IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BLACK, *et al.*,

Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION, *et al.*,

Defendants.

Case No. 2:09-cv-13616
Hon. Arthur J. Tarnow
Magistrate Judge Mona K. Majzoub

PENSION BENEFIT GUARANTY CORPORATION'S REPLY IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

Issue Presented

The sole issue here is whether plaintiffs have made the factual showing sufficient to satisfy one of the narrow exceptions to the general rule that discovery is not available in cases where the Court is asked to review federal agency action based on the administrative record compiled by the agency. Plaintiffs have sought far-reaching discovery based solely upon allegations that PBGC's Administrative Record is incomplete – allegations that Magistrate Judge Majzoub found were insufficient alone to justify discovery. As plaintiffs have not made any of the showings that the law plainly requires, they are entitled to no discovery.

Authority PBGC Chiefly Relies Upon

United States Supreme Court Cases

Florida Power & Light Co. v. Lorton, 470 U.S. 729 (1985)

Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc., 435 U.S. 519 (1978)

Camp v. Pitts, 411 U.S. 138 (1973)

Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 413 (1971)

United States Circuit Court Cases

Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1 (D.C. Cir. 1998)

Sierra Club v. Slater, 120 F.3d 623 (6th Cir. 1997)

Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978)

United States District Court Cases

Pac. Shores Subdivision, Cal. Water Dist. v. United States Army Corps of Eng'rs, 448 F. Supp. 2d 1 (D.D.C. 2006)

Sokaogon Chippewa Community v. Babbitt, 929 F. Supp. 1165 (W.D. Wis. 1996)

Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978)

Argument

I. The Magistrate Judge's Scheduling Order Did Not Unconditionally Grant Discovery and Overturn Decades of Established Case Law.

Through their Notice of a 30(b)(6) Deposition, plaintiffs seek broad and far-reaching discovery concerning everything that PBGC did in connection with the Delphi bankruptcy and the Delphi pension plans, only incidentally including PBGC's decision to seek termination of the Salaried Plan. Courts have consistently held, however, that in an action challenging an agency decision, plaintiffs are not allowed "to invoke all the benefits of the rules of civil procedure for an extensive search into the agency's decisional process."[1] The Supreme Court has created exceptions to the rule against discovery in administrative record cases, but they are extremely narrow and require detailed factual showings from plaintiffs who seek to invoke them.[2] Magistrate Judge Majzoub recognized this in her Scheduling Order and provided plaintiffs an opportunity to satisfy one or more of these exceptions. Despite plaintiffs' arguments to the contrary, the Scheduling Order did not grant plaintiffs blanket permission to fish through agency records, but rather states as follows:

> With respect to claim 4, Plaintiffs reserve the right to identify and to conduct discovery directed toward the alleged deficiencies in the administrative record. Defendant PBGC reserves the right to object to any discovery outside the administrative record, as Defendant PBGC does not agree that such discovery is permissible. All parties reserve

[1] *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 663 (D.D.C. 1978). *Accord Apex Const. Co. v. United States*, 719 F. Supp. 1144, 1147 (D. Mass. 1989) ("a plaintiff cannot institute discovery in a case involving review of an agency's action simply in the hope of finding something wrong in what the agency did").

[2] *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

> the right to seek judicial intervention on issues related to the scope of any discovery and the administrative record should that become necessary. [3]

Despite the Magistrate Judge's explicit order preserving PBGC's right to argue that plaintiffs were not entitled to any discovery and her direction that plaintiffs must go beyond their mere allegations that PBGC's Administrative Record is incomplete, plaintiffs have disregarded the requirement to *identify* supposed deficiencies in PBGC's administrative record. Rather, plaintiffs have presented to this Court nothing more than the same allegations that they made before the Magistrate Judge. As Magistrate Judge Majzoub correctly noted, the Court's review in this case is governed by the Administrative Procedures Act ("APA") which limits a court's review "to the administrative record in existence at the time of the decision under review."[4] Courts have consistently held that an agency is entitled to a strong presumption of regularity that it properly designated the complete administrative record.[5]

---

[3] Scheduling Order at ¶ 1, Mar. 28, 2011.

[4] Order Denying Mot. Sched. Order at 2, Mar. 28, 2011 (citing *Florida Power & Light Co. v. Lorton*, 470 U.S. at 743-44). *See also Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc*., 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *United States v. Carlo Bianchi & Co*., 373 U.S. 709, 715 (1963); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir.1998) (discovery is not permitted for APA claims; they must be decided upon the administrative record); *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 839-43 (D.C. Cir. 1976); *Ammex, Inc. v. United States*, 62 F. Supp. 2d 1148, 1170 (Ct. Int'l Trade 1999) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. at 744 ("The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking."); *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33(N.D. Tex. 1981) ("Matters not considered by the agency . . . are legally irrelevant, and therefore are not discoverable under Fed. R. Civ. P. 26.").

[5] *Pac. Shores Subdivision, Cal. Water Dist. v. United States Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (stating that "[C]ommon sense dictates that the agency determines what constitutes the "whole" administrative record because '[i]t is the agency that did the 'considering' and that therefore is in a position to indicate initially which of the materials were 'before' it -- namely, were 'directly or indirectly considered.'') (citing *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003)).

Plaintiffs' cite in their Brief In Opposition to PBGC's Motion For a Protective Order, the Sixth Circuit's decision in *Sierra Club v. Slater* as supporting their argument that the allegations of record gaps they made to the Magistrate Judge and repeat to this Court are sufficient, without any kind of additional factual showing, to justify their discovery fishing expedition.[6] In fact, the *Sierra Club* holding is exactly the opposite. Plaintiffs there challenged the decisions of several federal agencies made in connection with approving a road project in Toledo, Ohio. The Court of Appeals opinion reflects that the plaintiffs made many and varied allegations about inadequacies in the administrative records of those decisions – allegations that the Court of Appeals carefully addressed and dealt with in turn. But most noteworthy is what happened when the plaintiffs sought to launch extensive discovery of the agencies by noticing depositions. As described by the Court of Appeals:

> [T]he plaintiffs filed a notice for the taking of additional deposition testimony from Leite; two weeks after that, they filed yet another notice to depose Leite, along with another individual. At this point, the defendants filed motions contending that the taking of depositions was inappropriate, on the ground that judicial review should be limited to the administrative record. The district court then issued a ruling allowing depositions only by leave of court.[7]

The Court of Appeals affirmed the District Court order and rejected plaintiffs' argument that discovery should have been allowed.

II. Plaintiffs Have Yet to Make the Requisite Showing That This Case Qualifies for the Extremely Rare Exception Allowing Discovery in an Administrative Record Case.

The courts have firmly established what the plaintiffs here must do to satisfy the Magistrate's Order that they "identify . . . deficiencies in the administrative record" before they are entitled to discovery. The plaintiffs must overcome the presumption that the administrative

[6] *Sierra Club v. Slater*, 120 F.3d 623 (6th Cir. 1997).

[7] *Id.* at 637.

record is complete with a "most powerful preliminary showing to the contrary."[8] They must make a "strong showing of bad faith or improper behavior,"[9] or establish that "the record is so bare that it prevents effective judicial review,"[10] before limited discovery may be considered.[11]

The kind of factual showings that plaintiffs must make to justify discovery are detailed in *Sokaogon Chippewa Community v. Babbitt.*[12] In that case, the plaintiffs actually provided a substantial quantity of evidence to the Court purporting to show that the agency decision there was politically motivated and not based on the facts before the agency. The *Sokaogon* court rejected that *evidence* as insufficient to show bad faith by the agency. In this case, plaintiffs present only allegations and have failed to take advantage of the opportunity given them by Magistrate Majzoub to provide *any* evidence that the administrative record is incomplete or that the Agency made decisions in bad faith or behaved improperly.[13]

---

[8] *See Nat'l Nutritional Food Assoc. v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974), *cert. denied*, 419 U.S. 874 (1974); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 797 (E.D. Va. 2008); *Friends of the Shawangunks, Inc. v. Watt*, 97 F.R.D. 663, 661-68 (N.D.N.Y. 1983).

[9] *Cmty. For Creative Non-Violence v. Lujan*, 908 F.2d 992 (D.C. Cir. 1990) (citing *Overton Park*, 401 U.S. 413, 420 (1971).

[10] *Pac. Shores Subdivision, Cal. Water Dist.*, 448 F. Supp. 2d at 5.

[11] *See Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978) (courts must presume that "when administrative officials purport to decide weighty issues within their domain, they have conscientiously considered the issues") (citation omitted); *Nat'l Nutritional Foods Ass'n*, 491 F.2d at 1145-46; *Pac. Shores Subdivision, Cal. Water Dist.* 448 F. Supp. 2d at 5; *Commercial Drapery Contractors*, 133 F.3d at 7 (quoting *Overton Park*, 401 U.S. at 420)

[12] 929 F. Supp. 1165, 1176-78 (W.D. Wis. 1996).

[13] In PBGC's Response to Plaintiffs' Motion to Compel Discovery, filed simultaneously with this Reply, PBGC detailed at length why plaintiffs' allegations actually fail to show any infirmities in PBGC's Administrative Record. Some of the allegations are wrong – a careful reading of the Record shows that the gaps plaintiffs allege do not exist. And the remaining allegations do not challenge the decisions that PBGC actually made, but rather improperly criticize PBGC for not including a massive amount of irrelevant information in the Record.

As plaintiffs have failed to make any such showing, this Court should grant PBGC's Motion for a Protective Order Regarding Plaintiffs' Notice of a 30(b)(6) Deposition.

Dated: July 12, 2011

Washington, D.C.

Respectfully Submitted:

/s/ C. Wayne Owen, Jr.
ISRAEL GOLDOWITZ
Chief Counsel
KAREN L. MORRIS
Deputy Chief Counsel
JOHN A. MENKE
Assistant Chief Counsel
C. WAYNE OWEN, JR
CRAIG T. FESSENDEN
ERIN C. KIM
Attorneys

Attorneys for the Defendant
PENSION BENEFIT GUARANTY COPORATION
Office of Chief Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 326-4020 ext. 6767
Fax: (202) 326-4112
Emails: owen.wayne@pbgc.gov and efile@pbgc.gov

Local Counsel:

BARBARA L. McQUADE
United States Attorney
PETER A. CAPLAN
Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9784

Rather than repeat that discussion in this Reply, PBGC simply directs the Court to the Response to the Motion to Compel at pp. 12-15.

Certificate of Service

I hereby certify that on July 12, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

david.glass@usdoj.gov (David M. Glass)
edward.w.risko@gm.com (Edward W. Risko)
rswalker@jonesday.com (Robert S. Walker)
alan@jacobweingarten.com (Alan J. Schwartz)

/s/ C. Wayne Owen, Jr.
C. Wayne Owen, Jr.