

MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Implementation of the *Vernava* Decision

DATE: April 9, 2018

This memorandum is intended to supersede PERAC Memorandum No. 12 of 2018, which was issued on February 20, 2018.

Introduction

On February 13, 2018, the SJC issued the *Vernava* decision (a copy of which is attached to this memo), rejecting the long-held position of PERAC, and PERA before it, that vacation and sick time taken in conjunction with Workers' Compensation benefits should be considered regular compensation, and adopting the argument advanced by the Swampscott Retirement Board in litigating this matter.

Limitations

The decision will have no applicability to any member retiring under any section of Chapter 32 other than Section 7. This is because the SJC severely limited the ambit of its decision in footnote 3, which provides in its entirety as follows:

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, § 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 supplied).

Implementation as to Members Who Have Not Yet Retired

The limiting language of footnote 3 presents a challenge in determining whether or not a supplemental payment is regular compensation at the time it is received, because many members



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may receive Workers' Compensation at certain times during their careers, but may or may not ultimately retire pursuant to the provisions of G.L. c. 32, § 7. Thus, a person who was out on Workers' Compensation mid-career who subsequently retires for superannuation will have those payments counted as regular compensation.

Our recommendation is that payroll departments create a new pay code to utilize when a supplemental payment is being taken in conjunction with Workers' Compensation and withhold regular retirement deductions from such supplemental payments. If the member ultimately retires under G.L. c. 32, § 7, those payments would not be considered regular compensation and the deductions would need to be refunded to the member without interest.

This approach fulfills the SJC's mandate that such payments supplemental to the receipt of Workers' Compensation will not be regular compensation in those cases where a member ultimately retires pursuant to the provisions of G.L. c. 32, § 7.

It is recognized that retirement deductions which were not taken based on the directives contained in PERAC Memorandum No. 12 of 2018 will have to be recouped, without interest.

Retroactivity as to Previously Retired Members

In the case of *John McIntire*, petitioner, 458 Mass. 257, 261 (2010), the SJC held that "Where a decision does not announce new common law rules or rights but rather construes a statute, no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment," because the statute has had the same meaning since its effective date, citing *Shawmut Worcester Cty. Bank v. Miller*, 398 Mass. 273, 281 (1986). The *Vernava* SJC decision did not establish a new common law rule. Instead, it is an interpretation of a statutory provision that, the SJC found, PERAC and the retirement boards have historically misinterpreted. The effective date of Chapter 32, as inserted into the Massachusetts General Laws by Chapter 658 of the Acts of 1945, is January 1, 1946.

Boards are required by G. L. c. 32, § 20(5)(c)(2) to correct errors "as far as practicable". Since this legal decision is to be retroactive as noted above, and since recalculating every accidental disability retirement allowance awarded since 1946 is not practical, we are recommending an alternative: for an individual already retired for accidental disability to self-identify to the retirement board. Once a member becomes aware of the *Vernava* decision, and asks for their allowance to be recalculated in accord with it, the Board would then be required to act. Once a retiree requests the recalculation, that request cannot be withdrawn.

The Impact on the Allowances of Retirees

Retirees and attorneys have called PERAC in the wake of this decision regarding recalculation, and it is assumed they have also contacted retirement boards about recalculating previously

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awarded accidental disability retirement benefits. Many people assume that this will result in an earlier retirement date and a lump sum payment. However, recalculating the benefit in accord with the *Vernava* decision may sometimes be detrimental to a retiree. This is something that is not widely understood. It is difficult to develop a general rule about this, but this change will be harmful to some and helpful to others.

In the time prior to the *Vernava* case, those receiving Workers' Compensation benefits and a supplemental payment have always been able to use the "rate" of regular compensation when they last received those supplemental payments. With those payments excised from regular compensation, the allowances calculated under Section 7 will be based upon a rate in effect in the (perhaps distant) past.

Questions and Answers

We have had a number of questions posed to us by members of the public pension community. Some of these questions are set out below.

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.

We have a member who is on Workers' Compensation, and periodically receives a longevity payment. Should that longevity payment be considered regular compensation?

Yes. The SJC decided that all payments made to supplement Workers' Compensation must be excluded from regular compensation. A longevity payment is not a supplement to Workers' Compensation. It would be received regardless of whether the member was on Workers' Compensation or not. The member's receipt of a longevity payment has no connection to his or her receipt of a Workers' Compensation payment.

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?

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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)

No. In fact, in footnote 3 of its decision, the SJC explicitly declined to extend its decision in this way.

When employers pay the members' full salary, pursuant to their CBA, less Workers' Compensation benefits (i.e., paid leave), are these payments now excluded from "regular compensation?"

Yes. This is so because, in this example, we understand members sign over their Workers' Compensation to the employer periodically. In signing the Workers' Compensation benefits over to the employer, a member is effectively rendering the leave they are being paid "supplemental" to such payments.

A member has been out of work for 3 years, from 3/1/15 to 2/28/18, receiving Section 34 (full incapacity) Workers' Compensation and supplemental sick pay to make them "whole" (i.e., 60% Workers' compensation with 40% sick pay). The member applies for superannuation retirement with an effective retirement date of 2/28/18. Would we calculate the member's salary average using the years in which they were receiving Workers' Compensation, or would we have to use the years prior to the member receiving Workers' Compensation (3/1/12 to 2/28/15)?

You would use the member's salary on the most recent date, as this member is retiring for superannuation. The SJC decision will not apply to this member.

A member was injured on the job and is out of work, receiving Section 35 workers' compensation payments (partial incapacity) from 4/1/16 to 3/31/18 for 45% of salary plus 35% covered by sick pay. The member applies for an ordinary disability retirement with an effective retirement date of 3/31/18. Since membership began on 9/1/06, there are 9.7 years of creditable

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service through 3/31/16. Does this member meet the 10-year minimum requirement to be eligible for an ordinary disability retirement as of 3/31/18?

The member would meet the minimum eligibility requirement, since the SJC decision does not apply to those members who go out for ordinary disability retirement.

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, the member is not receiving Workers' Compensation benefits so would not be impacted by the *Vernava* decision.

Conclusion

We realize this SJC decision rejecting long-held positions of both PERA and PERAC will cause concern and additional work for the Boards. Nonetheless, it is our responsibility to inform you of this decision and to provide guidance.

If you have any further questions about this, please contact Deputy General Counsel Judith Corrigan at Extension 904 or at jacorrigan@per.state.ma.us.