

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF POSTAL
SUPERVISORS,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

Case No. 19-cv-2236 (RCL)

PLAINTIFF’S MOTION FOR ENTRY OF CIVIL DISCOVERY ORDER

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 26(d) and (f) and Local Civil Rule 16.3, parties to a civil case must confer and propose a discovery plan in all civil cases other than those in nine categories exempt from initial disclosure under Fed. R. Civ. P. 26(a)(1)(B) and LCvR 16.3(b). Here, the Postal Service erroneously contends that this litigation, in which the Court will determine whether the Postal Service has acted *ultra vires* and violated various aspects of the Postal Reorganization Act, is exempt from initial disclosure as “an action for review on an administrative record.” But, unlike cases reviewing agency action under the Administrative Procedure Act—from which this Circuit has repeatedly held the Postal Service is “expressly exempt,” *see e.g., Nat’l Ass’n of Postal Sup’rs v. United States Postal Serv.*, 26 F.4th 960, 970 (D.C. Cir. 2022) (“*NAPS II*”)—*ultra vires* lawsuits are not “actions for review on an administrative record.” Because discovery beyond what the Postal Service contends to be the “administrative record” is necessary for the National Association of Postal Supervisors to

establish the ways in which the Postal Service has acted *ultra vires*, and because such discovery will assist the Court in ascertaining whether and how the Postal Service has broken the law and what the remedies for those violations should be, discovery is both permitted and required.

This Court has previously allowed discovery in at least two cases contending that the Postal Service acted *ultra vires*, including a similar case brought by NAPS, and, to NAPS's knowledge, neither the Postal Service nor any other agency has ever challenged the availability of civil discovery in *ultra vires* cases. This Court recently permitted extensive discovery in another *ultra vires* challenge to Postal Service agency action, *New York v. Biden* (originally *New York v. Trump*), No. 20-cv-2340 (EGS) (D.D.C.). And, in NAPS's previous suit against the Postal Service under the same provisions of the Postal Reorganization Act at issue here, the parties engaged in civil discovery. *See Nat'l Ass'n of Postal Sup'rs v. U.S. Postal Serv.*, 602 F.2d 420, 427 (D.C. Cir. 1979) ("*NAPS I*") (recounting the procedural history of NAPS's challenge under section 1004(a) of the Act to Postal Service pay decisions and noting that "discovery ensued" before the Postal Service filed a dispositive motion). NAPS is not aware of any *ultra vires* cases in which discovery was not permitted, nor has the Postal Service cited any such case in response to NAPS's inquiry on this point.

On remand from the D.C. Circuit, this Court must determine, under *ultra vires* review, whether the Postal Service violated the Postal Reorganization Act when it set its 2016-2019 Field Executive and Administrative Schedule ("EAS") pay package by failing (1) to compensate its approximately 49,000 EAS employees comparably to the private sector; (2) to pay its supervisory and other managerial employees more than the clerks and carriers they supervised; and (3) to consult with NAPS regarding compensation for "Headquarters" and "Area"

employees, including such employees whom the Postal Service has claimed, without explanation or support, perform roles that are not supervisory or managerial. *NAPS II*, 26 F.4th at 966.

Ascertaining whether the Postal Service complied with the Postal Reorganization Act in establishing the 2016-2019 Field Pay Package requires more information than the Postal Service has included in what it now calls the “administrative record,” which it served on NAPS on November 15, 2022, pursuant to the Joint Scheduling Order, ECF No. 30. That “administrative record” merely re-produces the December 2018 factfinding hearing record along with the correspondence between NAPS and the Postal Service about the 2016-2019 pay package (from the initial announcement in September 2017 through the Postal Service’s May 15, 2019 letter to NAPS stating it would not incorporate the factfinding panel’s recommendations for correcting the pay package). Nothing in this so-called “administrative record” reflects the Postal Service’s internal consideration of the relevant statutory requirements for NAPS’s members’ compensation—for example, it does not include any e-mails, notes, memos, or correspondence between or among Postal Service employees regarding the pay decision. Nor does it include any individualized pay data that would allow the Court and NAPS to determine whether there were “adequate and reasonable differentials in rates of pay” between the Postal Service’s clerks and carriers and the supervisory and other managerial personnel who supervise them, as required by 39 U.S.C. § 1004(a). The Postal Service’s “record” does not include information regarding private-sector compensation and benefits that would allow the Court and NAPS to evaluate whether supervisory and managerial postal employees receive compensation and benefits “comparable to the rates and types of compensation paid in the private sector of the economy” as required by 39 U.S.C. §§ 101(c) and 1003(a) (or even to evaluate whether the Postal Service

considered private sector compensation and benefits, which it apparently did not).¹ And it does not include any information regarding the nature of the jobs performed by the “Headquarters” and “Area” employees regarding whom the Postal Service refused (and continues to refuse) to consult, as required by 39 U.S.C. § 1004(b).² Thus, that “record” is insufficient to answer the questions now before this Court.

Because the Postal Service has refused to confer about or agree to entry of a discovery plan, NAPS hereby requests an order requiring the Postal Service to do so promptly.

ARGUMENT

I. Claims that the Postal Service has acted *ultra vires* are not exempt from civil discovery.

Federal Rule of Civil Procedure 26(d) and (f) and Local Civil Rule 16.3 require parties to a civil case to confer and propose a discovery plan in all civil cases other than those specifically exempt from initial disclosure under Fed. R. Civ. P. 26(a)(1)(B) and LCvR 16.3(b). The federal discovery rules, including Federal Rules of Civil Procedure 26, 30, 33, 34 and 36 regarding initial disclosures, depositions, interrogatories, requests for production of documents, and requests for admissions, apply to all civil cases unless otherwise exempted.

In refusing to agree to civil discovery, the Postal Service has pointed solely to Fed. R. Civ. P. 26(a)(1)(B)(i) and LCvR 16.3(b)(1), which exempt an “action for review on an administrative record.” But the questions to be resolved on *ultra vires* review differ from those to

¹ The Postal Service’s “administrative record” contains only after-the-fact analysis that its expert prepared for the factfinding panel regarding the base salaries (but not the total compensation or benefits) of eight positions (out of over 1,000)—analysis the Court of Appeals held was inadequate to satisfy the Act’s comparability requirement. *NAPS II*, 26 F.4th at 973-74.

² Because the factfinding panel believed that its review powers did not encompass the scope of NAPS’s representation, *see* Factfinding R. & R. at 29 (Apr. 30, 2019) (attached as Ex. 2), no evidence was provided to that panel related to that issue.

be resolved under the Administrative Procedure Act and other similar laws that expressly limit review to an administrative record. *Ultra vires* review, which is non-statutory review that pre-dates the APA, requires determining whether the agency acted outside the limits of its delegated authority, *NAPS II*, 26 F.4th at 970 (citing *Aid Ass’n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1173 (D.C. Cir. 2003)). “Review for *ultra vires* acts rests on the longstanding principle that if an agency action is unauthorized by the statute under which [the agency] assumes to act, the agency has violate[d] the law and the courts generally have jurisdiction to grant relief.” *Id.* (quoting *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902)).

In other words, *ultra vires* review asks whether the agency violated the law, a question that requires comparing the relevant facts about the agency action with its statutory mandate. NAPS is entitled to discovery and presentation (including through expert testimony regarding private sector compensation) of the full range of relevant facts to prove the Postal Service violated the Postal Reorganization Act’s requirements in setting compensation for NAPS’s members under the 2016-2019 pay package.

Unlike the Administrative Procedure Act, which dictates the scope and procedure for review under that law—including the limitation of considering only “the whole record, or those parts of it cited by a party,” 5 U.S.C. 706; *see also* 5 U.S.C. 556(e) (defining administrative record as “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding”)—the Postal Reorganization Act does not include any provision confining adjudication of claims to an administrative record.³

³ Courts in this District have made clear that “APA-based counts are confined to the record,” and that so, too, are claims brought under other statutes that expressly provide for administrative record review. *Center for Biological Diversity v. Ross*, 349 F. Supp. 3d 38, 40-41 (D.D.C. 2018) (noting the adjudication of claims brought under the APA and the Marine Mammal Protection

Courts in this District have recently overseen civil discovery in an *ultra vires* challenge to a Postal Service policy change that impacted vote-by-mail administration. In *New York v. Biden* (formerly *New York v. Trump*), No. 20-cv-2340 (EGS) (D.D.C.), several states and municipalities sued the Postal Service for declaratory and injunctive relief, as NAPS has done here. In that case, Judge Sullivan granted Plaintiffs’ Motion for Expedited Discovery and issued an expedited schedule for serving and responding to written discovery and taking depositions. Order of October 10, 2020, listed on docket between ECF No. 53 and ECF No. 54. The Postal Service did not oppose the availability of civil discovery in that *ultra vires* action against it, arguing only that *expedited* discovery was not warranted where it had already produced relevant discovery on an expedited basis in two other, related cases. Joint Status Report, *New York v. Biden*, No. 20-cv-2340 (EGS) (D.D.C.) ECF No. 20, at 7 (Sept. 8, 2020) (citing *Washington v. Trump*, 20-cv-3127 (E.D. Wash. Aug. 27, 2020), and *Pennsylvania v. DeJoy*, 20-cv-4096 (E.D. Pa. Sept. 4, 2020)). The Postal Service’s agreement to the availability of discovery in that *ultra vires* case and Judge Sullivan’s order granting the expedited discovery are instructive here.

In addition to indicating its agreement that civil discovery is available in *ultra vires* cases by its voluntary participation in discovery in *New York v. Trump*, , the Postal Service has also already indicated that discovery in this case is *not* limited to the administrative record by failing to file an index of what it now claims is the “administrative record” with its motion to dismiss in October 2019, as required by LCvR 7(n)(1). That Local Rule requires: “In cases involving the judicial review of administrative agency actions, unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within

Act were both “confined to the administrative record”). In the absence of such a provision, civil discovery under the Federal Rules is presumptively available.

30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first.” The Postal Service neither filed any such list with its motion to dismiss nor asked this Court to be excused from that filing—thereby acknowledging that this is not an administrative record review case.

II. Civil discovery is necessary for NAPS to further develop its factual allegations that the Postal Service’s pay decision was *ultra vires*.

The Court of Appeals remanded this case for this Court to answer several questions: whether the Postal Service’s 2016-2019 Field Pay Package violated the statutory mandates of the Postal Reorganization Act by: (1) “failing to institute *some* differential in pay for supervisors” as compared to the employees they supervised; (2) “failing to demonstrate that it set its compensation levels by reference, *inter alia*, to the compensation paid in the private sector” and failing to “achieve and maintain” compensation comparable to the private sector; (3) “refus [ing] to consult with the Association on compensation for Area and Headquarters employees” (and “fail[ing] to offer any support for its position” that those employees are not “supervisory or other managerial employees”); (4) “refusing to consult regarding postmasters;”⁴ and (5) “failing to provide [NAPS] with reasons for rejecting its recommendations.” *NAPS II*, 26 F.4th at 966.

Fact and expert discovery are relevant to all of these questions, particularly discovery pertaining to the supervisory differential, comparability of pay to the private sector, and NAPS’s representation of Area and Headquarters employees. Each of these questions requires civil discovery to provide NAPS with the opportunity to obtain additional facts from the Postal

⁴ The Court of Appeals determined that NAPS’s postmaster members “plainly fall into the broad category of supervisory and other managerial employees” whom NAPS may represent under the Act, and that the Act “requires” the Postal Service to consult with NAPS regarding pay for these employees. *NAPS II*, 26 F.4th at 980 (citing 39 U.S.C. § 1004(b)). If the Postal Service continues to refuse to recognize NAPS’s representation of postmasters, NAPS is also entitled to discovery on the basis for that claim.

Service about its salary-setting process and the resulting compensation paid to employees, to take the deposition(s) of the Postal Service regarding those processes and its decision-making for the 2016-2019 pay package, and to develop and present expert witness testimony.

A. Discovery is needed to determine whether the Postal Service provided an adequate and reasonable differential in rates of pay between supervisors and line employees and, if it did not, to determine which supervisors are entitled to additional pay and the amount to which they are entitled.

The Postal Reorganization Act requires *some* differential in rates of pay between supervisory and other managerial personnel and the employees they supervise. 39 U.S.C. § 1004(a); *NAPS II*, 26 F.4th at 966, 972-73. Under the Act, the Postal Service has the “responsibility” of showing it has established this differential, which it failed to do on the record before the factfinding panel (the record it has now re-produced as its “administrative record”). *See NAPS II*, 26 F. 4th at 973 (finding “such a showing has not been made”). Whether the Postal Service maintained any such differential between supervisory and other managerial personnel and the clerks and carriers they supervised requires discovery of the salaries paid to the clerks and carriers as well as to the supervisors and other managerial personnel who supervised them. That information is not contained anywhere in the “administrative record” but can be readily ascertained from electronic pay records. The Postal Reorganization Act already contemplates that the Postal Service should provide such information to NAPS, 39 U.S.C § 1004(d)(3), but it has not done so.⁵

⁵ Postal Service employee compensation is public information, but not in a format that can be readily analyzed. *See* <https://www.fedsdatacenter.com/usps-pay-rates/>.

The Postal Service has determined that 5% (a differential far below the private sector)⁶ is an adequate supervisory differential for EAS employees. Ans., ECF No. 33 at ¶ 38; *see also NAPS II*, 26 F.4th at 972-73 (“The Postal Service contends that it has satisfied the pay differential requirement in section 1004(a) through its Supervisory Differential Adjustment, which sets a five percent differential . . .”).

But the Postal Service has not shown that its method for calculating that differential results in *any* differential in the rates of pay between every EAS employee and the craft employees they supervise. *See* Factfinding R. & R. at 15 (“Using the compensation levels of a single grade level from a single craft within one (1) of only four (4) Position Groups does not result in the differential being effectively applied to the significant number of managers and supervisors, in terms of both the minimum and maximum salaries within a range”); *see also NAPS II*, 26 F.4th at 968 (noting the factfinding panel “found that the Supervisory Differential Adjustment method used by the Postal Service had, in many instances, resulted in unreasonable and inadequate pay differentials”).

For example, NAPS has alleged that the Postal Service’s practice of using a lower-paid clerk position as the benchmark for the supervisory differential for all EAS employees rather than the higher paid, more populous carrier position results in a base salary for some supervisors that is below the carriers they supervise. Compl., ECF No. 1 at ¶ 39; *see also NAPS II*, 26 F.4th at 973 (noting NAPS’s allegation that “the Postal Service provided *no* differential in pay for thousands of supervisory employees”) (emphasis in original). The Postal Service admits that it

⁶ At the factfinding hearing, the Postal Service’s expert stated that the supervisory differential in the private sector falls between 10% and 20%, but typically on the higher end of that range in unionized work forces like the Postal Service. Factfinding R. & R. at 14, n. 15 (citing Dec. 11, 2018 Hr’g Tr. at 236, 251).

used the clerk position as the benchmark for supervisors of customer service's pay but apparently denies allegations regarding the higher salary paid to the carriers those supervisors supervise. Ans., ECF No. 33 at ¶ 39. The basis for that denial is one small example of information required as part of discovery. NAPS has also alleged that the rate at which craft employees receive overtime—a higher rate that takes effect after fewer hours—in some instances negates the SDA, resulting in additional craft employees receiving a rate of pay that exceeds their supervisors. Compl., ECF No. 1 at ¶ 35, 37; *see also* Factfinding R. & R. at 17 (“[T]he Panel recognizes that the significant impact of overtime on total craft pay may in some instances negate any differential and undermine the statutory intention of maintaining an SDA”).

The Postal Service admits “that certain EAS employees may supervise craft employees whose compensation exceeds their supervisors’ compensation,” Ans., ECF. No. 33 at ¶ 35, but the “administrative record” it supplied does not address this issue or indicate for which positions this is the case. Indeed, the Postal Service’s compensation expert at the factfinding hearing testified that he was not asked to and therefore did not consider what the craft employees made in evaluating the differential between them and their supervisors. Factfinding Hr’g Tr. Dec. 11, 2018, at 240:10-241:5 (attached as Ex.1).

To assess whether any differentials in rates of pay exist between the supervisory employees NAPS represents and the craft employees they supervise, as required under the statute, the Court and NAPS will need data on EAS employees—*i.e.*, their position (including grade), location, base salary, and overtime pay—and the same for each clerk and carrier they supervise in order to properly compare the two and ensure the SDA calculation methodology has

resulted in supervisors' rates of pay being higher than *all* of the employees they supervise.⁷ This additional information is also required to ascertain which supervisors and managerial employees were underpaid and by how much.

B. Discovery is needed to determine whether the Postal Service achieved and maintained compensation and benefits comparable to the private sector, and, if it did not, to determine remedies.

In setting pay, “the Postal Service must (1) consider private sector compensation and benefit rates in setting compensation for all employees, and (2) show a good faith determination that compensation and benefits are comparable.” *NAPS II*, 26 F. 4th at 973. On this record, including the re-production of the factfinding hearing documents as the Postal Service’s “administrative record,” there are no facts indicating what private sector compensation and benefits are for all EAS employees represented by NAPS let alone any indication that such comparators were considered.

The Postal Service did not retain any expert or commission any survey of comparable pay until *after* providing the 2016-2019 pay package to NAPS, *see* Factfinding Hr’g Tr. Dec. 11, 2018 at 239:21-240:3; even then the Postal Service’s expert for the factfinding hearing considered only salaries (and not total compensation) for only eight EAS positions in four locations out of more than 1,000 EAS positions, Factfinding Hr’g Tr. Dec. 11, 2018 at 240:4-12—three of which had average salaries below the private sector median, *id.* at 223:2-9; 225:11-14; 226:10-12. On this record, the factfinding panel concluded the Postal Service had violated

⁷ In the private sector, a 20 or 25% differential in base salary assures that supervisors’ rates of pay exceed that of the employees they supervise, even if the line employees earn overtime at a higher rate. Because the Postal Service has chosen to set its supervisory differential at just 5%, it must take additional steps to assure that its supervisors’ rates of pay exceed their supervisees.

the statute by setting pay without conducting a market survey into comparable compensation in the private sector. Factfinding R. & R. at 13.

The Court of Appeals agreed that “the Postal Service’s belated and limited look at pay—and not total compensation or benefits—for only eight of 1,000 positions” was insufficient under the Act. *NAPS II*, 26 F.4th at 974 (citing 39 U.S.C. § 1003(a)). And the Court was clear that “[i]n order to set compensation by reference to private compensation and benefit rates, the Postal Service must know what those rates are.” *Id.* at 968, 973-74 (internal quotation marks and citations omitted).

Although it may be possible to conclude from the “administrative record” that the Postal Service did not consider the rates and types of compensation in the private sector, it is not possible for the Court to determine whether the Postal Service “achieve[d] and maintain[ed] compensation for its . . . employees comparable to the rates and types of compensation paid in the private sector of the economy,” without knowing what comparable rates and types of private sector compensation are. *See* 39 U.S.C. § 101(c); *see also* 39 U.S.C. § 1003(a) (“It shall be the policy of the Postal Service to maintain compensation and benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector”); *NAPS II*, 26 F. 4th at 973-74. In other words, the questions before the Court are not merely “did the Postal Service adequately consider compensation in the private sector?” but also “did such a consideration include the rates and types of compensation paid in the private sector?” and “did it result in comparable compensation?” Those questions cannot be answered from the “administrative record.”

To compare the total compensation of EAS employees to comparable private sector positions requires additional information related to the salaries and other forms of compensation

for all EAS employees—information NAPS would request through written discovery—as well as the opportunity to evaluate whether those salaries and additional compensation are comparable to the private sector. Based on this information, an expert could analyze and testify regarding whether the pay package satisfies this statutory obligation. NAPS should also have an opportunity to request any and all documents on which the Postal Service intends to rely in support of its argument that it has fulfilled its statutory obligation to achieve compensation comparable to the private sector, which is not addressed in the current re-production of the factfinding hearing documents.

C. Discovery is needed to determine which “Headquarters” or “Area” employees the Postal Service has classified as not “supervisory or other managerial personnel” and the basis for that classification.

The Court of Appeals instructed that, “to support its claim that certain Area and Headquarters employees do not qualify for representation by the Association, the Postal Service must demonstrate that the job functions of these employees are not supervisory or ‘other managerial’ in nature.” *NAPS II*, 26 F.4th at 976 (citing 39 U.S.C. § 1004(b)). The Court found that, thus far, the Postal Service has relied only on its “sparse and self-serving” assertion that Area and Headquarters employees are not “supervisory” or “managerial” under the Act and therefore are not represented by NAPS. *Id.* at 975. The Court of Appeals concluded that it could not even assess this argument “because the Postal Service had failed to offer any support for its position,” *id.*, and instructed this Court on remand to “determine which of these employees have been improperly excluded from the right to representation granted in section 1004(b),” *id.* at 977.

Given that NAPS’s representation of Headquarters and Area employees was not an issue the factfinding panel considered, *see* Factfinding R. & R. at 29 (noting this was “not a matter that falls within the jurisdiction of the Panel under 39 U.S.C. § 1004”), the re-production of the

factfinding record as the “administrative record” in this case provides the Court with no information regarding the lawfulness of the Postal Service’s refusal to consult with NAPS regarding these particular employees’ pay.

Discovery is therefore required on the basis (if any) for the Postal Service’s assertion that some or all “Headquarters” or “Area” employees are not supervisory or managerial, including job descriptions for each position excluded from pay discussions with NAPS for the 2016-2019 pay package.

CONCLUSION

For the foregoing reasons, NAPS respectfully requests that the Court order that the Parties confer and submit a proposed discovery plan.

Respectfully submitted,



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