

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mr Michael Andrew Dyer
<b>Scheme</b>	The Firefighters' Pension (Wales) Scheme 1992
<b>Respondent(s)</b>	South Wales Fire & Rescue Service

**Subject**

Mr Dyer's complaint is about his entitlement to have two (split) pensions under the rules of the Firefighters' Pension (Wales) Scheme 1992 ("**the Scheme**") in respect of his service up to and after 23 April 2006 and the decision by South Wales Fire & Rescue Service ("**SWF&RS**") that he is not entitled to this.

**The Deputy Pensions Ombudsman's determination and short reasons**

An entitlement to two (split) pensions on suffering a reduction of pensionable pay, either due to taking up a different role or as a result of a different rate of pay in an existing role, is only available if such a change occurs on or after 1 April 2007.

Accordingly, the complaint should not be upheld against SWF&RS because Mr Dyer's change in role and resultant reduction in pensionable pay happened before that time, i.e. before the Scheme's provisions for two (split) pension awards came in to force.

## DETAILED DETERMINATION

### Material Facts

1. Mr Dyer is employed by SWF&RS as a Firefighter and is a member of the Scheme. Rhondda Cynon Taf County Borough Council (“**the Council**”) carries out the administration of the Scheme for employees of SWF&RS. Since SWF&RS have made submissions about the terms and conditions of Mr Dyer’s employment, extracts from his last contract of employment and the ‘Grey Book’ appear in the appendix.
2. Mr Dyer says he was seconded to the Fire Services College (“**the College**”) in 2001 and returned to SWF&RS in 2006. Before 2001 his job was that of a Sub-Officer grade. However, he says from 2001 he was initially promoted to a grade equal to Station Officer and later he was temporarily promoted to a ‘Group Manager (Competent)’ grade while working at the College.
3. In a letter dated 19 March 2001 The College informed Mr Dyer that he had been selected for secondment for three years (as Station Officer). Their letter also said,
 

“... you have been selected for secondment to the above position. The appointment will be for a three year period ...

I have written to your Chief Fire Officer ... and understand from previous correspondence with him that your brigade would not substantiate any appointment made by the College. Thus, you would return to your present rank, but you are advised to obtain an amended contract of employment from your brigade, specifying your conditions of service under which you will be employed by them, when you return from the College”.
4. The College wrote his Brigade on 20 March. SWF&RS replied on 25 April 2001 confirming its agreement to this secondment with effect from 23 April 2001. On the same day, SWF&RS wrote to Mr Dyer and said,
 

“...

I would confirm however that this promotion will be temporary and will last for the period of the secondment only. On your return to the Brigade you will revert to your substantive rank of Sub Officer, and posted to whatever vacant Sub Officers post that is available at the time of your return”.
5. In response to a query from Mr Dyer, SWF&RS told Mr Dyer in a letter of 30 April 2001 that if he applied for and passed the Station Officer Assessment Centre then he would be given an overall score and held on the promotion list.

When a vacancy became vacant, such a post would be filled in line with Brigade policy. If he were offered and accepted such a vacancy he would be made substantive in the rank from the date of any appointment and if that situation were to arise his secondment would continue until its completion.

6. The College temporarily promoted Mr Dyer to Assistant Divisional Officer (“**ADO**”) between 2 and 13 September 2002. This also occurred on further occasions between 31 March 2003 and 11 April 2003, and 30 June 2003 until 11 July 2003.
7. In a letter dated 11 August 2003 from SWF&RS to Mr Dyer, SWF&RS agreed to a further one year extension to Mr Dyer’s secondment at the College to 22 April 2005. Other correspondence indicates the secondment would be to March 2005.
8. As part of the employer’s national modernisation agenda, a national pay agreement was reached in November 2003. SWF&RS says this introduced a new pay structure and the removal of referring to uniformed employees by rank to that of their role. The new pay structure also introduced the creation of a ‘development’ and a ‘competent’ rate of pay for all roles. This was formalised by the ‘Fire Service Appointments and Promotion Regulations (2004)’.
9. SWF&RS says while at the College Mr Dyer was seconded to work as an Assistant Divisional Officer from 1 July 2004 to 23 April 2006 (*though Mr Dyer disagrees with that description since he says the College had already switched from the ‘rank’ to ‘role’ structure*).
10. A letter dated 10 February 2004 to SWF&RS requested permission to temporarily promote Mr Dyer retrospectively from 1<sup>st</sup> January 2004 to the end of his secondment on 22 April 2005. This was agreed. A further letter dated 12 January 2005 from the College to SWF&RS requested Mr Dyer’s secondment was extended by twelve months to 21 April 2006, and this was agreed by SWF&RS.
11. Following his return to SWF&RS, Mr Dyer says his grade was that of Watch Manager (formerly known as Sub-Officer) but he has also had further temporary promotions to Station Officer since 2006.

12. A letter was sent to Mr Dyer by SWF&RS on 21 April 2006 which said,  
 “I write to confirm that you will transfer in the substantive rank of Sub Officer from Watch Fire Service College to Watch Training, Cardiff Gate with effect from 9:00 hrs on 24 April 2006”.
13. Another letter from SWF&RS to Mr Dyer dated 26 April 2006 said,  
 “I write to confirm that upon returning from your secondment at the Fire Service College you will be posted in the substantive rank of Sub Officer to Training Commend, Cardiff Gate ...”.
14. For various reasons the formal implementation of ‘rank to role’ was not agreed within SWF&RS until 1 July 2007.
15. The Firefighters’ Pension (Wales) Scheme (Amendment) Order 2009 [2009 No. 1226 (W.109)] (“**the 2009 Amendment Order**”), adopted on 15 May 2009, further amended Schedule 2 of the Firemen’s Pension Scheme Order 1992, which set out the Scheme, from 1 April 2007 as follows:
- “1. In Part B (personal awards), after rule B5 (deferred pension), insert –  
 “Entitlement to two pensions  
 B5A  
 (1) A regular firefighter who –  
 (a) on taking up a different role; or  
 (b) becoming entitled to a different rate of pay in his existing role,  
 suffers a reduction in the amount of his pensionable pay such that the amount to be taken into account in the calculation of the pension to which he will be entitled at normal pension age is less than it would otherwise have been, is entitled to two pensions.  
 ...  
 (8) In paragraph (1), “role”, in relation to a firefighter, means the role in which he is for the time being employed, being a role set out in “Fire and Rescue Services Rolemaps” issued by the National Joint Council for Local Authority Fire and Rescue Services in August 2005””.
16. Mr Dyer says in early 2010 a colleague from the College made him aware of the amendment. Consequently he emailed the pensions contact at his employer on 14 January 2010 with a link to the Office of Public Sector Information (part of the National Archives) asking what he had to do to apply for the new pension settlement and if he could get some figures.

17. Mr Dyer says he subsequently made a request applying for a 'split pension' under the 2009 Amendment Order. In a letter dated 26 January (which Mr Dyer says was sent in 2010) in response to his request, SWF&RS confirmed that his salary was £45,205.20 between 1 July 2004 and 30 June 2005, and £47,313.60 between 1 July 2005 and 23 April 2006. His employer also said that, even though he was temporarily promoted to Group Manager he would be entitled to this 'split pension'. Further, they informed him that he should retain their letter as confirmation of his acknowledgement and when he came to retire if his pensionable pay at that time did not exceed the pensionable pay quoted above he would be entitled to claim a split pension.
18. On 1 April 2010 the Council sent Mr Dyer two estimates of his award on retirement; one with a 'split pension' and the other without. The estimates were for retirement in three years' time, i.e. at April 2013.
19. The estimate with no allowance for a split pension quoted an annual pension of £21,884, or a lump sum of £99,739 and reduced annual pension of £16,413 based on estimated service of 40/60ths and pensionable pay of £32,827 per annum.
20. The estimate on a 'split pension' basis showed an annual pension of £29,104 or a lump sum of £132,643 and reduced annual pension of £21,828. The maximum accrual of 40/60ths was apportioned 23 years 19 days (of 30 years) for service up to 23 April 2006 based on pensionable pay of £46,920, and 6 years 46 days (of 30 years) for service beyond 24 April 2006 based on pensionable pay of £32,827 per annum.
21. Mr Dyer says that after receiving these letters, he contacted both the Pensions Department at SWF&RS and the Pensions Helpdesk at the Council to see if he was required to do anything else to confirm this decision. He says he was told by both parties that all that was required of him was to request this split pension at the time of his retirement.
22. Mr Dyer says he received a personal benefit statement in May 2010 which he queried with SWF&RS's Pensions Department as he had not been given a breakdown on the 'split pension' basis. Mr Dyer says this statement stated his role as 'Area Manager A' and inaccuracies should be reported. He says he was obviously not an Area Manager A and he was entitled to a split pension. Mr Dyer says the person he spoke to confirmed these inaccuracies and, as the

statements were only issued annually, he was not concerned when he was told that the corrections would be made next year.

23. Mr Dyer says in January 2012 he received an updated benefit statement and again it did not show a 'split pension'. He again queried it with the Pension Department at SWF&RS and about a week later he was asked to meet with the Payroll, Pensions & Budget Manager which he declined to do. At a meeting in February 2012 with the Head of Human Resources ("**HR**") at SWF&RS he was told that he would not be receiving the split pension entitlement for service up to and after 23 April 2006. The main reasons given were (i) he was not eligible because he was in a temporary role, (ii) the awarding of a split pension was at the discretion of the Fire Authority, and (iii) the position before 1 April 2007 was that he would have paid pension contributions on pay that he would not be able to have taken into account on the assessment of his retirement pension.
24. On 3 May 2012 the Head of HR at SWF&RS wrote to Mr Dyer about his 'split pension' claim. The Head of HR said he did not believe that it was the intent of the circulars FPSC 7/2007 and 2/2008 or W-FPSC (09) 05 to offer a 'split pension' for reduction of pay based on temporary promotion, which may impact adversely on pensionable pay at the point of retirement. He considered the reference to 'split pension' was only in relation to where an individual's substantive role was changed with a detriment to the salary level. Reference to rule B5A was made (*but it has since been established that the statements made were based on another document that is now accepted as guidance probably from a government department rather than the regulations*) as well as circular FPSC 2/2008. However, given the letters of 26 January and 1 April 2010, the Head of HR sought further legal guidance.
25. Mr Dyer subsequently utilised the Scheme's Internal Dispute Resolution Procedure ("**IDRP**") and applied to the Chief Fire Officer of SWF&RS on 25 June 2012. He challenged each of the three reasons given.
26. The Director of People Services ("**the Director**") at SWF&RS gave a decision under the first stage (of two) of the Scheme's IDR on 22 August 2012. Each of Mr Dyer's three points was responded to. In conclusion, the Director said that, having considered the relevant circulars and minutes, he had decided not to uphold Mr Dyer's application.

27. Afterwards Mr Dyer had discussions with the Director, including the fact that he had taken out a further mortgage in respect of building works based on the information about him having two pensions as a result of his benefits being 'split'.
28. Mr Dyer made an appeal on 10 January 2013 as well as seeking assistance from the Pensions Advisory Service. He did not, however, include any detrimental reliance claim as part of his formal appeal as he did not think it relevant at that time. He says he felt the only issue then was whether he was in fact entitled to the split pension award.
29. The appeal was considered by Members of the Fire and Rescue Authority ("**the Panel**"), who gave a decision on 21 March 2012. They unanimously agreed not to uphold Mr Dyer's appeal. They concluded Mr Dyer's service between 1 July 2004 and 23 April 2006 while receiving higher pay while working as a Group Manager at the College pre-dated the 2009 Amendment Order. The Panel also agreed with the submissions on behalf of the Authority that it was not the intention of the provisions to allow for a split pension based on a temporary promotion. Nevertheless, the Panel concluded there had been maladministration as incorrect information had been given to Mr Dyer and that he had suffered distress and inconvenience as a consequence. They offered £300 as redress for any distress and inconvenience that may have been caused.
30. Mr Dyer has brought a complaint to me as he intends to retire soon.

#### **Summary of Mr Dyer's position**

31. In 2006 he accepted that if he could not secure a promotion again his pension contributions would have been null and void as there was no facility for a 'split pension' at that time.
32. He believes 1 April 2007 is the date at which it was expected that the rank to role process should have been completed. This was clearly stated by the Head of HR during the tribunal as being the main reason for issuing a split pension. Hence, if any person suffered a reduction in salary during the process they would be entitled to claim a split pension. SWF&RS did not achieve the change-over until 1 July 2007.

33. When he first applied for a split pension in 2010 he did not know whether he was entitled or not. He accepted and trusted the information given to him on 26 January 2010 confirming that he was entitled to this, which was reinforced by the Council outlining his benefits with regard to a split pension in April 2010.
34. He believes he is entitled to all such benefits. SWF&RS fully accepted that his pay during secondment was fully pensionable and appropriate pension contributions were deducted at that higher level. Thus, his entitlement is the same as anyone else who contributed at that higher level and over the same time period.
35. Had he retired within two years of returning to SWF&RS his salary as a Group Manager (or a proportion of it if retiring between two to three years from returning) would have been counted for the purpose of calculating his benefits.
36. The 2009 Amendment Order makes no differentiation between substantive and temporary role, and SWF&RS fully accepted his higher salary was pensionable.
37. SWF&RS's interpretation of Rule B5A is incorrect, in particular his contributions paid before 1 April 2007 are invalid.
38. He believes the first decision-maker read the guidance on Rule B5A out of context. The sentence clearly states "... *paid pension contributions on pay that you would not be able to have taken into account ...*" and not "*will not be able to have taken into account*". If this paragraph is read in its entirety it goes on to say that, "The introduction of Rule B5A on 1 April 2007 offers a form of protection by splitting your pension entitlement into two parts – one based on service accrued before the reduction in pay and one based on service accrued afterwards". The former sentence, along with the second sentence of that paragraph clearly indicates that his contributions prior to 1 April 2007 qualify him for this entitlement.
39. The introduction of the amendment on 1 April 2007 allows persons retiring to now apply for a split pension so that contributions made at a higher level in previous years in their service can now be considered. This, he believes, is the correct common sense interpretation of the amendment as it makes the system much fairer for people like him who have contributed funds at the higher level and that up to 1 April 2007 would have lost all benefit of these contributions. This introduction makes for a fairer pension system as it allows for some of the

pension contributions to be taken into account so that some pension from a higher level of contribution can be awarded.

40. He is claiming the split pension award as laid down in the 2009 Amendment Order as he believes he is entitled to it, and is not trying to ensure that SWF&RS uphold their own (initial) decision given to him in 2010 awarding him a split pension as confirmed in correspondence. He still firmly believes that their subsequent interpretation of this amendment is incorrect.
41. On the subject of the 2009 Amendment Order being introduced in 2009 and being backdated to 1 April 2007, he has difficulty understanding that 1 April 2007 is a cut-off date. If this were so, nobody would need to apply for a split pension until at least April 2010 as anyone paying contributions at a higher rate as of 2007 would still be entitled to a full pension until that date.
42. His return to SWF&RS was enforced by the service as he had been previously told he would have been extended at the College to 23 April 2007. But this extension was cancelled by the then Deputy Chief Fire Officer and he was made to return. He was told the reasoning for this was that it would be detrimental to his career development to stay any longer.
43. The disclaimer on benefit statements, which SWF&RS relies on, is standard wording entered on all statements and is not specific to the awarding of a split pension.
44. The building works (to provide two additional bedrooms and a bathroom) started in July 2007. Funding of approximately £30,000 for this was in place before the work started. Nonetheless, the quote for the foundations increased considerably due to the nature of the ground. He did not initially realise the extent of the building works and the cost of labour and materials.
45. In September 2010 a further sum of £26,600 (plus a fee of £35) was advanced on his existing mortgage and paperwork from the lender has been provided.
46. Mr Dyer says that this sum was used to pay off smaller loans (some of which were to family who had assisted financially) and credit card bills, as well as roughly £17,500 on the following items; windows (£4,500), central heating (£3,500), plastering (£3,000), bathroom fittings (£4,000), electrical wiring (£2,500) and additional costs for decorating materials and carpets (not quantified).

47. Without that loan he is unsure how he (and his wife) would have continued as they had taken a considerable amount of time to carry out the works to that point, only completing projects as their finances allowed. He (and his wife) would have probably continued in the same manner but would have taken a considerably longer time to complete the work.
48. A sum of £300 was paid to him. At the time of the second-stage of the IDRPs he refused to accept the offer on the basis it was derisory and insulting (and he still considers this so). SWF&RS sent him a cheque a few weeks' later. He did not immediately bank it. However, it was made clear to him it was for stress caused to him (and his family) and not for acceptance of any mistake supposedly made by SWF&RS. Following discussions with TPAS and SWF&RS the cheque was banked on the basis it would not affect any future action and was without prejudice to his case. The distress caused to him (and his wife) has been significant and is ongoing. He does not accept the respondent's comment that the £300 was in recognition of their mistake because he still does not believe a mistake has been made.

#### **Summary of South Wales Fire and Rescue Service's position**

49. Section 2.2 and 2.3 of the Wales Fire and Rescue Service Circular (W-FRSC (09) 05) issued by the Welsh Assembly Government explains that split pensions were allowed in the New Firefighters' Pension Scheme (2007) applicable to Wales and the same approach was being adopted for the Scheme. *[Similar provisions are set out in section 5.2 and 5.3 of the Firefighters' Pension Scheme Circular FPSC 2/2008 from the Department of Communities and Local Government in respect of the New Firefighters' Pension Scheme (2006) applicable to England]*.
50. It maintains there are three reasons as to why Mr Dyer is not entitled to two pensions by splitting his pensionable service; his promotion was a temporary position, it has discretion and the event was before 1 April 2007.
51. The period in which Mr Dyer seeks to rely on for the purposes of a split pension is from 1 July 2004 to 23 April 2006 ("**the Period**"). Prior to the Period Mr Dyer was employed in the substantive role of Sub Officer. After the Period of temporary promotion he reverted to the substantive role of Sub Officer.

52. As an emergency service, it is important that SWF&RS operates in such a way so as to ensure that it can meet its statutory and operational obligations. Hence, Firefighters are regularly called upon to enter into periods of temporary promotion. During such periods the Firefighter remains employed in their substantive role. That is to say, their contracts of employment state their substantive role (e.g. Area Manager, Group Manager, Station Manager, Watch Manager, Crew Manager, Firefighter etc) is not varied in respect of the role itself during a period of temporary promotion.
53. It remains a matter of fact that at the point at which Mr Dyer was subject to the period of temporary promotion in question, he remained employed in the substantive role of Sub Officer. His rate of pay changed because he was temporarily promoted and they believe this clarification is material.
54. Rule B5A applies only where a Firefighter takes up a different role. It is averred that at the time of the Period he was employed in the substantive role of Sub Officer. Following the Period, at which point Mr Dyer's pay decreased, he remained employed in the role of Sub Officer. Further, Mr Dyer was not subject to a different rate of pay for performing the role of Sub Officer – as per the second limb of Rule B5A [i.e. regulations (1) (b) of Rule B5A].
55. For the purposes of the 2009 Amendment Order, they consider a temporary promotion does not amount to the “taking up of a different role”.
56. Mr Dyer's terms and conditions of employment are governed by the National Joint Council (“**NJC**”) for Local Authorities' Fire Services (“the Grey Book”). In accordance with the Grey Book, reference to role means their substantive role, not the position that a Firefighter is performing during a period of temporary promotion. His promotion was temporary in nature and did not amount to a change in substantive role. The Grey Book does not refer to temporary promotions in its definition of roles and it is submitted that this approach is the correct one to take in the circumstances. As such, inclusion of the word “different” implies a change in substantive role.
57. It is for each Fire and Rescue Service to interpret the rules of the Scheme, including any relevant amending Orders, and exercise their discretion with the assistance of any Circulars and Guidance notes. Indeed, when clarification has been sought from the Welsh Government or the Council, the advice received is

that it is for each Service to interpret the Order as it sees fit. As such, it was this discretion that was relied upon during the IDRPs. It considers the rules have been applied consistently throughout, fairly and reasonably.

58. In terms of retrospective effect, the 2009 Amendment Order came in to effect from 15 May 2009 and the provisions of Rule B5A so far as they relate to a split pension have effect from 1 April 2007. Mr Dyer's claim relates to the Period. Even where Rule B5A could apply to Mr Dyer, which is denied, Section 1(a) of the Order applies only in relation to the scenarios envisaged in Rule B5A which occur after 1 April 2007. It is therefore averred that, notwithstanding the points made above, the provisions of Rule B5A are incapable of applying to the Period on the basis that it occurred before Rule B5A has effect.
59. In terms of interpreting the Order, it requests the Ombudsman to consider what was in the mind of the legislature at the time of the implementation of the 2009 Amending Order.
60. There are a number of examples in Circulars (e.g. FPSC 7/2007 and 2/2008 from the Department of Communities and Local Government and W-FRSC (09) 05 from the Welsh Assembly Government) and the explanatory note of June 2008 about Rule B5A. None of the illustrations include a situation where a firefighter is subject to a temporary promotion with accompanying increase in pay. Five of the six illustrations are where a firefighter is redeployed in an alternative role and it is submitted that this is a 'substantive' role. The sixth example is of Flexi Duty Allowance terminating and does not envisage redeployment. Had it been the intention to include temporary promotions for the purposes of split pensions it would have included an example. It is averred that the factual matrix in this case was not in the contemplation of the legislature at the time of drafting the 2009 Amendment Order and is not caught by this 2009 Amendment Order.
61. A decision that temporary promotions could allow split pensions will not only impact on SWF&RS but across the Fire Services nationally. Given the financial strain it is likely to impact on an operational basis and in their view the future of the Scheme itself could be at risk because it is not sustainable.
62. The text in their letter of 3 May 2012 is not taken from the regulations themselves but from an explanatory note created in June 2008. The explanatory note is on blank paper and although it does not quote the author, it believes this

guidance note came from a government body/department. It is clear that not only is the legislature's intention that only service occurring after 1 April 2007 is relevant for the purpose of a split pension but furthermore, that prior to this date there were scenarios where a firefighter would be obliged to make higher pension contributions and not take benefit of those higher contributions at the point his pension became payable.

63. Indeed the note states "The position before 1 April 2007 is that you would have paid pension contributions on pay that you would not be able to take in to account in the assessment of your retirement pension. The introduction of Rule B5A on 1 April 2007 offers a form of protection by splitting your pension entitlement into two parts – one based on service accrued before the pay reduction and one based on service accrued thereafter".
64. All annual benefit statements have a disclaimer stating: "**Does this statement reflect the actual amounts of the benefits I will receive from the scheme?** *No, this statement is an estimate of your benefits based on information currently held on your pension record in respect of this employment only. This is not a statement of entitlement – your actual benefits from the pension fund will be based on your final pay and membership up to the date of retirement*". The same condition applies to any pension estimates and projections that are issued.
65. It admits Mr Dyer was informed by SWF&RS (and the Council) that he would be entitled to a split pension under the terms of the 2009 Amendment Order. This was a genuine mistake and was as a result of a misunderstanding at the interpretation of the 2009 Amendment Order. Mr Dyer was offered financial compensation of £300 in recognition of the mistake, which he accepted.
66. Although Mr Dyer's building works were raised during the IDRP there are no further documents in its possession about that matter.

## Conclusions

67. SWF&RS has argued that it has discretion in this matter. Although SWF&RS (and any other fire service) may need to interpret the Scheme's provisions, I cannot see that Rule B5A itself provides for any discretionary decision to be made within that rule. Once the Scheme provisions have come into force, if a regular firefighter meets the stated criteria, which should be a matter of fact, then s/he has an entitlement to two (split) pensions.

68. Numerous comments have been made about Mr Dyer's employment status and, in particular, that he remained in his 'substantive' role. An employee's terms of employment are bound to change in a number of ways during the course of their employment. Broadly this could be categorized in two areas; discrete and very specific changes or varying terms as part of a general programme of harmonisation. An example of a discrete/specific change could be a pay increase or promotion and are likely to constitute changes to a contract of employment.
69. The last formal contract of employment issued to Mr Dyer was in July 1999 which pre-dates the changes from 'rank' to 'role'. It refers to the collective bargaining agreements, such as those embodied in 'The Grey Book', and to The Fire Services (Appointment and Promotion) Regulations as amended. Nonetheless, there is not anything explicitly stated within the contract itself about temporary promotions and how such a promotion affects his employment. Mr Dyer's secondment / temporary promotion seems to have been dealt with by an exchange of letters.
70. I find some comments by SWF&RS, such as Mr Dyer being a Sub Officer before the Period and 'reverting' to being a Sub Officer after the Period, are incompatible with its other comments, such as his promotion did not amount to a change in his substantive role. If his role supposedly did not change then why did it revert? Part of SWF&RS's submissions are also inconsistent with saying Mr Dyer was not subject to a different rate of pay for performing the role of Sub Officer – though I appreciate these comments might have been aimed more towards I (b) of Rule B5A. But if Mr Dyer's substantive role did not change then why did his pay change?
71. It is argued that in accordance with the NJC's Scheme of Conditions of Service (The Grey Book) reference to role means their substantive role, not the position that a Firefighter is performing during a period of temporary promotion. The phrase 'substantive' role is not used within the Grey Book. But I observe that in Section 4, Part B, paragraph 2 of the Grey Book it clearly says that pay entitlement must be dependent, among other things, on the employee's role.
72. Mr Dyer's rank was originally Sub Officer (equivalent to Watch Manager 'A' in the role structure). On secondment he initially held the rank of Station Officer - Flexi Duty (equivalent to Station Manager 'A' or 'B' in the role structure) and then the rank of ADO (equivalent to Group Manager 'A' in the role structure).

Each role (i.e. Watch Manager, Station Manager, Group Manager) has its own, different, rolemap listing activities.

73. Clearly the new pay structure is linked to the roles and as Mr Dyer was being paid a higher salary as a result of his temporary new rank/role, this indicates he had taken up a different role albeit for a temporary period. Also, it is unlikely that the employment duties he performed at the training college would be the same as he carried out as a Sub Officer at a fire station.
74. Based on the evidence that SWF&RS has submitted (which my office had to request), there is a lack of evidence to support their contention that Mr Dyer remained employed in his substantive role (as opposed to a different role) during the Period.
75. SWF&RS has argued Mr Dyer's temporary position as one reason why he was not entitled to two (split) pensions. Rule B5A I (8) of the Firemen's Pension Scheme Order 1992 as inserted by the 2009 Amendment Order defines 'role' as meaning a role for the time being employed. Employ would generally mean to engage or make use of the services of (a person) in return for money, hire, or to provide work or occupation for. I do not see that someone employed '*for the time being*' in a temporary rather than a permanent position would be precluded under the Scheme's rules. If the legislature had meant the Scheme's provisions to have applied only to a change in permanent or substantive role then it would have stated that. The fact that the circulars / guidance do not include any examples of a person returning to their former role after being temporarily promoted has no bearing one way or the other. But as Mr Dyer's complaint fails for different reasons that follow I do not need to make a decision about whether he took up a different role (as defined in the 2009 Amendment Order) once his secondment / temporary promotion at the College finished in April 2006.
76. I am satisfied that the introduction of two (split) pensions was to align the provisions of the Scheme with those of the New Firefighters' Pension Scheme (2007) in Wales rather than being introduced as a result of the change from rank to role.
77. Mr Dyer accepts that prior to the amendment that nobody could have two (split) pensions. However, he believes that once the amendment was enacted that this now enables him to be entitled to two (split) pensions.

78. Although the amendment was made in 2009 it had retrospective effect from 1 April 2007. If this change was to have the effect which Mr Dyer is arguing for, i.e. it also applied to firefighters suffering a reduction in pensionable pay either as a result of taking up a different role or receiving less pay in an existing role before 1 April 2007, then the effective date of the 2009 Amendment Order would have been backdated further.
79. In my view, a regular firefighter under the (Welsh) Scheme can only claim two (split) pensions if s/he suffers a reduction in pensionable pay due to either taking up a different role or a different rate of pay in an existing role as a result of such a change occurring on or after 1 April 2007. Mr Dyer's role changed before that time when there were no such provisions, and he cannot rely on provisions effective from a later date / time to apply to his circumstances that applied at an earlier date / time.
80. In response to comments from SWF&RS, Mr Dyer has made submissions surrounding the contributions he has paid, particularly those based on his higher rate of pay, and that these should qualify him for this entitlement. His benefits are, however, not based on the contributions he has paid but instead are, in principal, based on the Scheme's accrual rate, pensionable service and final pensionable pay. With regard to the guidance of June 2008 (from an undefined government source) and comments from both parties, I consider the wording used to be in relation to pay and not contributions. In other words, the position before 1 April 2007 is that pensionable pay (on which contributions were based) would not have been taken into account in the assessment of his retirement pension unless it fell within the final three years of retirement. I accept, though, the guidance could have been drafted more clearly.
81. SWF&RS accepts that incorrect information was given to Mr Dyer at the beginning of 2010. This error amounts to maladministration. However, Mr Dyer's benefits from the Scheme are dependent upon the statutory legislation that governs it.
82. The fact that Mr Dyer was told by SWF&RS that he was entitled to two (split) pensions does not itself entitle him to the incorrect information that was given to him. His actual entitlement does not alter and his benefits should be those set out under the legislation governing the Scheme. As explained above, under the Scheme's statutory provisions Mr Dyer does not qualify for two (split) pensions

because at the time his secondment to the College terminated there was no such rule / provision.

83. That said, if Mr Dyer has acted to his detriment on reasonable reliance of the incorrect information then he might be able to be compensated for any loss. I note that whilst Mr Dyer raised the matter of him increasing his loan associated with the mortgage on his house in respect of building works, he did not pursue that issue during the second stage of the IDRPs because he did not consider it was pertinent. It is therefore necessary for me to consider this matter in the interest of fairness.
84. Mr Dyer says the work for two bedrooms and a bathroom started in July 2007 following a Building Notice Application dated 23 May 2007. This building work therefore pre-dates the time when the incorrect information was given to him in 2010. So his initial decision to undertake such a project was thus not as a result of the incorrect information.
85. However, Mr Dyer increased his mortgage in September 2010 which he says was based on the higher pension scheme lump sum figures (i.e. £99,739 versus £132,643). Part (circa £9,000) of the total increased loan of £26,600 was used to repay other loans from family and credit cards. To the extent that some debt was raised to repay other existing debt does not amount to a change of position.
86. Of the increased borrowings Mr Dyer says that approximately £17,500 was used to continue with finishing the building works. He says that such expenditure would likely have been made but the work and cost would have been completed over a longer period of time. Whilst he will incur interest on the additional loan, I need to have regard to the fact that material / labour costs would more likely than not increase over time and that he now has the enjoyment / benefit of these house improvements much earlier than he may have done otherwise. Since Mr Dyer would likely have purchased the same items anyway but over a longer period of time, I am unable to conclude that he has changed his position to his detriment.
87. As I have said, the giving of incorrect information amounts to maladministration and will no doubt have raised Mr Dyer's expectations of a higher benefit than he is strictly entitled to. Needless to say this will have caused him some non-pecuniary injustice. I note, however, that SWF&RS offered and paid Mr Dyer the

sum of £300 for his distress and inconvenience. In my opinion this sum is commensurable with an amount I would normally award and so there is no outstanding injustice for me to remedy.

88. Accordingly, I do not uphold this complaint.

**Jane Irvine**  
Deputy Pensions Ombudsman

1 August 2014

## Appendix

89. The last “Statement of Particulars of Terms of Employment Uniformed Personnel Wholetime Service” sent by SWF&RS to Mr Dyer was issued on 23 July 1999.

Extracts are shown below:

“You are employed by the South Wales Fire Authority and your appointment is to the post of: Sub Officer.

...

### 1. **GENERAL CONDITIONS**

#### a. **Terms and Conditions of Employment**

Your terms and conditions of employment are covered by existing collective agreements negotiated with specified trade unions recognised by the Fire Authority for collective bargaining purposes in respect of the employment group to which you belong. These arrangements are embodied in the Scheme of Conditions of Service of the National Joint Council for Local Authorities’ Fire Brigades (known as and referred to in this document as the “Grey Book”) and, where applicable the Officers Committee of that Council as adopted and supplemented by the Fire Authority’s rules, records, Brigade Orders and other instructions, as amended. Along with such other employment law legislation which will apply from time to time.

...

The principal conditions current at the time of this contract are set out below.

The Fire Authority undertakes to ensure that any future changes to these terms will be entered in the documents referred to above or otherwise recorded for you to refer to, within one month of the change.

#### b. **Appointment and Promotion**

Your appointment and future employment is subject to the Fire Services (Appointment and Promotions) Regulations, as amended.

...

...

### 3. **OTHER GENERAL CONDITIONS AND INFORMATION**

- a. The NJC Agreements referred to in paragraph 1(a) of this document which directly affect other terms and conditions of your employment, currently include Special Leave, Emoluments and Allowances, Indemnifications Against Risk of Assault and Compensation for Death or Serious Injury on Duty.

The rules and local agreements made by the Service directly affecting other terms and conditions include an Agreement relating to Detached Duties and Temporary Transfers, ...”

90. The Scheme of Conditions of Service 6th Edition 2004 (Updated 2009) ('The Grey Book') said,

**“SECTION 3 – ROLES AND RESPONSIBILITIES**

1. The roles of fire and rescue service employees are those defined within the Integrated Personnel Development System and set out in accredited occupational standards determined by the Emergency Fire Services Vocational Standards Group. The roles used shall be as the fire and rescue authority considers necessary and specific activities within those roles will be determined by the authority to meet the local needs of the service based on this.

**Competence and Pay**

...

4. The defined roles of employees are

...

Watch Manager

Station Manager

Group Manager

...”

**“SECTION 4 – CONDITIONS OF SERVICE FRAMEWORK**

...

**PART B – PAY**

**Rates of pay**

...

2. The pay entitlement of an individual employee shall be determined by:

- (1) The employee’s role.  
 (2) Whether the employee is in training (...), development or competent stage of his or her role.

() ...

...

**Acting up and temporary promotion**

19. An employee who is required to undertake the duties of a higher role shall be paid the basic hourly rate for the development phase of that role. If the employee has demonstrated competence in the higher role payment will be at the competent rate. The payment shall be for a minimum of one shift.
20. It is necessary for an employee who acts up or is temporarily promoted to have:
  - (1) demonstrated competence in his or her current role;
  - (2) demonstrated the potential
  - (3) successfully completed the relevant assessment process for the higher role.

*See Appendix B for interim arrangements regarding acting-up and temporary promotion”.*

91. Appendix B said,

“Acting up and temporary promotion

5. The NJC recognises that in the early stages of implementing the Integrated Personal Development System there may on occasions be difficult to apply the principles at paragraph 19 of Section 4 Part B. Fire and rescue authorities, employees and trade unions should therefore adopt a co-operative and common sense approach to any problems that might arise.”