



# No “Parade of Horribles”: Implementing the *Vernava* Decision

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***PERAC v. CRAB & Others,***  
**Supreme Judicial Court of MA (“SJC”)**  
478 Mass. 832 (2/13/18)

- “Vernava”
- DPW worker, injured on the job on 6/13/2010
- On Workers’ Compensation 6/13/2010 to 7/7/2012
- Also receiving supplemental sick and vacation payments at same time.
- Issue in case: The effective date of his retirement.

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***PERAC v. CRAB & Others,***  
478 Mass. 832 (2/13/18), *Continued*

- Three possible retirement dates:
  - 1) Date of injury (6/13/2010) OR
  - 2) Date six months prior to filing application  
(Application date 2/1/12, so six months prior to 8/1/2011) OR
  - 3) Date he last received regular compensation

**WHICHEVER DATE SHALL LAST OCCUR**

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**NOTES:**

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## CRAB's Decision

“We do not resolve issues that are not before us, but do note that, at least where used to supplement workers' compensation payments, it is clear that sick, vacation, or ‘assault’ payments are not ‘regular compensation’ within the meaning of the retirement law, G.L. c. 32, § 1.”

*Vernava v. Swampscott Retirement Board & PERAC*, CR-12-640 (Emphasis Added.)

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## The Legal Positions of the Parties

PERAC	CRAB, Swampscott Retirement Board & Vernava
<ul style="list-style-type: none"><li>▪ Payments of sick and vacation time received in conjunction with Workers' Compensation are regular compensation.</li><li>▪ Vernava's date of retirement should be July 7, 2012, the last date he received these payments.</li></ul>	<ul style="list-style-type: none"><li>▪ Supplemental payments made in conjunction with Workers' Compensation are not regular compensation.</li><li>▪ Vernava's date of retirement should be August 1, 2011, the date six months prior to the retirement application being filed.</li></ul>

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## Quotable Quotes from the Briefs

### From PERAC's Brief:

"CRAB's proposed rule has no sound basis in the statute, is inconsistent with other statutory provisions, and would sow considerable uncertainty."

### From Swampscott's Brief:

"CRAB's limited application of Zelesky in this case – given the narrow question of whether a supplemental payment to an individual who is receiving worker's compensation can be considered regular compensation – is legally tenable...and must be affirmed."

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## Vernava's Bottom Line

- CRAB's decision is upheld.
- "Vernava's supplemental pay was not remuneration for work performed; rather, it was made only where Vernava was unable to perform work for his employer due to injury."

*Vernava*, at 836-37.

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## Footnote 3 From the SJC Decision

- Our interpretation of “regular compensation” in this case is limited to the receipt of supplemental pay in connection with workers’ compensation benefits, for the purpose of determining an employee’s effective date of retirement under G.L. c. 32, Section 7. We need not address the effective date of retirement for public employees who are not receiving workers’ compensation, such as those who voluntarily retire and use their supplemental pay before doing so. (Emphasis in original.)

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## Final Line of SJC Decision

- “We also do not find persuasive PERAC’s concern that confusion will ensue if CRAB’s interpretation is upheld.” *Vernava*, at 838.

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## PERAC Memorandum #17 of 2018

- Vernava decision only applies to those who
  1. Receive Workers' Compensation and
  2. Eventually retire under Section 7.
- New payroll codes needed.
- Deductions continue to be withheld.
- Return of deductions (without interest) if person ultimately retires under Section 7.

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## The Rationale

- Creditable service, except for partial incapacity when there is no time worked, is unaffected.
- “Effective date of retirement” being set is of crucial importance in calculation of accidental disability retirement allowances.
- SJC, Swampscott foresaw no problems with implementation (although CRAB did).

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## Active Members v. Retirees

Active Employees	Retirees
<ul style="list-style-type: none"><li>▪ Payroll codes going forward</li><li>▪ Return of deductions upon the approval of an ADR under Section 7.</li></ul>	<ul style="list-style-type: none"><li>▪ All those non-public safety retired under Chapter 32, Section 7, are affected.</li><li>▪ G.L. c. 32, Section 9 benefits also impacted.</li><li>▪ G.L. c. 32, Section 20(5)(c)(2) requires correction of errors “as far as practicable.”</li><li>▪ Not practical to visit cemeteries, nursing homes and other places searching for ADR retirees and their beneficiaries.</li></ul>

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## Self Reporting

- Those already retired may identify themselves to the retirement boards for recalculation of allowance.
- No general rule can be extrapolated, but sometimes this recalculation will be beneficial, and sometimes it will not.
- This decision is binding on all ADR retirees so once a retiree self-identifies, the recalculation must be undertaken.

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## Will This Approach Be Challenged?

- Workers' Compensation lawyers?
- Pending retirees?
- Those on Long-Term Workers' Compensation?
- Those already retired?

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## Caveat

- *Vernava* SJC footnote 3, **the SJC's final line in the decision**, and PERAC Memorandum #17 of 2018 limit the present impact of this decision.
- But for future scenarios involving payment of time for which services may not be rendered, other portions of the decision will be important.

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## The SJC's Other Grounds

- These payments are ad hoc, not regular or ordinary.
- The fact that the Legislature excludes “1-time lump sum payments” from regular compensation does not mean that there cannot be other exclusions.
- These payments are not of infinite duration, as Vernava could only use what was left of his sick and vacation time.
- These payments are substitutes for salary.

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## Questions Which Have Already Arisen

- Chapter 41, Section 111F
- Longevity payments
- Special Acts
- Section 91A
- Other supplemental payments
- Those on superannuation pending ADR approval
- How to do a recalculation in this situation

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## *Vernava*

- We all have to follow the SJC's decision.
- Retirement boards bound by PERAC Memoranda (see, e.g., *Grimes*).
- CRAB foresaw the Legislature taking action.
- PERAC's legislative filing for 2019-2020 session.
- PERAC and the retirement boards must work together in making these changes in our approach.

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## Slide 14, Revisited

- To recap, five slides back we wondered “Will this approach be challenged?”
- The answer to this question is “Yes.”
- The first presentation of this topic at MACRS on June 6, 2018.
- On August 8, 2018, PERAC was served with a lawsuit regarding its implementation of *Vernava*.

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## Suit for Declaratory Judgement

- Five retirement boards are suing PERAC, seeking a declaratory judgement that PERAC's guidance regarding *Vernava* is incorrect, and that PERAC's guidance regarding certain matters is irrelevant.
- Nevertheless, retirement boards should continue to follow the instructions contained in Memorandum #17 of 2018 unless an appellate court instructs us otherwise.

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