

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

<b>Applicant</b>	Mr Nigel Bent (on behalf of the Executors of the Estate of the deceased Miss Brenda Davies)
<b>Scheme</b>	NHS Pension Scheme ( <b>the Scheme</b> )
<b>Respondent</b>	NHS Pensions Betsi Cadwaladr University Health Board ( <b>BCUHB</b> )

**Subject**

Mr Bent is making an application on behalf of the executors of the estate. Mr Bent complains that NHS Pensions and BCUHB incorrectly paid the death gratuity payable in respect of a deceased former member of the Scheme, Miss Brenda Davies, to Miss Davies' long-term partner, Mr J. Mr Bent complains that the death gratuity should have been paid to Miss Davies' estate.

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

The complaint should be upheld against NHS Pensions because they provided misleading information.

The complaint should not be upheld against BCUHB because, although they misled Miss Davies, that was because they relied on the information provided by NHS Pensions.

## DETAILED DETERMINATION

### Relevant legislation

- I. Regulations F1, F5 and G14 of The National Health Service Pension Scheme Regulations 1995 (as amended) (**the Regulations**) provide as follows:

Regulation F1 says -

- (1) If a member dies in pensionable employment before reaching age 75, a lump sum on death shall be payable in accordance with regulation F5.

...

Regulation F5 says –

- (1) A lump sum under any of regulations F1 to F4 shall be paid in accordance with the following paragraphs.

...

- (3) If a member dies leaving a surviving partner and without having made a nomination in favour of another person, the lump sum shall be paid to that surviving partner unless -
- (a) the member has given notice to the Secretary of State that the surviving partner is not to receive the payment and has not revoked that notice; or
- (b) the surviving partner has been convicted of an offence specified in regulation T6(1A) and the Secretary of State has directed, as a consequence of that conviction, that the surviving partner's right to payment in respect of the member's death shall be forfeited; or
- (c) payment to the surviving partner is not, in the opinion of the Secretary of State, reasonably practicable,
- in which case the lump sum shall be paid to the member's personal representatives.
- (4) If a member dies having made a nomination in favour of one nominee (whether or not he also leaves a surviving partner), the lump sum shall be paid to that nominee unless-
- (a) the member has given notice to the Secretary of State revoking that nomination; or
- (b) the nominee has died before the payment could be made; or
- (c) the nominee has been convicted of an offence specified in regulation T6(1A) and the Secretary of State has directed, as a consequence of that conviction, that the member's right to payment in respect of the member's death shall be forfeited; or

- (d) payment to the nominee is not, in the opinion of the Secretary of State, reasonably practicable,

in which case the lump sum shall be paid to the member's personal representatives.

...

(12) In this regulation "surviving partner" means a -

- (a) widow; or
- (b) widower; or
- (c) civil partner; or
- (d) nominated partner,

who survives the member.

...

Regulation G14 says -

(1) A member whose pensionable employment ceases on or after 1st April 2008 may, by giving notice in writing to the Secretary of State, nominate a person ("the nominated partner") to receive a surviving nominated partner pension on the member's death and such a nomination shall be effective from the date the Secretary of State accepts it.

(2) The Secretary of State must accept a member's nomination if -

- (a) the member and the nominated partner have jointly made and signed a declaration in the form required by the Secretary of State that remains effective at the member's death; and
- (b) the nominated partner satisfies the Secretary of State that for a continuous period of at least two years ending with the member's death-
  - (i) the member and the nominated partner were living together as if they were husband and wife or civil partners;
  - (ii) the member and the nominated partner were not prevented from marrying or entering into a civil partnership;
  - (iii) the member and the nominated partner were financially interdependent or the nominated partner was financially dependent on the member; and
  - (iv) neither the member nor the nominated partner was living with a third person as if they were husband and wife or as if they were civil partners.

...

2. It is indirectly relevant that Regulation G14 was introduced with effect from 1 April 2008. Before that date there was no equivalent provision, and Regulation F5 said that the lump sum would be paid to the estate, but that if there was a surviving spouse or civil partner or a person nominated to receive it, then the Secretary of State “may” (rather than “shall” in the post-2008 version) pay it to the persons in those categories.

### Relevant documentation

#### *NHS Pension Scheme: Survivor Benefits – Member FAQs*

3. The second question and answer says as follows:

“Q. My partner nominated me to receive a survivor pension. Will I receive the Life Assurance Lump Sum?”

A. Only if your partner made a Death Benefit Nomination in your favour. If a nomination has not been made the death benefit will be paid to the Legal Personal Representative on production of Grant of Probate or Letters of Administration.”

Note: It is highly likely that “Death Benefit Nomination” refers to Form DB2, as the form shares this title.

#### *Notes to Form PNI*

4. Paragraph 2 of the notes to Form PNI says as follows:

“You can nominate your partner to receive a survivor pension after your death by completing this form and jointly signing the declaration.”

#### *Notes to Form DB2*

5. The notes to Form DB2 (entitled “Death Benefit Nomination”) say as follows:

“If you want your spouse or civil partner to receive 100% of your death benefits you do not need to complete this form, as they will receive it automatically, unless you have previously nominated someone else to receive it.

...

Important note: If you are completing the death benefit nomination in favour of your partner and want them to receive your survivor pension benefits when you die, you should complete a ‘Partner Nomination Form’ PNI...”

#### *Death Benefits Nominations Decision Tree*

6. A “Death Benefits Nominations Decision Tree” says (I have not laid in out in tree format):

“ Are you married or in a civil partnership?

- No
- These options are available to you
- Nominate your partner for a surviving partner pension – complete form PNI
- Make a death benefit nomination for any lump sum payable in respect of one or more individuals, or nominate an organisation or body – complete form DB2”

7. Another decision tree “Decision Tree For Which Form To Use” says that form DB2 should be used for death benefit and form PNI should be used to nominate a partner to receive a pension.

8. A slide from a PowerPoint presentation prepared by NHS pensions giving an overview of the Scheme says:

“Partner’s [sic] must be nominated for Lump Sum (DB2) & Pension (PNI)  
...”

### **Material Facts**

9. Miss Davies joined the Scheme on 1 November 1982.

10. Mr Bent says that in early 2012 Miss Davies got in touch with NHS Pensions and her employer, BCUHB, to discuss her application for ill health retirement from the Scheme and the allocation of her survivor benefits in the Scheme in the event of her death. It seems that Miss Davies knew that her illness was very serious, because there was some possibility of her fully commuting all of her pension on the grounds that her life expectancy was significantly reduced. (I take this from a letter from NHS Pensions of 9 May 2013 to Mr Bent, in which they refer to BCUHB having asked for an estimate on that basis.)

11. In particular Mr Bent refers to meetings in March 2012 at Wrexham Maelor Hospital. He says that present were Mr Bent, his co-executor, Miss Davies, and, from the NHS, an HR representative, a Pensions representative and Miss Davies’ line manager. He says that Miss Davies

“...was repeatedly advised that the survivor pension would be paid according to her partner nomination and the death gratuity would be paid to her estate unless she completed an additional nomination form. This was both her and the Executors’ understanding during the meetings and was what she emphatically wished to happen. This wish was expressed by [Miss Davies] several times and she was assured that the death gratuity would be paid to

the estate despite her making a partner nomination for the survivor pension.” (Stage 1 Internal Dispute Resolution submission.)

12. That account is reflected in an email from BCUHB dated 23 September 2013 which recalls a meeting that Miss Davies had with them about her pension benefits in the Scheme on 6 March 2012. In that email BCUHB say that in a later meeting – the date of which is unknown – Miss Davies told them “that she wanted her sister to have her lump sum [i.e. death gratuity] (left to her estate) and her partner to have her pension”.
13. There is no contemporary record of those conversations nor is there any other correspondence between BCUHB and Miss Davies.
14. On 26 March 2012 NHS Pensions received a partner nomination form – Form PNI – completed by Miss Davies and her long-term partner Mr J. The PNI was signed by both Miss Davies and Mr J and said that they had lived together for 21 years. The form was dated 23 March 2012.
15. NHS Pensions wrote to Miss Davies by letter dated 30 March 2012. In that letter NHS Pensions said that “I have also attached a DB2 form as you may wish to consider nominating your partner to receive the death gratuity payable in the unfortunate event of your death”.
16. Miss Davies died on 7 June 2012 without having completed a form DB2.
17. NHS Pensions were informed of Miss Davies’ death on 22 June 2012.
18. On 28 June Ms A, a Senior Sister at BCUHB wrote to Mr Bent’s co-executor. She sent a claim form for the lump sum and said “I know [Miss Davies] completed a number of forms previously but, circumstances changed therefore we have to re-submit new forms to allow her wishes to be granted. Her lump sum will now be allocated to her estate.” She went on to say that a form for claiming the pension had been sent to Miss Davies’ partner.
19. Mr Bent completed the form on 3 July 2012 to claim the death benefit payable from the Scheme in respect of Miss Davies.
20. NHS Pensions responded to Mr Bent by letter dated 11 July 2012 informing him that a Form PNI had been completed by Miss Davies and Mr J and that, once it had been “verified”, Miss Davies’ lump sum death benefit (and a survivor pension)

from the Scheme would be paid to the surviving partner named in the Form PNI (i.e. Mr J).

21. NHS Pensions made enquires about the validity of the Form PNI and were satisfied that the “appropriate criteria” had been met. They paid the death benefit to Mr J on 17 April 2013. The amount was £55,249.92.

### **Summary of Mr Bent’s position**

22. The PNI form signed by Miss Davies and Mr J specifies that it only nominates a survivor pension. The form does not mention any other survivor benefits. Indeed, the confirmation letter dated 30 March 2012 from NHS Pensions acknowledging receipt of the Form PNI advised Miss Davies to complete Form DB2 if she wanted her nominated partner to receive the death gratuity as well as the survivor pension. Further, the guidance notes for Form DB2 said that the form need not be completed in the case of spouses and civil partners - thereby suggesting that it needed to be completed in other circumstances. No Form DB2 was completed by Miss Davies. Accordingly, she did not nominate anybody to receive the death gratuity. It follows that the death gratuity should have been paid to the estate rather than Mr J.
23. Regulation G14(1) refers only to the “nominated partner” being nominated to receive the survivor pension. It does not refer to any other survivor benefits (specifically, it does not refer to the death gratuity). Accordingly, the Regulations provide that in the absence of a completed Form DB2 the death gratuity should be paid to Miss Davies’ estate.
24. NHS Pensions acted in breach of the Regulations by assuming that any nomination specified on Form PNI in respect of a survivor pension can also be applied to the death gratuity. In circumstances where a “nominated partner” is not the spouse or civil partner of the member, a Form DB2 must be completed to effectively nominate a “nominated partner” to receive a death gratuity.
25. If it is not found that NHS Pensions acted in breach of the Regulations, Miss Davies was misled by both her employer (BCUHB) and NHS Pensions and as a result the estate and the beneficiaries of Miss Davies’ Will have suffered financial loss.

26. NHS Pensions - in failing to pay the death gratuity to the estate - have caused the executors of the estate and the beneficiaries of Miss Davies' Will to suffer significant distress and inconvenience.

### **Summary of NHS Pensions' position**

27. They can only pay benefits in accordance with the Regulations. They consider that the death gratuity paid to Mr J was paid in accordance with the Regulations.
28. The Regulations were amended in 2008 to allow single (that is persons without a spouse or civil partner) members to nominate a partner to receive a survivor pension upon their death. Certain criteria must be met for a survivor pension to be payable. These criteria can only be tested (and subsequently verified) upon the death of the member. Once the criteria have been tested and verified the surviving partner takes on the same status as a spouse or civil partner. If a member nominates their surviving partner to receive just their death gratuity only there is no entitlement to a survivor pension. However, if a surviving partner is nominated for a survivor pension on a Form PNI and no Form DB2 has been completed, the Regulations provide that the death gratuity will be paid to the person nominated in Form PNI (i.e. once the "criteria" have been tested and verified).
29. NHS Pensions recognise that the "Survivor Benefits – Member FAQs" (outlined above) document was incorrect but say that they are unable to comment on whether Miss Davies' ever saw the document and, therefore, relied upon it.
30. Further, NHS Pensions also recognise that information provided in their letter to Miss Davies of 30 March 2012 - in suggesting that Miss Davies needed to complete a Form DB2 to nominate Mr J to receive the death gratuity - was incorrect. NHS Pensions have argued that they have "encouraged" members to complete the Form DB2 to avoid any "unnecessary delays" in payment of the death gratuity but that, in the circumstances, as Mr J was Miss Davies' surviving partner (as a Form PNI had been completed) there was no need to complete it.
31. NHS Pensions accept that this may amount to maladministration for which some compensation should be payable but maintain that no legal rights were infringed.



## Summary of BCUHB's position

32. Any information provided to Miss Davies was given in good faith based on BCUHB's understanding of information available from the NHS Pensions Agency website and pension form guidance.
33. The notice issued to employers in 2008 by NHS Pensions explaining the changes to the Regulations did not make clear that the default position for a member who was single had changed.
34. The Death Benefits Nominations Decision Tree for employers provided by NHS Pensions also referred to separate nomination forms for pension and lump sum.
35. The information available to BCUHB clearly treated the benefits as two separate entities and that form PNI was required to nominate a partner for survivor pension and form DB2 was required to nominate the death gratuity.
36. The correspondence dated 30 March 2012 from NHS Pensions to Miss Davies made it clear that a DB2 form was required if she wished to nominate her partner to receive the death gratuity.

## Conclusions

### *The position under the Regulations*

37. The death gratuity became payable on Miss Davies' death in accordance with regulation F1 and regulation F5 sets out to whom Miss Davies' death gratuity should be paid.
38. Regulation F5(3) says that if a member dies having left a "surviving partner" and without having nominated another person to receive the death gratuity, the death gratuity will be paid to the surviving partner unless one of a number of prescribed conditions are met.
39. Regulation F5(12) sets out the definition of "surviving partner". It says that a "nominated partner" can be a "surviving partner".
40. The definition of "nominated partner" is set out in regulation G14(1). It says that a member whose pensionable employment ends after 1 April 2008 may, "by giving notice in writing to the Secretary of State", nominate a person – who shall be "the nominated partner" – "to receive a surviving nominated partner pension on the member's death".

41. Accordingly, regulation G14(1) says that if a member has nominated a person to receive a survivor pension then that person can be a “nominated partner”. It therefore follows that a person nominated to receive a survivor pension falls under the definition of “surviving partner” in regulation F5(12).
42. As Mr J is a “surviving partner” regulation F5(3) says that - in the absence of any of the criteria set out at regulation F5(3)(a), (b) and (c) being met - the death gratuity should be paid to him. There is no suggestion that Mr J would trigger any of the exclusions in regulation F5(3)(a), (b) and (c).
43. So Mr J is the correct recipient of the death gratuity under the Regulations. It follows that the death gratuity was not payable to the estate under the arrangements that Miss Davies actually made.

*Misleading information*

44. The evidence of Mr Bent, which is not contested at all by BCUHB, is that BCUHB told Miss Davies that the absence of a nomination form for the death benefit meant that it would go to the estate. It is clear from the documents – for example the email of 23 September 2013 and the letter of 28 June 2012 – that BCUHB wrongly believed that to be true and thought that Miss Davies had taken the right steps to achieve her wish, which was that her partner should receive the pension and that the lump sum would be paid to her estate.
45. I find that that was her intention – and that the reason that she failed to achieve it was substantially the information she was given by BCUHB. She could have achieved her aim by giving notice under Regulation F5(3)(a) that the surviving partner was not to receive the lump sum.
46. However, BCUHB say that they were themselves misled by NHS Pensions.
47. NHS Pensions have conceded that the Member FAQ they published was incorrect. It does not explain that if a Form PNI has been completed and a Form DB2 has not, in the absence of any other form of express nomination of a recipient of the death gratuity, the death gratuity will be paid to the person nominated in the Form PNI. Indeed, it suggests that a death gratuity will only be paid to a person who completed a Form DB2. This is clearly not reflective of what the Regulations say.

48. NHS Pensions have also conceded that the letter they sent Miss Davies on 30 March 2012 (which I have referred to at paragraph 9 above) was incorrect. The letter enclosed a copy of Form DB2 (and, presumably, the guidance notes to it). The letter confirmed receipt of the Form PNI and said that the Form DB2 had been enclosed “as you [Miss Davies] may wish to consider nominating your partner to receive the death gratuity payable in the unfortunate event of your death”. This statement suggested that a Form DB2 needed to be completed for a death gratuity to become payable to a nominated partner (and that the death gratuity nomination was not covered by the Form PNI). That was of course wrong.
49. In addition, the notes to Form PNI are potentially misleading. The notes to the Form PNI say that a member completing the form “can nominate your partner to receive a survivor pension after your death by completing this form and jointly signing the declaration”. The reference is to a survivor pension only. This is not the full picture as regulation F5(3) says that a death gratuity will be paid to a person who is nominated under a Form PNI (as they can be, as described above, a “surviving partner” for the purposes of regulation F5).
50. BCUHB have said that the guidance provided to them by NHS Pensions is misleading. There is no indication at all in any of the guidance that by completing form PNI in favour of her partner Miss Davies was also in effect nominating him to also receive the death gratuity. The decision trees do not reflect it, nor does the PowerPoint slide.
51. There is no evidence that Miss Davies saw any of the material (other than the form PNI and the letter confirming receipt of it) but that is immaterial if it misled BCUHB, who in turn misled Miss Davies.
52. The information that was available has to be considered against the background that until 2008 a lump sum could only have been payable to Miss Davies’ partner if she had nominated him to receive it using Form DB2. (Also the payment of a lump sum to a surviving spouse in place of the estate was discretionary before April 2008.) As it was not stated that completing Form PNI would result in the partner receiving the death benefit, it was in my judgment reasonable that BCUHB thought that the pre April 2008 position obtained, and it would be paid to the estate.

53. Such documents as Miss Davies did see came from NHS Pensions and would have reinforced her belief that she had done what was necessary. The Form PNI did not tell her that it effectively altered the position in relation to the lump sum – and the letter from NHS Pensions confirmed that a Form DB2 was needed.
54. NHS Pensions in effect misstated the position and Miss Davies relied upon a reasonable understanding that she had arranged for the death benefit to be paid to her estate. Had she been properly informed she would have made an alternative arrangement to the same effect. So the estate is to be put back in the position it would have been had Miss Davies not been misled. I find, for the reasons given above, that NHS Pensions, rather than BCUHB, are liable to compensate the estate accordingly.

#### **Directions**

55. Within 28 days of the date of this Determination NHS Pensions shall pay to Miss Davies' estate , as compensation, the sum of £55,249.92, being the value of the death gratuity plus simple interest from 17 April 2013 to the date of payment. The interest shall be calculated at the base rate for the time being quoted by the reference banks.

**Tony King**  
Pensions Ombudsman

12 December 2014