SJC-13137

WORCESTER REGIONAL RETIREMENT BOARD & others[1] vs. PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION.

Suffolk. November 3, 2021. - February 4, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Public Employee Retirement Administration Commission. County, Retirement board. Municipal Corporations, Retirement board. Retirement. Public Employment, Retirement, Vacation pay, Sick leave benefits, Worker's compensation. Administrative Law, Exhaustion of remedies, Judicial review. Jurisdiction, Judicial review of administrative action, Justiciable question. Retroactivity of Judicial Holding. Statute, Construction. Words, "Regular compensation."

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on August 9, 2018.

Following transfer to the Superior Court Department, the case was heard by Patrick M. Haggan, J., on motions for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

[1] Essex Regional Retirement Board, Franklin Regional Retirement Board, Stoneham Retirement Board, and Peabody Retirement Board.

Julia E. Kobick, Assistant Attorney General, for the defendant.

Michael Sacco for the plaintiffs.

CYPHER, J. In this appeal, we consider the scope of our prior interpretation of the term "regular compensation" defined in G. L. c. 32, § 1, as excluding vacation or sick leave pay used to supplement workers' compensation payments. Public Employee Retirement Admin. Comm'n v. Contributory Retirement Appeal Bd., 478 Mass. 832, 832 (2018) (Vernava). Here, we are asked to determine whether our construction of "regular compensation" narrowly applies only to determinations of an employee's effective retirement date under the provision in G. L. c. 32, § 7, relating to accidental disability retirement, or more broadly applies to any form of retirement, including the ordinary disability or superannuation retirement provisions of G. L. c. 32, §§ 5 and 6. Additionally, we are asked to address the authority of the Public Employee Retirement Administration Commission (PERAC) to issue memoranda that bind retirement boards to PERAC's interpretation of appellate court decisions, and whether the plaintiff retirement boards (boards) may seek judicial review of such memoranda without first exhausting available administrative remedies.

Because our interpretation of "regular compensation" in Vernava did not depend on the specific retirement provision

under which the issue arose, we conclude that this construction applies consistently across uses of the term in G. L. c. 32, §§ 5, 6, and 7, thereby applying to superannuation, ordinary disability, and accidental disability retirement, and does so retroactively. Where the existing statutory framework and case-specific application of the exhaustion doctrine have served amply the parties' need to address the statutory construction question raised in this case, no actual controversy is raised by the abstract issue of exhaustion of administrative remedies in hypothetical disputes over future PERAC memoranda interpreting appellate opinions.

Background. In Vernava, 478 Mass. 832, we addressed the intersection of G. L. c. 32, concerning retirement systems, and G. L. c. 152, concerning workers' compensation.[2] We considered "whether the supplemental pay received pursuant to G. L. c. 152, § 69, constitutes 'regular compensation' as defined by G. L. c. 32, § 1, when received in conjunction with workers' compensation."[3] Vernava, supra at 834. In concluding that the

[2] "Employees who are unable to work because of injuries sustained on the job can seek benefits in lieu of salary under the workers' compensation act." Public Employee Retirement Admin. Comm'n v. Contributory Retirement Appeal Bd., 478 Mass. 832, 833 n.2 (2018) (Vernava).

[3] "[A] public employer may pay an employee receiving workers' compensation all of that employee's accrued vacation and sick time in part until any sick leave allowance which the employee has to [the employee's] credit has been used," so long

two hours of supplemental pay received per week by the employee in Vernava did not constitute "regular compensation" for the purposes of determining the effective date of his accidental disability retirement under G. L. c. 32, § 7, we held that where an employee receives accrued vacation or sick leave pay in conjunction with workers' compensation benefits, such accrued vacation or sick leave used as supplemental pay is not "regular compensation" because the injured "employee has ceased providing services to the employer." Vernava, supra at 838.

Subsequent to our decision in Vernava, PERAC, the regulatory agency overseeing the 104 retirement systems constituted under G. L. c. 32, issued a memorandum advising retirement boards on the scope of that decision. This memorandum alerted members that the Vernava decision "will have no applicability to any member retiring under any section of [G. L. c.] 32 other than [§] 7." Highlighting footnote 3 of our opinion in Vernava, PERAC interpreted our holding to be limited such that the meaning of "regular compensation" applied solely

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as the employee receives only "so much of any sick leave allowance payment as, when added to the amount of any disability compensation . . . will result in the payment to [the employee] of [the employee's] full salary or wages" (quotations and citation omitted). Vernava, 478 Mass. at 833 n.2, quoting G. L. c. 152, § 69.

to calculations of an employee's effective date of accidental disability retirement pursuant to § 7 (2).[4]

PERAC emphasized the language of the first sentence of the footnote, including its direct reference to "the purpose of determining an employee's effective date of retirement under G. L. c. 32, § 7." PERAC concluded that

> "[t]he limited 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 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."

PERAC thereafter issued a second memorandum emphasizing that all Massachusetts retirement boards were bound by its interpretation of the scope of this court's holding in Vernava.

In response to the PERAC memoranda, the boards filed a complaint in the county court pursuant to G. L. c. 231A, § 1. The complaint sought two declarations: first, that the Vernava construction of regular compensation as excluding supplemental

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[4] Footnote 3 states: "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 in original). Vernava, 478 Mass. at 834 n.3.

pay when paid in conjunction with workers' compensation applies regardless of whether a retirement system member retires for disability under G. L. c. 32, § 6 or 7, or for superannuation under G. L. c. 32, § 5 (count 1); and, second, that PERAC's memoranda interpreting case law are not binding on retirement boards, who have independent authority to interpret retirement statutes and associated case law (count 2).[5]

The case was transferred to the Superior Court by order of a single justice. In the Superior Court, the boards requested that, in the alternative, the judge declare as to count 2 that retirement boards may seek review of PERAC memoranda interpreting appellate court opinions by an action for declaratory judgment without first exhausting administrative remedies. With regard to the first claim, the judge rejected PERAC's interpretation of our holding in Vernava and held that footnote three did not restrict the construction of "regular compensation" to apply only with respect to accidental disability retirement. The judge declined to reach the merits of either version of the boards' second claim, characterizing the declarations sought as akin to an advisory opinion. PERAC appealed from the judge's declaration as to count 1; the boards appealed from the judge's decision to decline to reach the

[5] The boards also requested that the court order any other relief it deemed proper and just.

merits of count 2, pressing on appeal their alternative request for a declaration that retirement boards may seek review of PERAC memoranda interpreting appellate court opinions without first exhausting administrative remedies.[6] We granted PERAC's application for direct appellate review.

Discussion. 1. Jurisdiction. Declaratory relief pursuant to G. L. c. 231A, § 1, in the form of "binding declarations of right, duty, status and other legal relations," is limited to cases where "an actual controversy has arisen and is specifically set forth in the pleadings." "An actual controversy arises under our law where there is 'a real dispute caused by the assertion by one party of a legal relation, status or right in which [that party] has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is

[6] The boards also sought to include in the issue raised on appeal the statutory interpretation opinions of the Contributory Retirement Appeal Board (CRAB). CRAB is not a party to this action. The boards' brief does not offer any arguments specifically addressing CRAB opinions -- the cursory reference falls short of the level of acceptable appellate argument, and we do not reach it here. See McCone v. New England Tel. & Tel. Co., 393 Mass. 231, 236 (1984) ("cursory and conclusory" statement of claim, without citation to supporting legal authority, is "insufficient appellate argument"), quoting Tobin v. Commissioner of Banks, 377 Mass. 909, 909 (1979) (deeming insufficient appellate argument waived); Lolos v. Berlin, 338 Mass. 10, 14 (1958) (party's "duty is to assist the court with argument and appropriate citation of authority").

[adjudicated] such antagonistic claims will almost immediately and inevitably lead to litigation.'" Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 546-547 (2012), quoting School Comm. of Cambridge v. Superintendent of Sch. of Cambridge, 320 Mass. 516, 518 (1946). Where no actual controversy is presented by a claim for declaratory relief, the court lacks subject matter jurisdiction over the matter, and the claim must be dismissed. Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 502, 505 (2008) (affirming judgment of dismissal for lack of subject matter jurisdiction on ground that "in order for a court to provide declaratory relief, an actual controversy . . . must exist"). "[W]henever a problem of subject matter jurisdiction becomes apparent to a court, the court has both the power and the obligation to resolve it" (quotation omitted). Doherty v. Civil Serv. Comm'n, 486 Mass. 487, 491 (2020), quoting Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 547 (2018).

Here, we find no problem of subject matter jurisdiction concerning count 1: there is an actual controversy as to the scope of our holding in Vernava regarding the meaning of "regular compensation." Each party has asserted a specific interest in the scope of our construction of "regular compensation" in Vernava -- PERAC has a specific interest in its duty of "efficient administration of the public employee

retirement system," G. L. c. 7, § 50, and the boards have a specific interest in accurate calculations of retirement allowances and creditable service for workers and retirees under G. L. c. 32. Litigation arising from this issue appears inevitable; the boards assert that PERAC's interpretation of Vernava already has been contradicted by the Division of Administrative Law Appeals in several proceedings currently pending before the Contributory Retirement Appeal Board. For that reason, we conclude that this court has subject matter jurisdiction over count 1, and we reach that question on the merits.

However, although not raised by the parties, we conclude that we do not have subject matter jurisdiction as to count 2. No actual controversy is presented by the alternative declaration the boards press on appeal, which would identify a sweeping prospective right to proceed directly, without first exhausting administrative remedies, to judicial review of PERAC memoranda concerning appellate statutory interpretation opinion. "A mere difference of opinion or uncertainty over the meaning to be ascribed a statute does not, without more, rise to the level of a justiciable controversy." Department of Community Affairs v. Massachusetts State College Bldg. Auth., 378 Mass. 418, 422 (1979). Controversy is properly shown where both parties assert a definite interest in the meaning of the statute, in

circumstances clearly showing that "such antagonistic claims will almost immediately and inevitably lead to litigation." Libertarian Ass'n of Mass., 462 Mass. at 547, quoting School Comm. of Cambridge, 320 Mass. at 518. The declaration sought on appeal by the boards as to count 2 does not meet such a standard: it addresses an abstract question unmoored from any particular circumstance, and applies to purely hypothetical disputes over future PERAC memoranda in which the boards cannot establish a specific, present interest. Libertarian Ass'n of Mass., supra ("declaratory relief . . . is not a vehicle for resolving abstract . . . [or] hypothetical . . . questions").

The lack of an actual controversy raised by count 2 is demonstrated by the adequacy of the remedy available to the parties under G. L. c. 231A, § 1, for the specific and present controversy that we address in count 1. The doctrine of exhaustion has not precluded this court from reaching the merits of count 1 in the specific circumstances of this case, which raise not only a pure question of law, but also an important public issue that immediately concerns a numerous group of government employees and retirees. See Suburban Health Care, Inc. v. Executive Office of Health & Human Servs., Office of Medicaid, 488 Mass. 347, 352 (2021), quoting Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination, 463 Mass. 472, 479-480 (2012) ("When considering whether to excuse the

failure to exhaust administrative remedies, we look at 'whether resort to the administrative remedy would be futile; whether the case raises important public questions whose resolution will affect people beyond the parties to the case; whether pursuing the administrative remedy will result in irreparable harm to either party; and whether there is a question of law peculiarly within judicial competence'").

For those reasons, we conclude that count 2 must be dismissed upon our own motion. See Prudential-Bache Sec., Inc. v. Commissioner of Revenue, 412 Mass. 243, 248 (1992), citing Department of Community Affairs, 378 Mass. at 422-423 (issues of subject matter jurisdiction may be raised by appellate court on its own motion).

2. The merits. General Laws c. 32, § 1, defines "regular compensation" as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." By the express language of § 1, this definition applies "as used in [§§ 1 to 28], inclusive, unless a different meaning is plainly required by the context." Id. PERAC does not identify any specific uses of the term "regular compensation" within § 5 or § 6 as plainly requiring a different meaning due to context. Instead, PERAC argues that the specific language of the § 7 (2) standard for determining the effective date of accidental disability retirement differs from the

provisions setting retirement dates in §§ 5 and 6, and thus our interpretation of "regular compensation" in Vernava was limited solely to the context of § 7.[7] Although we afford deference to an agency's interpretation of a statute that it administers, such deference does not extend to facially unreasonable constructions. Cf. Boston Retirement Bd. v. Contributory Retirement Appeal Bd., 441 Mass. 78, 82 (2004) (deference afforded to PERAC's "reasonable interpretation of the statute on its face"). For the reasons set forth infra, we reject as unreasonable PERAC's interpretation of "regular compensation" as having multiple meanings amongst §§ 5, 6, and 7.

Section 6, setting forth the requirements for ordinary disability retirement, contains eight references to "regular compensation," the majority of which relate to the computation of retirement allowances. As in § 7 (2), the effective date of retirement under § 6 is constrained by the last date an employee

[7] General Laws c. 32, § 7 (2), states: "Upon retirement under the provisions of this section a member shall receive an accidental disability retirement allowance to become effective on the date the injury was sustained or the hazard or account of which [the employee] is being retired was undergone, or on the date six months prior to the filing of the written application for such retirement with the board and [the employee's] respective employer, or on the date for which [the employee] last received regular compensation for his employment in the public service, whichever date last occurs."

receives "regular compensation."[8] Section 5, setting forth the requirements for superannuation retirement, contains forty-five references to "regular compensation," largely relating to computation of required deductions or retirement allowances. Unlike §§ 6 and 7, the effective date of retirement under § 5 is not constrained by the date the employee last received "regular compensation."[9]

However, when read as a whole, the context of the various uses of "regular compensation" in §§ 5 and 6 is not distinguishable from the fourteen uses of the same term in § 7.

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[8] General Laws c. 32, § 6 (1), states that upon written application, the employee "shall be retired for ordinary disability as of a date which shall be specified in such application and which shall be not less than fifteen days nor more than four months after the filing of such application but in no event later than the maximum age for [the employee's] group, nor earlier than the last day for which [the employee] received regular compensation" (emphasis added).

[9] General Laws c. 32, § 5 (1), requires that the employee specify a retirement date in the written application, which date "shall be subsequent to but not more than four months after filing of such application." For certain classifications of public employees, the retirement date must occur by a specified "maximum age." G. L. c. 32, §§ 1, 3. If such employees serve in positions with duties falling into two different classifications and paid from two appropriations, the required retirement age is determined by which duties account for the major portion of the employee's "regular compensation." Id. In short, the source of certain public employees' "regular compensation" determines the mandatory retirement age, and thus the latest possible retirement date, for such individuals. However, unlike in §§ 6 and 7, the date such employees last received "regular compensation" does not constrain the effective date of retirement for the purposes of § 5.

Accordingly, there is no clear basis in G. L. c. 32 to overcome § 1's explicit application of a single, consistent definition of "regular compensation" to §§ 5, 6, and 7, in the absence of context that "plainly require[s]" a different meaning.[10]

To the extent any ambiguity remains in the face of the plain language applying a uniform definition of "regular compensation" throughout the statutory scheme, we resolve it to similar effect. "Where the Legislature uses the same words in several sections which concern the same subject matter, the words must be presumed to have been used with the same meaning in each section." Meyer v. Veolia Energy N. Am., 482 Mass. 208, 214-215 (2019), quoting Insurance Rating Bd. v. Commissioner of Ins., 356 Mass. 184, 188-189 (1969). Sections 5, 6, and 7 concern the same general subject matter: various forms of

[10] This uniform construction is consistent with our past opinions interpreting the limits of "regular compensation" as defined in § 1, without restriction to a specific type of retirement. See, e.g., Rotondi v. Contributory Retirement Appeal Bd., 463 Mass. 644, 652-654 (2012) (determining meaning of "fixed annual compensation" for purposes of membership eligibility under § 3 [2] [d] not substantially different from meaning of "regular compensation" in § 1, without consideration of future retirement type); Pelonzi v. Retirement Bd. of Beverly, 451 Mass. 475, 482 (2008) (determining "regular compensation" excludes value of employee's use of automobile provided by employer in appeal from § 5 retirement allowance calculation, but relying on apparent intent of "entire statutory scheme" and making no distinction for other retirement types); Bulger v. Contributory Retirement Appeal Bd., 447 Mass. 651, 661 (2006) (determining "regular compensation" excludes particular annuity payments in appeal from § 5 retirement allowance calculation, without distinction from other retirement types).

retirement by public employees. Within each section, the term "regular compensation" is referenced in relation to the calculation of retirement allowances and required contributions. In §§ 6 and 7, the latest date of receipt of regular compensation is used to constrain an employee's retirement date, using nearly identical phrasing.[11] Absent any evidence of contrary legislative intent, this consistent use of the term throughout the c. 32 statutory scheme must be presumed to reflect a uniform meaning, regardless of the specific type of retirement at issue.

Accordingly, we conclude that our construction of "regular compensation" in Vernava to exclude supplemental pay received in conjunction with workers' compensation applies equally whether an employee receiving such pay subsequently retires under superannuation, ordinary disability, or accidental disability, G. L. c. 32, §§ 5-7, and affirm the judge's declaration that PERAC's memorandum is incorrect as a matter of law by limiting our holding in Vernava to accidental disability retirement under G. L. c. 32, § 7.

3. Retroactivity. "In general, when we construe a statute, we do not engage in an analysis whether that

[11] General Laws c. 32, § 6, uses the phrase "last day for which [the employee] received regular compensation," while § 7 uses the phrase "date for which [the employee] last received regular compensation."

interpretation is given retroactive or prospective effect; the interpretation we give the statute usually reflects the court's view of its meaning since the statute's enactment." Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 587 (2012), citing McIntire, petitioner, 458 Mass. 257, 261 (2010), cert. denied, 563 U.S. 1012 (2011). "There must be good reason 'to disturb the presumptively retroactive application' of a statutory interpretation." Commonwealth v. Ashford, 486 Mass. 450, 453-454 (2020), quoting American Int'l Ins. Co. v. Robert Seuffer GmbH & Co. KG, 468 Mass. 109, 121, cert. denied, 574 U.S. 1061 (2014). "This court traditionally has given prospective effect to its decisions in very limited circumstances," Eaton, supra at 588, and "would have to be satisfied that special circumstances exist to limit our answer here to only prospective application," Payton v. Abbott Labs, 386 Mass. 540, 565 (1982). We have been more willing to apply our decisions prospectively in the property and contract law contexts than other subject areas. See Pinti v. Emigrant Mtge. Co., 472 Mass. 226, 243 (2015) ("in the property law context, we have been more willing to apply our decisions prospectively than in other contexts"); Eaton, supra, quoting Blood v. Edgar's, Inc., 36 Mass. App. Ct. 402, 407 (1994) (applying statutory interpretation decision prospectively in "circumstances where the ruling announces a change that affects property law" and where "prior law is of questionable

prognosticative value"); Payton, supra at 565, 570, and cases cited (declining to apply prospective effect to tort law decision, unlike property or contract law). Our exercise of discretion to apply a decision prospectively "is guided by consideration of the novelty of the interpretation, whether retroactivity is consistent with the purposes of the rule announced, and whether 'hardship or inequity would result from retroactive application' (citation omitted)." Ashford, supra at 453.

PERAC urges this court to limit our interpretation of "regular compensation" to prospective application to superannuation and ordinary disability retirement under G. L. c. 32, §§ 5 and 6. PERAC argues that this case presents an exceptional circumstance where our interpretation could require the boards to recalculate retirement allowances for any existing retiree who at one time received supplemental pay along with workers' compensation, and could possibly result in the total loss of benefit eligibility for some retirees who received supplemental pay in conjunction with partial incapacity workers' compensation, if recalculation resulted in a reduction of creditable service below the minimum retirement threshold.

The hardship of reduced retirement allowance amounts for superannuation and ordinary disability retirees is akin to the hardship facing accidental disability retirees due to our

decision in Vernava, which we did not limit to prospective effect. However, this case presents a novel question of hardship, where recalculation of creditable service may affect an individual retiree's eligibility for any benefits, and individual employees may have relied upon the boards' prior calculations of creditable service on the basis of PERAC's erroneous interpretation of Vernava when choosing a particular retirement date under § 5 or § 6.

This is an issue that did not arise in Vernava, because existing retirees who received workers' compensation for total incapacity are protected by statute from impacts on the creditable service they otherwise would have accrued during the period of injury.[12] In contrast, existing retirees who received workers' compensation for partial incapacity in conjunction with supplemental pay would lose prorated creditable service for the period workers' compensation benefits were received, where the

[12] General Laws c. 32, § 14 (1) (a), "protects employees who are injured on the job by allowing them to continue accumulating creditable service while receiving workers' compensation [for total incapacity] and by instructing the employer to make the contributions to the employee's annuity fund which would have been deducted from the employee's salary had [the employee] not been injured" (footnote omitted). Hayes v. Retirement Bd. of Newton, 425 Mass. 468, 473-474 (1997) (distinguishing right to accrue creditable service while receiving workers' compensation benefits from "different question of an employee's receipt or nonreceipt of regular compensation"). Partial incapacity workers' compensation benefits under G. L. c. 152, § 35, are not among the types of workers' compensation explicitly included in § 14 (1) (a).

supplemental vacation or sick pay used along with those benefits no longer constitutes "regular compensation" for the purposes of calculating weeks of creditable service.[13]

Nevertheless, we decline, as we implicitly did in Vernava, to depart from the presumption of retroactivity for our construction of "regular compensation" in this case. See McIntire, petitioner, 458 Mass. at 261. PERAC does not offer a specific estimation of how many existing retirees would be rendered ineligible for superannuation or ordinary disability retirement benefits due to retroactive recalculation to exclude periods of partial incapacity from their creditable service.[14]

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[13] General Laws c. 32, § 5 (1) (m), requires at least ten years of creditable service to be eligible for superannuation retirement, while § 6 (1) requires at least either ten or fifteen years of creditable service to be eligible for ordinary disability retirement, depending on the date the employee began service or the particular retirement system at issue. Section 4 (1) (c) states that creditable service "shall include any period of [the employee's] continuous absence with full regular compensation, or in the event of his absence with partial regular compensation such period or portion thereof, if any, as the board shall determine. Creditable service in the case of any member may be allowed by the board for any period of [the employee's] continuous absence without regular compensation which is not in excess of one month. Any portion of any leave . . . which is in excess of one month shall not be counted as creditable service except as specifically otherwise provided for in this section . . . ." (Emphases added.) No other provision of § 4 explicitly allows the inclusion of a period of partial incapacity workers' compensation exceeding one month.

[14] PERAC estimated that "at least hundreds" of retirees had received supplemental pay in conjunction with partial incapacity workers compensation, but did not estimate the number or proportion of individuals for which recalculation would result

Nor is it clear that the boards lack existing statutory discretion to waive recalculations that would result in the total loss of retirement benefit eligibility for some existing retirees, and thus that the risk of hardship to those hypothetical retirees truly is imminent.[15]

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in creditable service falling below the minimum statutory threshold.

[15] After our holding in Vernava, PERAC advised retirement boards that correction of § 7 retirement allowances for existing accidental disability retirees need only be completed "as far as practicable," G. L. c. 32, § 20 (5) (c) (1), and recommended that boards only engage in retroactive recalculation when an affected retiree "self-identif[ied] to the retirement board" by filing for retirement allowance recalculation. Similarly, in response to our holding in Pelonzi v. Retirement Bd. of Beverly, 451 Mass. 475, 482 (2008), excluding the value of an employee's use of an employer-owned vehicle from the § 1 definition of "regular compensation," PERAC issued a memorandum advising that retirement boards had the discretion under G. L. c. 32, § 20 (5) (c) (3), to waive collection of related overpayments to existing retirees where "the error in any benefit payment . . . persisted for a period in excess of one year," "the error was not the result of erroneous information provided by the member," and "the member . . . did not have reason to believe that the benefit amount . . . was in error."

The questions whether the § 20 (5) (c) practicability and overpayment waiver provisions permit boards to decline to proactively identify existing retirees whose creditable service would fall below the minimum eligibility threshold as a result of our holding in this case, or permit retirement boards to waive revocation in such circumstances on the basis of reliance upon PERAC and the boards' prior representations of sufficient creditable service, have not been briefed before this court, and we do not reach such questions here. We reserve a determination of the rights of any such retirees until such time, if ever, when these questions come to us as fully developed issues.

This absence of specific evidence establishing the likely occurrence of extraordinary hardship weighs in favor of the presumption of retroactive application. Ashford, 486 Mass. at 453. There is little novelty in a uniform application of the meaning of "regular compensation" to all types of retirement under G. L. c. 32, given the explicit application in § 1 of a uniform definition of the term "as used in [§§ 1 to 28], inclusive." See Eaton, 462 Mass. at 588, quoting Blood, 36 Mass. App. Ct. at 407 (prospective effect may be appropriate where "prior law is of questionable prognosticative value"). Moreover, just as in Vernava, retroactivity is consistent with the purpose of limiting the meaning of "regular compensation" to that intended by the Legislature, as regular, ordinary compensation for services performed by the employee. For those reasons, our construction of the meaning of "regular compensation," as applied to superannuation, ordinary disability, and accidental disability retirement under G. L. c. 32, §§ 5 to 7, has retroactive effect.

Conclusion. The judgment of the Superior Court as to count 1 of the complaint, declaring that the construction of "regular compensation" set out in Vernava is not limited to accidental disability retirement under G. L. c. 32, § 7, is affirmed. We remand the case to the Superior Court for an order of dismissal of count 2 of the complaint.

So ordered.