

## Ombudsman's Determination

|            |   |
|------------|---|
| Applicant  | Mr N  |
| Scheme     | NHS Pension Scheme ( <b>the Scheme</b> )          |
| Respondent | NHS Business Services Authority ( <b>NHSBSA</b> ) |

## Outcome

1. I do not uphold Mr N's complaint and no further action is required by NHSBSA.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N has complained that NHSBSA has said he is not eligible for Mental Health Officer (**MHO**) status. This means he is not able to retire at age 55, without being subject to an early retirement reduction.

## Background information, including submissions from the parties

4. MHO status is defined in section R3 of the NHS Pension Scheme Regulations 1995 (**the Regulations**, as shown as the Appendix to this Determination). The status was abolished on 6 March 1995. However, members who qualified for MHO status on or before that date, were able to retain it, provided that they had not had a break in active membership of five years or more.
5. Mr N joined the Scheme on 24 June 1991, and paid pension contributions in various employments to the present day. Mr N transferred to the 2015 section of the Scheme on 1 April 2015. His retirement age in the 2015 section of the Scheme is the same as his State Pension Age.
6. On 18 February 2017, Mr N submitted MHO1 forms to NHSBSA, which provided details of the three roles he worked in, and the percentage of direct hands on patient care. He asked NHSBSA whether he was eligible for MHO status.

7. Mr N’s relevant employment history is as follows:

| Hospital                       | Within the role                | Direct hands on care of patients | Non-direct hands on care of patients |
|--------------------------------|--------------------------------|----------------------------------|--------------------------------------|
| Stepping Hill Hospital         | 19 April 1993 to 14 April 1998 | 65%                              | 35%                                  |
| Warrington and Halton Hospital | 15 April 1998 to 20 June 1999  | 75%                              | 25%                                  |
| Stepping Hill Hospital         | 21 June 1999 to 1 June 2014    | 80%                              | 20%                                  |

8. NHSBSA responded to Mr N and said he was not eligible for MHO status. On 24 May 2017, Mr N wrote to NHSBSA and said he wanted to make a formal complaint under stage one of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**).

9. On 10 July 2017, NHSBSA responded under stage one of the IDRP. It said when Mr N’s employment began in each of his roles, his employer told NHSBSA that he was not eligible for MHO status. However, NHSBSA still considered Mr N’s application for MHO status, and concluded that he was not eligible to receive this because he did not spend enough time working in direct patient care.

10. Mr N appealed and made the following comments:

“In the context of pharmacy services at the time, a largely clinical post in psychiatry was a novelty. It would be surprising if pharmacy managers and chief pharmacists at that time would have been cognisant of MHO status as something that might apply to any of their staff, just as myself with these matters in April 1993 – though you’ll allow that certainly in those days, few 23-year-olds would have been so far sighted.

It seems that the description of my role as the clinical and directorate pharmacist for mental health at that time is not under dispute – and I would further suggest that the 0.[6]5WTE (which is since 1993 the minimum time I have spent on mental health division work) would in this context, qualify that role for MHO status. The decisions not to grant the status seems particularly odd in the context of its being granted to part-time workers who spent, and spend, less time per week working clinically in mental health setting than I did and continue to do.

You will see from my employment history that I worked continually in NHS mental health services since April 1993. It almost appears that, in not being granted MHO status, I am being discriminated against for having been in full-time, rather than part-time employment.”

11. NHSBSA responded under stage two of the IDRP. It said the Regulations confirm who qualifies for MHO status, it confirmed that pharmacists were not included in those that would automatically receive the status. The Regulations explained that other members may be considered but they must devote all or almost all their time to the treatment of people with a mental disorder. Mr N's employer did not request MHO status. NHSBSA reconsidered the information he provided, in particular his April 1993 role. In this role, Mr N completed 65% of his work with direct hands on patient care, and 35% not involving direct hands on care. NHS BSA said 65% could not be classed "as all or almost all", so it remained of the view that he should not receive MHO status. It went on to say whilst part-time members may have spent the same number of actual hours as Mr N in the treatment or care of people with mental disorder, if they had the same percentage as Mr N confirmed, they would not be granted MHO status.
12. Mr N remained dissatisfied and brought his complaint to the Pensions Ombudsman to be independently reviewed.
13. NHSBSA provided further information about its designation policy, specifically its view that care and treatment must be "direct and hands on". This included an extract from the "Service and Membership procedures notes" circa February 1986 (the 1986 SAM); and, a background brief for the Minister of State (circa March 1986). At para 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 [MHO1] is designed to provide us with the information we require in the vast majority of cases."

14. This approach was reiterated in the background brief to the Minister as follows: -

"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."

## Adjudicator's Opinion

15. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHSBSA. The Adjudicator's findings are summarised briefly below:-
- The evidence indicated that NHSBSA had reviewed all the documents and in particular, the form relating to MHO status. The form summarised that in April 1993, 65% of Mr N's time was spent in direct contact with patients. However, 35% was spent completing other tasks which did not include direct patient care. Therefore, NHSBSA said this cannot be classed as "all or almost all" of the time spent on direct patient care. The Adjudicator concluded that this is a reasonable conclusion for NHSBSA to reach.
  - NHSBSA considers it is correct to ask employers to differentiate between, hands on time spent in the presence of mentally ill patients, and time spent away from mentally ill patients – in order to establish whether members meet the relevant criteria. This is because it is the time spent working in the presence of mentally ill patients that carries the extra stresses and strains, due to the increased possibility of violence, and the need to restrain patients.
  - Neither "all or almost all" nor "treatment or care" is defined in the Regulations. But the documents provided by NHSBSA demonstrate that the interpretation of the term "treatment or care", as applied to ancillary staff, has been actively considered since 1972 (and has been the subject of Departmental guidance since 1986). Having reviewed these guidance documents, it was deemed reasonable for NHSBSA to ask employers to distinguish between direct hands-on and non-direct hands-on work.
  - The 1986 SAM sets out the rationale for NHSBSA's interpretation and use of MHO1 forms. It supports NHSBSA's understanding that "treatment or care" requires the presence of the patient; and, it shows this expression of the Secretary of State's position is long-standing. There was not sufficient grounds to interfere with NHSBSA's policy.
  - The amount of time spent on direct hands on treatment of patients with a mental disorder is worked out as a percentage. Therefore, if a part-time worker completes fewer hours in total, then their percentage will be higher. The Adjudicator did not believe this amounted to discrimination because, if a part-time worker had the same percentage as Mr N, then they would not be granted MHO status either.
16. NHSBSA accepted the Adjudicator's Opinion and did not provide any further comments.
17. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N said the following:

- he believes it is unfair that, because he worked full time with only 65% of his work with direct hands on patient care, that he does not qualify for MHO status;
- he does not believe that spending the rest of the working week with patients suffering from physical health problems, as opposed to mental health problems, would be any less stressful; and
- part-time workers in mental health were treated more favourably because they could work the same number of hours as a full-time staff member, in direct hands on treatment of patients, and receive MHO status.

18. Mr N's additional comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

### **Ombudsman's decision**

19. Mr N is dissatisfied that he is not being granted MHO status, meaning if he chooses to retire at age 55, his benefits will be subject to an early retirement reduction.
20. MHO status was designed to acknowledge, and compensate for, the extra stresses and strains of working with patients with mental health problems. But, members could only hold the status if they were working all or almost all of the time with patients with mental health problems. Mr N may not agree with NHSBSA's interpretation, but NHSBSA is only complying with the Regulations.
21. I have considered carefully Mr N's argument about part-time workers versus full-time workers. However, I do not find that this is discriminatory, nor that NHSBSA's decision-making amounts to maladministration in this regard. MHO status is awarded, or not awarded, based on the percentage of time spent working directly with mentally ill patients. Therefore, it is the relative amount of time, not the absolute amount of time, that counts.
22. NHSBSA was required to put a process in place for deciding whether a person should hold MHO status or not. The Regulations did not stipulate how the decision needed to be made, so this was open for NHSBSA to decide. It did this by using a percentage to decide whether a person spent all, or almost all of their time in direct hands on care of patients with a mental disorder. This is a reasonable method to use, and I do not consider that 65% could be classed as all or almost all of time. As this is the method NHSBSA uses for both full time and part time workers, it cannot be said that one has been discriminated against in favour of the other.
23. Therefore, I do not uphold Mr N's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
25 October 2018

## Appendix

### The NHS Pension Scheme Regulations 1995

#### The NHS Pension Scheme Regulations 1995

R3 Mental Health Officer

*(5) Subject to paragraphs (6) and (7), where this regulation applies—*

(a) if the member has in excess of 20 years' pensionable service as a mental health officer, regulation E1 (normal retirement pension) will apply as if the reference, in paragraph (1) of that 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 count as 2 years' pensionable service.

*(14) In this regulation, "mental health officer" means—*

(a) an officer working whole-time on the medical or 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 persons 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 officers 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).