer should back this up with evidence of permanent disablement from his or her GP, or other medical practitioner he or she has been referred to. The chief constable should bring any such request to the notice of the police authority with comments from the FMA on whether the FMA is satisfied that there is a medical issue to consider. Where necessary he FMA will first see the officer...

20. In normal cases the police authority should ask the FMA most familiar with the case to provide advice on the case to the SMP, whose name and address should be confirmed with the FMA, unless the FMA indicates that the choice of SMP needs to be held over until he or she has completed the advice. The purpose of the FMA's advice is to inform the assessment by the SMP. The SMP will be asked to answer the relevant statutory questions as appropriate (see H1(2) [1987] and 71 [2006]). In all cases if his or her opinion is that the officer is permanently disabled for the ordinary duties of a member of the force, the SMP will also be asked to assess the extent of the officer's capability for other work. This assessment will be conducted in the same way regardless of which scheme the officer is a member of, although the reason for undertaking it varies between the two schemes. Further details of the differences are contained in the SMP guidance. The assessment of capability must also address the extent to which, if at all, the SMP considers that the disablement will affect the officer's attendance. Where the SMP considers that attendance may be affected if the officer were to perform particular police duties, this should also be addressed. (This applies also to references to assessments of the officer's capability in paragraphs 21, 29 and 56.)

21. To assist the SMP, the FMA's advice will consist of two sections: a medical background and opinion:

- The medical background will include all relevant medical details and history of the case. This section should take account of the assessments of the officer's GP and hospital specialist as appropriate and wherever possible should be supplemented with relevant records, reports, X-rays, or scans. (The FMA should seek the written consent of the officer for this section to be referred to the SMP.)
- The opinion will be the FMA's advice to the SMP on the issue of permanent disablement for the ordinary duties of a member of the force. The authority should ensure that the FMA is aware of the officer's compulsory retirement age. Where the

FMA is of the view that the officer is permanently disabled for the ordinary duties of a member of the force he or she should complete a capability assessment checklist (included in Appendix B). (This section will not include any confidential medical information and therefore no consent of the officer is required.)

22. Wherever possible the FMA should give a clear view on whether or not the officer is permanently disabled, whether for the ordinary duties of a member of the force or, in appropriate cases, for regular employment. However, the FMA should not feel obliged to strive for a conclusion on the balance of probabilities in finely balanced or complex cases. In difficult cases involving more than one medical condition the FMA may conclude his or her opinion by setting out the issues and advising that the police authority appoint a board of two or more SMPs.

23. It will normally be expected that the SMP will examine the officer concerned, but there may exceptionally be cases where the police authority indicates that there are no management objections to there being no examination. Without an examination there can be no full assessment of the officer's capability. This course will therefore be appropriate only where expedited consideration of medical retirement is being recommended and, in 2006 scheme cases, where the FMA considers the officer to be permanently disabled for regular employment as well as for the ordinary duties of a member of the force. Provided the officer concerned is also content with this, the FMA can suggest to the SMP that there is no specific need for the officer to be examined.

24. The police authority should request the FMA to complete the advice to the SMP within 28 days and to let it know as early as possible whether there are problems over this timescale. The FMA should send the advice direct to the SMP.

25. The FMA should send copies of the opinion section and any advice on capability at the same time to the police authority and the officer. The police authority should check that the opinion and any advice on capability are set out in clear terms. The FMA should also give the officer the opportunity to request a copy of the medical background section. If the officer asks for a copy, the FMA should agree to release the medical background section unless there are medical reasons for withholding it. The FMA should also send the police authority a copy of the medical background if the officer gives written consent for this to be done.

26. The PNB has agreed that in **exceptional** circumstances the function of the SMP should be carried out by a board of two or more doctors. It will be for the police authority to decide whether to do this, but it will look to the FMA in the first place to draw attention to whether the number or complexity of the medical issues in a case makes such a course worth considering.

Appendix 3: Excerpts from Dr Yarnley's reports

16 February 2018 report

Formulation:

[Mr S] considers his shortness of breath and cardiac status would prevent him from undertaking the normal duties of a police officer. There is no doubt from the information provided [Mr S] has required specific treatment to manage a heart rhythm disorder but this has now been effectively treated by ablation. There is also no doubt he has emphysema likely to be secondary to smoking. The test results support some reduction in lung function but this does not appear to be such as would prevent him from being able to function as a police officer.

He reports significant shortness of breath, however when assessed this was not evident to the extent that he appeared to suggest. In addition, he is not exercising and therefore there is no doubt he is likely to be deconditioned and hence improved exercise tolerance would be expected.

Further respiratory and cardiac function testing may allow for a more evidence based determination, however with the information provided I do not consider he meets the criteria for payment of deferred benefit.

He also refers to a right hip problem for which no information as to causality is available. This needs further investigation before a determination as to the relevance to his application.

I consider [Mr S] needs to seek further clarification of his cardiac status in relation to whether he has evidence of congestive heart failure and also the extent to which his reported shortness of breath on exertion is cardiac or respiratory in origin or a mix of both. An indication of his ability to complete the Bruce Protocol would be beneficial.

[Mr S] introduced, through a request for amendment, a problem affecting his right hip. He says that there should be a record of this within his UK GP records but this could not be found.

CAS-32325-J0P5

22 June 2018 report

Formulation:

[Mr S] considers his shortness of breath and cardiac status would prevent him from undertaking the normal duties of a police officer. There is no doubt from the information provided [Mr S] has required specific treatment to manage a heart rhythm disorder but this has now been effectively treated by ablation. There is also no doubt he has emphysema likely to be secondary to smoking. The test IMASS Occupational Health results support a significant reduction in lung function which has failed to improve; indeed, has worsened over the last 12 months or so.

In relation to the assessment findings there is no doubt that improved physical conditioning would be helpful and whilst this would lead to improved cardiac function it is unlikely this will affect his overall capability due to reduced lung function.

It is therefore my opinion he is permanently unable to undertake the following:

- able to run;
- able to exercise reasonable physical force and restraint and retention.

He can however be expected to undertake the following:

- able to walk reasonable distances and stand for reasonable periods;
- able to make coherent decisions and be relied upon to report situations accurately to others in a police environment;
- able to evaluate information properly and think logically;
- able to retain and concentrate to explain facts and procedures to a reasonable standard;
- Able to sit or stand is necessary, read and write and;
- use IT and the telephone.