

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 June 2008

Case No. 2008-RIS-00020

In the Matter of:

**U.S. DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS
SECURITY ADMINISTRATION,**
Complainant,

v.

**TILE FINISHERS LOCAL 88 NY,
BAC SAVINGS PLAN,**
Respondent.

**DECISION AND ORDER – DENYING MOTION TO DISMISS AND GRANTING
MOTION FOR SUMMARY JUDGMENT**

Procedural Background

This matter arises under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132, 1135 and the Secretary's Order 1-87, 53 Fed. Reg. 13,139 (1987) as implemented by regulations found at 29 C.F.R. Parts 2560 and 2570.

The Complainant, the Employee Benefits Security Administration, U.S. Department of Labor ("EBSA"), issued a Notice of Intent to Assess a Penalty against the Respondent, Tile Finishers Local 88 NY, BAC Savings Plan ("Respondent"), pursuant to section 502(c)(2) of ERISA, 29 U.S.C. § 1132(c)(2), for failure to file an acceptable report of an independent qualified public accountant, as described in ERISA §§ 103(a)(1)(B) and 103(a)(3)(A), 29 U.S.C. §§ 1023(a)(1)(B) and 1023(a)(3)(A). Respondent thereafter requested an administrative hearing.

After the case was docketed at this Office on November 19, 2007, EBSA filed a motion to dismiss or, in the alternative, for summary judgment. The motion was filed by facsimile on January 17, 2008 and the original papers were received at this Office on January 22, 2008. Respondent requested an extension of time to file its opposition, and on January 31, 2008 Chief Judge Vittone granted the request. Respondent's opposition papers were timely received on February 20, 2008. EBSA later filed a motion to file a reply along with a reply brief. Respondent has filed no opposition to EBSA's motion.

This matter was assigned to me on May 16, 2008. EBSA's unopposed motion to file a reply is granted.

Findings of Fact

EBSA submitted a Statement of Undisputed Facts in support of its alternative motions. Respondent's opposition included declarations from its counsel and from John Storey, its former Plan Administrator, setting forth certain disputed and undisputed facts that Respondent believes are relevant to the issues at bench. Upon review of the documents submitted by the parties, I find that the following facts are undisputed¹:

1. Respondent is the plan administrator of Tile Finishers Local 88 NY, BAC Savings Plan (the "Plan").
2. As of the beginning of the 2004 plan year, the Plan had 498 participants and held assets in trust. [Motion, Ex. 1, p. 2 line 6.]
3. The due date for Respondent's annual report was July 29, 2005, which is 210 days after December 31, 2004, the end of the plan year; however, Respondent received an automatic extension of 2 ½ months to file its annual report. [Motion, Ex. 1, p. 13.]
4. Respondent filed its annual report for the 2004 plan year on or about October 17, 2005, without an IQPA report. [Motion, Ex. 1.]
5. EBSA issued a letter to Respondent on January 9, 2006, requesting submission of the missing IQPA report within 30 days. [Motion, Ex. 2.] Respondent did not respond to the letter.
6. EBSA issued a second letter to Respondent on March 2, 2006, requesting submission of the missing IQPA report within 30 days. [Motion, Ex. 3.] Respondent did not respond to the letter.
7. On or about October 3, 2006, EBSA issued a Notice of Rejection to Respondent advising Respondent that it was required to file an amended annual report including the missing IQPA report within 45 days to avoid incurring a penalty. [Motion, Ex. 4.]
8. Respondent's accountant responded to the Notice of Rejection by letter dated November 14, 2006, stating that the reason the IQPA had not been completed was that the accountant had been unable to gather all the information necessary to complete the audit. [Motion, Ex. 5.]
9. Respondent did not file an amended annual report within the 45-day deadline. [Motion, Ex. 6, p. 3.]

¹ To the extent that I have not included certain facts proposed in the moving papers, I find that they are not material to the issues.

10. On December 4, 2006, EBSA issued a Notice of Intent to Assess a Penalty, proposing that Respondent pay a \$50,000 penalty for failure to file a compliant annual report. The Notice further advised Respondent that within 35 days it must file a written statement of reasonable cause as to why the IQPA had not been filed, and as to why the proposed penalty should not be assessed. [Motion, Ex. 6.]
11. Respondent filed its statement of reasonable cause, together with an amended annual report including the necessary IQPA report on or about January 8, 2007, within the 35-day deadline. [Motion, Ex. 7.]
12. John Storey resigned as Plan Administrator on January 31, 2007. [Affidavit of John Storey at ¶ 2.]
13. By letter dated February 12, 2007, EBSA issued a Notice of Determination on Statement of Reasonable Cause, rejecting its reasons for its failure to file a 2004 IQPA and assessing an abated penalty of \$5,000. [Motion, Ex. 8.]
14. John Storey did not receive EBSA's Notice of Determination dated February 12, 2007. [Storey affidavit at ¶ 6.]
15. On November 16, 2007, Respondent submitted an answer and requested an administrative hearing. [Motion, Ex. 9.]

Conclusions of Law

1. Motion to Dismiss

EBSA moves to dismiss this case on the grounds that Respondent failed to exhaust its administrative remedies. Specifically, EBSA contends that Respondent's failure to request an administrative hearing within 35 days of the February 12, 2007 Notice of Determination deprives me of jurisdiction to hear the matter.

Title 29 C.F.R. Section 2560.502c-2(g) provides that a Notice of Determination on Statement of Reasonable Cause becomes final 45 days after the date of service of the Notice. Section 2560.502c-2(h), however, provides in pertinent part:

(h) Administrative hearing. A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.61(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.60 through 2570.71 of this chapter, and files an answer to the notice.

In turn, Section 2570.61(c) provides that an “[a]nswer means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c-2(g) of this chapter.” The Respondent filed its answer and

request for hearing, as defined in Section 2570.61(c), on November 16, 2007, just shy of eight months after the 30-day deadline.

EBSA's argues that a failure to comply with the 30-day requirement of Section 2560.502c-2(h) constitutes a failure to exhaust administrative remedies, and deprives this tribunal of jurisdiction over this matter. EBSA has, however, provided no authority for its position other than a citation to that section. The case law compels me to conclude that EBSA is incorrect. Compliance with the timeliness requirements of government regulations is generally not a jurisdictional matter. *See, e.g., Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Pauling v. Sec'y of Interior*, 160 F.3d 133, 135-136; *Gain v. Las Vegas Metropolitan Police Department*, ARB 03-108 (June 30, 2004), Slip Op. at p. 4 n. 5. Likewise, a failure to exhaust administrative remedies is not a jurisdictional matter in the context of administrative proceedings. *See, e.g., In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 131 (2d Cir. 2007); *Richardson v. Goord*, 347 F.3d 431, 434 (2d Cir. 2003).

Based on the foregoing, EBSA's motion to dismiss for lack of jurisdiction due to Respondent's failure to exhaust administrative remedies will be denied.

2. Motion for Summary Judgment

a. Standards

Title 29 C.F.R. Section 18.40(d) provides that an administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." For cases arising under § 502(c)(2) of ERISA, where "no issue of a material of fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal ... shall become a final order." 29 C.F.R. § 2570.67(a)(1).

The standards for summary judgment under 29 C.F.R. are the same as those that are applicable under Fed. R. Civ. P. 56(e); to prevail, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The initial burden is on the moving party to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party meets that burden, the opposing party has the burden to show the existence of a fact that could affect the outcome of the litigation. *Anderson, supra*, 477 U.S. at 248.

b. Discussion

In enacting ERISA, Congress intended to protect the vested interests of employees in their employment benefit plans, such as the Plan at issue here. To that end, the Act requires extensive reporting and disclosures, including the filing of an annual report and, because Respondent has more than 100 participants and assets in trust, the report of an IQPA. 29 U.S.C. § 1023(a)(3)(A); 29 C.F.R. § 2520.104-20(b). It is the responsibility of the plan administrator to

ensure that the annual report and IQPA report are completed properly and timely filed. 29 U.S.C. §§ 1021(b) and 1024(a)(1). The required annual report under ERISA is due 210 days after the end of the applicable plan year. 29 U.S.C. § 1024(a)(1).

The Secretary of Labor may reject any annual report that does not comply with statutory requirements. 29 U.S.C. § 1024(a)(4). If the Secretary does so, and a compliant report is not submitted within 45 days of her rejection, she may take any action authorized by Title 1 of ERISA. 29 U.S.C. § 1024(a)(5). Among those authorized actions are the imposition of a civil penalty pursuant to 29 U.S.C. § 1132(c)(2). That section authorizes a civil penalty of up to \$1,100 per day² for a failure to file a timely annual report.

It is undisputed that Respondent initially filed an annual report without an IQPA report, and did not file an amended report within the 45-day period established in 29 U.S.C. § 1024(a)(5). That period expired on November 17, 2006, 45 days after the date of EBSA's Notice of Rejection, and the amended report including an IQPA report was not submitted until January 8, 2007.

Respondent contends that it did timely respond to the Notice of Rejection by way of its accountant's letter dated November 14, 2006. That letter, however, stated that the reason the IQPA report had not been completed was that the accountant had been unable to gather all the information necessary to complete the audit. The accountant's letter was not a sufficient response. Under 29 U.S.C. § 1025(a)(5), Respondent was required to file an amended annual report, including the missing IQPA report, within 45 days of the Notice of Rejection. The Notice of Rejection explicitly informed Respondent of its obligation to do so, or risk the assessment of a civil penalty. The November 14, 2006 letter of Respondent's accountant did not forward an amended annual report with an IQPA report; instead, it constitutes an admission that no IQPA report would be filed within the required 45-day period. And in fact, no IQPA report was filed within that time.

On December 4, 2006, in response to Respondent's failure to file an amended annual report within 45 days after EBSA's Notice of Rejection, EBSA issued a Notice of Intent to Assess a Penalty, proposing a civil penalty of \$50,000 penalty for its failure to file a compliant annual report. The Notice further advised Respondent that within 35 days it must file a written statement of reasonable cause as to why the IQPA report had not been filed, and as to why the proposed penalty should not be assessed. Respondent filed its amended annual report, including an IQPA report, on January 8, 2007, within the 35-day time period specified in the Notice of Intent. On the same day, Respondent also submitted a statement of reasonable cause as to why the IQPA report had not been previously filed. The then-plan administrator, Mr. Storey, asserted that he faxed the Notice of Rejection to the plan accountant immediately upon receipt; that he assumed the accountant was working to rectify the annual report; that he was surprised to receive the December 4, 2006 Notice of Intent; and that, when he did receive the Notice of Intent, he took immediate steps to ensure that an amended annual report and IQPA report were prepared.

² ERISA provides for a penalty of up to \$1,000 per day; however, section 31001(s) of the Debt Collection Improvement Act requires the Secretary to adjust civil monetary penalties for inflation. Pursuant to that requirement, the Secretary increased the daily maximum penalty to \$1,100 for violations occurring after July 29, 1997. 29 C.F.R. § 2575.502c-2.

He further stated that the failure to file an IQPA report was not willful. Upon receipt and review of Mr. Storey's letter of January 8, 2007, EBSA determined that he had not shown reasonable cause for Respondent's failure to submit an amended annual report, but that in light of the eventual submission of a compliant annual report, it would abate 90% of the proposed \$50,000 penalty, reducing it to \$5,000. At issue is whether the \$5,000 penalty is reasonable.

In reviewing a penalty for failure to file an IQPA report, an administrative law judge will not disturb EBSA's penalty absent evidence that it acted arbitrarily, capriciously, or unreasonably. *See Dept' of Labor, EBSA v. New Design Construction Co., Inc.*, 2007-RIS-00009, at 6 (ALJ May 4, 2007); *Dep't of Labor, PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-00062, at 3 (ALJ Mar. 29, 1995); 5 U.S.C. § 706(2).

Respondent asserts that a penalty cannot be imposed because EBSA did not include affidavits to the effect that (1) reasonable cause does not exist to abate the entire penalty, and (2) its proposed penalty was reasonable. Respondent provided no authority that such evidence is required, and no such requirement in the statutes, regulations or case law. I find that EBSA is not required to submit such affidavits and that I can make a determination as to the reasonableness of EBSA's actions without them.

The undisputed facts show that Respondent did not submit a timely, complete annual report until January 8, 2007. It was due initially 210 days after the end of the plan year, or on July 29, 2005. That deadline was automatically extended to October 15, 2007. Thus, Respondent submitted its amended annual report 530 days after the original due date, and 448 days after the extended deadline. The amended annual report appeared only after EBSA issued two letters requesting the submission of the IQPA report, a Notice of Rejection, and a Notice of Intent to impose a penalty of \$50,000. In the face of the large proposed penalty, Respondent finally filed an amended report.

In addition, EBSA properly applied its internal guidelines to determine the appropriate penalty. Although ERISA permits a penalty of up to \$1,100 per day for failure to file a timely and complete annual report, EBSA has determined that it will apply a penalty of \$150 per day up to a maximum penalty of \$50,000 for a missing or deficient accountant's report. Under 29 C.F.R. § 2560.502c-2(b)(3), the time period for the daily penalty is to be calculated from the initial due date, without regard to any extension for filing. As discussed above, the final amended annual report, with IQPA report, was submitted 530 days after its initial due date. The statutory maximum penalty for Respondent's failure to file a proper annual report was therefore \$583,000 (\$1,100 per day for 530 days). At \$150 per day for 530 days, the maximum penalty under the Secretary's policy would be \$79,500, but is capped at \$50,000.

Given (1) EBSA's scrupulous compliance with the regulatory requirements for imposition of a penalty, (2) EBSA's decision to abate 95% of the proposed penalty after receiving a proper annual report, (3) Respondent's disregard of its obligations and of EBSA's requests and Notices until notified that it faced a substantial penalty, and (4) the ultimate assessment of a penalty that is less than 1% of the amount authorized by statute, I find that EBSA did not act arbitrarily, capriciously, or unreasonably in imposing the proposed penalty.

Because EBSA did not act arbitrarily, capriciously, or unreasonably, and the proposed civil penalty of \$5,000 is reasonable, EBSA is entitled to summary judgment.

ORDER

1. EBSA's motion to dismiss is denied;
2. EBSA's motion for summary judgment is granted;
3. Respondent shall pay to the U.S. Department of Labor a civil penalty in the amount of \$5,000 within 45 days of the date of this Order.
4. Any portion of this penalty that is not paid by that date shall be subject to such penalties and interest as ERISA and its implementing regulations have provided.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 29 C.F.R. § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of issuance of this Decision and Order, or the decision of this court will become the final agency action within the meaning of 5 U.S.C. § 704.