



Issue Date: 12 April 2012

Case Number: 2012-RIS-00052

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY
ADMINISTRATION,

Complainant

v.

Plan Administrator
INTERNATIONAL UNION OF TOOL, DIE & MOLD
MAKERS PENSION PLAN
(Case No. 11-3316D),

Respondent

DECISION AND ORDER DISMISSING CASE FOR LACK OF JURISDICTION

This case arises under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §§ 1100 *et seq.*, and the regulations at 29 C.F.R. §§ 2560 and 2570.

According to 29 C.F.R. §2560.502(c)(2)(e)-(f), a plan administrator has thirty (30) days after service of the Department of Labor's Notice of Intent to Assess a Penalty to file a Statement of Reasonable Cause explaining why extraordinary circumstances dictate that the penalty should be reassessed, reduced, or waived. Failure to file a Statement of Reasonable Cause within thirty (30) days constitutes a waiver of the right to appear and contest the facts alleged in the Notice of Intent. The Notice of Intent becomes the final order of the Secretary of Labor forty-five (45) days after service of the Notice of Intent. *Id.* at §2560.502(c)(2)(f).

In the instant case, the Department of Labor issued a Notice of Intent to Assess a Penalty dated July 25, 2011 for a deficient annual report filing. Respondent sent a letter Statement of Reasonable Cause on September 21, 2011, which is later than forty-five days following the issuance of the Notice of Intent.¹ No Notice of Determination was made in the

¹ According to the regulation, Respondent has forty-five days from *service* of the Notice of Intent to file a Statement of Reasonable Cause, and not forty-five days from the date the Notice of Intent was issued. Here, however,

case because the Notice of Intent became a final order of the Secretary forty-five days after the Notice of Intent was issued. The Department of Labor sent a past due notice on October 11, 2011 when the penalty was not paid, and did not respond to the Statement of Reasonable Cause. Respondent replied on November 7, 2011 seeking abatement but again did not receive a response as the file no longer remained with the Employee Benefits Security Administration and had been transferred to the collections department. On December 2, 2011, Respondent paid the penalty in full.

In an answer filed with the Office of Administrative Law Judges on February 2, 2012, Respondent requested a hearing to determine whether its penalty should be reduced or waived and noted several mitigating and exceptional circumstances as to why it sought a hearing on a penalty that was already paid. The undersigned issued a Notice of Docketing and an Order to Show Cause on February 16, 2012 directing the parties to show cause, if any, as to why this case should not be dismissed for lack of jurisdiction as the Secretary's Order became final after Respondent failed to timely file a Statement of Reasonable Cause. Complainant filed a Response on March 19, 2012, arguing that there were no reasons why the case should not be dismissed. Respondent filed a Response on March 21, 2012, arguing that due to unusual circumstances the case should not be dismissed.

In this case, the Notice of Intent became a final decision of the Secretary of Labor on September 8, 2011, which was forty-five (45) days following the issuance of the Notice of Intent, plus time for mailing and service. At that time, Respondent waived the right to appear and to contest the facts stated in the Notice of Intent, and their failure to timely respond constituted an "admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act." 29 C.F.R. §2560.502(c)(2)(f).

In light of the foregoing, this case is DISMISSED for lack of jurisdiction.

SO ORDERED.

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STEPHEN L. PURCELL
Chief Administrative Law Judge

Washington, D.C.

Respondent does not argue that its Statement of Reasonable Cause dated September 21, 2011 should be considered timely, although they argue that Respondent called Complainant by phone to explain the circumstances (Respondent's Response to Order to Show Cause dated March 20, 2012). The Notice of Intent was presumably sent by certified mail.

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 this 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 Ave, 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.