UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF POSTAL SUPERVISORS, Plaintiff, v. UNITED STATES POSTAL SERVICE, Defendant.	Civ. A. No. 19-2236 (RCL)

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF CIVIL DISCOVERY ORDER

Having already been afforded a full factfinding at the administrative level, the National Association of Postal Supervisors ("Association") nonetheless seeks full-blown discovery in this challenge under a narrow *ultra vires* theory to the Postal Service's compensation decision that followed that fact-finding process. Neither the Postal Reorganization Act (the "Act"), this Court's limited scope of review of allegedly *ultra vires* actions, nor existing D.C. Circuit authority supports discovery in this case.

As framed by the D.C. Circuit following the appeal of this Court's prior dismissal of this action, this Court's review on remand is limited to assessing whether the Postal Service considered certain factors that the Act required it to consider in setting compensation, not to judge the resulting decision reached by the Postal Service. If the statutorily mandated factors were considered by the Postal Service, then its decision was not *ultra vires* and judgment should be granted to the Postal Service. If the Court determines that a statutorily mandated factor was not considered, then the case should be remanded to the Postal Service to consider that factor and to determine what, if any, effect it has on the Postal Service's compensation decision. This Court "'cannot substitute

its own judgment of what is adequate and reasonable for that of the Postal Service,'" and, therefore, has no role but to determine whether the Postal Service considered the factors that the D.C. Circuit has held the Postal Service was statutorily required to consider. *Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv*. ("*NAPS II*"), 26 F.4th 960, 973 (D.C. Cir. 2022).

This Court's review, therefore, is necessarily limited to the administrative record assembled by the Postal Service, which presumptively consists of all materials compiled by the agency "that were 'before the agency at the time the decision was made.'" *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The record assembled by the Postal Service, moreover, is presumed complete, and Plaintiff has made no attempt to present "clear evidence to the contrary" as would be required to rebut that presumption. *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 219 (D.C. Cir. 2012); *see also Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (to establish that an administrative record should be supplemented, a party must show that documents considered by agency decisionmakers were not included as part of the administrative record certified by the agency).

Nor has Plaintiff attempted to meet the narrow exception for discovery in a record review case, which would require "a strong showing of bad faith or improper behavior" by the Postal Service or that "the record is so bare that it prevents effective judicial review." *Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 328 (D.C. Cir. 1998). In seeking discovery, the Association instead is attempting to improperly supplement that record with information that was not part of the Postal Service's decision-making process and thereby obtain *de novo* review of the Postal Service's compensation decision, contrary to the deference mandated by the D.C. Circuit's decision governing this remand. For the reasons set forth below, this Court should reject the

Association's request for discovery and direct the parties to confer on a schedule for summary judgment briefing on the legal issues before the Court based on the administrative record.

BACKGROUND

I. This Court's Dismissal of the Complaint and Reversal by the D.C. Circuit

Although re-characterized by Plaintiff during litigation as asserting a claim of non-statutory review, the Complaint actually filed in this action purported to assert a private cause of action against the Postal Service under the Act. (Compl. ¶ 1, alleging a violation of the Postal Reorganization Act). The terms "non-statutory review" or "ultra vires" do not appear in the Complaint and were first asserted by Plaintiff in response to Defendant's motion to dismiss, which had argued that there was no express or implied private cause of action under the Act. (Def. Mot., ECF No. 11 at 7-15; Pl. Opp., ECF No. 16 at 9-19).

In a Memorandum Opinion and Order dated July 17, 2020, this Court granted the motion to dismiss and entered judgment for the Postal Service. (ECF Nos. 22 and 23) As set forth more fully in that decision, this Court held that the provisions of the Act cited in the Complaint did not provide an express or implied cause of action against the Postal Service, that the Postal Service was exempt from review under the Administrative Procedure Act, and that this case was not susceptible to non-statutory review. (ECF No. 22, Mem. Op. at 6-12) In addition, this Court held that even if the provisions of the Act cited in the Complaint were susceptible to non-statutory review, the Association had failed to sufficiently plead that the Postal Service acted *ultra vires*. (*Id.* at 12-14)

On appeal,[1] the Association abandoned any contention that the statutory provisions at issue confer a private cause of action. Instead, the Association relied solely on non-statutory review as the basis for its claims. In its decision, the D.C. Circuit began by setting forth the familiar standard of review applicable to consideration of a motion to dismiss: "We must 'assume the truth of all the plaintiff's well-pleaded factual allegations in the complaint' and 'draw[] all reasonable inferences in plaintiff's favor.'" *NAPS II*, 26 F.4th at 970.

The D.C. Circuit held, as an initial matter, that the statutory provisions at issue are sufficiently clear and mandatory to allow for *ultra vires* review, and that Congress had not foreclosed judicial review in the statute. *Id.* at 970-72. The Court nevertheless acknowledged that "'[t]he history of the Postal Act indicates that Congress contemplated a very restricted judicial role in the Postal Service's compensation decisions[.]'" *Id*. at 972 (quoting *Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv.*, 602 F.2d 420, 432 (D.C. Cir. 1979) ("*NAPS I*"). It further noted that "we remain mindful that '[r]eviewability and the scope of review are two separate questions'" and that "'[t]he Postal Service has broad discretion in setting compensation levels.'" *Id*. (quoting *NAPS I*, 602 F.2d at 432).

Assuming the truth of the Association's factual allegations, the D.C. Circuit next addressed each of the Association's claims to determine whether they plausibly stated a claim for *ultra vires* review.

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[1] The Association did not appeal the dismissal of Count III of the Complaint. *NAPS II*, 26 F.4th at 969. That count had alleged violations of a statutory provision providing that "It shall be the policy of the Postal Service to provide compensation, working conditions, and career opportunities that will assure the attraction and retention of qualified and capable supervisory and other managerial personnel . . . [and] to establish and maintain continuously a program for all such personnel that reflects the essential importance of a well-trained and well-motivated force to improve the effectiveness of postal operations[.]" 39 U.S.C. § 1004(a).

A. Private Sector Comparability Requirement (Count I)

Section 101(c) directs the Postal Service to "achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy." 39 U.S.C. § 101(c). Section 1003(a) similarly provides that "[i]t 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 of the economy." 39 U.S.C. § 1003(a).

The D.C. Circuit held that these provisions established mandatory obligations and that, to meet them, "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. Additionally, "[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 973-74. Finally, "the statute's directive that the Postal Service 'maintain' comparable compensation entails some showing that it is keeping pace with rising private sector rates." *Id*. at 974. The Association alleged that the Postal Service did not study private compensation or benefits before issuing its Field Pay Package and that its allegedly belated inquiry into "pay rates for eight out of a thousand positions included in the Field Pay Package" failed to constitute a good faith effort at a comparability determination. *Id.* at 973.

The scope of review on remand is thus limited to whether the actual record—not the record as characterized by the Association in its pleading—demonstrates that the Postal Service considered private sector compensation and benefit rates and reflects a good faith determination by the Postal Service that the rates are comparable. "Within these bounds, the Postal Service has broad discretion to 'achieve and maintain' comparability to the private sector using the means it

sees fit. [T]he statute does not specify how similar the rates must be, the manner in which rates are compared, or the method of study of private sector rates." *Id*. at 974.

B. Pay Differential Requirement (Count II)

Section 1004(a) requires that there be "adequate and reasonable differentials in rates of pay between employees in the clerk and carrier grades in the line work force and supervisory and other managerial personnel." 39 U.S.C. § 1004(a). As explained by the D.C. Circuit, the Association stated a claim for *ultra vires* action by alleging that the Postal Service provided no differential:

> In alleging the Postal Service provided *no* differential in pay for thousands of supervisory employees, the Association thus states a claim that the Postal Service has exceeded its statutory authority. It is the responsibility of the Postal Service to indicate that it has established "*some* differential." Here, such a showing has not been made.

NAPS II, 26 F.4th at 973 (emphasis in original).

Whether "such a showing" has been made by the Postal Service—that is, whether some deferential was present—will be reflected in the administrative record. The D.C. Circuit made clear that the scope of review and potential remedies are extremely limited: "Though a differential must be present, the Postal Service has broad discretion to decide its size and how it is computed. . . . Accordingly, 'a court can compel the Postal Service to *consider* and *fulfill* the differential requirement, but it cannot substitute its own judgment of what is adequate and reasonable for that of the Postal Service.'" *NAPS II*, 26 F.4th at 973 (quoting *NAPS I*, 602 F.2d at 435) (emphasis in original).

C. Consultation Requirement (Counts IV and V)

As to the Association's claims that the Postal Service failed to consult with it regarding pay policies relating to its members who are (1) managers and supervisors at the Area and Headquarters levels or (2) postmasters, the D.C. Circuit held that consultation with both groups is

required by 39 U.S.C. § 1004(b). *Id*. at 974-80. The Court also found that the Association stated a claim for *ultra vires* review based on its allegation that the Postal Service did not provide the Association with reasons for rejecting its recommendations in the final pay decision.[2] *Id*. at 980.

The D.C. Circuit concluded that the Association "plausibly alleges that the Postal Service exceeded the scope of its delegated authority on multiple counts." *Id*. at 980.

II. Service of Administrative Record

On November 15, 2022, following the D.C. Circuit's remand and pursuant to the scheduling order proposed jointly by the parties and adopted by the Court (ECF No. 31), the Postal Service served upon the Association the Administrative Record of the Pay Package Decision for Field Employee and Administrative Schedule ("EAS") employees for Fiscal Years 2016 through 2019. The Postal Service also filed simultaneously a certified index of the administrative record (ECF No. 34)[3] The record comprises over 2,100 pages and includes:

- Correspondence documenting the Postal Service's consultation with the Association in developing the pay package, in compliance with 39 U.S.C. § 1004(c)-(e);

- The record of proceedings before a fact-finding panel of the Federal Mediation and Conciliation Service, convened at the Association's request pursuant to 39 U.S.C. § 1004(f), including the transcript of a two-day evidentiary hearing held before the

[2] This allegation is set forth in paragraphs 53 and 54 of the Complaint but does not correspond to any of the numbered counts.

[3] The Association argues that the Postal Service is precluded from contending that this case should be limited to review of the administrative record when it failed to follow the procedure set forth in Local Civil 7(n)(1) when it filed its motion to dismiss, which the Association characterizes as a concession by the Postal Service that record review was not applicable. (Mot. at 6-7) This argument is specious. First, the Association failed to assert non-statutory review in the Complaint as a basis for its claims, and it did not raise this theory of judicial review until it filed its opposition to the Postal Service's motion to dismiss. Second, the issues raised in the Postal Service's motion to dismiss were purely legal (the absence of a private cause of action and failure to plausibly plead a cognizable claim) and could be resolved based solely on the allegations in the Complaint. *See, e.g., Arab v. Blinken*, Civ. A. No. 21-1852 (BAH), 2022 U.S. Dist. LEXIS 73310 at *9 n.2 (D.D.C. Apr. 21, 2022) (compliance with Local Civil Rule 7(n)(1) not required when the administrative is not necessary for the court's decision).

panel on December 10-11, 2018, approximately 70 exhibits submitted to the panel, and pre-hearing and post-hearing briefs;

- The fact-finding panel's 30-page Report and Recommendations issued April 30, 2019, which addressed the same complaints raised by the Association here regarding the adequacy of the differential in pay between supervisors and non-supervisors, and the comparability to the private sector of the pay package's compensation and benefits;

- The Postal Service's final pay package decision issued May 15, 2019 (Exhibit A), which addressed in detail the panel's findings and recommendations and explained its reasons for accepting or rejecting each of the panel's recommendations.

(ECF No. 34)

The administrative record documents the formal, statutorily-mandated process that resulted in the final Pay Package Decision at issue for Field EAS employees for Fiscal Years 2016 through 2019. In addition to consultation and participation procedures for recognized supervisory, postmasters, and managerial organizations, 39 U.S.C. § 1004(c)-(e), Congress also provided for dispute resolution procedures. Specifically, if a recognized organization believes that the Postal Service has acted inconsistently with the statute, it may request that the Federal Mediation and Conciliation Service convene a fact-finding panel and that panel will hold a hearing and make recommendations to the Postal Service. *Id*. § 1004(f). The Postal Service is required to "give full and fair consideration to the panel's recommendation," but it is not required to accept any particular recommendation of the panel. *Id*. § 1004(f)(5).

This dispute resolution process was utilized here. As part of that process, the Association submitted a pre- and post-hearing brief, presented exhibits as part of the hearing and as attachments to its briefs, and offered testimony from multiple witnesses, including its own compensation expert. For its part, the Postal Service also submitted pre- and post-hearing briefs, presented its own exhibits, and offered its own witnesses, including a compensation expert and a separate benefits expert that testified as to the Postal Service's compliance with the statutory requirements

at issue here. In total, the Panel held a two-day hearing, the full transcript of which is contained in the Administrative Record, along with the Panel's 30-page Report and Recommendations and the Postal Service's final pay package decision in which it accepted some of the Panel's recommendations, and rejected others. In that decision, the Postal Service explained its reasons for accepting or rejecting each of the Panel's recommendations. The entire record of that statutorily-mandated process is part of the Administrative Record that has been compiled and served. (ECF No. 34)

ARGUMENT

I. The Association's Motion For Discovery As To Counts I And II Should Be Denied.

A. The Court's Review is Limited to the Administrative Record.

The Association's motion for discovery is premised on the assumption that, because its claims do not arise under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq*, the Court's review is not limited to the administrative record and it is entitled to discovery. This is incorrect. Courts can and do limit review of non-APA claims to the administrative record when it is appropriate to do so. *See Bellion Spirits LLC v. United States*, 335 F. Supp. 3d 32, 41-43 (D.D.C. 2018) (denying plaintiffs' motion to file extra-record evidence as to non-APA claims so as to accord appropriate deference to agency's interpretation of scientific information); *Chiayu Chang v. Citizenship & Immigr. Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017) (finding that "discovery on plaintiffs' equal protection and due process claims is not appropriate here"); *see generally Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 549 (1978) ("when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding'" and whether it is "'sustainable on the administrative record made'").

Here, the Association exercised its right under 39 U.S.C. § 1004(f) to a fact-finding proceeding through which it submitted pre- and post-hearing briefs, offered testimony, and introduced exhibits in support of its position on the same issues before this Court. The Postal Service did the same. Following a recommendation from the Panel, as contemplated by 39 U.S.C. § 1004(f)(3)(B), and after taking those recommendations into consideration, the Postal Service made its final decision, which is left to its discretion under 39 U.S.C. § 1004(f)(5). That decision, as it was statutorily required to do, explained the Postal Service's reasons for accepting or rejecting each of the Panel's recommendations. (Ex. A hereto)

Given the "very restricted judicial role in the Postal Service's compensation decisions," *NAPS II*, 26 F.4th at 972, and the existence of a presumptively complete administrative record that will enable effective judicial review, the Court's review of the *ultra vires* claims in Counts I and II is appropriately limited to the administrative record here. Discovery should not be allowed for the same reasons that apply in APA record-review cases: "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Indeed, the rationale for limiting review to the administrative record weighs even more strongly here, where judicial review is being exercised under the "extraordinary" and "extremely limited scope" of non-statutory review to determine whether the Postal Service acted *ultra vires*. *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984); *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988). Non-statutory review "represents a more difficult course for [the Association] than would review under the APA." *Trudeau v. FTC*, 456 F.3d 178, 190 (D.C. Cir. 2006). It would be illogical to conclude that the "extraordinary" and "extremely limited"

remedy of non-statutory review would entitle the Association to broader review than it would receive under the APA.

The D.C. Circuit's decision in this case does not suggest otherwise. Indeed, the D.C. Circuit's decisions in this case and in *NAPS I* emphasize repeatedly the "very restricted" scope of review of the Postal Service's compensation decisions and the Postal Service's "broad discretion" in making those decisions. *NAPS II*, 26 F.4th at 972; *NAPS I*, 602 F.2d at 432. As the D.C. Circuit explained in reversing Judge Green's ruling in *NAPS I* directing the Postal Service to implement certain salary increases and to maintain a specified salary differential:

> This court is in no position to assess and to weigh the numerous and sundry considerations the Postal Service must address in fulfilling its statutory duty to classify and fix the compensation and benefits of its employees.
>
> Our holding that the Postal Service has broad discretion in setting compensation levels for supervisory and other managerial employees is consistent with the traditional reluctance of courts to scrutinize lawful agency decisions on internal management matters. This deference derives from two well-considered and complementary principles: that administrative agencies must be free from undue encumbrances to perform wholly managerial functions assigned to them by Congress, and that courts are ill-equipped to run the administrative agencies of government. That deference is appropriate here.

NAPS I, 602 F.2d at 432 (citations omitted).

The D.C. Circuit reiterated in the present case that the Postal Service has "broad discretion" in determining the appropriate pay differential and in maintaining comparability to the private sector. *NAPS II*, 26 F.4th at 973-74. Non-statutory review of the Association's claims is limited to determining whether there has been "a showing" that the Postal Service has "considered" and "fulfilled" these requirements. *Id*. Such a showing can be made only by reference to the administrative record, which, by definition, consists of the record that was before the Postal Service in this decision-making process. In seeking discovery, the Association is attempting to improperly supplement that record with information that the Postal Service never considered and

thereby obtain *de novo* review of the Postal Service's compensation decisions, contrary to the deference mandated by *NAPS I* and *II*. *Cf. Bellion*, 335 F. Supp. 3d at 43 ("The Court's evaluation of the Agency's decision is not aided by considering evidence to which the agency was not privy.").

Indeed, it is well-established that "[g]oing beyond the administrative record presented by the agency when reviewing its action is only done in exceptional cases." *Cape Hatteras Access Preservation All. v. United States*, 667 F. Supp. 111, 114-15 (D.D.C. 2009) (citing *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)). This rule applies with "maximum force" where, as here, the "substantive soundness of the agency's decision is under scrutiny[.]" *Id*. The three exceptions to this rule are: (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision; (2) the district court needed to supplement the record with background information in order to determine whether the agency considered all of the relevant factors; or (3) the agency failed to explain administrative action so as to frustrate judicial review. *District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015). The Association does not and cannot assert that any of these exceptions apply here.[4]

The Association cites two cases in which it contends that discovery was allowed in an action alleging that the Postal Service acted *ultra vire*s. (Mot. at 2) Neither of the cited cases supports the Association request for discovery here. In *New York v. Biden*, Civ. A. No. 20-2340 (EGS), 2022 WL 5241880 (D.D.C. Oct. 6, 2022), where the plaintiffs challenged alleged policy changes affecting Postal Service delivery operations, there was no administrative record of the

[4] Were the Association to change its position and attempt to claim that its requested discovery is justified by the need "to determine whether the agency considered" the market comparability and pay differential requirements, such a contention would be baseless as the Postal Service explicitly considered and addressed these factors in its final pay decision. *See* Exhibit A at AR2123-AR2125.

policy changes at issue.[5] In contrast, the present case has an extensive record of a formal, statutorily-mandated process in which the Association fully participated and the legal requirements it raises were fully addressed. *New York*, therefore, does not establish an entitlement to discovery in all *ultra vires* actions, but simply falls within the exception to the rule against discovery in record review cases when the absence of a record would preclude effective judicial review.

The other case cited by the Association is the previous case it brought against the Postal Service, *NAPS I*, 602 F.2d at 427, where the D.C. Circuit noted in passing that unspecified discovery "ensued" prior to the district's court's judgment from which the Postal Service had appealed. This hardly supports the Association's request for discovery, because after recounting that bit of procedural history the D.C. Circuit proceeded to vacate portions of the district court's judgment for having "adopted too narrow a view of the Postal Service's discretion under section 1004." *Id*. at 441. If anything, this sequence of events supports the Postal Service's position that discovery is inappropriate here.

Ultimately, the question here is not whether discovery is never appropriate in *ultra vires* challenges (a position the Postal Service is not advancing), but whether discovery is appropriate for the limited review at issue here as directed by the D.C. Circuit's decision governing this remand. As explained above, that review is properly conducted based on the record before the Postal Service, not a new record developed in litigation.

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[5] Indeed, one of the Postal Service's arguments was that the lawsuit improperly bypassed the established statutory process in 39 U.S.C. § 3662(a) for lodging certain types of legal complaints regarding the Postal Service with the Postal Regulatory Commission. *See New York*, 2022 WL 5241880, at *8. The filing of a complaint with the Commission results in the creation of an administrative record, which forms the basis for any subsequent judicial review of the Commission's final order or decision. 39 U.S.C. § 3663.

B. The Association Has No Need for Discovery and Instead is Effectively and Improperly Seeking *De Novo* Judicial Review of Substantive Compensation Issues.

The broad and intrusive discovery that the Association is contemplating— "the opportunity to obtain additional facts from the Postal 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," [6] Mot. at 7-8—is completely at odds with the limited scope of review and the deference that must be accorded to the Postal Service in making pay and compensation decisions regarding its workforce.

The Association's motion relies on a mischaracterization of the D.C. Circuit's decision as "agree[ing]" with the Association's position and about what the Court has "found . . . thus far." (Mot. at 12-13) To be clear, the D.C. Circuit made no findings but only assumed the truth of the Association's allegations within the context of a Rule 12 motion to determine whether the Association stated a non-statutory claim. *NAPS II*, 26 F.4th at 970; *see also id.* at 980 (the Association "plausibly alleges" *ultra vires* claims). For example, the Association claims that the Court "agreed" that the Postal Service's compensation study was inadequate based on the Association's allegation that it examined "only eight of 1,000 positions." (Mot. at 12) However, because the Association's appeal was decided at the motion to dismiss stage, the Court did not

[6] The Association's stated intention of taking the depositions of Postal Service officials regarding their internal deliberations is especially inappropriate. As this Court stated in *Dallas Safari Club v. Bernhardt*, 518 F. Supp. 3d 535 (D.D.C. 2021): "[E]ven if the court were not limited to review of the administrative record, Plaintiffs would not be automatically entitled to such evidence. . . . The Supreme Court's bar on 'prob[ing] the mental processes of' agency officials predates the passage of the APA, *United States v. Morgan*, 313 U.S. 409, 422, (1941), and for the reasons that follow, Plaintiffs have not shown that such an intrusion is warranted in this case." *Dallas Safari Club*, 518 F. Supp. 3d at 541.

have the benefit of the administrative record which demonstrates that the eight positions represent approximately 21,000 actual EAS jobs, or 68% percent of Association-represented EAS jobs recognized by the Postal Service. (Ex. B hereto, AR1911)

As will be addressed more fully at the summary judgment stage, the Postal Service maintains that it satisfied the statutory requirements identified by the D.C. Circuit, and will so demonstrate based on the administrative record developed as part of the fact-finding process that was undertaken at the administrative level. The Association can similarly contend, again based on the administrative record, that the Postal Service failed to consider the factors identified by the appellate court.

The Association's motion also makes assertions about "information . . . not contained anywhere in the administrative record," or about what the Postal Service "has not shown," or about "questions [that] cannot be answered from the 'administrative record.'" (Mot. at 8-9, 12) In making these assertions, however, the Association is conflating its alleged need for discovery with the ultimate question to be decided on the merits of its claims at summary judgment briefing: whether the administrative record shows that the Postal Service acted within its statutory authority by properly and adequately considering the market comparability and supervisory differential requirements. For example, the Association contends that it needs extensive, individualized electronic pay data information to make its argument regarding the pay differential requirement in 39 U.S.C. § 1004(a). (Mot. at 8). The Association does not contend that this data was part of the factfinding process or was considered by the Postal Service in making its pay decision, and that it therefore should have been included in the administrative record. Rather, the Association is asserting that the Postal Service was legally required to consider this data to comply with section

1004(a). However, that is not a justification for discovery but rather one of the ultimate issues on the merits for the Court to decide after summary judgment briefing.

Further, contrary to the Association's suggestion, the D.C. Circuit did not hold that a differential is required between each supervisor and each craft employees that he or she supervises. Rather, the D.C. Circuit stated merely that "some" differential is required and that the Association had stated a claim by "alleging the Postal Service provided *no* differential in pay for thousands of supervisory employees." *NAPS II*, 26 F.4th at 973 (emphasis in original). On remand "it is the responsibility of the Postal Service to indicate that it has established some differential," *id*., and the Postal Service can and will do so based on the administrative record. The Association thus has no need for discovery on this issue or any other.[7]

In seeking to take discovery and introduce new experts and other information that the Postal Service never considered, the Association has made clear that its intent to is to effectively seek *de novo* review in this Court. However, that is not this Court's role, as the D.C. Circuit made clear in *NAPS I* and *II*. The Association has already had the opportunity to present its case to the Factfinding Panel and the Postal Service on the substantive pay and compensation issues underlying this dispute, as part of the statutorily mandated consultation process. It is understandable that the Association may be dissatisfied with the Postal Service's failure to agree with or accept all its recommendations and requests, but Congress gave the Postal Service

[7] The Association's suggestion that it needs discovery as to its claim that the Postal Service failed to provide the Association with reasons for rejecting its recommendations is particularly meritless. (Mot. at 7) Either the Postal Service did or did not provide reasons for accepting or rejecting the Association's recommendations as required by the statute, and that narrow question can be decided based on the administrative record. As the Postal Service will demonstrate when it briefs the merits, the administrative record shows that, in addition to the final pay package decision (Exhibit A hereto), the Postal Service provided the Association with the reasons for its positions and its rejection of the Association's recommendations throughout the consultation and administrative fact-finding process, including the hearing and briefing.

considerable discretion to make such pay decisions. The Association is entitled to review of its claims that the Postal Service exceeded its statutory authority, but this "very restricted" review is limited to the administrative record. *NAPS II*, 26 F.4th at 972.

II. The Association's Motion for Discovery As to Count IV Should Be Denied.

The D.C. Circuit held that the Association stated a cognizable non-statutory claim in Count IV that the Postal Service has failed to consult with Association-represented supervisors and managers at the Area and Headquarters levels as to pay and compensation. The Postal Service had not previously recognized the Association as the representative of these employees based on a 1978 Memorandum of Understanding between the Postal Service and the Association in which it was agreed that the Association would be recognized as the representative of thousands of non-supervisory field positions, and that the Association would not represent personnel, including supervisors, at the Area and Headquarters levels. This agreement expired by its terms three years later, in 1981, but the parties continued to adhere to it, which is why the Postal Service did not consult with the Association as to Area and Headquarters pay packages. *See NAPS II*, 26 F.4th at 976 ("[The Association] represented at oral argument that no such 'agreement between the Postal Service and the supervisors' organization' has been in effect since 1981. The Postal Service did not dispute this claim.").

In light of the Association's position in this litigation that it no longer wishes to adhere to the Memorandum of Understanding, the duty to consult reverts to the statutory requirement that the D.C. Circuit made clear includes all supervisors, regardless of alignment to Area and Headquarters levels. So far as the Postal Service is aware there is no known disagreement as to

who those employees are, but any potential disputes would be resolved by applying the definition of "supervisor' as set forth in the National Labor Relations Act, 29 U.S.C. §§ 151-166.[8]

Accordingly, the Association has no need to engage in discovery regarding Count IV, and its motion should be denied.[9]

CONCLUSION

For these reasons, the Association's motion for a civil discovery order should be denied.[10]

Respectfully submitted,

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[8] "[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

[9] Based on the D.C. Circuit's decision that the Association's postmaster members "plainly fall into the broad category of 'supervisory and other managerial employees' the Association may represent," it is not seeking discovery as to Count V of the Complaint but merely reserving the right to do so "[i]f the Postal Service continues to refuse to recognize NAPS's representation of postmasters." (Mot. at 7 n.4) Accordingly, the Postal Service is not addressing Count V in this opposition.

[10] To the extent the Court grants the Association's motion or otherwise permits discovery to proceed, thereby enabling NAPS to supplement the administrative record compiled through the process mandated by 39 U.S.C. § 1004(f), the Postal Service reserves the right to seek and take discovery of its own.