



**Issue Date: 06 July 2012**

Case Number: 2012-RIS-00047

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR,  
EMPLOYEE BENEFITS SECURITY  
ADMINISTRATION,

Complainant

v.

Plan Administrator  
MMG OF CLIFTON PARK, INCORPORATED PLAN,  
MMG OF CLIFTON PARK, INCORPORATED,  
(Case No. 11-2631D),

Respondent.

## **ORDER OF DISMISSAL 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.

### **Procedural Background**

On August 1, 2011, the Employee Benefits Security Administration of the United States Department of Labor (Complainant) notified the Plan Administrator of MMG of Clifton Park, Incorporated Plan and MMG of Clifton Park, Incorporated (Respondent) of its intent to assess a civil money penalty for violating ERISA.<sup>1</sup> Therein, Complainant alleges that Respondent failed to file a satisfactory 2009 Form 5500 Annual Report. Respondent filed a Statement of Reasonable Cause (Statement) but did not include language concerning the penalty of perjury, which it timely corrected on October 4, 2011 after an amended notice was sent on September 26, 2011. The Notice of Determination was sent on December 12, 2011. The Office of Administrative Law Judges received Respondent's request for a hearing on January 31, 2012.

---

<sup>1</sup> The Notice of Intent to Assess a Penalty has not been transmitted to the Office of Administrative Law Judges (OALJ). According to attorney for Complainant, the file has been sent to collections and does not remain with the Solicitor of Labor's office (Case Status Report, March 13, 2012).

I issued a Notice of Docketing on February 1, 2012. Respondent filed its prehearing statement on February 28, 2012. After reviewing the files in this matter Complainant submitted a Case Status Report on March 13, 2012 advising that Respondent's request for hearing was not timely filed. Complainant asserted that because Respondent did not file a request for hearing within thirty-five (35) days of the Notice of Determination, the Notice of Determination became a Final Order of the Secretary of Labor under 29 C.F.R. § 2570.64. The assessed penalty became immediately due and payable forty-five (45) days after the date of the Notice of Determination.

Accordingly, on May 9, 2012, I issued an Order to Show Cause directing Respondent to show cause, if any, within thirty (30) days as to why the Notice of Determination issued by the Employee Benefits Security Administration should not be the Final Order. On June 8, 2012, Respondent filed a Reply Brief. On June 18, 2012, Complainant filed the December 12, 2011 Notice of Determination and reserved its right to respond to the Respondent's filing within the time allotted for an objection. To date, Respondent has not filed such an objection.

### **Discussion**

According to 29 C.F.R. § 2570.64,

Failure of the respondent to file an answer to the notice of determination described in § 2560.502c-2(g) of this chapter within the 30 day period provided by § 2560.502c-2(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.61(g) of this subpart, forty-five (45) days from the date of service of the notice.

In the present case, Respondent's request for a hearing was filed approximately fifty (50) days after Respondent sent the Notice of Determination, which was sent certified mail. In ERISA cases, the failure to timely request a hearing is a jurisdictional defect, and consequently equitable tolling does not apply. See Final Regulation Relating to Civil Penalties Under ERISA Section 502(c)(2), 54 Fed. Reg. 26890-01, at 26892 (June 26, 1989).

Respondent argues that its violation of any of the Secretary's regulations was minor and, thus their late filing should be excused. Respondent represents that its late filing was due to the filing deadline falling during the busy holiday season, the relocation of its corporate offices, and delayed communication with its payroll company. Respondent asserts that it acted in good faith and has consistently communicated with DOL regarding this matter.

Because it is undisputed that Respondent's hearing request was untimely, I find that Respondent's complaint must be dismissed as untimely under ERISA. The principles of equitable tolling do not apply to ERISA cases, therefore, there is no way to cure this jurisdictional defect.

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

SO ORDERED,

A

STEPHEN L. PURCELL  
Chief Administrative Law Judge

Washington, D.C.

**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.