



Issue Date: 08 November 2011

In the Matter of

UNITED STATES DEPARTMENT OF
LABOR, EMPLOYEE BENEFITS
SECURITY ADMINISTRATION

Complainant

v.

NELLO CORPORATION,

Respondent

Case No.: 2011-RIS-00014

**DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT**

Complainant, U.S. Department of Labor (“Department”), Employment Benefit Security Administration (“EBSA”), moves for summary judgment affirming a civil penalty assessed against Respondent, Nello Corporation, as the plan administrator of the Nello Corporation 401(k) Profit Sharing Plan, pursuant to Section 502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA” or the “Act”), 29 U.S.C. § 1132(c), and its implementing regulations published at 29 C.F.R. Parts 2560 and 2570. Complainant’s Motion includes a Statement of Undisputed Facts, a Memorandum in Support of Summary Judgment (“Compl. Mem.”), and seven supporting exhibits (hereinafter referenced as “CX-__”). In response, Respondent filed an opposition to Complainant’s Motion (“Resp. Opp.”), which was followed by Complainant’s Reply in Further Support of Motion for Summary Decision (“Compl. RMSJ”). For the reasons set forth below, Complainant’s motion is granted.

Background¹

ERISA is a remedial statute designed to protect the integrity of employee benefit plans maintained by employers. To that end, the Act contains extensive reporting and disclosure requirements, and provides civil penalties for failure to comply. Sections 101 and 104, 29 U.S.C. §§ 1021, 1024, require administrators of employee benefit plans to file an annual report,

¹ As no opposition was received from Nello Corporation, the following findings are derived from EBSA’s Statement of Undisputed Facts, as corroborated by the exhibits submitted with its motion.

called a Form 5500, with the Secretary of Labor within 210 days after the close of the plan year. Section 502(c)(2), 29 U.S.C. §1132 (c)(2), authorizes the Secretary of Labor ("Secretary") to assess a civil penalty of up to \$1,100 per day for a plan administrator's failure to timely file an annual report. 29 U.S.C. § 1132(c)(2). The Secretary has promulgated regulations, set forth at Title 29 C.F.R. Part 2560.502c-2, governing the assessment of civil penalties under Section 502(c)(2) of the Act.

As plan administrator of the Nello Corporation 401(k) Profit Sharing Plan (the "Plan"), Respondent, Nello Corporation, is responsible for timely filing the Plan's annual reports. The Plan's 2008 Form 5500 ("2008 Report") was due on or before July 31, 2009 (EBSA's Statement of Undisputed Facts at ¶ 2); it was not received by EBSA, however, until February 12, 2010. (EBSA's Statement of Undisputed Facts ¶ 4.)

On October 25, 2010, EBSA issued a Notice of Intent to Assess a Penalty ("NOI"), notifying Respondent of its intent to assess a civil penalty of \$9,800 for Respondent's failure to timely file the Plan's 2008 Report—\$50 for each of the 196 days after the Plan's July 31, 2009 reporting deadline until EBSA received the Plan's 2008 Report on February 12, 2010. (CX-3.) The NOI further advised Respondent that it had thirty-five days within which to submit a statement of reasonable cause setting forth, in writing, facts alleged to constitute reasonable cause for its failure to timely file the 2008 Report and/or why the penalty, as calculated, should not be assessed.

Respondent submitted its statement of reasonable cause by letter dated November 23, 2010. (CX-3.) In the letter, the Plan's administrator, Mr. Kevin M. Brisson, conceded that the 2008 Report had not been timely filed, but alleged that the delay had been caused by "mitigating circumstances." Mr. Brisson explained that Respondent's only manufacturing facility had been destroyed by a tornado on October 18, 2007, and that the company's operations were not fully restored until July 2008. Then, once the operations had been fully restored, Respondent's insurance policy required it to settle all outstanding claims in 2009 or risk losing benefits. Mr. Brisson asserted that, given the catastrophic effect an adverse insurance settlement would have on Respondent's business, he diverted all of his attention to the company's insurance claims until a final insurance settlement was obtained on December 21, 2009. Thereafter, he was able to return his focus to normal operations, including the filing of the Plan's 2008 annual report, "which was completed in early February—a short time after the insurance settlement was finalized." *Id.* Mr. Brisson further declared:

History shows that this is the first and only time Nello Corporation's annual report was not filed in a timely manner. If not for the aftermath of the tornado this report would have also been filed on time. As such, I respectfully request that the circumstances outlined above be accepted as reasonable cause for our late filing and that all proposed penalties be waived.

Id.

Upon review of Respondent's November 23, 2010 letter, the Reasonable Cause Committee determined that Respondent had provided sufficient details to demonstrate reasonable

cause to reduce the assessed penalty amount to \$1,250.00. (EBSA's Statement of Undisputed Facts at ¶ 8.) Accordingly, on December 6, 2010, EBSA issued a Notice of Determination on Statement of Reasonable Cause ("NOD") abating the civil penalty assessed to Nello in the NOI to \$1,250.00. (*Id.* at ¶ 9; CX-5.)

Dissatisfied the penalty had not been fully waived, Respondent requested a hearing before the Office of Administrative Law Judges, stating : "We do not believe the Department weighed reasonable cause, dated November 23, 2010, correctly in making their penalty assessment and wish to have the case heard." Thereafter, the matter was assigned to the undersigned administrative law judge, and a hearing was scheduled for October 3, 2011, in Indianapolis, Indiana. The hearing was later continued, however, pending a ruling on Complainant's Motion for Summary Judgment.

DISCUSSION

Pursuant to the regulations governing 502(c)(2) penalty proceedings, "[w]here no issue of a material 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.R.R. § 2570.67 (2010). The parties agree that there are no material facts in dispute. The only issue is thus one of law—*i.e.*, whether, by assessing Nello an abated penalty of \$1,250.00 for its failure to timely file the 2008 plan, EBSA acted in an arbitrary, capricious, or unreasonable manner.

The Department's procedures governing the assessment of civil penalties under ERISA § 502(c)(2) are set forth at Title 29 C.F.R. Parts 2560 and 2570. Under these regulations, the Department is authorized to assess a penalty of up to \$1,000 a day for a plan administrator's refusal or failure to timely file an annual report. *See* 29.C.F.R. § 2650.502c-2(b). The penalty is to be computed from the day after the date a report is due (without regard to extensions), continuing up until the date a satisfactory report is filed with the Secretary, taking into account the degree and/or willfulness of the plan administrator's noncompliance. *See* 29.C.F.R. § 2650.502c-2(b).

Before assessing such a penalty, the Department must provide a plan administrator with written notice of intent to assess a penalty, including "the amount of such penalty, the period to which the penalty applies, and the reason(s) for the penalty." *Id.* at § 2650.502c-2(c). Within 30 days of the service of the notice, the plan administrator may file a "statement of reasonable cause" explaining why the assessed penalty, as calculated, should be reduced, or not be assessed. *Id.* at § 2650.502c-2(e). Following a review of the facts alleged in the plan administrator's reasonable cause statement, the Department must notify the plan administrator of its determination to either uphold the penalty assessed in the notice of intent, and/or waive the penalty, in whole or in part. *Id.* at § 2650.502c-2(g). The Department is authorized to waive the penalty assessed in the notice of intent, in whole or in part, upon a showing of "reasonable cause," *i.e.*, mitigating circumstances regarding the degree or willfulness of the plan administrator's noncompliance. *Id.* at § 2650.502c-2(d).

Penalties assessed pursuant to Section 502(c)(2) may be appealed to the Office of Administrative Law Judges. Generally, unless the Department has acted in an arbitrary,

capricious, or unreasonable manner, an administrative law judge will not disturb penalties assessed pursuant to Section 502(c)(2). *See U.S. Dep't of Labor Employee Benefit Sec. Admin. V. Tile Finishers Local 88 NY, BAC Sav. Plan*, 2008-RIS-20, at 6 (ALJ June 3, 2008).

Complainant asserts that EBSA “gave due consideration to Respondent’s [reasonable cause statement] and, after an evaluation of the facts and circumstances, EBSA determined that Respondent failed to demonstrate sufficient reasonable cause and/or good faith compliance to justify a 100% abatement of the assessed penalty.” (Compl. RMSJ at 4.) I agree, and find that there is no evidence EBSA acted in an arbitrary, capricious, or unreasonable manner.

As plan administrator, Respondent was responsible for filing the Plan’s 2008 annual report in a timely manner. In Respondent’s November 23, 2010 Reasonable Cause Statement, Mr. Brisson acknowledged that the Plan’s 2008 annual report was filed on or about February 12, 2010, seven months after the July 31, 2009 reporting deadline, and conceded that he chose to focus on non-plan administration issues rather than comply with this mandatory reporting deadline. Respondent thus neglected its responsibility, as the Plan’s administrator, to comply with ERISA’s mandatory reporting and disclosure requirements.

Respondent contends that, in determining not to waive the assessed penalty, EBSA did not take into account the fact that Nello had no prior reporting violations. But the regulations do not forbid the assessment of penalties to first time offenders, and given that the abated penalty assessed against Respondent is far below the \$1,100.00 per day maximum, it is reasonable to infer that EBSA did take into account Respondent’s lack of prior reporting violations when computing the abated penalty assessment.

Respondent additionally alleges that EBSA failed to consider that Nello was “a small company with limited staff and resources,” whose “very existence” was “being challenged,” and “all available resources were focused on keeping the business open and people employed.” According to Respondent: “A reasonable conclusion would be that if the tornado had not destroyed the company and disrupted normal operations for two (2) years (until the insurance settlement on December 21, 2009) Nello would have filed the form on time.” Still, Respondent fails to set forth *any* mitigating actions it took to avoid the late filing penalties, and the 2008 annual report it eventually submitted to EBSA amounted to a mere six pages (CX-1). In light of the fact that Respondent’s business was fully operational by July 2008—a full year before the 2008 annual report was to be filed—I find EBSA’s determination not to fully waive the penalty assessment, and thus condone Respondent’s purposeful neglect of ERISA’s mandatory reporting obligations, eminently reasonable.

Finally, Respondent asserts that “full consideration and weight” should be given to the IRS’ full waiver of the \$3,000 penalty that it assessed Respondent for the same conduct, arguing: “The same mitigating circumstances were provided to both agencies, but with different outcomes. The IRS wavier shows a government agency working with a business rather than the Complainant assessing fees.” (Resp. Opp. at 2.) However, EBSA is not bound by the IRS’ determination. Upon reviewing the Respondent’s Reasonable Cause Statement, EBSA determined that the 2007 tornado and its aftermath provided reasonable cause for a substantial penalty abatement, and it reduced the penalty assessed to the Respondent by approximately 85%.

Notwithstanding the IRS' waiver, it was well within EBSA's discretion to determine that Respondent failed to demonstrate sufficient reasonable cause and/or good faith compliance to justify a 100% abatement of the assessed penalty.

Based on the foregoing, I find no basis to conclude that the abated penalty EBSA acted in an arbitrary, capricious, or unreasonable manner when it assessed Respondent an abated penalty of \$1,250.00 for its failure to timely file the Plan's 2008 report.

ORDER

IT IS HEREBY ORDERED that:

1. The Motion for Summary Judgment filed by Complainant, U.S. Department of Labor, Employment Benefit Security Administration, is granted;
2. Respondent, Nello Corporation, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$1,250.00 within forty-five days of the date of this Decision and Order. Respondent's payment shall be sent to the U.S. Department of Labor, ERISA Civil Penalty, P.O. Box 70942, Charlotte, NC 28272-0942;
3. 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

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 29 CFR §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 will become the final agency action within the meaning of 5 U.S.C. §704. A notice of appeal should be filed with:

Director of the Office of Policy and Research
Employee Benefits Security Administration
200 Constitution Av, NW, Ste N-5718
Washington, DC 20210

See Secretary's Order 6-2009, 74 Fed. Reg. 21524-01, 2009 WL 1227622 (signed Apr. 30, 2009) (delegation of review authority to the Assistant Secretary for Employee Benefits Security). A

notice of appeal must state, with specificity, the issue or issues on which the party is seeking review. The notice of appeal must be served on all parties of record.