

# **Strathclyde Fire and Rescue Joint Board Statutory Report on the retirement and re-employment of the Chief Officer**



Prepared for the Accounts Commission by the Controller of Audit  
September 2012

Audit Scotland is a statutory body set up in April 2000 under the Public Finance and Accountability (Scotland) Act 2000. It provides services to the Auditor General for Scotland and the Accounts Commission. Together they ensure that the Scottish Government and public sector bodies in Scotland are held to account for the proper, efficient and effective use of public funds.

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# Commission findings

1. The Commission has considered and accepts the Controller of Audit's report on Strathclyde Fire and Rescue Joint Board in relation to the retirement and re-employment of the chief fire officer. The complex series of events in this case are set out by the Controller of Audit in his report.
2. We find that there was a systemic failure by the board and its officers to follow principles of good governance in its consideration of, and decisions about, the retirement and re-employment of the chief fire officer.
3. In our view, the processes in place to support the board in such an important decision in April 2011 to meet the personal tax liabilities of the chief fire officer – and the decision preceding it in 2009 – were inadequate to allow the public to have confidence in these decisions. In order to allay understandable concerns of the public, in considering such exceptional action, the board should have compelling reasons to spend public money in this way and should have considered fully all of the alternatives and implications. There was no such full consideration.
4. We are concerned that the information made available to the board was inadequate to allow it properly to consider decisions. While we recognise that in June 2009 there may have been a genuine desire of the board to retain the services of the chief fire officer, there was no full consideration of the other choices open to them. The report submitted jointly by the chief fire officer and clerk in June 2009, which proposed the chief fire officer retire and be re-employed to post for a three-year period beyond the eligible retirement date, should also have presented the board with a full range of choices available and a business case. The information should have set out a full consideration of the other choices, including the appointment of another individual or the refusal of the chief fire officer's request to retire. The information should also have included the implication of these choices for finance (short and long term), workforce planning, leadership capacity and continuity. Later, in April 2011, the implications of all choices available to the board were again not fully set out.
5. During 2010, the board should have been kept informed of potential changes to pension arrangements – and thus potential liabilities to the board – arising from its 2009 decision. The board was not informed until April 2011, and this seriously limited its opportunity to assess fully all the implications of making such an important decision.
6. We note with concern the decision by the convener and vice conveners not to pass information about the potential liabilities to all members of the board as soon as it was available. The convener and vice conveners should have exercised their leadership responsibilities to ensure that officers kept the board informed of developments. More widely, board members should have better exercised their obligations to scrutinise and challenge the information provided to them by officers.
7. Officers also should have ensured that better information was presented to the board. Further, the roles of clerk and Treasurer, both to advise and ensure that the board is aware of and follows the principles of good governance, were not fulfilled. We are clear that the performance of these officers in these roles fell markedly short of the standards expected of them.
8. It was inappropriate that the June 2009 report was a joint report between the chief fire officer and clerk given the direct interest of the chief fire officer in the matter. Nor was it appropriate that the chief fire officer was present during discussion of the matter at the June 2009 meeting of the board. The chief fire officer had a direct pecuniary interest in the matter and should have taken no part in the proceedings. The clerk should have advised the board of the inappropriateness of the chief fire officer being in attendance at the meeting during the consideration of this report.

9. In relation to the 2011 report, we believe that it was inappropriate that the procurement of legal advice was led by the fire service rather than the clerk. This does not provide full assurance about the objectivity of the procurement of such advice. We are also concerned that there was no legal adviser at the April 2011 meeting to advise further if necessary. In addition, the Treasurer failed to fulfil his proper role in providing advice to the board about the potential financial implications of the decision.
10. In our view, public confidence in decisions on matters such as early retirement can only be secured if decisions are made and reported in accordance with principles of good governance, including full transparency. We emphasise a number of key points for general application by all local authorities:
  - Members of joint boards have an important decision making role. In order to fulfil this role effectively they must be provided with full and objective information and advice, setting out appropriate choices, and the full implications of those choices.
  - Members must scrutinise and challenge officers on the information and advice provided to them, especially if they believe that it is inadequate.
  - Members must be kept up to date with issues that are relevant to them fulfilling their obligations.
  - The distinct roles and responsibilities of senior officers, either from the supporting authority or from the services for which a board is responsible, need to be clearly set out and adhered to.
11. We note that fire boards will cease to exist in April 2013 as a consequence of national reform of fire and rescue services. In the case of Strathclyde Fire and Rescue Joint Board, the potential liabilities incurred by the board are likely to be inherited by a successor authority and thus it is important that the board continue to monitor the implications of its decision.

# Part 1. Introduction

1. This report is made under Section 102(1)(b) of the Local Government (Scotland) Act 1973. This provides for the Controller of Audit to make reports to the Commission about any matters arising from the accounts of local authorities, or the auditing of those accounts, that I think should be considered by the local authority or brought to the attention of the public.
2. The purpose of this report is to provide the Commission with the details of an issue arising from the annual audit of Strathclyde Fire and Rescue Joint Board (the board) in 2010/11.
3. In November 2011, I received the annual audit report on the Strathclyde Fire and Rescue Joint Board from the appointed auditor PricewaterhouseCoopers (PwC) for the financial year ended 31 March 2011. The report notes an unqualified opinion on the financial statements and that the draft financial statements are of a good standard. However, the report raises concerns about the process through which the board decided to allow the Chief Officer to retire and then be re-employed and the board's decision to make provision for potential tax liabilities of the Chief Officer.
4. The report highlighted that the appointed auditor (the auditor) could see no formal consideration made by the board of alternative options other than retirement and re-employment of the Chief Officer in June 2009, nor that further options were considered in April 2011. The auditor also expresses in the report that the board was unable to demonstrate that the Chief Officer was fully independent of the decision-making process. In the summary of findings the auditor states:

*'Overall, the level of evidence made available to us does not readily support a best value decision concerning retirement, re-employment and the potential use of board funds to pay the Chief Officer's £206,715 unauthorised payment charge.'*
5. Relevant extracts from the annual audit report are attached at [Appendix 1](#), including the executive commentary and section covering governance and internal control arrangements. The full report is available on the Audit Scotland website<sup>1</sup>.
6. In December 2011, I received a letter from the convener of the board stating that he did not agree with the report's content or conclusions in relation to the retirement and re-employment of the Chief Officer. The letter was presented with a report to the board on 8 December 2011. The letter is attached as [Appendix 2](#). The appendix to the letter is not included as it contains sensitive personal information.
7. In his letter the convener raised concerns about the audit process, the content of the report and the conclusions it reaches. He expressed:

*'disappointment that the (external audit) report fails to provide a balanced or even accurate view in relation to the section about the Chief Officer's retirement and re-employment' and the report 'does not set in context the actions taken by members and officers', and, 'has failed to accurately reflect the complex nature of the position the board found itself in'.*
8. In February 2012, I brought a report to the Commission to bring this matter to its attention. The Commission requested that I undertake further work and bring back a report in due course. This report responds to that request. In it I:
  - comment on the standard of governance, accountability and transparency of the actions taken by the board

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<sup>1</sup> [http://www.audit-scotland.gov.uk/docs/local/2011/fa\\_1011\\_strathclyde\\_fire\\_rescue.pdf](http://www.audit-scotland.gov.uk/docs/local/2011/fa_1011_strathclyde_fire_rescue.pdf)

- comment on whether the board's actions present an appropriate and good use of public money.
9. The rest of this report is structured into four sections:
- **Part 2 - Summary** provides an overview of my assessment of this matter.
  - **Part 3 - Context** gives a brief outline of the board, fire service, changes to the interpretation of the firefighters pension scheme and the move to a national fire and rescue service.
  - **Part 4 - Timeline of events:** outlines the events chronologically from 2008 to 2011 that relate to the scope of the audit.
  - **Part 5 - Audit assessment:** details my evaluation of the governance and processes around the two key decisions made (the decision in 2009 by the board to allow the retirement and re-employment of the Chief Officer and of the decision in 2011 to set aside funds to meet the costs of a potential personal tax liability of the Chief Officer).
10. The audit work included:
- Analysis of the relevant statements made in the 2010/11 annual audit report and of the letter to the Controller of Audit from the convener of the board.
  - Collation of a detailed timeline of events and decisions.
  - Review of relevant documents.
  - Interviews with a cross section of members of the board.
  - Interviews with key officers from South Lanarkshire Council (which provides support to the board as the host council).
  - Interviews with relevant officers from Strathclyde Fire and Rescue Service.
  - Interview with the audit manager at PwC leading the Strathclyde Fire and Rescue Joint Board audit in 2010/11.
  - Reference to relevant published guidance, including the Accounts Commission *Bye Now Pay Later* reports and CIPFA's *Delivering Good Governance in Local Government* guidance.
11. We gratefully acknowledge the co-operation and assistance provided to the team by members of the board and officers from Strathclyde Fire and Rescue and South Lanarkshire Council who participated in the audit work. The factual accuracy of this report has been agreed through the clerk to the board.

# Part 2. Summary

## Timeline of events

12. During 2008 and 2009 Strathclyde Fire and Rescue was progressing workforce management plans and developing succession-planning strategies to deal with a significant level of retirements across the service.
13. In June 2009, the board approved the retirement and re-employment of the Chief Officer in 2011 (when he was eligible to retire with the boards approval.) The principal reason for this was the board's desire to have continuity and retain corporate leadership capacity.
14. In December 2009, the Scottish Public Pensions Agency (SPPA) issued a circular to all clerks of fire boards and chief officers outlining the implications of guidance from HMRC relating to pension arrangements for some chief officers of fire and rescue services. The circular states that, in certain circumstances, chief officers and boards could be liable to pay 'unauthorised payment charges' when a Chief Officer retires.
15. In February 2011, the board's executive subcommittee considered a report and legal advice on this matter and a further report was considered by the full board in April 2011.
16. At its meeting in April 2011, the board agreed to make provision to meet the potential unauthorised payment charges that might be levied by HMRC on the board and for the Chief Officer.
17. At the time of writing, this remains a budget provision and no public money has been spent on meeting the unauthorised payment charges.

## Governance and process

18. There were weaknesses in the governance and management arrangements impacting on the robustness of the decision-making processes in both June 2009 and April 2011.
19. The clarity and quality of reporting to the board was unsatisfactory, with consequences for the transparency of the process, the standard of scrutiny by members and the robustness of the decision-making processes. For example, only one paragraph in the body of the 2009 report referred to the Chief Officer's request to retire and be re-employed and the report offered no options, only a proposal for retirement and re-employment.
20. The report to members in June 2009 referred to the process being 'in accordance with the board's Return to Work policy.' However, there were some important requirements and key principles of the procedure that were not adhered to and the variances from the procedure were not recorded or reported to members.
21. There is no evidence that the Chief Officer's role in the processes has had an influence on the decisions made, but the arrangements to ensure the independence of the Chief Officer from the process were poor. For example, the Chief Officer was present at the 2009 meeting when the board approved his retirement and re-employment.
22. The support and guidance from advisory officers to the board from the host authority was not effective. There was insufficient guidance from the clerk on governance issues, insufficient involvement of the Treasurer (particularly in relation to the decision in April 2011) and South Lanarkshire Council's Head of Legal Services was not present at the board meeting in April 2011 where the decision depended significantly on the legal implications of the decisions being taken. The Treasurers and clerk to the board who were in post at the time of the decisions in 2009 and 2011 have all since retired.

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## Board decisions

23. At the meeting in June 2009, Strathclyde Fire and Rescue Joint Board did not provide effective scrutiny and challenge to officers regarding the decision to allow the Chief Officer to retire and be re-employed. The board was not provided with a business case for the decision. Despite these shortcomings, the rationale for the board's 2009 decision was reasonable given the circumstances at the time as it sought to tackle challenges in maintaining the capacity and stability of the Corporate Management Team. It was also not unusual practice to allow officers to retire and be re-employed in fire and rescue services.
24. In February and April 2011, the executive subcommittee and board respectively found themselves in a difficult and very unusual position because of HMRC's interpretation of the changes to pension rules. The board considered a report entitled *Board's Succession Planning* and external legal advice. In summary, the main factors leading to the board's decision to make provision for the potential unauthorised payment charges were:
- The decision to allow the Chief Officer to retire and be re-employed had already been made in 2009 and the board felt the rationale for retaining the Chief Officer was still valid in 2011.
  - External legal advice indicated that not standing by the 2009 decision could lead to legal action by the chief officer and potentially significant associated costs.
  - The external legal advice also indicated that there were potential legal arguments against the unauthorised payment charges should HMRC decide to pursue the charges.
  - Fairness to the individual, as only nine Chief Officers in the UK were affected by this change in pension rights and none of the others have subsequently faced the unauthorised payment charges.
25. The board did not receive a business case or clear financial information to inform its considerations, which undermined the robustness of the decision-making process. The legal advice considered by the board suggests that financial implications of taking a different course of action, for example reversing its 2009 decision, could have been more costly and under these exceptional circumstances, the decision made was understandable. Under normal circumstances, paying the personal tax liability of an individual officer would not be a good use of public money. Even taking account of the circumstances the board found itself in April 2011, this would not meet the public's expectations of what is an acceptable use of public funds.
26. It is also unsatisfactory that during 2010 no information was provided to members of the board, beyond the convener and vice-conveners, regarding the potential of changes to pension arrangements on the board's decision in 2009 to retain and re-employ the Chief Officer. Although I understand efforts were being made to resolve the issue at a national level during 2010, it shows a lack of transparency to not share this significant issue with the board. This also limited the opportunity for further consideration of this issue by the board, with a need for a decision by the board at its meeting in April 2011.

# Part 3. Context

## Strathclyde Fire and Rescue Joint Board

27. Strathclyde Fire and Rescue Joint Board consists of 34 councillors who represent the 12 local authorities that cover the Strathclyde area. The political makeup of the 2007 to 2012 board was (as at April 2011) 15 Labour, nine SNP, five Independent, three Conservative and two Liberal Democrat members. Over the relevant period, the convener was Councillor Brian Wallace (Labour) of North Lanarkshire Council. The two vice-conveners were Councillor Joe Lowe (Labour) of South Lanarkshire Council and Councillor Tommy Morrison (Labour) of the City of Glasgow Council.
28. The board meets six times per year, and is supported by a Budget Scrutiny Forum, Performance and Audit Forum, Employee and Equality Forum and Executive Subcommittee. The convener and two vice-conveners take a lead role in each of these groups.
29. The board is supported by officers from South Lanarkshire Council, the host authority.

## Strathclyde Fire and Rescue Service

30. Strathclyde Fire and Rescue Service is the second largest fire and rescue service in the UK. It serves a population of around 2.3 million people, around 42.6 per cent of Scotland's population. Its firefighting crews are based in 110 stations across the 12 council areas the service covers. It employs around 3,300 members of staff, including approximately 2,800 firefighters.
31. The Chief Officer, Mr Brian Sweeney, took up his post in 2004. He retired on 14 July 2011 having completed 30 years in the fire and rescue service. He was re-employed on 14 August 2011 in the same role as Chief Officer for an anticipated period of three years. This allowed the Chief Officer to access his pension lump sum payment, but not his annual pension, which has been abated while he is re-employed.

## Changes to pension conditions

32. Changes to pension conditions and how these are interpreted has led to the circumstances described in this report, in relation to the decision made by the board to make provision for unauthorised payment charges.
33. The Finance Act 2004 introduced a requirement for all registered pension schemes to incorporate a normal minimum pension age of 55 by 6 April 2010. The Act provides for the members of certain pension schemes to preserve their full entitlement to benefits before the age of 55. The Firefighters' Pension Scheme allows for members with 25 years pensionable service to retain the right to retire and take their pension from the age of 50. The Finance Act also gives protection against the increase in minimum pension age to those who, under the Rules of their pension scheme, had a prospective right to a pension from age 50 before April 2006.
34. In December 2009, a circular<sup>2</sup> from the SPPA noted that HMRC guidance advises that protection is given only to those who had an 'unqualified right' to retire before April 2006. The rules state that a chief fire officer is required to seek the permission of the fire and rescue authority to give notice of retirement and this means that any retirement before age 55 is therefore not an unqualified right. HMRC have taken the view that chief fire officers appointed

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<sup>2</sup> Scottish Fire and Rescue Circular 11/2009, Scottish Public Pensions Agency, 16 December 2009.

before 5 April 2006 would therefore have to pay an unauthorised payment charge if they retire before age 55.

35. It means that the board and the Chief Officer may each be subject to an unauthorised payment charge. This set of circumstances applies to only nine of the 56 Chief Fire Officers across the UK, including Mr Sweeney.
36. Of the other eight, two were chief officers in Scotland. The potential unauthorised payment charges will not be relevant to any of the other eight officers and the authorities. Of the eight, three chief officers have chosen not to retire and to continue in their original employment contract. The other five have retired as part of management restructures within their services. Rule A14 of the Firefighters' Pension Scheme 1992 relates to compulsory retirements to support efficiency arrangements. Using this rule removes the potential for an unauthorised payment charge. This approach was discussed but not considered as an appropriate option in Strathclyde Fire and Rescue - refer to [paragraph 95](#).

## National context

37. During 2010/11, the Scottish Government indicated a potential restructuring of the fire and rescue service in Scotland. In September 2011, it announced a commitment to deliver a single Fire and Rescue Service for Scotland.
38. The Police and Fire Reform (Scotland) Bill received Royal Assent in August and on the 16 August 2012 Mr Alasdair Hay, currently Acting Chief Fire Officer of Tayside Fire and Rescue, was confirmed as the Chief Officer of the single service.

# Part 4. Timeline of events

39. Exhibit 1 provides an outline of the key events and decisions over 2008 to 2011 relevant to the focus of this audit. The following paragraphs provide further detail.

## Exhibit 1: Timeline of key events

Date	Event
2008	<ul style="list-style-type: none"> <li>Work progressing on workforce planning within the service reported to the board and its subcommittees</li> </ul>
11/06/2009	<ul style="list-style-type: none"> <li>Report to board on the retention of corporate management experience</li> <li>Board make decision to approve CO's retirement and re-employment</li> </ul>
23/06/2009	<ul style="list-style-type: none"> <li>Letter to the CO from the clerk advising of the board's decision</li> </ul>
10/12/2009	<ul style="list-style-type: none"> <li>Report to board on proposals for a revised Corporate Management Structure</li> </ul>
16/12/2009	<ul style="list-style-type: none"> <li>Scottish Fire and Rescue Circular 11/2009 - Scottish Public Pensions Agency outlines the implications of guidance from HMRC relating to changes in Pension arrangements in the Finance Act 2004</li> </ul>
2010	<ul style="list-style-type: none"> <li>No related decisions or reports to the board</li> <li>Liaison and discussion with relevant external parties by the convener/vice-convener, service management, Chief Officer</li> </ul>
11/01/2011	<ul style="list-style-type: none"> <li>Formal request by convener to external legal advisors for advice</li> </ul>
21/02/2011	<ul style="list-style-type: none"> <li>Report to executive subcommittee advising of variation in interpretation of the firefighters' pension scheme (as per the circular received 16/12/2009) and the impact on the Chief Officer's retirement</li> </ul>
14/04/2011	<ul style="list-style-type: none"> <li>Report to board advising of variation in interpretation of the firefighters' pension scheme (as per the circular received 16/12/2009) and the impact on the Chief Officer's retirement</li> <li>Board agreed to make provision to meet the potential charges levied by HMRC on the board and the Chief Officer for unauthorised payment</li> </ul>
23/05/2011	<ul style="list-style-type: none"> <li>Chief Officer and board sign a compromise agreement</li> </ul>
14/07/2011	<ul style="list-style-type: none"> <li>Chief Officer retires</li> </ul>
14/08/2011	<ul style="list-style-type: none"> <li>Chief Officer re-employed</li> </ul>
22/11/2011	<ul style="list-style-type: none"> <li>Annual audit report submitted by PwC</li> </ul>
01/12/2011	<ul style="list-style-type: none"> <li>Letter sent to the Controller of Audit by the convener regarding the annual audit report</li> </ul>
08/12/2011	<ul style="list-style-type: none"> <li>Report to board regarding the annual audit report</li> </ul>
16/02/2012	<ul style="list-style-type: none"> <li>Controller of Audit report to the Accounts Commission</li> </ul>

Source: Audit Scotland

## 2008

40. During 2008, the board and its supporting forums considered reports outlining how the service was taking forward workforce planning. To plan its workforce requirements at a strategic level the service has a workforce-planning group. The group examines staffing numbers on a quarterly basis by rank and role and plans how to address gaps and surpluses.
41. In 2008, the service anticipated that around 17 per cent of its uniformed workforce could leave over a two-year period. This is a common issue across fire services, with major recruitment exercises in the 1970s and 80s leading to peaks in retirements 25 to 30 years after these recruitment drives.
42. In 2008, the service introduced a formal procedure. The 'Flexible Retirement and Return to Work Procedure' is used by the service to manage skills gaps and succession planning where there are particular difficulties in maintaining sufficient levels of experience and expertise. This policy allows for staff to retire and gain access to their pension lump sum but then return to employment, subject to the service's needs.
43. The key principles of the procedure are set out in [Exhibit 2](#).

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### Exhibit 2: Retirement and return to work - key principles

- The primary purpose of re-employment of employees following retirement is to enable Strathclyde Fire and Rescue to ensure that it retains sufficient skills and experience in its workforce to maintain effective service delivery.
- All decisions in relation to the authorisation of Re-Employment or Flexible Retirement will always take account of the short and long-term financial implications to the service.
- Strathclyde Fire and Rescue will consider applications for Re-employment or Flexible Retirement on their merits and in relation to the efficient operation of the service.
- In applying this policy, Strathclyde Fire and Rescue will always seek to ensure consistent and equitable application.
- This policy will be regularly reviewed in accordance with the service's on-going workforce planning requirements, any financial implications for the service or the pension fund(s) and any amendments to the pensions regulations.

*Source: Strathclyde Fire and Rescue Service Retirement and Return to Work Procedure 5/2008*

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44. The policy also sets out a range of specific requirements that include:
  - '...The annual rate of contractual pay following re-employment when added to the annual rate of pension should not exceed the annual rate of pay received immediately prior to retirement ... Any excess of pay beyond pensionable pay will result in the employee's pension being abated to ensure that the total of both payments do not exceed the pensionable pay'.
  - 'Employees who wish to make an application to retire and be re-employed must submit their request in writing at least three months (or as early as is reasonably practicable) before their expected retirement date and no earlier than one year before retirement'.
  - 'Consideration will be given to the following:
    - Retaining the valuable skills, knowledge and experience of the employee.
    - The service's workforce planning requirements.
    - Savings to SFR in recruitment and training costs'.
45. [Paragraph 87](#) gives an assessment of how the procedure and its principles were applied in relation to the Chief Officer.

46. The service recorded that during the period 2007 to 2010, 48 members of its staff had their retirement and re-employment approved. Exhibit 3 shows that six of these are senior managers with two being members of the Corporate Management Team (CMT). Predominantly the period of re-employment has been one year but six officers, including the Chief Officer's period of re-employment, was for three years.

### Exhibit 3

#### Retirements and Re-employment in SFRS 2007-10

Role	Re-employments	Re-employment period (years)			
		1	2	3	3+
Chief Officer	1	-	-	1	
Assistant Chief Officer	1	-	1	-	
Area Commander	-	-	-	-	
Group Commander	4	2	1	1	
Station Commander	-	-	-	-	
Watch Commander	14	11	1	1	1
Crew Commander	7	5	1	1	
Firefighter	21	17	2	2	
<b>Total</b>	<b>48</b>	<b>35</b>	<b>6</b>	<b>6</b>	<b>1</b>

Source: Strathclyde Fire and Rescue Service

47. During 2008, the board also received reports on the retention of corporate management experience. The convener expressed concern to the Chief Officer about the turnover of officers in senior roles and queried the proportion of anticipated retirements in the CMT. This linked to the board's intent for a review of the service's management structure. In August 2008, the Chief Officer brought a paper to the board outlining his own concerns regarding the CMT. His concerns related to the turnover of senior officers and a lack of stability and experience at the most senior level of the incident command structure - Gold Command. Gold Command officers provide strategic leadership for major incidents, particularly where there is a multi-agency response. In 2008, five of the seven officers in the CMT had Gold Command level responsibilities. Of these, four were eligible to retire in the following three years. In the preceding four years, seven members of the CMT had retired or been seconded out of the service.
48. In August 2008, the board approved a number of proposals to improve the stability of the CMT, such as future appointments being for a minimum of five years. It also requested the Chief Officer consult the members of CMT to clarify their individual plans and therefore succession planning needs and bring back a report on the future restructuring of the management team. There was no reference to the Chief Officer's position at this time.
49. In October 2008, the board noted the approval by its executive subcommittee of the retirement and re-employment of a member of the CMT, the Assistant Chief Officer (Training & Operational Review), through the retirement and return to work policy for a period of two years. One of the main reasons was to retain his experience to lead the imminent development of a new training centre.

## 2009

50. In June 2009, the Chief Officer and clerk brought a report to the board entitled, *The retention of corporate management experience*. The report's purpose was to 'advise on the outcome of the Chief Officer's consultation with employees within Strathclyde Fire and Rescue's CMT regarding future employment plans'. The recommendations, approved by the board, were:
- that the outcome of the Chief Officer's consultation with the CMT be noted

- that the Chief Officer provides a further report on proposals for a revised CMT structure based on the outcomes of the consultation
  - that a three-year extension to the Chief Officer's contract be approved in line with the board's Return to Work policy.
51. Excluding the paragraphs covering the purpose of the report and the recommendations, the report consisted of 13 paragraphs. Of these, only one raised the Chief Officer's request to retire and be re-employed. The paragraph referred to the Chief Officer 'continuing' in post rather than his retirement and re-employment but referred to the relevant procedure:
- 'The clerk to the board has discussed with the Chief Officer his future career plans and, while eligible to retire in July 2011, it is proposed that the Chief Officer continue in post for a three-year period beyond that eligible retirement date in accordance with the board's Return to Work policy.'*
52. The board did not receive any further documented information, such as an options appraisal or business case.
53. The Chief Officer expressed a preference for a two-year period of re-employment. The executive subcommittee's preference was for a period of three years, to retain the Chief Officer's experience to lead the service through to the Commonwealth Games in 2014.
54. This report, in June 2009, was the Chief Officer's formal notification to the board of his request to retire and be re-employed. No other written notification was provided to the clerk, convener or internally within the service.
55. Following the board meeting on 25 June 2009, the clerk wrote to the Chief Officer formally advising him of the board's decision and the Chief Officer replied, acknowledging the agreement.
56. Also on 25 June, the service's human resources management circulated a memo indicating that workforce-planning arrangements were proving effective and the flexible retirement and return to work arrangements would now be limited to one group of officers where difficulties in recruitment and retention remained.
57. On 10 December 2009, the board approved a report from the Chief Officer outlining a new management structure and proposing a review of the wider organisational structure. The new management structure will reduce the CMT from seven to five officers by 2014. The service anticipates this will provide annual savings of £235,000 but acknowledge initially pension scheme payments will partly offset this saving.
58. On 16 December 2009, the Scottish Public Pensions Agency (SPPA) sent a circular to the clerk and Chief Officer that outlined the implications of guidance from HMRC relating to changes in pension arrangements in the Finance Act 2004 - [see Exhibit 4](#).

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#### Exhibit 4

##### Extract from circular SPPA Fire circular 11/2009

...members of the FPS<sup>3</sup> who can reckon 25 years' pensionable service retain the right to retire and take their pension from age 50. Finance Act gives protection against the increase in minimum pension age to those who, under the Rules of their pension scheme, had a protective right to a pension from age 50 before April 2006. HMRC guidance says that protection is given only to those who had an unqualified right before April 2006. Rule B1(2) states that a Chief Fire officer is required to seek the permission of the Fire and Rescue Authority to give notice of retirement and as such, means that retirement before 55 is qualified and therefore is not an unqualified right. HMRC are taking the view that Chief Fire Officers appointed before 5 April 2006 are caught and would have to pay an unauthorised payment

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<sup>3</sup> Firefighters Pension Scheme

charge if they retire before age 55. ...this affects Chief Fire Officers only and those who were in post on 5 April 2006. Any individual who had a protected pension age as at 5 April 2006 who is subsequently promoted to Chief Fire Officer from 6 April 2006 retains their protected pension age and can retire under age 55 without incurring a tax penalty.

*Source: Scottish Public Pensions Agency*

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59. This means that unauthorised payment charges would apply where chief fire officers met all of the following criteria:
- Retiring before age 55 after 6 April 2010.
  - Appointed as a chief fire officer before 5 April 2006.
  - Did not have approval from the board prior to 5 April 2006 to retire before age 55.
60. In June 2009, when the decision to allow the Chief Officer to retire and be re-employed was made, none of the relevant parties at Strathclyde Fire and Rescue had been notified of this issue. It was not until later in the year that they were informed. The Chief Officer became aware of this issue in the autumn of 2009, informally through his professional organisation, the Association of Principal Fire Officers. The convener and vice-conveners were aware of the matter in December 2009, with the receipt of the circular. However, the wider board did not receive this information until April 2011.

## 2010

61. During 2010, the Chief Officer sought guidance from his professional organisation, the Association of Principal Fire Officers. The convener and vice-conveners lobbied for this issue to be addressed through direct communication with HMRC and by raising the issue with the Department of Communities and Local Government through the Fire Pensions Committee. The Chief Officer and the convener and vice-conveners believed that the issue would be resolved nationally and did not consider it necessary to bring a report to the board. However, the Chief Officer became concerned towards the end of 2010 that the issue had not been settled and his retirement date was getting close. He asked the clerk to take this issue to the board.
62. A number of meetings were held late in 2010 and early in 2011 that involved the convener, the clerk, the Deputy Chief Officer, the Assistant Chief Officer (Human Resources) and other officers and advisors. The Chief Officer was not involved in these meetings.

## 2011

63. In January 2011, the convener requested that external legal advice be sought. This was organised primarily by the Assistant Chief Fire Officer. An external legal firm provided advice as commissioned by the convener. The legal advice informed reports then taken to the executive subcommittee in February 2011 and then the full board in April 2011. The Chief Officer was not present at the February meeting and was not present for the relevant agenda item at the board meeting in April 2011.
64. The main points made in the legal advice highlighted risks to the board of potential legal action against it. The advice suggested setting aside the funding as a contingency for the board liability and that it was up to the board if it also wished to set aside contingency for the Chief Officer's liability. The advice suggested that should the board choose to retract its decision to allow the Chief Officer to retire and be re-employed the Chief Officer would have grounds to claim breach of contract. The report from the external legal firm outlined that there are legal points that could be argued to challenge the HMRC position but these would need to be viewed favourably to be successful. The suggestions in the legal advice included that it could be argued that the Chief Officer did have a protected pension age of 50 if retrospectively the board confirmed that the Chief Officer had consent to retire from 50 before 6 April 2006.

The suggestions also included that the role of Chief Fire Officer or Firemaster (as referred to in the scheme) ceased to exist in 2004 and the role is now Chief Officer, therefore he did not need consent.

65. The clerk to the board and South Lanarkshire Council's Head of Legal Services were involved in providing advice and guidance to the board in this process but it is not clear when and how effectively the Treasurer was involved. The information that I received during the audit work does not provide a consistent or clear picture of this. Given the financial implications of this issue, I would expect the Treasurer to have a central role in this process and there is no evidence of this.
66. At the executive subcommittee in February 2011, the committee discussed the implications of the potential unauthorised payment charges at some length. The clerk, Deputy Chief Officer and Assistant Chief Officer (with responsibility for human resources) responded to questions and South Lanarkshire Council's Head of Legal Services explained the advice provided by the external legal firm. Options were set out in the report submitted but the discussion focused on retaining the Chief Officer as approved in 2009 and setting aside the potential unauthorised payments charges. The options set out in the report were:
  - a) that the board make future budgetary provision to meet the payment of any scheme sanction charges (employer) arising from the board's decision of 11 June 2009
  - b) that, in consideration of the specific circumstances outlined in this report and supporting legal advice, the board makes future budgetary provision to meet the payment of any scheme sanction charges (employer) and any unauthorised payment charges (employee) arising from the board's decision of 11 June 2009
  - c) that the board make provision to meet the payment of any scheme sanction charges (employer) and ask the convener to consult the Chief Officer regarding a proportion of the unauthorised payment charge (employee) being met by the Chief Officer arising from the board's decision of 11 June 2009 and report back to the subcommittee
  - d) that the board take no further action at this time'.
67. In April 2011, the board received a report from the Assistant Chief Fire Officer (Human Resources) and the clerk to the board, with the same content as the report to the executive subcommittee in February 2011. This was the first information regarding this issue brought to the full board. Some members did raise concerns and there was some discussion at the meeting regarding the legal position, how effectively the decision would stand up to media scrutiny and the fairness of the circumstances. The board unanimously decided to make provision to meet the potential charges levied by HMRC on the board and the Chief Officer. This meant setting aside almost £236,000 of board funding to meet up to £206,715 of the employee element of the unauthorised payment charge and up to £29,227 of the charge to the board as employer.
68. It was made clear to members that they should consider the potential unauthorised payments to be at the highest end of a scale presented to them, ie £236,000. No documented business case or financial analysis was presented to either of the meetings.
69. The Chief Officer and the clerk, on behalf of the board, signed a compromise agreement in May 2011. The advice to the board from both the external legal firm and from South Lanarkshire Council's Head of Legal Services both suggested a compromise agreement. The compromise agreement protects the board from any related legal claims by the Chief Officer and assures the Chief Officer that the board agrees to indemnify him against the unauthorised payment charges.
70. The Chief Officer retired in July and was re-employed after one month, as required by the flexible retirement and return to work procedure.

71. In preparing the 2010/11 annual audit report, the auditor discussed draft reports with the Treasurer, clerk, convener and Deputy Chief Officer. On 22 November 2011, the final report was sent to the Controller of Audit and clerk to the board.
72. On 1 December, the convener sent a letter to the Controller of Audit expressing concerns about the content of the report regarding the governance of the decision to retain the Chief Officer and make provision for unauthorised payments.
73. In December, the board considered a report regarding the annual audit report. This report included the convener's letter and the attached information that illustrated the financial rationale for the decision. This was the first such information provided to the members on this issue.
74. The board is supported by officers from South Lanarkshire Council, the host authority for the board. Over the relevant period, there have been a number of individuals in the advisor roles to the board. Between April 2008 and June 2011 there have been 22 board meetings. During that period, two officers have formally been the clerk to the board with another individual deputising for one meeting. Two different officers have formally been Treasurer to the board, with two further officers deputising for two meetings. The Treasurers and clerk to the board who were in post at the time of the decisions in 2009 and 2011 have all since retired.

# Part 5. Audit assessment

## Governance and process

The governance and management of the retirement and re-employment of the Chief Officer was poor. The clarity and quality of reporting to the board was weak and the arrangements to ensure the independence of the Chief Officer from the decision-making processes were inadequate. It is unsatisfactory that the board was not provided with information during 2010 about the potential impact of changes to pension arrangements on its decision in 2009 to retain and re-employ the Chief Officer. The administrative processes to manage the Chief Officer's retirement and re-employment were not well managed. Support and guidance from advisory officers to the board from the host authority was not effective.

### Information for decision-making

76. The clarity and quality of reporting to the board was weak. There was a collective failure by officers and the board members to ensure the quality, range and timeliness of information was adequate to support transparency, a good standard of scrutiny by members and robustness of the decision-making processes.
77. The Chief Officer's formal request to retire and be re-employed was poorly presented. It is not clear from the report title 'the retention of corporate management experience' that this significant decision is being put to members. It is set out in the purpose of the report but the bulk of the report outlines the Chief Officer's consultation with members of the CMT about their career plans and his intention to bring a further report setting out a new management structure. The Chief Officer made his request in a single paragraph (see paragraph 51). There is no business case or options set out to inform the members' decision. I cannot conclude from the audit work if members fully understood the decision at the time. Members found it difficult to remember their understanding of the report and of the relevant discussion at the meeting in June 2009.
78. It is clear from discussion with members that there were questions and discussion at the board meeting about the decision at the April 2011 meeting. However, the transparency of the decision to members not present at the meeting and to the public was not good given the limited content of the minute and limited content of the report.
79. It is unsatisfactory that the board was not provided with information during 2010 about the potential impact of changes to pension arrangements on its decision in 2009 to retain and re-employ the Chief Officer. The issue with the pension arrangements was not apparent to officers or members in June 2009 but in December 2009 formal information was received. Although I understand efforts were being made during 2010 to resolve the issue, it shows a lack of transparency not to share this significant issue with the board. The majority of the board were not made aware of this issue until it was brought to the meeting in April 2011, 13 months after the circular was received from the SPPA. This also limited the opportunity for further consideration of this issue by the board, with a need for a decision by the board at its meeting in April 2011.
80. Support and guidance from advisory officers to the board from the host authority was not effective. It is unclear why advisory officers did not address weaknesses in the governance arrangements, such as a lack of supporting information for decisions. In addition, the balance of roles and responsibilities across the advisory officers and officers of the fire service in supporting the board was not adhered to - see paragraph 83.

### Chief Officer's independence

81. There were weaknesses in the arrangements that put into question the independence of the Chief Officer from the decision-making processes. However, there is no evidence that the Chief Officer's role in the processes had a significant influence on the decisions made.
82. The report in June 2009 was presented to members by the Chief Officer. Good practice would have been the presentation of the issues in two separate reports. One report should have covered the issues related to the CMT restructuring presented by the Chief Officer. A second report should have been presented specifically about the Chief Officer's request to retire and be re-employed, setting out options and relative business cases. This would be more appropriately presented to the board by the clerk and treasurer. It was not appropriate for the Chief Officer to be present for the discussion and decision about his retirement and re-employment.
83. There were weaknesses in the governance arrangements for managing the preparation of the report to the executive subcommittee in February 2011 and the board in April 2011. Although the Chief Officer had no involvement, two of his senior officers took lead roles in the procurement of legal advice and, consideration and planning of the papers taken to both forums. The clerk and officers from South Lanarkshire Council were involved but should have led this work with limited involvement of officers from Strathclyde Fire and Rescue Service. It is the role of the advisors from the lead authority to support the convener and the board rather than officers from the service. There is no evidence to suggest any improper conduct, but these two officers report directly to the Chief Officer and cannot be considered to be providing independent advice to the convener.
84. It is inappropriate that the 2011 report to the board includes a sentence that indicates the Chief Officer has plans that will be impacted by the decision. 'The Chief Officer has planned accordingly since the board's confirmation of his retirement arrangements and in consideration of HMRC guidance has asked the clerk to bring this matter before members'. The decision by the board should be based on what is the right and best value decision for the governance of Strathclyde Fire and Rescue Service. The personal impact on the Chief Officer should not be such a significant consideration in this decision.

### Application of the retirement and return to work procedure

85. The period of the Chief Officer's re-employment, for three years, was not exceptional. Although primarily the period of re-employment in Strathclyde Fire and Rescue Service has been up to two years, there have been examples, other than the Chief Officer where the period has exceeded three years. [See Exhibit 3 on page 13.](#)
86. The administration of the process around the Chief Officer's retirement and return to work was not well managed. The report to members in June 2009 refers to the process being 'in accordance with the board's Return to Work policy.' However, there were some important requirements and key principles of the procedure that were not adhered to and variances from the procedure were not recorded or reported to members.
87. The key principles of the procedure ([see paragraph 43](#)) were not fully demonstrated. The retention of the Chief Officer does support 'maintaining sufficient skills and experience' as well as the 'efficient operation' of the service. However, the decision process did not take account of the 'short and long term financial implications'. Although it is understandable that some of the process is adapted to take account of the Chief Officer's position, the lack of transparency around these variances does not support the principle of 'consistent and equitable application'. For example, the procedure requires that 'employees ... must submit their request in writing at least three months ... and no earlier than one year before retirement.' The Chief Officer's request was made much earlier than this to support good management planning and the processing of a formal written application may have required different processing than for other staff, but there is no record of a written application (other than the report to the board), or record of variance from the procedure.

## Decision in 2009 to allow the retirement and re-employment of the chief officer

The rationale for the board's decision in 2009 to allow the Chief Officer to retire and be re-employed appears reasonable, given the circumstances at that time. It was also not unusual practice to allow officers to retire and then be re-employed in fire and rescue services. However, the process to support the decision was not good, members did not provide effective challenge, there was little discussion of the issue at the 2009 meeting and board members did not receive a business case to inform the decision.

88. It is my view that the board's rationale for making the decision for retaining the Chief Officer in 2009 through his retirement and re-employment by the board appears reasonable, given the circumstances at the time. However, this is in the context that retirement and re-employment is an agreed policy of Strathclyde Fire and Rescue and it is accepted practice across fire and rescue services.
89. The main factors contributing to the decision to retain the Chief Officer were:
  - A need for stability in the CMT.
  - The management team included new senior officers and no obvious successor.
  - The need to retain experienced Gold Command capacity in the CMT.
  - The Chief Officer is well regarded by the board members and they felt he has a strong track record of performance.
  - Retaining strong leadership:
    - in a challenging financial context
    - to lead in the run up to the 2014 Commonwealth Games
    - to lead the service through changes in the shift patterns and organisational restructuring
    - to lead the service through the development of a significant capital project - the new training centre.
90. These factors build a good case for the decision and it was approved unanimously at the board meeting in June 2009. However, it is disappointing that an important decision like this was made with limited discussion by members, very limited information in the report and no options or supporting business case presented. Members interviewed acknowledge other items on the agenda of that meeting were given a stronger focus.
91. The board did not formally consider any other options, however evidence from the further audit work undertaken suggests members of the executive subcommittee and officers considered other options informally.
92. It is important to note that in June 2009, when this decision was made, officers and members had not yet been informed of the tax issues highlighted in the SPPA circular in December 2009 (see paragraph 58).
93. Members interviewed during the audit work all have a high regard for the Chief Officer and his management and leadership skills. Members also indicated that they feel the decision made in 2009 to retain the leadership of the Chief Officer had been the right decision. They consider the challenges at that time benefited from the continuity and retention of his experience. These include the financial challenges facing the public sector, succession planning for the management team, delivery of the service's new training centre and implementation of a new shift scheme across the service.

## Decision in 2011 to set aside funds for potential tax liability of the chief officer

Strathclyde Fire and Rescue Joint Board faced an unusual and difficult decision in April 2011. The board agreed to make provision to pay charges made by HMRC to the Chief Officer for unauthorised payments. No payments have been made at the time of writing this report and this remains a provision.

The board made its decision following a good level of discussion informed by external legal advice. Factors that contributed to the board's decision included a sense of fairness to the individual in exceptional circumstances. The board did not receive a business case or clear financial information for making this provision, undermining the robustness of the process.

The legal advice considered by the board suggests that financial implications of taking a different course of action, for example reversing its 2009 decision, could have been more costly and under these exceptional circumstances, the decision made was understandable. Under normal circumstances, paying the personal tax liability of an individual officer would not be a good use of public money. Even taking account of the circumstances the board found itself in April 2011, this would not meet the public's expectations of what is an acceptable use of public funds.

94. In April 2011, the board agreed to make provision to pay potential charges that may be levied by HMRC on the board and the Chief Officer for unauthorised payments. No payments have been made at the time of writing this report and this remains a budget provision.
95. A number of contributing factors led to the decision made by the board. These include:
  - The decision had already been made in 2009 to allow the Chief Officer to retire and be re-employed and the board's rationale for retaining the Chief Officer was still valid. To retract the decision to allow him to retire and be re-employed could have led to significant costs associated with a breach of contract. The cost associated would be likely to be well in excess of the £236,000 set aside for the tax liability.
  - Fairness to the individual. As described in paragraph 36, only nine Chief Officers of fire and rescue services were affected by this change in pension rights. Of these, five have not been subject to this potential tax liability, retiring under management restructuring arrangements. This was not viewed as an option in Strathclyde in 2011 given a management restructuring exercise had already taken place. The other three Chief Officers have chosen not to retire at this point, a choice open to Mr Sweeney, but he was perfectly within his rights to request to retire.
  - External legal advice indicated that it was not clear whether HMRC would pursue the unauthorised payment charges, given this issue appeared to be an unintentional consequence of changes to pension arrangements. The legal advice also indicated that there were potential legal arguments against the unauthorised payment charges should HMRC decide to pursue the liabilities.
96. Independent legal advice was used appropriately to guide the report to the board but legal support should have been available at the board meeting. The independent legal advice provided gave a balanced assessment of the board's position. It did not provide a definitive recommendation to take to the board but does set out key considerations and highlights the main risks the board needed to consider. These were included in the reports in February and April 2011. Some options suggested, including retrospective approval of the Chief Officer's retirement to before April 2006, were not taken forward. Legal advice from South Lanarkshire Council was provided at the executive subcommittee meeting but was not present at the board meeting in April. Given the legal implications of the decision being asked of members I would have expected there to have been independent legal support present.
97. With the legal advice provided to the convener and the continued importance to the board of retaining the experience and leadership of the Chief Officer, it is understandable that the board did not consider retracting the Chief Officer's approval for retirement and re-employment. However, the decision-making process is weakened significantly by the lack of a

clear business and financial case being set out for members. Four options were set out in the report to the board (see paragraph 66) but with little further comment. No business case is set out in the report for members to consider the options and the financial, policy and management implications of these. Through the additional work, I have not found evidence that the board discussed these alternative options at its meeting in April 2011. The lack of a robust report and lack of advisory support to the board affects the standard of scrutiny and challenge from members.

98. Financial advice from the Treasurer at the time on this issue was inadequate. No specific advice from the board's Treasurer was provided on this issue to the executive subcommittee or the board. The reason for this is not clear from the audit work as the description of this from interviews was conflicting and there is no documentary evidence. This means that members of the board took this decision without a clear picture of the full financial implications.
99. Members were informed at the meeting and understood that the likely liability would be at the top of the scale presented. The report did not make this clear but stated that the range of the potential liability may range from £26,715 to £206,715.
100. Full financial information was not provided to members as part of the decision-making processes, though legal advice considered by the board suggests that financial implications of taking a different course of action, for example reversing its 2009 decision, could have been more costly. Retrospectively (December 2011), advisors to the board have illustrated some of the financial implications of different options. I have undertaken further analysis, considering the potential costs to the board of a range of hypothetical scenarios. This suggests that the potential costs of the decision made in 2011 were less or similar to the possible costs of the hypothetical scenarios considered and under the exceptional circumstances, the decision made was understandable. Under normal circumstances, paying the personal tax liability of an individual officer would not be a good use of public money. Even taking account of the circumstances the board found itself in April 2011, this would not meet the public's expectations of what is an acceptable use of public funds.

# Appendix 1

## Extracts from the Annual audit report to the board of Strathclyde Fire and Rescue and the Controller of Audit: 21 November 2011

### Extract from the Executive Commentary

#### Governance and Control - Section 5

##### Chief Officer arrangements

We have assessed the board's overall governance arrangements including a review of board and key committee structures and minutes, financial reporting to the board, and risk management. The Corporate Management Team has undergone a structural change in the period, reducing the number of members from seven to five at strategic manager level.

The board's Chief Officer retired on 14 July 2011, and was re-employed on 14 August 2011 in the same role as Chief Officer for an expected three-year period. This allowed the Chief Officer to access his pension lump sum payment but not his annual pension, which has been abated while he is re-employed.

In April 2011, the board approved the action to set aside £235,000 of board funding to meet the costs of an unauthorised payment charge incurred by the Chief Officer (employee element of £206,000) alongside the employer scheme sanction charge which would be incurred (employer element of £29,000).

We have reviewed the process followed by the board to allow the Chief Officer to retire and be re-employed and the decision to subsequently pay the employee unauthorised pension charge. We can see no formal consideration within the process followed by the board that alternative options other than retirement and re-employment of the Chief Officer were considered in June 2009, nor that further options were explored and considered in April 2011. In addition, the board has been unable to demonstrate to us that the Chief Officer was fully independent of the decision making process due to his noted involvement and a lack of formal available evidence to the contrary.

Overall, the level of evidence made available to us does not readily support a best value decision concerning retirement, re-employment and the potential use of board funds to pay the Chief Officer's £206,715 unauthorised payment charge.

### Extract from the body of the report

#### Chief Officer's retirement and re-employment August 2011

The board's Chief Officer retired on 14 July 2011, and was re-employed on 14 August 2011 in the same role as Chief Officer for an expected three-year period, this allowed the Chief Officer to access his pension lump sum payment but not his annual pension, which has been abated while he is re-employed.

Under the firefighters pension scheme, Chief Officers can only retire before the age of 55 if the board has given permission for retirement. In December 2009, the Scottish Public Pensions Agency advised the board, that Chief Officers at 6 April 2006, should they retire before the age of

55 would incur a personal liability relating to an employee unauthorised payment charge (in accordance with HMRC legislation), levied off the pension lump sum received. We understand that this impacted only nine Chief Fire Officers across the UK, including the board's Chief Officer. In April 2011, the board approved the action to set aside board funding to meet the costs of the unauthorised payment charge incurred by the Chief Officer (employee element of £206,000) alongside the employer scheme sanction charge which would be incurred (employer element of £29,000).

We have reviewed the process followed by the board to allow the Chief Officer to retire and be re-employed and the decision to subsequently pay the employee unauthorised pension charge, under our wider external audit obligations. Outlined below are the key decisions made by the board in respect of this arrangement:

#### **Decision taken by the board in June 2009 to approve retirement and re-employment**

A paper entitled *Retention of Corporate Management Experience* was presented to the board in June 2009 by the Chief Officer and the clerk to the board (a joint paper signed in both names) covering the wider succession plans for the Corporate Management Team and the Chief Officer's own position.

In relation to the Chief Officer's arrangements, the paper outlined: "The clerk to the board has discussed with the Chief Officer his future career plans, and while eligible to retire in July 2011, it is proposed the Chief Officer continue in post for a three-year period beyond the eligible retirement date in accordance with the Board's return to work policy". It is not explicit within the paper presented that the board had to give specific approval for retirement as the Chief Officer was not 55 or that this meant that the Chief Officer would effectively retire and be re-employed. Following this meeting, a formal letter was written on 25 June 2009 by the clerk to the board outlining the board's approval for the Chief Officer to take retirement and be re-employed.

#### **Board's HR Return to Work policy**

The board's *Flexible retirement and re-employment uniformed and support staff* procedure, dated April 2008, sets out arrangements for retirement and potential re-employment. In particular, the procedure outlines: "The service will write to all employees who are eligible to retire on the grounds of service to advise them of their options" also "Employees who wish to make an application to retire and be re-employed must submit their request in writing using the request to retire and return to employment letter as shown in appendix 4, at least three months before their expected retirement date and no earlier than one year before retirement, to the Assistant Chief Officer (HR)". From a review of papers submitted to the board on occasions where firefighters took retirement and were re-employed, we noted that this situation would be for no more than two years to facilitate succession planning.

In the case of the Chief Officer, no application in writing under this policy was submitted; the conversation noted in the June 2009 board paper (see above) between the clerk to the board and Chief Officer was not formally recorded; the decision was taken two years, rather than one year or less before potential retirement; and the Chief Officer has returned on an expected three-year contract not on the usual two years or less contract.

We have been informed that this three-year contract was considered necessary by the board to cover planning for the Commonwealth Games in 2014, and a decision on the position of the Chief Officer was necessary at this point in time (June 2009) to facilitate succession planning, bringing stability to the Corporate Management Team.

### **Board approval in April 2011 to provide for the Chief Officer's unauthorised pension charge of £206,715**

A paper 'to advise on a recent variation in interpretation of the firefighters pension scheme which could impact on the Chief Officer's retirement', was presented for approval to the executive subcommittee in February 2011, and subsequently to the board at the start of April 2011. This paper was prepared by the clerk to the board included legal advice from a third party legal adviser. The paper sets out that a potential unauthorised employee payment charge would be levied by HMRC in respect of the Chief Officer's retirement and asked the board to consider four options, summarised as:

- no further action at this time
- make provision for the employer charges arising
- make provision for the employer and employee contribution arising
- the convenor speaks to the Chief Officer regarding a proportion of the unauthorised charge being met by the Chief Officer.

The board approved the option of making a budgetary provision for both the employer and employee charge.

As a result, a provision totalling £235,000 has been included in the 2010/11 financial statements. It is emphasised that this is an accounting provision only and no payment has so far taken place. As of July 2011, this provision has been confirmed as an accurate calculation, based on information received from the Scottish Public Pension's Agency calculated on the Chief Officer's pension lump sum.

From review of the executive subcommittee (February 2011) and board paper (April 2011), we would highlight the following:

- The possibility of an employee unauthorised payment charge was first identified in December 2009 but was not presented to the board for discussion until April 2011. We understand this was due to the vice-convenor raising the issue at the National Firefighters' Pension Committee, aiming to seek resolution at a national level.
- The paper states that "the Chief Officer has planned accordingly since the board's confirmation of his retirement arrangements and in consideration of HMRC guidance has asked the clerk to bring this matter before members".
- The paper did not explicitly consider the potential option of no longer allowing the Chief Officer to take retirement, and potential legal costs and implications in respect of this were not prepared at the time. However, we have been informed this was discussed with the convenor and vice-convenors at the time.
- The paper did not fully explore alternative options such as employing a Chief Executive rather than a Chief Fire Officer or that the post was no longer required due to possible national restructuring (efficiency argument), thereby potentially avoiding the unauthorised payment charge. However, the paper stated, "The Chief Officer and the clerk to the board have discussed the matter and do not consider a further organisational review to be appropriate nor to be in the best long term interests of SFR. The succession planning arrangements put in place by the board in June 2009 have been progressed and considered by both officers to represent the best way forward for the service".
- The financial range of the potential liability presented in the board paper (£26,715 to £206,715) is wide and a likely scenario was not presented. The unauthorised charge would only be at the lower end of the scale (£26,715) if no lump sum was taken and this option seems somewhat unlikely.

Following discussion we have held with the clerk to the board, convenor and members of management we have been informed that the board decision was discussed and questions were asked by elected members during the meeting. However, the relevant board minutes are brief and do not reflect such questioning or challenge prior to board approval. In addition, we understand that the Treasurer was not consulted over this decision, despite there being financial implications for the board.

**Summary of findings**

We can see no formal consideration within this process that alternative options, other than retirement and re-employment of the Chief Officer were considered in June 2009, nor that further options were explored and considered in February and April 2011. In addition, the board has been unable to demonstrate to us that the Chief Officer was fully independent of the decision making process due to his noted involvement and a lack of formal available evidence to the contrary.

Overall, the level of evidence made available to us does not readily support a best value decision concerning retirement, re-employment and the potential use of board funds to pay the Chief Officer's £206,715 unauthorised payment charge.

# Appendix 2

## Letter to Controller of Audit from convener of the board

Dear Sir

### STRATHCLYDE FIRE & RESCUE ANNUAL REPORT

I have recently received the Annual Report to the Board of Strathclyde Fire and Rescue prepared by our appointed external auditors, PWC, and I feel it is necessary to write to you to express my disappointment that the report fails to provide a balanced or even accurate view in relation to the section about the Chief Officer's retirement and re-employment, which is the minimum I would expect and, importantly, it does not set in context the actions taken by members and officers. In light of this, as well as addressing a number of issues, I will also provide some context.

In doing so, I must express my disappointment that the auditor, having interviewed myself, the clerk to the board, Deputy Chief Officer and ACO (Human Resources) at length and, having received written comments on the draft report, has failed to accurately reflect the complex nature of the position the board found itself in (including the need to balance varying factors which have come into play in this particular circumstance) and the lack of any viable alternative course of action available. It is also disappointing to note that her report failed to adequately reflect the fact that the board sought and obtained appropriate legal advice from both a third party and the Head of Legal Services from our Lead Authority and, having done so, acted responsibly and reasonably in this matter, including seeking verification that such actions were within the powers of the board.

I would specifically like to comment on the following issues raised in her report:-

The report fails to note that the abatement of the Chief Officer's pension results in quantifiable benefits in a saving to the public purse of £241,425, which is the sum that would have been paid had the Chief Officer simply retired and accessed his pension. This is clearly in excess of the maximum potential payment to HMRC.

The report fails to note that the application of an unauthorised payment charge in relation to the Chief Officer is open to challenge and the legal advice obtained by the board advised that "there are sufficient arguments in favour of a protected pension age entitlement for the Chief Officer for it to be open to the board to pay him pension and lump sum before age 55 on the basis that they are authorised payments for tax purposes". These arguments and the legal advice, which outlines them in detail, was presented to the board and provided to the auditor, however, no recognition of it is included within the report. That advice did go on to say that there was a significant risk that HMRC would seek to apply the unauthorised payment charge and the board agreed to make provision on that basis.

The report fails to make clear that the board did not take a decision to pay the charge but rather to make provision for it and in the event of a charge being levied by HMRC, the board will determine whether to challenge payment based upon the legal advice received that such a charge in these circumstances is discriminatory and/ or not payable in terms of the relevant legislation.

Although not contained within any of the draft reports presented to the service by the auditor, the final report as submitted to you states that it was not explicit that the Chief Officer would effectively retire and be re-employed. I would dispute this. The paper stated that his retirement would be in accordance with the board's Return to Work policy. To suggest that, as elected members, we did not understand this is both insulting and inaccurate. With the benefit of hindsight, the wording could

have been more explicitly stated, however, I am strongly of the belief that having done so would not have altered the decision taken by the board at that time.

The auditor's report states that re-employment would be for no more than two years, although this is not included within the board's policy, however, it fails to note that there are examples of employees other than the Chief Officer exceeding this period where there is specific justification and a business need to do so. In addition, the report fails to outline that it would not have been appropriate for the Chief Officer to request application of this policy to the Assistant Chief Officer (Human Resources), his subordinate. In the case of the Chief Officer, this request required to be considered by the board.

Whilst the auditor was informed that it is normal for applications to be made in writing one year prior to the retirement date, this is to facilitate the management of the recruitment and training programme for vacancies. The policy advises that notice should be given as early as possible. In the case of the Chief Officer, the board held the view that a Management Team Succession Plan was both timely and necessary given the significant number of changes that had occurred and the Chief Officer's key role within the organisation. It would not be uncommon for succession planning in relation to the most senior employees to be a longer-term process than it would be for the vast majority of employees. The succession plan, and the decisions that flowed from it, are seen as good practice in bringing stability and certainty over a challenging period, and this was outlined to the auditor in detail during discussion including the fact that the overall Succession Plan which the Chief Officer's retirement was part of, resulted in an annual saving to the board of £235,000. However, as the issues surrounding the benefits of the succession plan as explained by myself, the clerk, Director of Human Resources and Deputy Chief Officer, are not contained within the auditor's report, this leaves it open to misinterpretation.

The auditor places some weight on the departure from the letter of the timescales and process provided for in the Return to Work policy. The purpose of this policy is to create a framework, used in most instances, so that employees and the service can plan accordingly. In this instance, both the Chief Officer and the board had agreed to a variation of the timescales and process as was appropriate given his seniority within the service and the potential impact if arrangements could not be put in place to secure the stability and consistency of leadership which was deemed important in light of the challenging times ahead.

The reasons for the delay in bringing the issue of the charges before the board were explained in detail to the auditor. These not only included the vice-convenor raising the issue at the National Firefighters' Pension Committee but representation being made to HMRC and legal advice being sought by the Chief Officer's representative body, APFO. In addition, no reference has been made within the report to the delay by SPPA in notifying the board of the possibility of an employee's unauthorised payment charge and after the board's original decision taken in June 2009. The board should not be held accountable for this lack of action by the SPPA. The board acted in good faith at the time but had notification been received prior to the board's original decision taken in June 2009, the matter may have had an alternative outcome although I do not believe that this would have been the case.

The auditor's report states that the paper does not explicitly consider the potential option of no longer allowing the Chief Officer to take retirement, however, the report fails to adequately outline the reasons why this option was not considered appropriate for inclusion in the paper, including the significant risk of claims by the Chief Officer in respect of which we would have no obvious defence (such as age discrimination, breach of contract and maladministration/misrepresentation), although this was explained in some detail during interviews with the auditor.

No doubt as you will fully appreciate, a balance was to be maintained between varying and competing factors (which ultimately impact on best value considerations), and the potential claims as a result of withdrawing from the contract with the Chief Officer were discussed with myself and

vice-conveners and are highlighted in the legal advice which was discussed at meetings of the executive subcommittee and board.

The costs associated with these claims had the potential to exceed the provision for unauthorised payments, setting aside all other important and relevant arguments in relation to the non-financial considerations of losing the current Chief Officer at such a critical time for the service and potential industrial relations issues. Again, with the benefit of hindsight, these potential costs could have been reported to the board although they would only have served to strengthen even further the board's decision in relation to this matter. The consequences for a public body of seeking to renege from commitments made can be seen clearly in the decision of the Court of Appeal in *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] IRLR 786, CA, where the Trust was criticised for withholding payments which it had agreed to pay to a senior employee under a compromise agreement.

The audit report suggests that the board should have fully explored the option of employing a Chief Executive rather than a Chief Fire Officer thereby potentially avoiding the unauthorised payment charge. It is somewhat disappointing to read the proposition that, as a public body, the board should have considered measures simply to avoid a charge levied by HMRC rather than to act in the best interests of the service. Such action is considered to be inappropriate. As convener, I outlined to the auditor the views of the board in relation to the importance of the position of Chief Officer, the need to ensure that the person within the role had the necessary operational skills and experience and the benefits of consistency in light of the challenges anticipated, however, this is not adequately reflected in her report. In any event, given that it was the retirement of the Chief Officer (rather than his re-employment) which triggered the potential of any charges, the proposal would not have avoided the potential of any such charges. Indeed, the re-employment of the Chief Officer has mitigated the exposure to any such charges given that his annual pension was abated.

In relation to the financial range presented, the auditor was advised on several occasions that the likely scenario was outlined to members during the meetings and they were well aware of the extent of the provision required. However, with the benefit of hindsight, perhaps a slightly different form of words making it clear that although the range was accurate, in all likelihood the higher figure would be required, could have been used. However, it is also inconceivable that members took their decision on the basis of anything other than a belief that the potential costs would be at the upper end.

The report is critical of board minutes but, as outlined to the auditor, there has been no previous comment about the style of board minutes which focus on the decision taken rather than the discussion leading to the decision. The level of debate and discussion can be verified by interviewing those present.

The final report includes the statement that there is no formal evidence that the Treasurer was consulted during this process despite there being financial implications for the board. This statement was not included in any previous drafts of the report sent to the service by the auditor and, therefore, neither officers nor myself have been given the opportunity to correct this inaccuracy. For the record, I can confirm that all draft board papers are issued to the Treasurer for comment, he or his representative attends meetings of the board, as well as meetings held separately to finalise the agenda and reports for the board that he considers necessary, and the clerk to the board met the Treasurer to discuss this matter with him prior to this matter being considered.

The report fails to adequately note that the paper presented to the board in April 2011 contained four options rather than a formal recommendation and legal advice outlining the consequences of withdrawing notice of retirement for the Chief Officer and reneging on our contractual obligations as explained to the auditor at various meetings. Her report does not fully reflect that alternatives were explored and considered but were found to be unsuitable. Indeed, the alternatives suggested by the auditor have been shown to be more financially challenging than the option actually taken

by the board as outlined in Appendix A. Members of the board were free to propose alternative courses of action to the four set out (although it is unclear if there are other reasonable courses) but instead they unanimously supported the same option.

The auditor's report infers that the Chief Officer was not independent, or had too much influence, in this matter. However, it has been confirmed that the Chief Officer was not present at the executive subcommittee meeting held in February 2011, or the board meeting in April 2011, when the issue was discussed albeit I recognise that the minutes do not reflect this fact. The board can demonstrate that the Chief Officer was not involved in the decision-making of the board, which took place at those meetings, in relation to arrangements for the retiral and re-employment of the Chief Officer. The auditor did not take the opportunity (which was offered) to verify this with the Chief Officer. I would also seek to emphasise that the board would never prioritise the personal interests of an individual employee over the interests or obligations of the service, even if there was any pressure from the employee to do so which was most certainly not the case in this instance.

Given all of the above, the testimony of elected members and officers, the legal advice given and the options available to the board, I would strongly refute the conclusion that Best Value was not obtained or considered in the decision to provide for the potential unauthorised payment charge. In the auditor's own investigation the two alternative positions offered would, in reality, have cost the board more, as shown in Appendix A, and no other viable options have been found which would ensure that no claim could be brought against the board and/or service by the Chief Officer.

In addition to the above points made in relation to the details contained within the audit report, I would wish the following general observations to be considered:-

The strategic direction of the board rests with myself and my two vice-conveners, but all members act in the best interests of the board and service. Decisions taken by all board members are about ensuring that we provide the service with the right leadership, the right policies, the right people, the right training and development, and the right equipment so that we can achieve and maintain at all times an appropriate service delivery level in order to protect the people of Strathclyde and ultimately save lives. To suggest that members are motivated by anything other than that is to fail to understand what motivates board members.

The board, in arriving at its decision, obtained written independent legal advice and further advice from the Legal Services Department of the Lead Authority. In seeking and obtaining such third party independent advice, the board acted responsibly in carrying out its duties. The advice received clearly outlines that the decision taken was within the legal powers of the board. It is highly questionable why the audit report does not highlight this key point.

The auditor confirmed at a meeting with the Deputy Chief Officer held in June 2011 that the actions of the board were within its legal power. The auditor has signed off the accounts with a clean audit certificate and failed to raise any concerns with elected members through the Performance and Audit Forum or with officers through the normal audit process.

On 28 October 2011, the auditor questioned, for the first time, the legality of the board's actions but later clarified that the legality of the decision was not an issue by removing all reference to it.

A number of areas of concern have been the subject of discussion with members and officers. The report should better reflect all aspects of the contents of discussions and evidence presented by members and officers to provide a balanced view and give the context necessary to understand the complex issue and competing factors in this circumstance. These include, for example, the reference on page 15 that the contract extension related to the Commonwealth Games in 2014 when the auditor was advised that it also related to the significant modernisation agenda around the 5 Group Duty System, the new Training Centre, national reform, the Olympic events in the Strathclyde area, and stability and consistency in leadership at a particularly important time for the

Board and Service. It is unclear why these were not included in the report in order to provide appropriate context.

A key issue for the board was its role as an equal opportunity employer and its concerns, confirmed in the legal advice, that one of its employees (the Chief Officer) was the potential subject of discrimination on the grounds of age. To refuse consent to retirement and/or to renege on contractual commitments made on grounds of the age of the employee and the cost of consenting to retirement or fulfilling the contractual commitments could have given rise to claims of direct and indirect age discrimination under the Employment Equality (Age) Regulations 2006 and the Equality Act 2010, for which the compensation which the Employment Tribunal award is uncapped. These key considerations were outlined in discussion with the auditor but are not covered at all in the audit report. The board, by entering into the arrangements agreed with the Chief Officer in 2009, has mitigated its exposure to the above potential claims which, as indicated in Appendix A, are in excess of the potential exposure to the unauthorised payment charges and scheme sanction charges. Any potential liability in respect of the unauthorised payment charges and scheme sanction charges are also prospective. Therefore, the board acted responsibly in carrying out its duties.

Unfortunately, given the numerous changes made to the audit report and the lack of inclusion of key facts and context, I do not believe this represents a balanced report on the issue and, therefore, cannot agree with its contents or conclusions.

In light of the above, the clerk to the board wrote to the auditor prior to her concluding her report to ask that it be amended to accurately reflect the complex nature of the position the board found itself in, and the fact that it had acted responsibly and reasonably and within its powers. It is of great disappointment that the contents of that communication appear to have been largely ignored and I have found it necessary to raise these issues within this communication. In publishing the contents of the audit report on your website, I would be grateful if you would consider including a copy of this letter in order that the reader can be given a more accurate, balanced and fair view of the matter.

I and my officers would be pleased to meet with you to discuss the contents of this letter in further detail if required.

Yours faithfully



Councillor Brian Wallace  
Convener of the Board of Strathclyde Fire & Rescue