

## MEMORANDUM

TO: All Retirement Boards

FROM: John W. Parsons, Esq., Executive Director

RE: Supreme Judicial Court decision in *Vernava II* – Action Required

DATE: June 2, 2022

### **I. Statement Regarding Prior Memoranda**

PERAC has issued prior guidance (Memoranda No. 12 and 17 of 2018) on this matter as it moved through the judicial process. In order to provide current and comprehensive guidance following the recent Supreme Judicial Court (“SJC”) decision of February 4, 2022, these prior memoranda should no longer be consulted on this topic. This Memorandum reflects the current treatment of this subject matter.

### **II. Background**

On February 4, 2022, the SJC issued a final determination in the matter of *Worcester Regional Retirement Board & others v. PERAC*, SJC-13137 (“*Vernava II*”) regarding whether supplemental payments of vacation and sick time taken in conjunction with Workers’ Compensation benefits should be considered “regular compensation.” In an earlier decision, “*Vernava I*,”<sup>1</sup> the SJC had ruled that such payments were not regular compensation. Because of the wording in the original decision itself and because of the unique structure of the accidental disability retirement statute, PERAC understood the SJC’s determination in *Vernava I* to be limited to those retiring for accidental disability under G.L. c. 32, § 7. PERAC issued Memo 17 of 2018 to the retirement boards on the basis of that understanding.

Following the release of that memorandum, five retirement boards, Essex Regional, Franklin Regional, Peabody, Stoneham, and Worcester Regional, appealed PERAC’s interpretation. The SJC ruled in favor of the broader interpretation of these five retirement boards, that the definition of regular compensation does not differ between sections of the retirement statute and that *Vernava I* should apply to all sections of Chapter 32, not just Section 7. Despite PERAC’s arguments to

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<sup>1</sup> *PERAC v. CRAB et al.*, 478 Mass. 832 (2018)



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make application of the SJC decision prospective,<sup>2</sup> the SJC also agreed with the five retirement boards that the Court's determination in this matter must be retroactive.<sup>3</sup>

All retirement boards must take immediate action to implement the SJC decision in *Vernava II*.

### III. Who Will Be Affected by This Decision

Because this SJC decision is retroactive by its terms, it will impact any active or inactive member of a system, and any retiree of a system, who received supplemental payments of any kind while simultaneously receiving disability payments under any section of the Workers' Compensation statute at any point from the effective date of Chapter 32, January 1, 1946<sup>4</sup> to the present.

#### Specifically:

Generally speaking, G.L. c. 32, § 14 permits the award of creditable service for those members receiving payments under the Workers' Compensation statute, Chapter 152 of the General Laws. Importantly, G.L. c. 32, § 14 does not permit the award of creditable service for those receiving benefits pursuant to Section 35 of Chapter 152 for *partial incapacity*. Therefore, any regular compensation and creditable service previously granted on the basis of the receipt of supplemental payments of any kind received while a member was on partial Workers' Compensation will need to be removed. However, no change will be made to a member's regular compensation or creditable service for any period for which he or she received partial incapacity benefits while simultaneously working part time for the same employer.

Those receiving a superannuation, an ordinary disability, or a termination retirement allowance, all of which require a minimum amount of service<sup>5</sup> pursuant to G.L. c. 32, §§ 5, 6, or 10, may be impacted by the loss of creditable service possibly leading to the loss of his or her allowance.

Those members retired under Sections 5, 6, or 10 of Chapter 32 who have their creditable service reduced, but do not suffer the loss of their allowance, will nonetheless suffer a reduction in the amount of the allowance due to the reduction of creditable service.

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<sup>2</sup> PERAC's Appellant Brief, pp. 43 to 46.

<sup>3</sup> Appellant Brief of the Five Retirement Boards, pp. 31 to 34.

<sup>4</sup> The Workers' Compensation statute pre-dates Chapter 32, as does the availability of partial Workers' Compensation benefits.

<sup>5</sup> Members of Group 4 retiring as members in service in Group 4 are a notable exception to the service requirement for superannuation. However, public safety employees, generally speaking, will not be receiving Workers' Compensation benefits.

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A member, inactive member or retiree who received Workers' Compensation benefits under a section other than Section 35 at any point in their career will not suffer a reduction in their creditable service for those time periods. However, these members may nevertheless suffer a reduction (or, possibly, in rare cases, an increase) in the amount of their allowance depending upon which section of Chapter 32 was used as the vehicle for their retirement. Those who retired under Sections 5 or 10 may have the date upon which their "annual rate of regular compensation" was established changed. Those retiring under Section 6 may have the date they last received regular compensation altered.

A member who has retired for accidental disability retirement may have the amount of his or her allowance either reduced or increased, if the SJC decision results in a new effective date of retirement.

Survivors receiving allowances will also be impacted.

### **IV. Actions Which Must Be Undertaken**

#### **A. For Active Members, and Inactive Members Who Have Not Yet Retired**

Because of the sheer magnitude of this task, PERAC advises retirement boards to begin by focusing on current active members, and those inactive members who have not yet retired, and make all necessary adjustments.

Effective immediately, no deductions should be taken on any payment of any kind which is received while the member is simultaneously receiving a disability payment under the Workers' Compensation statute. (An exception of course being if a member is on Workers' Compensation for partial incapacity and is working part-time for the same public employer. In that case, all supplemental payments, including but not limited to sick and vacation leave, would be subject to retirement deductions.)

The retirement boards should identify all individuals who, at any point in their careers, have been on any section of Workers' Compensation, Chapter 152, and received supplemental payments of any kind upon which regular deductions were taken and regular compensation was awarded.

After the identification of the affected individuals, the following three steps should be undertaken:

1. For those time periods during which a member received supplemental payments of any kind while simultaneously receiving Workers' Compensation under G.L. c. 152, Section 35, remove all regular compensation and creditable service which a member

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had previously been awarded. This does NOT include time periods during which a member on Section 35 worked for their public employer on a part-time basis.

2. Notify the member of this change to the service previously awarded and now removed, and provide appeal rights pursuant to G.L. c. 32, § 16(4).
3. Return, without interest, all retirement deductions taken on supplemental payments of any kind received in conjunction with any disability payment under G.L. c. 152.

### **B. For Retired Members, and Their Beneficiaries**

Although PERAC and other entities are currently pursuing a legislative remedy for retirees who will be impacted by *Vernava II*, it is unknown if such legislative efforts will be successful. Therefore, the boards are obligated by this decision to identify all retirees, and/or the beneficiaries of such retirees, who received Workers' Compensation benefits at any point in their careers.

This will necessarily include all individuals who were awarded regular compensation and creditable service because of their receipt of supplemental payments of any kind while simultaneously receiving Section 35 payments, and whose retirement allowance was based upon such award.

The boards should then follow these four steps:

1. For those time periods during which a retiree received supplemental payments of any kind while simultaneously receiving Workers' Compensation under G.L. c. 152, Section 35, remove all regular compensation and creditable service which a retiree had previously been awarded. This does NOT include time periods during which a member on Section 35 worked for their public employer on a part-time basis.
2. Recalculate the retirement allowances as necessary. Calculate the amounts of overpayment the retiree may owe to the retirement board, or underpayments which the board may owe to the retiree. In some cases, unfortunately, this process may result in the loss of retirement allowances and health insurance to certain retirees and their beneficiaries.

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3. Notify the retiree or the beneficiary of the retiree of this change to the retirement allowance previously awarded and now reduced or removed, and provide appeal rights pursuant to G.L. c. 32, § 16(4).<sup>6</sup>
4. Return, without interest, all retirement deductions taken on supplemental payments of any kind received simultaneously with any disability payment under G.L. c. 152.

All retirement allowance reductions or losses and subsequent recalculations for this group of individuals will likely result in an overpayment by the retirement board to the affected retiree/beneficiary. It will be up to the boards to decide whether or not to waive such overpayments pursuant to G.L. c. 32, § 20(5)(c)(3) (the so-called “Needham Waiver”). This is discretionary on the part of each board.

**C. Estates of Deceased Members and Beneficiaries**

PERAC advises that if a retiree and his or her beneficiary are both deceased, any efforts to address this decision would be futile, cost ineffective for the system, and should not be undertaken.

**V. Other Supplemental Pay**

Since the decision in *Vernava I*, PERAC has consistently advised that certain payments made simultaneously to individuals on Workers’ Compensation should still be considered regular compensation. These would include such payments as longevity and educational incentive payments, which a member would be entitled to even if the member was not on Workers’ Compensation. The SJC opinion in *Vernava II* focuses on the issue of sick and vacation pay. However, due to subsequent decisions of the Division of Administrative Law Appeals (“DALA”) interpreting *Vernava I*, PERAC is no longer advising boards that these payments should be considered regular compensation. (This would be true from January 1, 1946 to the present.)

There are currently pending before the Contributory Retirement Appeal Board (“CRAB”) seven cases involving the interpretation of *Vernava I* as to longevity and/or educational incentive pay.

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<sup>6</sup> A retiree or beneficiary facing this reduction or loss of his or her allowance, who files an appeal with the Contributory Retirement Appeal Board (“CRAB”) may petition CRAB for a stay in the implementation of the reduction or loss in accord with the Administrative Procedure Act, G.L. c. 30A, § 14(3). Whether such a stay would be granted remains entirely in CRAB’s discretion.

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Three different DALA Magistrates have opined that supplemental pay of any kind received in conjunction with Workers' Compensation is not regular compensation.

Thus, in regard to any supplemental pay received (except when the person is on partial Workers' Compensation and working part time for their public employer), the same steps as listed above must be undertaken.

**VI. Conclusion**

PERAC recognizes the hardships which may result from this decision. However, this SJC decision is final and not appealable. PERAC will continue to pursue and monitor legislative remedies to address the issues raised by *Vernava II* and will immediately notify the boards if any legislation is passed. If you have any questions about this memo, please contact PERAC's General Counsel, Judith Corrigan, at (617) 591-8904.

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**VII. Addendum**

**Frequently Asked Questions**

*Will payments received under G.L. c. 41, § 111F be impacted by this decision?*

No, because Section 111F benefits will never be paid as a supplement to Workers' Compensation. (Memo 17 of 18, p. 3)

*We have a member who has been on Workers' Compensation for 16 years and 2 months, all the while making retirement deductions on supplemental sick and vacation time payments. Do I use the rate of regular compensation in effect for this person 16 years and 2 months ago in determining his allowance should he retire pursuant to Section 7?*

Yes. Such a person would also be entitled, upon retirement under Section 7, to a return of all the deductions they had made over the same period of time, without interest.

*A member is on a leave of absence due to illness. He or she is using up their sick and vacation time while they are out. Should we stop taking deductions out of the sick and vacation time paid to the member?*

No. The SJC case applies by its terms only to members who are on Workers' Compensation and receive supplemental payments concurrently. In this example, no Workers' Compensation is being paid.

*If sick and vacation payments are used to supplement long-term/short-term disability insurance payments, are these supplemental payments now excluded from "regular compensation" too?*

No. The SJC decision is limited to supplemental payments made in conjunction with Workers' Compensation payments.

*If sick or vacation payments are used at the end of members' careers, when there is no expectation of a return to service, are these payments now excluded from "regular compensation?" (i.e., used leave vs. unused leave)*

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No. No payments of Workers' Compensation benefits pursuant to G.L. c. 152 are being made.

***What about those on active duty with the military? They cannot perform services for the employer. Should that time be excluded from regular compensation?***

No, such members are not receiving Workers' Compensation benefits and so would not be impacted by either *Vernava* decision.

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