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STATUTORY INSTRUMENTS

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**2009 No. 544**

**PENSIONS**

**The Armed Forces Pension Scheme  
etc. (Amendment) Order 2009**

<i>Made</i>	- - - -	<i>9th March 2009</i>
<i>Laid before Parliament</i>		<i>11th March 2009</i>
<i>Coming into force</i>	- -	<i>6th April 2009</i>

In exercise of the powers conferred by sections 1(1)(a) and 10(2)-(4) of the Armed Forces (Pensions and Compensation) Act 2004(1), and pursuant to article 2 of the Armed Forces (Pensions) (Prescribed Modification) Order 2009(2), the Secretary of State for Defence makes the following Order:

**Citation, commencement and interpretation**

1.—(1) This Order may be cited as the Armed Forces Pension Scheme etc. (Amendment) Order 2009 and comes into force on 6<sup>th</sup> April 2009.

(2) In this Order—

“the EDP Scheme Order” means the Armed Forces Early Departure Payments Scheme Order 2005(3); and

“the AFPS 2005” means the Armed Forces Pension Scheme 2005 established by article 2(1) of the Armed Forces Pension Scheme Order 2005(4) and set out in Schedule 1 to that Order.

**Amendments to the EDP Scheme Order**

2. The EDP Scheme Order is amended in accordance with articles 35.

**Inflation adjustments in determining final relevant earnings for early departure payment awards**

3. For article 7 substitute—

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(1) 2004 c. 32.

(2) S.I. 2009/262.

(3) S.I. 2005/437, amended by S.I. 2006/717, 2007/2608 and 2008/229.

(4) S.I. 2005/438, amended by S.I. 2006/717, 2007/2608 and 2008/229.

### **“Inflation adjustments in determining final relevant earnings**

7.—(1) For the purpose of determining a person’s final relevant earnings under article 6, the amount of relevant earnings, as determined in accordance with article 6, for that part of the period of 365 days that falls 365 days or more before the last day of service is adjusted for inflation.

(2) If the member’s final relevant earnings are determined in accordance with paragraph (1) to be an amount for any period in relation to which any adjustment for inflation has been made under this article, then, except as provided in article 11(2) and (3), the member’s final relevant earnings are to be taken for all purposes to be the amount so determined after that adjustment.

(3) The reference in paragraph (1) to adjusting for inflation the amount of relevant earnings for part of a period is a reference to increasing it by the same amount as that by which an annual pension of an amount equal to those earnings would have been increased under the Pensions (Increase) Act 1971(5) on the day following the last day of relevant service if the pension—

- (a) were eligible to be so increased, and
- (b) had come into payment on the day following the last day of that period.”.

### **Inflation adjustments: supplementary**

4.—(1) Article 11 (increases for inflation) is amended as follows.

(2) In paragraph (1) after “article 7” insert “in determining the amount of the person’s final relevant earnings”.

(3) For paragraphs (2) to (4) substitute—

“(2) For the purposes of determining the annual amount of the payments to be calculated in accordance with article 10(6), any adjustment required by article 7 is disregarded, and accordingly, the person’s actual total relevant earnings for the 365 consecutive days applicable in the person’s case under article 6(1) is taken to be the amount of the person’s final relevant earnings.

(3) But the payments calculated in accordance with article 10(6) must be increased by the same amount which they would be increased under the Pensions (Increase) Act 1971 if they were payments of pension so calculated and the pension was eligible to be increased under that Act.”.

### **Effect of entering further military service on early departure payment awards**

5.—(1) Article 12 (effect of rejoining armed forces or entering certain reserve forces service on article 9 award) is amended as follows.

(2) In paragraph (1)—

- (a) omit “or” at the end of sub-paragraph (c);
- (b) at the end of sub-paragraph (d) for “;” substitute “,”; and
- (c) after sub-paragraph (d) insert—

“or

- (e) enters service to which Part 3 or 4 of Chapter 6 of the Territorial Army Regulations 1978(6) applies (non-regular permanent staff officers or soldiers);”.

(3) In paragraph (5) for “paragraph (1)(c) or (d)” substitute “paragraph (1)(c), (d) or (e)”.

#### **Amendments to the AFPS 2005**

6. The AFPS 2005 is amended in accordance with articles 712.

#### **Inflation adjustments in determining final pensionable earnings for the AFPS 2005**

7. For rule A.5 substitute—

##### **“A.5. Inflation adjustments in determining final pensionable earnings**

(1) For the purpose of determining which is the greatest amount mentioned in rule A.4(1), the amount of pensionable earnings, as determined in accordance with rule A.4, for that part of the period of 365 days that falls 365 days or more before the last day of service is adjusted for inflation.

(2) Any adjustment made for the purpose of determining final pensionable earnings shall be disregarded for all other purposes of the Scheme.

(3) The reference in paragraph (1) to adjusting for inflation the amount of pensionable earnings for part of a period is a reference to increasing it by the same amount as that by which an annual pension of an amount equal to those earnings would have been increased under the Pensions (Increase) Act 1971 on the day following the last day of reckonable service if the pension—

- (a) were eligible to be so increased, and
- (b) had come into payment on the day following the last day of that period.”.

#### **Gratuity-earning service**

8.—(1) In rule A.7 (qualifying service) in paragraph (1)—

- (a) omit “and” at the end of sub-paragraph (d);
- (b) at the end of sub-paragraph (e) substitute “,” for “.”; and
- (c) after sub-paragraph (e) insert—

in the case of a person whose service was gratuity-earning service before its terms were changed and who meets the condition in paragraph (1A), that period of gratuity-earning service, and

- (g) in the case of a person who was paid a gratuity on the satisfactory completion of gratuity-earning service and has repaid that gratuity together with interest at the Bank of England base rate, calculated on a monthly basis, from the day after the last day of service in respect of which the gratuity was awarded to the day before the date of re-entry within the period of one year of becoming an active member of this Scheme, that completed service.

(1A) The condition referred to in paragraph (1)(f) and rule A.8(1)(h) is that the person has surrendered all rights to a gratuity in respect of the gratuity-earning service in consideration for which the person becomes eligible for membership of this Scheme.”.

(2) In rule A.8 (reckonable service) in paragraph (1)—

- (a) omit “and” at the end of sub-paragraph (f);
  - (b) at the end of sub-paragraph (g) substitute “,” for “.”; and
  - (c) after sub-paragraph (g) insert—
    - “(h) in the case of a person whose service was gratuity-earning service before its terms were changed and the person meets the condition in rule A.7(1A), that period of gratuity-earning service, and
    - (i) in the case of a person who was paid a gratuity on the satisfactory completion of gratuity-earning service (as so defined) and has repaid that gratuity together with interest at the Bank of England base rate, calculated on a monthly basis, from the day after the last day of service in respect of which the gratuity was awarded to the day before the date of re-entry within the period of one year of becoming an active member of this Scheme, that completed service.”.
- (3) In rule A.1 (interpretation: general) after the definition of “final pensionable earnings” insert

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““gratuity-earning service” means service on a short service commission on terms providing that the person serving is not eligible to be a member of this Scheme or the AFPS 1975, but will be eligible for the payment of a gratuity on leaving service, subject to the satisfactory completion of that person’s service;”.

#### **Disregard of short breaks in service**

9.—(1) Rule A.10 (disregard of short breaks in service) is amended as follows—

- (a) in paragraph (1) for “If” substitute “Subject to paragraph (1A), if”;
- (b) after paragraph (1) insert—
  - “(1A) Where an active member meets the conditions in paragraph (1)(a) and (b) and rejoins at a lower rank than the substantive rank held at the end of the earlier service, the member may opt for paragraph (1) to apply, such option may be exercised at any time during the later service. ”;
- (c) after paragraph (3) insert—
  - “(4) Paragraph (1A) does not apply if before the time when the condition in paragraph (1)(b) is met, a pension has come into payment for the earlier period of service.”.

(2) In rule E.3 (amount of pensions under rules E.1 and E.2: active members) after paragraph (4) insert—

“(4A) If immediately before the member’s death he was entitled to exercise the option under rule A.10(1A), then unless paragraph (5) applies, these Rules apply as if the member had exercised that option before his death.”.

#### **Pension credit members’ pensions**

10. For paragraph (3) of rule D.3 (pension credit members’ pensions) substitute—

- “(3) The pension and any lump sum become payable—
  - (a) where the pension sharing order is made before 6<sup>th</sup> April 2009—
    - (i) immediately on the pension credit member reaching pension benefit age, or
    - (ii) if it is later, when the pension sharing order under which the member is entitled to the pension credit takes effect;
  - (b) where the pension sharing order is made on or after 6<sup>th</sup> April 2009—

- (i) immediately on the pension credit member reaching pension age, or
- (ii) if it is later, when the pension sharing order under which the member is entitled to the pension credit takes effect.”.

**11.** For rule D.4 (early payment of pensions with actuarial reduction) substitute—

**“D.4. Early payment of pensions with actuarial reduction**

(1) A member who is not entitled to immediate payment of a pension under rule D.1, D.2 or D.3(3)(b)(i) may opt for immediate payment of a reduced pension and lump sum if the member has reached pension age and either paragraph (2) or paragraph (3) applies.

(2) This paragraph applies if the member—

- (a) meets the condition in rule D.2(1)(a) or (b); and
- (b) has ceased to be in service that qualifies him to belong to the Scheme.

(3) This paragraph applies if—

- (a) the member is a pension credit member;
- (b) the pension sharing order from which the pension credit rights derive was made before 6th April 2009; and
- (c) that order has taken effect.

(4) If a member exercises the option under this rule, the amount of the annual pension to which the member becomes entitled is first calculated as mentioned in rule D.2(3) or D.3(5) and then that amount is reduced by such amount as the Secretary of State determines after consulting the Scheme actuary.

(5) If a member exercises the option under this rule, the amount of the lump sum to which the member becomes entitled is first calculated as mentioned in rule D.2(4) or D.3(5) and then that amount is reduced by such amount as the Secretary of State determines after consulting the Scheme actuary.

(6) The option under this rule may only be exercised by notice in writing to the Scheme administrator in such form as the Secretary of State requires.”.

**Other amendments to the AFPS 2005**

**12.—**(1) In rule A.4 (meaning of “final pensionable earnings”) in paragraph (4) for “for the purposes of that paragraph” substitute “for the purposes of those paragraphs”.

(2) In paragraph (3) of rule B.4 (joining the Scheme after service begins) in subparagraph (b) omit the words “after consultation with the Scheme medical adviser”.

(3) In rule D.5 (early payment of benefits: active members with permanent serious ill-health) in paragraph (2) for “For the purposes of these Rules” substitute “For the purposes of this rule and rule D.8”.

(4) In rule D.7 (early payment of benefits: deferred members with permanent serious ill-health)—

- (a) in paragraph (1)(a) for “(see rule D.5(2) and (3))” substitute “(see rule D.5(3) and paragraph (4) below),”; and
- (b) after paragraph (3) insert—

“(4) For the purposes of this Rule a member’s breakdown in health is “permanent” if, in the opinion of the Secretary of State, it will continue at least until the member reaches pension benefit age.”.

(5) In rule D.8 (member’s requests for review of ill-health awards) for paragraph (7) substitute—

“(7) If on any review under paragraph (4), the Secretary of State is of the opinion that—

- (a) the member has suffered such a breakdown as is mentioned in paragraph (4)(a), but
- (b) the condition by virtue of which he became entitled to the pension under rule D.6 has deteriorated so that he suffered such a breakdown later,

then the member's entitlement to a pension under rule D.6 ceases and the member is entitled to a pension calculated in accordance with paragraph (7A) from the date on which the review was requested.

(7A) The pension to which a member is entitled under paragraph (7) shall consist of—

- (a) a pension calculated under rule D.5, and
- (b) an increase in that pension by an amount equivalent to the amount that a pension would be increased if the option to exchange a lump sum under rule D.10 were exercised where the amount of the lump sum exchanged is the difference between the lump sum paid to the member under rule D.6 and the lump sum which the member would have received had the member been entitled to it under rule D.5.”.

(6) In rule D.10 (option to exchange lump sum for pension) in paragraph (1) for “an increase in the amount of pension payable to himself or to any other person under these Rules” substitute—  
“an increase—

- (a) in the amount of pension payable to himself under these Rules, or
- (b) in the amount of pension payable to himself and to any other person under these Rules as a result of his membership of the Scheme.”.

(7) In rule D.11 (option for members in serious ill-health to exchange whole pension for lump sum) omit paragraph (4).

9th March 2009

*Kevan Jones*  
Parliamentary Under Secretary of State  
Ministry of Defence

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order is made under the Armed Forces (Pensions and Compensation) Act 2004 (c. 32) (“the 2004 Act”). It modifies certain provisions of the Armed Forces Early Departure Payments Scheme Order 2005 (“the EDP Scheme”) and the Armed Forces Pension Scheme 2005 (“the AFPS 2005”). The Armed Forces (Pensions) (Prescribed Modification) Order 2009 (S.I. 2009/262), made under section 1 of the 2004 Act, which came into force on 6<sup>th</sup> March 2009, satisfies the requirements of section 3(1)(b) (Accrued rights) of the 2004 Act. It enables the Secretary of State to modify rule A.5 of the AFPS 2005 even though such modification might or will adversely affect any entitlement or accrued rights of any member acquired before the power is exercised (see below as to the effect of those amendments to rule A.5).

Articles 3 and 4 of this Order amend articles 7 and 11 of the EDP Scheme to change the way that earnings are be adjusted for inflation when calculating final relevant earnings. The original Scheme rules applied increases to earnings falling within a previous tax year. The amendment applies increases to earnings falling within a previous year. It also corrects the way that periodical payments under the EDP Scheme are adjusted for inflation once the person receiving them reaches the age of 55 to avoid double indexation.

Article 5 amends article 12 of the EDP Scheme so that those who enter service to which Part 3 or 4 of Chapter 6 of the Territorial Army Regulations 1978 applies (during which they belong to the Non-Regular Permanent Staff Pension Scheme) cease to be entitled to periodical payments under the EDP Scheme whilst they are in such service. This brings the treatment of such people into line with others who re-enter service.

Article 7 amends rule A.5 of the AFPS 2005 to change the way that earnings are adjusted for inflation when calculating final pensionable earnings. The original Scheme rules applied increases to earnings falling within a previous tax year. The amendment applies increases to earnings falling within a previous year. It also provides that other than for rule A.10, this adjustment should be disregarded for all other purposes, including making adjustments to pensions in payment. The Pensions (Increase) Act 1971 (c. 56) (“the 1971 Act”) applies to pensions payable under the AFPS 05 by virtue of the Pensions Increase (Armed Forces Pension Schemes and Conservation Board) Regulations 2006 (S.I. 2006/801). This amendment removes the possibility of double indexation with the pensions being inflated both under the Scheme rules and the 1971 Act.

Article 8 amends rules A.7 and A.8 of the AFPS 2005 by allowing those who started their service on gratuity-earning terms but changed to service on pensionable terms to count that gratuity-earning service as qualifying and reckonable service where they have agreed to surrender their rights to gratuities in exchange for the change in their terms of service to pensionable terms. Similar amendments provide for the counting as qualifying and reckonable service that completed gratuity-earning service of those who subsequently rejoin on pensionable terms if the gratuity is repaid with interest within one year of becoming Scheme members.

Article 9 amends rule A.10 of the AFPS 2005 which provides that short breaks in service (of up to 6 months) are disregarded for the purposes of calculating qualifying and reckonable service. The usual rule is that any short break is disregarded allowing both periods of service to count towards the final pension. The amendment allows the break to be taken into account where re-employment is at a lower substantive rank so that the member will have a preserved pension in respect of the first period of service. This enables existing personnel to voluntarily take up posts at lower ranks (i.e. at a lower pay rate) without this adversely impacting the final level of their pension.

Articles 10 and 11 amend rules D.3 and D.4 of the AFPS 2005. Article 10 is amended so that a pension credit member with a pension sharing order made on or after 6<sup>th</sup> April 2009 will now be entitled to a pension from the lower age of 55. Article 11 amends rule D.4 so that those pension credit members whose pension sharing order was made before 6<sup>th</sup> April 2009 (and who can only get their pension at age 65) can apply for a pension and lump sum from age 55 in the same way as others not entitled to an immediate pension. Under D.4 the amount of pension will be actuarially reduced because it is being paid early.

Article 12 contains miscellaneous amendments to the AFPS 2005:

- it makes a minor amendment to rule A.4 to correct a typographical error (paragraph (1));

- it removes the requirement for the Secretary of State to consult with the Scheme medical adviser about the health of a person applying to join the Scheme after his service begins (paragraph (2));

- it amends rule D.5 to make clear that paragraph (2) applies also for the purpose of rule D.8 (paragraph (3));

- it amends rule D.7 so that a deferred member's breakdown in health is only 'permanent' if it will continue at least until the member reaches pension benefit age (65) (paragraph (4));

- it amends rule D.8 to provide an increased pension for a member who suffers a permanent breakdown in health after they left service. It provides a pension calculated under rule D.5 together with an additional periodical amount that represents the difference in the lump sum received and the sum he would have received had the member ceased service due to a permanent breakdown in health had that lump sum been exchanged under rule D.10 (paragraph (5));

- it amends rule D.10 to make it clear that the option to exchange a lump sum payable on retirement for an increased pension can be exercised either in respect of the individual's own pension or both that pension and any pension payable to another person as a result of other Scheme pension in respect of him (paragraph (6));

- it amends rule D.11 so that where a member in serious ill-health opts to exchange their pension for a lump sum, that part of the pension representing the person's guaranteed minimum pension under the Pension Schemes Act 1993 (c. 48) can be included (paragraph (7)).

A full regulatory impact assessment has not been produced on this instrument as it has no impact on the costs of business, charities or the voluntary sector.