

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

JOSEPH V. FISHER,)	
)	
Plaintiff,)	
)	Case No. 1:14-cv-01275-RDM
-against-)	
)	
PENSION BENEFIT GUARANTY)	
CORPORATION,)	
)	
Defendant.)	
_____)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PENSION
BENEFIT GUARANTY CORPORATION’S OPPOSITION TO PLAINTIFF’S MOTION
IN THE ALTERNATIVE FOR RELIEF UNDER FEDERAL RULE OF CIVIL
PROCEDURE 56(d)**

I. INTRODUCTION

Plaintiff Joseph V. Fisher (“Mr. Fisher”) and Defendant Pension Benefit Guaranty Corporation (“PBGC”) have both moved for summary judgment. ECF Doc. No. 16, 17. Mr. Fisher filed this Motion (“Motion for Discovery”) seeking, in the alternative, deferral of this Court’s ruling on the motions for summary judgment to allow Mr. Fisher discovery related to PBGC’s authority under 29 U.S.C. § 1345 to recapture a portion of a lump-sum payment made in the 3-year period before termination of a pension plan. Rule 56(d) under which Mr. Fisher moves is inapplicable here because discovery, much less the additional discovery authorized by Rule 56(d), is not available under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 -706, which governs review of this case. Furthermore the requested discovery is irrelevant and unnecessary: PBGC’s cross-motion for summary judgment (“Cross-MSJ”) made no assertions

concerning PBGC's policies, procedures, or past practices regarding recapture of payments. Rather, PBGC's Cross-MSJ discusses § 1345—along with other longstanding statutory and regulatory provisions—to explain the focus under Title IV of ERISA on preserving plan assets in a terminating plan and to place in context the specific prohibition on paying lump sums after a distress termination is initiated.

II. ARGUMENT

This is an action to review an informal adjudication by a federal agency, and is therefore governed by the arbitrary and capricious standard of § 706 of the APA. *See, e.g., Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 636 (1990). Review in such an action is limited to the agency's administrative record and opportunities to submit additional evidence are not needed. *Id.* at 655; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking.”); *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) (judicial review is to be based on the administrative record that was before the agency); *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.”)). This well-established law is sufficient to require denial of Mr. Fisher's motion.

Even if there were a basis for going beyond the administrative record in this case, it is clear from an examination of PBGC's moving papers that the discovery sought is completely irrelevant to the decision in this case. PBGC argues in its Cross-MSJ that its Appeals Board correctly interpreted 29 U.S.C. § 1341(c)(3)(D) and 29 C.F.R. § 4041.42 to prohibit PBGC's

payment of a lump sum to Mr. Fisher. *See* Cross-MSJ at p. 13-15. To provide further background, PBGC gave an overview of the statutory and regulatory framework regarding the asset-allocation rules and guarantee limits under Title IV of ERISA. *See* Cross-MSJ at p. 2-7. PBGC discussed 29 U.S.C. § 1322 (single-employer plan benefits guaranteed); 29 U.S.C. § 1341 (termination of single-employer plans); 29 U.S.C. § 1344 (allocation of assets); and 29 U.S.C. § 1345 (recapture of lump sums paid before termination). PBGC also discussed the relevant regulations under these statutory provisions. *Id.* This legal background explains that PBGC does not guarantee all benefits under a plan and that the asset-allocation rules direct plan assets to certain benefits of a terminating plan ahead of others.

As further support for the argument that the Appeals Board correctly interpreted 29 U.S.C. § 1341(c)(3)(D) and 29 C.F.R. § 4041.42, PBGC contends, *inter alia*, that when the agency's authority to recapture lump sums is considered in conjunction with other statutory and regulatory provisions, "it is clear that PBGC's only obligation is to pay guaranteed benefits as an annuity." Cross-MSJ at p. 18. Mr. Fisher disagrees with this contention: "Plaintiff argues that as a matter of law, the authority to *recover* payments does not provide a legal basis for refusing to *pay* them." Plaintiff's Motion for Discovery at p. 3 (emphasis in original). Nowhere in its Cross-MSJ does PBGC discuss the exercise of its discretionary authority to recover lump sums, nor does it refer to any procedure or policy regarding that authority. Mr. Fisher seeks discovery regarding an issue of fact where no factual dispute exists. PBGC is willing to stipulate that it has not sought to recover any portion of any lump sum paid by the Penn Traffic Cash Balance Pension Plan ("Plan").

The Appeals Board's denial of Mr. Fisher's appeal was an agency adjudication based on the Administrative Record. The Administrative Record did not include the recapture of lump

sums by PBGC or any policy or procedure regarding the authority to recapture lump-sum payments. The result of the Appeal Board's decision (if upheld) is that PBGC will not pay Mr. Fisher the nonguaranteed portion of his Plan benefit. PBGC's discussion of 29 U.S.C. § 1345 in its Cross-MSJ provides relevant context regarding Title IV of ERISA, its design to protect PBGC's insurance funds and the allocation of a plan's assets, and the decision of the Appeals Board in this matter.

III. CONCLUSION

Discovery under Rule 56(d) is not available in this APA case. Moreover, PBGC's Cross-MSJ discusses the authority to recapture certain lump-sum payments as part of the legal background and because the authority is consistent with the agency's argument that PBGC is obliged to pay benefits only as annuities. Accordingly, the discovery requested by Mr. Fisher concerns matters that are not relevant to the issues in this case.

The Motion for Discovery should be denied.

Date: June 26, 2015

Respectfully submitted,

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