

## Ombudsman's Determination

Applicant	Mrs I
Scheme	NHS Pensions Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHSBSA</b> )

## Outcome

1. Mrs I's complaint is upheld and to put matters right NHSBSA should re-assess whether Mrs I is eligible for Mental Health Officer (**MHO**) status.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs I has complained that NHSBSA have refused to award her MHO status for her period of service from 1989 to present. This means that if she chooses to retire at age 55, she will be subject to early retirement reductions.

## Background information, including submissions from the parties

4. From 1989 to September 1994, Mrs I was employed by West Sussex NHS Trust. From September 1995 to September 2008, she was employed by West Sussex Primary Care Trust, which was a direct evolution of West Sussex NHS Trust. From September 2008 to the present time she was employed by Sussex Partnership NHS Foundation Trust. Despite Mrs I's changes in employment she has undertaken similar roles.
5. In July 2014, Mrs I wrote to NHSBSA to clarify her MHO status. NHSBSA asked her line managers to complete the SM1 form explaining her duties. After seeking clarification about what work was classed as direct hands on care, Mrs I's current employer said her work was split as 30% hands on care, 50% administration and 20% travel to attend meetings.
6. On 26 September 2014, NHSBSA wrote to Mrs I and said the following:

"I have found that you [do not spend the majority] of your time in direct hands on care of the mentally ill in your role as a Principal Speech and Language Therapist for adults with Learning Disabilities. As you do not

fulfil the criteria as stated, you will not be granted MHO status in this employment.

We have been unable to clarify MHO status for another of your employments from 1 September 1995 to 30 September 2008 whilst working for West Sussex PCT. The SM1 form has been sent to your employer, but this has not been completed or returned to the Scheme. If you feel that this employment should attract MHO status, please contact your employer directly.

As we have not been able to amend your records further, you have been granted MHO status for the period of 1 September 1992 to 13 September 1994 only.”

7. Mrs I raised a complaint under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). She made the following comments:

- R3(14) of the NHS Pension Scheme Regulations 1995 (**the Regulations**) makes no reference to the “direct hands on care” requirement imposed by NHSBSA;
- Mrs I was granted MHO status for the period of 1992 to 1994, but not thereafter even though the roles were exactly the same;
- Mrs I also attached her current job description which demonstrated that she spent the whole of her time devoted to care of persons suffering from mental disorders.

8. On 24 April 2015, NHSBSA wrote to Mrs I and said the following:

“The criteria used to determine eligibility for MHO status in respect of any NHS employment requires that all of the member’s time is spent in direct treatment or care of patients who are mentally ill. This is the intention of Regulations R3(14).

Whilst I acknowledge Mrs [I]’s interpretation of the Regulations, it stands to reason that MHO status should only be granted where the nature of the duties undertaken would warrant the significant additional benefits and entitlement that the status provides.

I have considered Mrs [I]’s claim for MHO status in the employment she specified.

West Sussex PCT – Operational Manager, Speech and Language Therapy Department – 01/09/1995 to 30/09/2008

The job description does not indicate that all or nearly all of Mrs [I]’s duties would involve the direct treatment of patients who are suffering from mental illness or condition.”

9. In August 2015, Mrs I's employer sent revised submissions relating to Mrs I's employment. This supported the application for MHO status.
10. On 9 November 2015, NHSBSA provided the stage two IDRPs decision letter. It said it did not believe the complaint could be upheld because the information provided did not conclusively support Mrs I's application. It asked Mrs I's employers to complete new SM1 forms.
11. On 12 May 2016, NHSBSA wrote to Mrs I and said it had updated her pension records for MHO status, but information about one period of service remained outstanding. On 6 June 2016, the outstanding information was provided by Mrs I's employer to NHSBSA.
12. NHSBSA sent an email to Mrs I's trade union representative on 22 September 2016, and said its records had been amended to show MHO status was held from 1 September 1992 to present.
13. On 4 November 2016, NHSBSA wrote to Mrs I and said that following a further review of the details it held it had concluded that Mrs I was not eligible for MHO status. This was because its records showed that her employer had consistently determined since 1989, that she was not eligible for MHO status. It said it was not until 2014, that Mrs I first claimed MHO status. NHSBSA said the new forms incorrectly assumed that duties such as travel between locations or administrative duties would count towards time spent in direct treatment of patients. Activities such as planning a course or treatment or writing medical reports/case notes which might be essential for a patient's overall care, did not count towards time spent in direct patient care for MHO status purposes. Furthermore, difficulties with learning, communication or swallowing did not constitute a mental disorder.
14. Mrs I remained dissatisfied and brought her complaint to the Pensions Ombudsman to be independently reviewed.
15. Through this Office's investigation NHSBSA provided a detailed response on 24 November 2017. NHSBSA provided an updated table for Mrs I's employment history. NHSBSA said that none of Mrs I's employers had applied for MHO status on her behalf. It said it would accept the confirmation from her employer that all patients seen in the roles of Principal Speech and Language Therapist for Adults with Learning Disability were mentally ill and that no patients were treated who were not mentally ill. NHSBSA said it was not in a position to know the exact amount of time Mrs I spent doing direct hands on care and treatment of mentally ill patients, which is why its requests that the SM1 forms are completed accurately by the employers. It said it would reconsider Mrs I's MHO status, provided it received satisfactory evidence from her employer that she spent the majority of her time in the direct hands on care of mentally ill patients. NHSBSA said it was following the past determined case (ref: PO-5361) in making its decision.

16. In response Mrs I said she could not see what additional information she could provide to NHSBSA, in order to resolve her complaint.

## Adjudicator's Opinion

17. Mrs I's complaint was considered by one of our Adjudicators who concluded that further action was required by NHSBSA. The Adjudicator's findings are summarised briefly below:-
- Entitlement for MHO status is set down in Regulation R3 (as shown in the Appendix). Under the Regulation, in order to qualify for MHO status Mrs I must spend "...all, or almost all..." of her time in "...the treatment or care of persons suffering from mental disorder".
  - The Regulations do not define the meaning of "all, or almost all, of time..." or "treatment or care", but the general rule of statutory interpretation is that the words are given their plain and ordinary meaning (unless this would produce an absurd result). NHSBSA interpret "treatment or care" as time spent in direct hands on contact with patients which is not unreasonable.
  - NHSBSA have received numerous SM1 forms for the same employers. The forms have not provided consistent information about Mrs I's roles and how her time was split, on different tasks. Therefore, NHSBSA have reached a decision based on conflicting information. Which also conflicted with Mrs I's current job description which states that she spent the whole of her time devoted to care of persons suffering from mental disorders.
  - Therefore, NHSBSA should reconsider Mrs I's eligibility for MHO status. Before doing so it would need to request new SM1 forms to be completed by all of Mrs I's employers. It will also need to provide each employer with guidance of what is classed as direct patient care.
18. Mrs I did not accept the outcome of the Adjudicator's Opinion, and provided the following comments:
- Mrs I commented on a past determination (ref PO-15708) which said the following:  

"The complaint should be upheld against NHSBSA because its stipulation that care must be "direct (hands-on)" to qualify towards MHO status is a restriction that Regulation 14 does not include. Consequently NHSBSA have failed to consider whether certain elements of the work conducted by Mrs Y falls within the scope of treatment or care of persons suffering from mental disorder."

- Mrs I considered that this determination contradicted the Adjudicator's Opinion and the determination (PO-5361) referred to by NHSBSA.
  - Mrs I argued that SM 1 forms should not attempt to distinguish between direct hands-on and non direct hands-on work because this is not a requirement of the Regulations. Employers have struggled to properly understand this distinction and what job particular need to go in what box etc as there is a general lack of transparency and guidance over how NHSBSA apply their decision making process in awarding MHO status.
  - Mrs I said she did not make an application for MHO status, because she was part-time and was incorrectly informed that part-time workers could not hold MHO status. Therefore, it was not that her previous employers did not support her case for MHO status, but that the case was never made.
  - Mrs I expressed concern that if NHSBSA were simply requested to revise its decision without correcting any underlying error in the interpretation of the Regulations then asking for further forms SM1 forms to be completed was unlikely to result in a different decision.
  - She also raised the practical difficulties of asking for further SM1's given key contributors had already retired.
19. NHSBSA accepted the Adjudicator's opinion but provided the following response to Mrs I's comments:
- It explained that MHO status, had been provided for members because of the "stresses and strains" of working with people with mental disorders.
  - It said its opinion was that completing reports, attending team meetings and meeting carers did not constitute this kind of work.
20. NHSBSA also provided some further information about the origin of its designation policy, specifically its view that care and treatment had to be 'direct and hands on'. These include an extract from the Service and Membership procedures notes circa February 1986 ('1986 SAM'), and a background brief for the Minister of State also circa March 1986.
21. At paragraph f, the 1986 SAM addresses the treatment of ancillary professionals designated under the predecessor of what is now R3 (14)(b) as follows:
- 'This is an area for the use of discretion and judgment. Precedent decisions over the years have determined the criteria, which are numerous and complex, but behind every decision for these and other grades the underlying principle is that the whole spirit and intention of the Regulations are designed to give individual recognition to those

who are subjected to the stress and strain of having mental patients constantly in their care.

‘There are numerous precedents governing whether or not a person is considered to be subject to the strain of caring for patients (‘treatment’ has been regarded as being a function of medical staff and not delegated to other grades). We normally require information about the duties performed and we consider, amongst other things, for how long a person is in the presence of patients, whether what he is doing is likely to cause stress and strain, how many patients there are, how dangerous they may be, whether other nursing staff are present etc. Form SM 1 is designed to provide us with the information we require in the vast majority of cases.’

22. This approach was reiterated in the background brief to the Minister:

‘The Regulations give no guidance as to how ‘the whole or substantially the whole of an officer’s time devoted to treatment and care’ is to be measured...the Regulations.. are designed to give individual recognition to those who are subjected to the stress and strain of having mental patients constantly in their care.’

23. NHS Pensions therefore believes it is correct in asking NHS employers to differentiate between time spent in the presence of mentally ill patients on the one hand and away from mentally ill patients on the other, in order to determine if a member meets the criteria of spending all or nearly all of their time in the care and treatment of mentally ill patients because it is the time spent working in the presence of mentally ill patients which carries the extra stresses and strains due to the increased possibility of violence and the need to restrain patients.
24. I agree with the outcome of the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mrs I for completeness.

### **Ombudsman’s decision**

25. Ombudsman cases are all decided on individual facts and the arguments presented in each case and do not have the weight of precedent. That said, I can understand why Mrs I makes the points she does about the need for some guidance about how NHSBSA should make any redecision.
26. The words “all or almost all” and “treatment or care” are not defined in the 1995 Regulations. Given that the interpretation of ‘treatment or care’ has been put directly in issue by Mrs I, NHSBSA were asked for further detail about the origin of their interpretation and the use of SM 1’s.

27. The documentation recently produced by NHSBSA demonstrates that the interpretation of the words 'treatment or care' as applied to ancillary staff has been actively considered since at least 1972 and has been the subject of Departmental guidance since at least 1986. Having reviewed these documents I am satisfied that NHSBSA's interpretation of the Regulation and its approach to asking employers to distinguish between direct hands-on and non direct hands-on work is reasonable.
28. The decision whether to designate an individual member as having MHO status under Regulation 14(3)(b) rests with the Secretary of State. The evidence shows that this power has long been exercised on a case by case basis by a delegated decision maker in line with Departmental guidance. The 1986 SAM sets out the rationale for NHSBSA's interpretation and the use of SM 1's. It supports NHSBSA's understanding that 'treatment or care' requires the presence of the patient and demonstrates that this expression of the Secretary of State's position is long standing. I have heard no argument that another interpretation of the Regulation is to be preferred and therefore see no reason to interfere with established policy on this point.
29. I also see no reason to criticise the use of the SM 1 as a primary means of collecting information about which elements of an employee's role fall into the category where patients are directly present and which do not. This practice does not in my view detract from NHSBSA's obligation to assess any grey areas which may present in a particular role description and to assess it against the policy made by the Secretary of State.
30. In conclusion, NHSBSA have provided further information on how it makes its decisions and I am satisfied that this is in line with the instructions it received from the Secretary of State. In this case, due to the conflicting information in the SM1 forms, and the absence of any reasoning by which Mrs I may understand how the instructions of the Secretary of State have been applied to her roles as NHSBSA understand them, NHSBSA should reconsider her application. Therefore, I uphold Mrs I's complaint.

## **Directions**

31. Within 21 days of the date of this determination NHSBSA should contact each of Mrs I's employers, provide each employer with guidance of what is classed as direct patient care, and request that new SM1 forms are completed relating to the work Mrs I undertook; and

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32. Upon receipt of the completed SM1 forms NHSBSA should then reconsider Mrs I's eligibility for MHO status and provide her with a revised decision including a full explanation of how the conclusion was reached with reference to the statutory test which has been applied and any supporting Departmental instruction or guidance which has been used as part of its detailed decision making process.

**Karen Johnston**

Deputy Pensions Ombudsman  
11 July 2018



## **Appendix**

The NHS Pension Scheme Regulations 1995

R3 Mental Health Officer

(5) Subject to paragraphs (6) and (7), where the regulation applies-

(a) if the member has in excess of 20 years' pensionable service as a mental health officer status, regulation E1 (normal retirement pension) will apply as if the reference, in paragraph (1) of the regulation, to age 60, were a reference to age 55, but only if the member was in pensionable employment as a mental health officer immediately before leaving; and

(b) each complete year of pensionable service as a mental health officer in excess of 20 years will be counted as 2 years' pensionable service.

(14) In this regulation "mental health officer" means-

(a) an officer working whole-time on the medical nursing staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder, who devotes all, or almost all, of his time to the treatment or care of person suffering from mental disorder;

(b) any other officer employed in such a hospital who is within a class or description of officers designated by the Secretary of State as mental health officer for this purpose; and

(c) a specialist in part-time NHS employment who devotes all, or almost all, his time to the treatment or care of persons suffering from mental disorder and who satisfies the requirements of paragraph (15).