

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5289

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

National Association of Postal Supervisors,
Plaintiff-Appellant,

v.

United States Postal Service,
Defendant-Appellee,

United Postmasters and Managers of America,
Intervenor Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

Brief for Intervenor Defendant-Appellee

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Certificate as to Parties, Rulings, and Related Cases

Parties

Appellant is the National Association of Postal Supervisors (“NAPS”). Appellee is the United States Postal Service (“Postal Service”). The United Postmasters and Managers of America (“UPMA”) intervened in the district court and is also an appellee here. There were no amici in the district court not, at the time of filings, before this court.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, NAPS certifies that it is a nonstock corporation incorporated in Virginia, that it is not a publicly held corporation, that it does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Rulings Under Review

The ruling under review is the district court’s order of July 17, 2020 (Judge Royce C. Lamberth), JA 53, and accompanying memorandum opinion issued the same day, JA 39. The memorandum opinion is published at *National Association of Postal Supervisors v. U.S. Postal Service*, No. 1:19-CV-2236-RCL, 2020 WL 4039177 (D.D.C. July 17, 2020).

Related Cases

The case on review has not previously been before this Court or any other, save the district court from which it originated. The undersigned counsel is unaware of any related cases currently pending in this Court or any other court

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Glossary of Abbreviations

PRA – Postal Reorganization Act

NAPS – National Association of Postal Supervisors

UPMA – United Postmasters and Managers of America

USPS – United States Postal Service

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 39 U.S.C. § 409(a), which states that “[e]xcept as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.” The court also had jurisdiction under 28 U.S.C. § 1339, which states that “[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.” This Court has jurisdiction under 28 U.S.C. § 1291, because this appeal is from the district court’s grant of the Postal Service and UPMA’s motions to dismiss on July 17, 2020, which disposed of all parties’ claims. Appellant filed its notice of appeal on September 11, 2020.

STATEMENT OF THE ISSUE

Whether the Postal Service’s refusal to recognize NAPS’s representation of Postmasters violates 39 U.S.C. § 1004(b)?

PERTINENT STATUTES

39 U.S.C. § 1004. Supervisory and other managerial organizations

(a) 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; to provide 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; 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; and to promote

the leadership status of such personnel with respect to rank-and-file employees, recognizing that the role of such personnel in primary level management is particularly vital to the process of converting general postal policies into successful postal operations.

(b) The Postal Service shall provide a program for consultation with recognized organizations of supervisory and other managerial personnel who are not subject to collective-bargaining agreements under chapter 12 of this title [39 USCS §§ 1201 et seq.]. Upon presentation of evidence satisfactory to the Postal Service that a supervisory organization represents a majority of supervisors, that an organization (other than an organization representing supervisors) represents at least 20 percent of postmasters, or that a managerial organization (other than an organization representing supervisors or postmasters) represents a substantial percentage of managerial employees, such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees.

(c) (1) The Postal Service and the supervisors' organization shall, unless otherwise mutually agreed to, meet at least once each month to implement the consultation and direct participation procedures of subsection (b) of this section.

(2) (A) At least 7 days before each meeting, each party shall—

(i) provide notice of agenda items, and

(ii) describe in detail the proposals such party will make with respect to each such item.

(B) Grievances of individual employees shall not be matters which may be included as agenda items under this paragraph.

(d) (1) In order to facilitate consultation and direct participation by the supervisors' organization in the planning and development of programs under subsection (b) of this section which affect members of the supervisors' organization, the Postal Service shall—

(A) provide in writing a description of any proposed program and the reasons for it;

(B) give the organization at least 60 days (unless extraordinary circumstances require earlier action) to review and make recommendations with respect to the program; and

(C) give any recommendation from the organization full and fair consideration in deciding whether or how to proceed with the program.

(2) If the Postal Service decides to implement a program described in paragraph (1) of this subsection, the Postal Service shall before such implementation—

(A) give the supervisors' organization details of its decision to implement the program, together with the information upon which the decision is based;

(B) give the organization an opportunity to make recommendations with respect to the program; and

(C) give such recommendations full and fair consideration, including the providing of reasons to the organization if any of such recommendations are rejected.

(3) If a program described in paragraph (1) of this subsection is implemented, the Postal Service shall—

(A) develop a method for the supervisors' organization to participate in further planning and development of the program, and

(B) give the organization adequate access to information to make that participation productive.

(4) The Postal Service and the supervisors' organization may, by agreement, adopt procedures different from those provided by this subsection.

(e) (1) The Postal Service shall, within 45 days of each date on which an agreement is reached on a collective bargaining agreement between the Postal Service and the bargaining representative recognized under section 1203 of this title which represents the largest number of employees, make a proposal for any changes in pay policies and schedules and fringe benefit programs for members of the supervisors' organization which are to be in effect during the same period as covered by such agreement.

(2) The Postal Service and the supervisors' organization shall strive to resolve any differences concerning the proposal described in paragraph (1) of this subsection under the procedures provided for, or adopted under, subsection (d) of this section.

(3) The Postal Service shall provide its decision concerning changes proposed under paragraph (1) of this subsection to the supervisors' organization within 90 days following the submission of the proposal.

(f) (1) If, notwithstanding the mutual efforts required by subsection (e) of this section, the supervisors' organization believes that the decision of the Postal Service is not in accordance with the provisions of this title, the organization may, within 10 days following its receipt of such decision, request the Federal Mediation and Conciliation Service to convene a factfinding panel (hereinafter referred to as the "panel") concerning such matter.

(2) Within 15 days after receiving a request under paragraph (1) of this subsection, the Federal Mediation and Conciliation Service shall provide a list of 7 individuals recognized as experts in supervisory and managerial pay policies. Each party shall designate one individual from the list to serve on the panel. If, within 10 days after the list is provided, either of the parties has not designated an individual from the list, the Director of the Federal Mediation and Conciliation Service shall make the designation. The first two individuals designated from the list shall meet within 5 days and shall designate a third individual from the list. The third individual shall chair the panel. If the two individuals designated from the list are unable to designate a third individual within 5 days after their first meeting, the Director shall designate the third individual.

(3) (A) The panel shall recommend standards for pay policies and schedules and fringe benefit programs affecting the members of the supervisors' organization for the period covered by the collective bargaining agreement specified in subsection (e)(1) of this section. The standards shall be consistent with the policies of this title, including sections 1003(a) and 1004(a) of this title.

(B) The panel shall, consistent with such standards, make appropriate recommendations concerning the differences between the parties on such policies, schedules, and programs.

(4) The panel shall make its recommendation no more than 30 days after its appointment, unless the Postal Service and the supervisors' organization agree to a longer period. The panel shall hear from the Postal Service and the supervisors' organization in such a manner as it shall direct. The cost of the panel shall be borne equally by the Postal Service and the supervisors' organization.

(5) Not more than 15 days after the panel has made its recommendation, the Postal Service shall provide the supervisors' organization its final decision on the matters covered by factfinding under this subsection. The Postal Service shall give full and fair consideration to the panel's recommendation and shall explain in writing any differences between its final decision and the panel's recommendation.

(g) Not earlier than 3 years after the date of the enactment of this subsection [enacted Aug. 8, 1980], and from time to time thereafter, the Postal Service or the supervisors' organization may request, by written notice to the Federal Mediation and Conciliation Service and to the other party, the creation of a panel to review the effectiveness of the procedures and the other provisions of this section and the provisions of section 1003 of this title. The panel shall be designated in accordance with the procedure established in subsection (f)(2) of this section. The panel shall make recommendations to the Congress for changes in this title as it finds appropriate.

(h) (1) In order to ensure that postmasters and postmasters' organizations are afforded the same rights under this section as are afforded to supervisors and the supervisors' organization, subsections (c) through (g) shall be applied with respect to postmasters and postmasters' organizations—

(A) by substituting "postmasters' organization" for "supervisors' organization" each place it appears; and

(B) if 2 or more postmasters' organizations exist, by treating such organizations as if they constituted a single organization, in accordance with such arrangements as such organizations shall mutually agree to.

(2) If 2 or more postmasters' organizations exist, such organizations shall, in the case of any factfinding panel convened at the request of such organizations (in accordance with paragraph (1)(B)), be jointly and severally liable for the cost of such panel, apart from the portion to be borne by the Postal Service (as determined under subsection (f)(4)).

(i) For purposes of this section—

(1) “supervisors’ organization” means the organization recognized by the Postal Service under subsection (b) of this section as representing a majority of supervisors;

(2) “members of the supervisors’ organization” means employees of the Postal Service who are recognized under an agreement between the Postal Service and the supervisors’ organization as represented by such organization;

(3) “postmaster” means an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors;

(4) “postmasters’ organization” means an organization recognized by the Postal Service under subsection (b) as representing at least 20 percent of postmasters; and

(5) “members of the postmasters’ organization” shall be considered to mean employees of the Postal Service who are recognized under an agreement—

(A) between the Postal Service and the postmasters’ organization as represented by the organization; or

(B) in the circumstance described in subsection (h)(1)(B), between the Postal Service and the postmasters’ organizations (acting in concert) as represented by either or any of the postmasters’ organizations involved.

STATEMENT OF CASE

1. Statement of Facts

Plaintiff-Appellant (“NAPS”) is an organization recognized by the United States Postal Service (“Postal Service”) as an organization representing supervisory personnel employed by the Postal Service. JA 06. NAPS claims to represent approximately 27,000 active and retired Executive and Administrative Schedule employees. JA 6, Compl. ¶ 2. The Postal Service sent NAPS a proposed

pay and benefits package for fiscal years 2016-19 in September 2017. JA 9, Compl. ¶¶ 16-17. For the following nine months, NAPS provided recommendations to the pay package. JA 9, Compl. ¶ 18. On June 28, 2018, the Postal Service issued its final decision. JA 9, Compl. ¶ 19. Dissatisfied with the decision, NAPS requested a factfinding panel to review the proposal in accordance with 39 U.S.C. § 1004(f). JA 10, Compl. ¶ 20.

Intervenor Defendant-Appellee (“UPMA”) represents the highest share of postmasters in the country. JA 22, Compl. ¶ 76. UPMA is recognized as a postmasters organization by the Postal Service for purposes of pay consultations. On October 1, 2018, NAPS wrote to the Postal Service requesting that the Postal Service recognize NAPS’ right to represent postmasters with respect to pay consultations. JA 22, Compl. ¶ 78. The Postal Service responded on February 25, 2019, explaining “the Postal Service cannot lawfully recognize NAPS as a representative of postmasters in addition to its supervisors.” JA 23, ¶ 78.

2. Procedural History

NAPS filed its complaint in the district court on July 26, 2019. JA 2. The Postal Service filed a motion to dismiss on October 25, 2019. JA 32-38. UPMA filed an unopposed motion to intervene on November 7, 2019, moving to dismiss Count V of the complaint regarding NAPS’s representation of postmasters. JA 3; Unopposed Mot. to Intervene, Nov. 7, 2019, ECF. No. 14. The district court

granted the motion to intervene on December 3, 2019. JA 4; Order Granting Mot. to Intervene. The district court granted the Postal Service and UPMA's motions to dismiss on July 17, 2020. JA 39-53. NAPS filed a timely notice of appeal on September 11, 2020. JA 4.

SUMMARY OF ARGUMENT

UPMA's intervention is limited to the claim asserted in Count V of the Complaint. JA 26-28. The Postal Reorganization Act ("PRA") does not create a private remedy. Additionally, this Court should rely on the plain language of 39 U.S.C. § 1004(b) and legislative history to find that NAPS, as an organization recognized by the Postal Service to represent supervisors cannot also be recognized to represent postmasters. Moreover, this Court should also find NAPS has not acted ultra vires because the Postal Service did not violate a clear and mandatory directive. Accordingly, the Postal Service's interpretation of its governing statute is entitled to deference.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss for failure to state a claim. *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019). The Court "accept[s] plaintiff's well pleaded factual allegations as true and draw[s] all reasonable inferences in

plaintiff's favor.” *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 788 (D.C. Cir. 2019).

ARGUMENT

I. Postal Service's interpretation of 39 U.S.C. § 1004 is entitled to deference

The PRA does not contain congressional intent to create a private remedy. *Nat'l Postal Prof'l Nurses v. U.S. Postal Serv.*, 461 F. Supp. 2d 24, 33 (D.D.C. 2006). The provisions cited by NAPS, specifically 39 U.S.C. §§ 101, 1003, and 1004 do not create private rights of action nor are subject to APA review. *Mittleman v. Postal Reg. Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014). The clear intent of the PRA was to create “an independent executive agency” and “neither the language nor its legislative history shows that Congress intended to create a private remedy.” *Gaj v. U.S. Postal Serv.*, 800 F.2d 64, 68 (3d Cir. 1986).

The Supreme Court has held “time and again that courts must presume that a legislature says in a statute what it means.” *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Accordingly, the plain language of 39 U.S.C. § 1004(b) demonstrates that an organization representing at least 20 percent of postmasters, such as Intervenor, which is not an organization representing supervisors, may be recognized to represent the postmasters in pay and benefit consultations with the Postal Service. Under the plain language of the Act, an organization representing

supervisors in pay and benefit consultations cannot also represent postmasters. The

Act states, in part:

Upon presentation of evidence satisfactory to the Postal Service

. . . that an organization (**other than an organization representing supervisors**) represents at least 20 percent of **postmasters**, . . ., such organization or organizations shall be entitled to participate directly in the planning and development of pay policies and schedules, fringe benefit programs, and other programs relating to supervisory and other managerial employees.

39 U.S.C. § 1004(b) (emphasis added). The language, “other than an organization representing supervisors;” precludes NAPS by law from representing postmasters in pay consultations with USPS. 39 U.S.C. § 1004(b). Therefore, NAPS, as a recognized supervisor organization, is precluded from representing postmasters in pay consultations.

The legislative history further illustrates a distinction between a postmaster and a supervisor. *See* S. Rep. No. 108-86 (2003). “Postmaster” is defined as “an individual who is the manager in charge of the operations of a post office, with or without the assistance of subordinate managers or supervisors.” 39 U.S.C. § 1004(i)(3). Conversely, “[m]embers of the supervisors organization means employees of the Postal Service who are recognized under an agreement between the Postal Service and the supervisor’s organization as represented by such organization”. 39 U.S.C. § 1004(i)(2). NAPS alleges and acknowledges in the

Complaint that it is such a supervisors' organization. The postmaster title and job provide postmasters with the responsibility to manage a group of supervisors, managers and other employees and to ensure their postal operation runs efficiently. The Postal Reorganization Act, its legislative history, as well as established practice recognize the distinct and separate status of supervisor and postmaster organizations.

In addition to the plain language and legislative history, this Circuit has determined that 39 U.S.C. § 1004(a) affords the Postal Service significant discretion in setting compensation policies. *See Nat'l Ass'n of Postal Supervisors v. U.S. Postal Serv.*, 602 F.2d 420, 431-32 (1979). The trial court determined that 39 U.S.C. § 1004(b) did not establish a single, unanimous interpretation and as a result, the Postal Service is entitled to deference.¹ JA 52; *Nat'l Ass'n of Postal Supervisors*, 602 F.2d at 432 ("courts owe a measure of deference to the agency's own construction of its organic statute"). So long as the differential set by the agency is "adequate and reasonable," it is entitled to the agency's discretion. *Nat'l Ass'n of Postal Supervisors*, 602 F.2d at 433.

¹ UPMA agrees, as it must, that the Postal Service is entitled to deference as to its own construction of its governing statute. UPMA believes that the Postal Service's refusal to recognize NAPS as an organization that can represent postmasters for purposes of pay and benefit consultations with the Postal Service was in accordance with the plain language of the statute.

II. Even if the Provision are not subject to non-statutory review, NAPS has not plead the Postal Service Acted *Ultra Vires*

The trial court determined “ultra vires activity requires a violation of a clear and mandatory directive with only a single interpretation.” JA 50. The trial court correctly determined NAPS has not established how the Postal service violated a clear and mandatory directive in sections 101 or 1003. JA 51. Additionally, NAPS has not shown the Postal Service violated a clear and mandatory directive regarding compensation under 39 U.S.C. § 1004(b). Since there is no violation, the Postal Service’s interpretation of this provision is entitled to discretion. *See National Ass'n of Postmasters v. Runyon*, 821 F.Supp. 775, 777 (D.D.C. 1993) (the Postal Service “has ‘broad discretion’ in conducting its affairs under § 1004”).

CONCLUSION

For the aforementioned reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

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s/Jonathan Greenbaum
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March 18, 2021