

FOR PUBLICATION

**Bedfordshire Fire and Rescue Authority
Audit and Standards Committee
12 April 2019
Item No. 7**

REPORT AUTHOR: SECRETARY/MONITORING OFFICER

SUBJECT: PENSIONS INVESTIGATION

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Background Papers: None

Implications (tick ✓):

LEGAL	✓	FINANCIAL	
HUMAN RESOURCES		EQUALITY IMPACT	
ENVIRONMENTAL		POLICY	
CORPORATE RISK	Known	OTHER (please specify)	
	New	CORE BRIEF	

Any implications affecting this report are noted at the end of the report.

PURPOSE:

To review the actions that the FRA has taken to examine the decisions taken between January 2009 and May 2012 regarding the pension paid to the Chief Fire Officer following his retirement in February 2010.

RECOMMENDATION:

1. That the FRA be recommended to ratify:
 - (a) the decision taken by the Chair of the FRA (with the support of the Executive) to use the salary received by the CFO during his last full year of service as the basis for abating his pension when he retired and was re-engaged in February 2010.
 - (b) the decision taken by the Chair of the FRA on 30 May 2012 (supported by the Executive and with the agreement of the Chief Fire Officer) to extend his fixed term contract and apply abatement to the CFO's salary rather than his pension.
 2. That the Committee considers any further advice to give to the FRA about changes to the CFO's employment contract for the future.
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1. The Investigation

- 1.1 In August 2017 the Chief Fire Officer asked the Authority's Secretary/Monitoring Officer to examine and advise on the circumstances in which an allowance the CFO had received whilst he was seconded to Warwickshire County Council in 2009 was treated as pensionable. The Secretary/Monitoring Officer subsequently instructed external solicitors to carry out an independent investigation into the matter.

2. Report to Audit and Standards Committee

- 2.1 The outcome of this investigation was reported to the Audit and Standards Committee on 25 September 2018. The independent investigator criticised the manner in which the organisation took certain decisions about the Chief Fire Officer in 2009 and also questioned the CFO's judgment in raising the issue of his pensionable pay with the payroll team. However, he found no wrong-doing or criminality by/of the Chief Fire Officer.

2.2 The Audit and Standards Committee passed a number of resolutions. They condemned the fact that the FRA had not been involved in decisions regarding the CFO's secondment to Warwickshire and that these arrangements had left the Authority disadvantaged financially, whereas the CFO had benefitted financially. The Committee called for further reports on various aspects of the matter.

3. Consideration by the Fire and Rescue Authority

3.1 The FRA considered the matter at its meeting on 18 October 2018. At that meeting, the FRA received a report from the Treasurer setting out the salary rates and employer costs over the period 2009 to 2018 which illustrated the impact of abatement and the savings from this that had arisen for the FRA.

3.2 The FRA resolved that the external auditors be asked to consider all the available evidence to consider whether the current processes and procedures satisfied the requirements for openness, transparency and the need to demonstrate probity in the conduct of the business of a public authority.

3.3 The FRA also instructed the Assistant Chief Officer (HR and OD) to report to the next meeting of the Audit and Standards Committee providing information on the decision to use the CFO's salary in the final year as the basis for abatement rather than his salary on the last day of service, whether in-service or inter-service abatement should have been applied and what effect abatement had in relation to savings and costs to the service.

4. Abatement of Salary

4.1 On 6 December 2018 the Assistant Chief Officer (HR and OD) submitted a report to the Audit and Standards Committee explaining the rationale behind the decision taken in 2010 to use the CFO's final year's pay as the basis to abate the CFO's pension and the subsequent decision to abate the CFO's salary rather than his pension. This decision was taken in May 2012 by the Chair after consultation with the Executive and coincided with a decision to extend the CFO's fixed term contract for two years. However, the Executive had not been made aware that the decision to abate salary rather than pension was contrary to guidance at the time.

4.2 The Assistant Chief Officer's report referred back to the basis on which the FRA had decided to allow the CFO to retire and be re-engaged in December 2009. The ACO explained that it was the practice at that time to use an employee's last full

year's salary for the purpose of determining the amount of abatement and that the level of abatement to be applied to the CFO had been determined on this basis.

- 4.3 The Committee had some further concerns about decision making process but noted that the external auditors were aware of these issues and decided to review the situation following receipt of the auditors' report.
- 4.4 The decision to use the last full year's salary, including temporary allowances, for abatement has and continues to result in a higher cost to the public purse.

5. Reference to the External Auditors

- 5.1 The FRA's Treasurer and Monitoring Officer met and briefed the Associate Partner from EY on the issues that had arisen. The auditor decided to take his own legal advice and he has shared this advice with the FRA's officers. The solicitors consulted by the auditor raised questions about the legality of the original decision taken in 2009 to treat the allowance received by the CFO as pensionable and also about the decision taken in 2012 to abate the CFO's salary rather than his pension. (Copies of this legal advice have been made available to the members of the Audit and Standards Committee on a confidential basis.) In view of the questions about the legal position, the auditor recommended that the FRA should take further legal advice from specialist counsel.

6. Counsel's Advice

- 6.1 The Secretary/Monitoring Officer instructed Naomi Ling of counsel to advise. In summary, Ms Ling has advised as follows:
 - The decision to treat the allowance received by the CFO during his secondment to Warwickshire County Council from February to October 2009 as pensionable was lawful, though this was marginal. This was a matter of statutory construction, not a matter over which the FRA had discretion.
 - The decision taken on in December 2009 to allow the CFO to retire and be re-engaged and to base abatement on his final year's pay was lawful.
 - The decision taken in May 2012 to abate the CFO's salary instead of his pension was also lawful, although contrary to guidance.

- To the extent that there was any doubt about whether those who took these decisions on behalf of the FRA had delegated power to do so, it was open to the FRA to ratify the decisions now and they should consider doing so. This aspect of the matter is considered further in paragraph 7.
- The FRA could consider re-making the 2010 and 2012 decisions to take into account and give effect to DCLG guidance (Circular FPSC 10/2009).

7.0 Governance Failings

- 7.1 The investigations that have taken place into this matter have revealed some weaknesses in the governance arrangements that were in place during the relevant period.
- 7.2 The decision to treat the allowance received by the CFO whilst he was seconded to Warwickshire County Council as pensionable appears to have been taken by the Director of HR without reference to the FRA. (It is unclear to whether the FRA's Chairman was consulted about this.) The decision to permit the CFO to retire on his 50th birthday and to re-engage him immediately on a fixed term contract was taken by the FRA Chair with the support of the Executive. The same decision-making process was adopted in 2012 when the decision was taken to extend the CFO's fixed term contract and to abate his salary instead of his pension.
- 7.3 The FRA as a whole was not involved in these decisions and it seems to have been the practice at the time for such matters to be decided by the Chair in consultation with the Executive rather than by a formal decision-making body.
- 7.4 These weaknesses have now been addressed in changes that have been introduced since 2016 and will be further strengthened following the governance review that is currently taking place. In particular, it is proposed that the Executive Committee will be responsible for managing the employment relationship between the CFO and the FRA.

8. Publication

- 8.1 This report contains exempt information as defined in paragraphs 1, 2 and 3 of Schedule 12A of the Local Government Act 1972. The report considers matters that affect the CFO's salary and pension. Standing Orders provide that when matters

affecting an individual employee are under discussion, the FRA should first decide whether or not the power to exclude the public should be exercised.

- 8.2 Until now, the FRA has excluded the press and public from meetings when the matter has been under discussion. However, now that the investigations have been completed, it may be appropriate to make this report public in the interest of openness and transparency.
- 8.3 When deciding whether or not to disclose a report containing exempt information, the Authority is required to balance the advantage of maintaining the exemption against the advantage of public disclosure and determine the matter on that basis.

9. Legal Implications

- 9.1 The legal implications are set out in the body of the report. Counsel has advised that the High Court recently considered the definition of pensionable pay under the Firefighters' Pension Scheme 1992 in another case. Counsel has considered whether the judgement in that case has any implications for our own situation. However, she has concluded that we are no further forward in terms of understanding whether uplifts for temporary promotions were pensionable prior to 2013. Therefore, counsel does not revise her view that, on balance, the allowance paid to the CFO during his secondment to Warwickshire in 2009 was probably pensionable (whilst acknowledging that this was a marginal judgement).

JOHN ATKINSON
SECRETARY/MONITORING OFFICER