

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 30 November 2016

CASE NO.: 2015-RIS-00023

In the Matter of:

**UNITED STATES DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION,**
Complainant,

v.

**PLAN ADMINISTRATOR,
WHITE MOUNTAIN APACHE TRIBE RETIREMENT SAVINGS
AND 401(K) PROFIT SHARING PLAN ANNUAL REPORT,**
Respondent.

**DECISION AND ORDER GRANTING EBSA'S MOTION FOR SUMMARY DECISION
AND DENYING CROSS MOTION FOR SUMMARY DECISION**

This proceeding arises under the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), 29 U.S.C. § 1132, and the applicable regulations found at 29 C.F.R. Parts 2560 and 2570. On May 4, 2015, the U.S. Department of Labor's Employee Benefits Security Administration ("EBSA") issued a Notice of Determination to Respondent, Administrator of the White Mountain Apache Tribe Retirement Savings and 401(k) Plan ("Respondent" or "WMAT"), assessing a penalty against Respondent for failure to comply with the filing requirements in section 103(a)(3) of the Act, 29 U.S.C. § 1023(a)(3), and the implementing regulations at 29 C.F.R. § 2520.103-1(b), which requires a plan administrator to submit a report from an independent qualified public accountant along with the Form 5500 annual report. On June 3, 2015, Respondent requested a hearing before the Office of Administrative Law Judges, and the case was referred to the undersigned administrative law judge.

I. PROCEDURAL HISTORY

On September 15, 2014, EBSA issued a Notice of Rejection of the Respondent's Form 5500 Annual Report to WMAT for failing to attach an Independent Qualified Public Accountant ("IQPA") report for the Plan Year ending April 30, 2013. The Notice of Rejection informed

WMAT it could be subjected to civil penalties of \$1,100.00 per day. On October 30, 2014, WMAT sent a letter to EBSA asserting the penalty for the delinquent filing should be waived.

On March 23, 2015, the Department issued a Notice of Intent to Assess A Penalty against WMAT for its deficient Form 5500 filing for Plan Year 2012.¹ By letter dated April 27, 2015 WMAT filed a Statement of Reasonable Cause and Request For Waiver of Penalties; Request for Relief Under Executive Order 13175; and Request for Pre-decisional Conference And to Supplement the Record.

On May 4, 2015, EBSA issued a Notice of Determination on Statement of Reasonable Cause finding there was no reasonable cause to waive the penalty and the Department assessed a penalty of \$50,000.00 under Section 502(c)(2) of ERISA. In response, WMAT filed an Answer and Request for Hearing before the Office of Administrative Law Judges on June 4, 2015.

I issued a Notice of Assignment and Hearing and Pre-Hearing Order on August 19, 2015 setting the hearing for December 14, 2015. EBSA filed a motion for summary decision on November 13, 2015 seeking summary decision in its favor affirming the penalty assessed against WMAT.²

On February 12, 2016, EBSA filed a Motion to Extend Trial Date seeking a stay of the hearing until the Court has ruled on its motion for summary decision.³ On February 17, 2016, I issued an Order continuing the matter generally and establishing deadlines for the parties' responses to the motion for summary decision.

Respondent's Response in Opposition to EBSA's Motion for Summary Decision and Cross Motion for Summary Decision in Favor of Respondent was filed on February 25, 2016. On March 14, 2016, Complainant filed a Response in Opposition to Respondent's Cross Motion for Summary Decision. On April 7, 2016, Respondent filed a Reply in Support of Cross Motion.

On June 1, 2016, I held a telephone conference with the parties seeking clarification of record support for one statement included in EBSA's Statement of Undisputed Facts and one statement in EBSA's Response in Opposition to Respondent's Cross-Motion for Summary Decision.⁴ Counsel for EBSA was unable to provide the requested citations to record evidence.⁵

¹ EBSA's motion erroneously states this Notice of Intent to Assess A Penalty was issued on February 23, 2015. *See* EBSA Mot. SD at 4. Examination of the document attached to the motion reveals it was dated March 23, 2015. EBSA Mot. SD at EX E.

² Thereafter, the parties engaged in an attempt to resolve the matter which was unsuccessful.

³ Respondent did not object. *See* e-mail dated February 17, 2016.

⁴ Specifically, I requested EBSA to identify support for the last sentence in No. 5 of its Statement of Undisputed Facts which reads "In Respondent's prior filing for Plan Year ending April 2011, OCA Case No. 14-0266V, the Department found that respondent had made a late filing, but that Respondent had availed itself of the Department's Delinquent Filer Voluntary Compliance Program ("DFVCP") and had paid the related reduce penalty. See Exhibit B" because Exhibit B did not support the statement. Second, I requested EBSA identify the location of record support for the following statement appearing on page 17 of EBSA's Response in Opposition to Respondent's Cross-Motion for Summary Decision: "Further, Respondent's willful noncompliance is demonstrated by its failure

Later that same date, EBSA filed Motion for Judicial Notice and Response to the Court's Question Raised in the June 1st Conference along with additional exhibits. On June 10, Respondent filed its Response in Opposition to EBSA's Motion for Judicial Notice and Response To Court's Questions of June 1st. Respondent contends EBSA "misstates the focus of the two questions raised by the Court and provides additional evidence that again does not support their factual contentions." WMAT Response at 1. Pursuant to 29 C.F.R. § 18.72(e) a party failing to properly support an assertion of fact may be given an opportunity to properly support or address the fact and because WMAT's only objection is the additional exhibits submitted by EBSA do not support the two factual statements of concern, I grant EBSA's Motion and accept the four additional exhibits attached to its motion.

II. STATEMENT OF UNDISPUTED FACTS

The material facts in this case are largely undisputed. What is disputed are the legal implications and ramifications of the undisputed facts under ERISA. In support of its Motion for Summary Decision, EBSA submitted a Statement of Material Facts Not in Dispute ("EBSA SUF") which included 13 paragraphs. In response, WMAT filed its Response in Opposition to EBSA's Motion for Summary Decision, Cross Motion for Summary Decision in Favor of Respondent and Respondent's Opposing Statement of Material Facts which it also referred to as Statement of Disputed Facts ("WMAT SDF"). Respondent's SDF stated it "follows the same captions and numbering appearing in EBSA's SUF for ease of reference" and Respondent used a chart format.⁶ See WMAT SDF. Upon review of the parties submissions the following facts are not disputed:

1. The White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan (the "Plan") is an employee pension benefit plan established or maintained by WMAT to provide retirement income to employees. EBSA SUF ¶ B1; WMAT SDF at 9-10 and EX A (Decl Deron Peaches).⁷

to file compliant Form 5500s with accompanying IQPA reports for Plan years 2009, 2010, and 2011, and its failure to take *any* action to comply with ERISA in Plan Year 2012."

⁵ Counsel indicated the information was on a public website. The website was not cited in EBSA's Motion for Summary Decision, Statement of Undisputed Facts, or its Opposition to Respondent's Cross-Motion for Summary Decision and the undersigned was unfamiliar with any such public website. It is not up to the adjudicator to hunt through unidentified public records to locate evidentiary support for claimed undisputed facts.

⁶ Respondent's chart titled Respondent's Statement of Disputed Facts is confusing. While it purports to respond to the 13 paragraphs in EBSA's Statement of Material Facts Not in Dispute the chart also includes substantial argument masquerading as "fact." It is difficult to decipher precisely what "facts" Respondent is alleging are disputed in its Statement of Disputed Facts.

⁷ Respondent does not deny the Plan at issue is an employee pension benefit plan established to provide retirement benefits for its employees. Rather, Respondent argues determining coverage under ERISA for its Plan requires factual determinations as to whether its employee Plan participants are performing "essential governmental functions" that are not "commercial" in nature. WMAT SDF at 9; see also EX A (Decl Deron Peaches detailing that WMAT traditionally had one employee pension benefit plan covering all employees and now made efforts at developing a second employee pension benefit plan for commercial employees, but never denies the Plan at issue is

2. WMAT is the administrator of the Plan. EBSA SUF ¶ B.2; WMAT SDF at 10.
3. The 2012 Plan Year ended on April 30, 2013. EBSA SUF ¶ B 3; WMAT SDF at 10.⁸
4. WMAT has not filed an IQPA report for plan year ending April 30, 2013. WMAT did submit a Form 5500 as part of its reporting duties under 101(b)(1) and 104(a)(1) of ERISA. EBSA SUF ¶ B. 4-5; WMAT SDF at 10. WMAT failed to file an annual report for the Plan's 2012 year ending April 30, 2013 that included the IQPA report. EBSA SUF ¶ B. 4-5; WMAT SDF at 10.⁹ WMAT admitted in its Form 5500 that "[t]he Plan includes employees engaged in activities defined as 'commercial' in Notice 2006-89 and therefore the Tribe is making the attached Form 5500 filing." The Form 5500 also stated "[t]he Tribe continues to work with its auditors, on a reasonable good faith basis, and intends to complete and submit Plan audits on a volunteer basis as soon as reasonably possible." EBSA SUF, ¶ B. 4 and Ex A; WMAT SDF at 10-11, 19.
5. WMAT has never filed an IQPA report for the Plan including the year at issue here.¹⁰ EBSA SUF ¶ 5; WMAT SDF at 12. In prior years in which WMAT failed to file an IQPA report, EBSA has taken action or utilized strategies to encourage compliance. EBSA SUF at 3 ¶ B 5; WMAT SDF at 12-B.5 (3). For instance, for Plan year ending April 30, 2010, OCA Case No. 11-2832D, EBSA withdrew the Notice of Intent to Assess a Penalty "based on our desk review of the information received in response to our Notice the Department intends to take no further action." EBSA SUF at 3 ¶ 5; WMAT SDF EX C.¹¹ EBSA's Withdrawal Notice also provides withdrawal was "limited to the issues discussed in the Notice. The Department is not precluded from taking any further action on issues under ERISA surrounding your duties and obligations as the Plan Administrator." WMAT SDF EX C. In response to the Department's Notice to Assess a Penalty in Case No. 11-2832D, WMAT raised the very same issues it now raises to excuse its failure to include an IQPA report with its

an employee pension benefit plan established or maintained by Respondent to provide retirement income for Respondent's employees).

⁸ EBSA contends the original due date for the plan's annual report was December 1, 2013. EBSA SUF ¶ B. 3. WMAT asserts the original due date for the Form 5500 and IQPA report with an April 30, 2013 year end would be November 30, 2013, with an extended due date of February 15, 2014. WMAT SDF at 10. There is no dispute the Form 5500 report and accompanying IQPA report for Plan Year 2012 has not been filed whether the due date was the original due date or an extended due date.

⁹ 29 U.S.C. § 1023(a)(3) requires annual reports under ERISA include an IQPA report.

¹⁰ In addition, WMAT Opposing Statement of Material Facts, EX A (Decl. of Deron Peaches) also establishes the Plan has not filed an IQPA report for plan years prior to the one at issue here.

¹¹ WMAT's letter to EBSA dated June 17, 2011 in response to the Notice of Intent to Assess Penalty for Plan year ending April 30, 2010, requested a waiver of the financial statement and auditor opinion requirements with regard to the 5500 filing for its Plan. WMAT SDF EX. C Ex. 2. In the absence of a waiver WMAT requested additional time to complete the 5500 filing requirements. *Id.* The letter further stated its requests were supported by its response to the Notice of Rejection and it attached its response as Ex 2 which raises the same defenses for excusing its failure to comply in 2011 as the Respondent raises in the instant case. WMAT SDF EX C, Ex 2.

Form 5500 for Plan year 2012 at issue in this case. In Case No. 11-2832D WMAT also requested a waiver of the 5500 filing requirements, or alternatively six months additional time to seek relief and/or submit the audited financial statements at issue, and a waiver of civil penalties. EBSA SUF at 3 ¶ 5; WMAT SDF at EX C; WMAT SDF EX C (2) (May 2, 2011 Ltr at 4). For WMAT's filing for Plan year ending April 2011, OCA Case No. 14-0266V, the Department determined WMAT made a late filing, and WMAT availed itself of the Delinquent Filer Voluntary Compliance Program ("DFVCP") and paid a reduced penalty. WMAT SDF at 12-13 No. 9 and EX A ¶ 26 (Decl Deron Peaches).¹²

6. WMAT was aware that unless the Plan was exempt as a "governmental plan," ERISA required it to file an annual report including an IQPA report. EBSA SUF B ¶ 6 and EX A ; WMAT at 13.¹³
7. On September 15, 2014, EBSA issued a Notice of Rejection of the Form 5500 Annual Report to WMAT for failing to attach the IQPA report for the Plan year ending April 30, 2013. EBSA SUF at 4 ¶ 7 and Ex C; WMAT SDF at 14.
8. On October 30, 2014, WMAT sent a Statement of Reasonable Cause to EBSA asserting three reasons the penalty for the delinquent filing should be waived: (1) the Plan is exempt from reporting requirements under ERISA 3(32), 29 U.S.C. § 1002; (2) the Plan did not cover employees engaged in commercial activities; and (3) EBSA should waive the filing requirements under Executive Order 13175. EBSA SUF at 4 ¶ 8 and Ex D; WMAT SDF at 14.
9. On March 23, 2015, the Department issued a Notice of Intent to Assess A Penalty against WMAT. The document notified WMAT the Department intended to assess a penalty of \$50,000 for its deficient Form 5500 annual report for Plan year 2012. The Notice informed WMAT EBSA had determined there was no reasonable cause to reduce or waive the assessed penalty for two reasons: (1) "[a]n IQPA report and amended Form 5500 were not submitted within 35 days after the date of the Notice of Intent to Assess a Penalty" and (2) neither the requirements under either Executive Order 13175 or the Department's Tribal Consultation Policy applied to enforcement actions under ERISA section 103, 29 U.S.C. § 1023. EBSA SUF at 4 ¶ 9 and Ex E; WMAT SDF at 15.¹⁴ The document also indicated a civil penalty in the amount of \$67,350 had accrued. *Id.*

¹² Additionally, WMAT concedes the filing through the DFVCP did not include an IQPA report. WMAT SDF at 12-15 and EX A ¶ 26 (Decl Deron Peaches).

¹³ WMAT asserts however, that EBSA had a policy of non-enforcement for tribal plans pending guidance under the PPA. WMAT SDF at 13-14.

¹⁴ Respondent does not dispute the existence of the facts set forth by EBSA. Instead, it asserts EBSA's March 25th Notice of Intent to Assess Penalty did not respond to the reasonable cause grounds Respondent submitted. WMAT SDF at 15.

10. By letter dated April 27, 2015 from WMAT styled, Statement of Reasonable Cause and Request For Waiver of Penalties; Request for Relief Under Executive Order 13175; and Request for Pre-decisional Conference And to Supplement the Record, WMAT asserted the Department of Labor failed to provide sufficient guidance related to the Pension Protection Act's ("PPA") amendment of the definition of "non-governmental tribally sponsored plan," an "essential governmental function" or the term "commercial" in the context of Section 3(32) of ERISA, and alleged the Department had an inconsistent enforcement policy and requested a Pre-decisional conference. EBSA SUD at 5 ¶ 10 and Ex. F; WMAT SDF at 16.
11. On May 4, 2015, EBSA issued a Notice of Determination on Statement of Reasonable Cause: White Mountain Apache Tribe Retirement Savings and 401(k) Plan Annual Report. This document stated EBSA found there was no reasonable cause to waive the penalty because: (1) no IQPA report was submitted for the Plan's 2012 year; (2) requirements in the Department's Tribal Consultation Policy and Executive Order 13175 did not apply to enforcement actions for violations of ERISA section 103, 29 U.S.C. § 1023; (3) WMAT did not present reasonable cause for its failure to file an acceptable annual report initially and failed to correct this mistake in a timely manner; and (4) WMAT had a fiduciary duty to meet the reporting requirements. Thus, the Department assessed a penalty of \$50,000 under Section 502(c)(2) of ERISA. EBSA SUF at 5 ¶ 11 and Ex. G; WMAT SDF at 17.
12. On June 4, 2015, WMAT filed an Answer and Request for Hearing. In this document, Respondent admitted that an IQPA report had not been filed with respect to the 2012 plan year. However, in contrast to WMAT's Form 5500 for the 2012 plan year, this document now alleges that "all employees covered by the Plan perform functions that are not commercial in nature." EBSA SUF at 5 ¶ 12 and Ex H at 4; WMAT SDF at 18.
13. In the course of discovery, WMAT admitted it "maintains a 401(k) plan that includes certain hotel, casino, service station and/or convenience store employees." EBSA SUF at 6 ¶ 14 and Ex K.

III. PARTIES' POSITIONS

EBSA seeks approval of the \$50,000.00 civil penalty assessed against Respondent for failure to file an annual report for Plan year ending April 30, 2013 which included an IQPA report. EBSA Mot. SD at 10. EBSA contends the Plan is not a governmental plan within the PPA's definition of "governmental plan" as the definition excludes plans sponsored by Indian tribal governments where the covered employees engage "in the performance of commercial activities (whether or not an essential government function)." 29 U.S.C. § 1002(32). *Id.* at 10-11, 14-20. EBSA asserts Respondent's admission that the Plan "includes employees engaged in activities identified as 'commercial' in Notice 2006-89" establishes the Plan is not a governmental plan as defined by the PPA and ERISA, and therefore, it is subject to ERISA's reporting requirements. *Id.* Notice 2006-89 is a notice issued by the Internal Revenue Service

(“IRS”) following passage of the PPA which modified the definition of “governmental plan.” *Id.* The Notice provides a “governmental plan” does not include plans whose participants “are employed by a hotel, casino, service station, convenience store or marina operated by the [tribal government] from the first day of the first plan year beginning on or after August 17, 2006.” *Id.* at 11. Because Respondent admitted the Plan includes employees working in its casino, hotel and convenience store, EBSA states there are no material facts in dispute and the Plan does not qualify as a governmental plan. *Id.* at 18-19. EBSA next contends neither Executive Order 13175 nor the Department of Labor’s Tribal Consultation Policy provide a defense for the instant enforcement action. *Id.* at 11, 20-23. EBSA maintains the Department’s enforcement action in other cases involving reporting violations under ERISA have no bearing on the outcome of this matter. Nor do EBSA’s actions with regard to Respondent’s prior Plan years act as a waiver or preclude EBSA from taking enforcement action as to future deficient filings. *Id.* at 11-12, 23-28.

Finally, EBSA argues there are no disputed facts and Respondent has engaged in continuous, deliberate and willful non-compliance with ERISA’s reporting requirement. EBSA Mot. SD at 12-13-27; EBSA Resp. Opp to Respondent’s Mot SD at 14-18.

Respondent first asserts several alleged defenses for its failure to include an IQPA report with the Form 5500 filing for Plan year 2012. WMAT Opp to SD/Cross Mot for SD at 1, 3-16. Respondent later contends EBSA’s motion is based upon material facts that are disputed. *Id.* at 3, 16-19. The facts Respondent contends are disputed are facts related to EBSA’s assertion Respondent has willfully failed to comply with ERISA. *Id.* at 16-19.

Respondent WMAT broadly asserts that ambiguity under ERISA must be construed in its favor pending final guidance under the PPA. In this regard, WMAT argues the question of whether the plan established by an Indian tribal government is subject to Form 5500 and the IQPA report filing requirements under ERISA turns on whether the employees are performing “essential government functions” and/or “commercial activities.” *Id.* at 4. Respondent asserts that since passage of the PPA neither the IRS nor the Department of Labor published any regulations defining these terms and the terms are ambiguous. *Id.* at 4-6. Respondent conceded the IRS issued transitional guidance in IRS Notice 2006-89 and 2007-67 which identified five categories (casinos, hotels, convenience stores, service stations, and marinas) it would consider “commercial” for purposes of the IRS pending final guidance, but stated the IRS Notice was focused on relief for Tribes under the Internal Revenue Code and did not purport to apply to ERISA, or to Form 5500. *Id.* at 4-9. Respondent states EBSA is now claiming these same categories are applicable for purposes of ERISA, but this position has never been communicated to Respondent other than in this enforcement action. *Id.* Respondent states Executive Order 13175 requires consultation with the Tribe and that is the vehicle for working out these issues. *Id.* at 6. WMAT also asserts that all participants in its Plan engaged in activities that generated revenue for public purposes, that were essential for WMAT to perform its government functions, and it determined its casino, hotel and convenience store were not “commercial” pending final guidance under the PPA. *Id.* at 7-10.

Next, WMAT argues that even if EBSA has adopted the IRS Notices as interim guidance for purposes of ERISA under the PPA, the IRS Notices do not address any specific ERISA requirements such as Form 5500 reporting and IQPA reports. *Id.* at 10-11. WMAT further

contends even if the Plan is subject to the ERISA reporting requirements, it has demonstrated reasonable cause and mitigating factors for its failure to include an IQPA report with its Form 5500 filing, including financial hardships, difficulties with record-keeping, and difficulties splitting its plan into commercial and non-commercial plans under the PPA amendment. *Id.* at 11- 16. Respondent maintains EBSA’s enforcement actions are inconsistent and arbitrary as it has applied tribal reasonable cause waivers inconsistently. *Id.* at 19-20. Lastly, WMAT contends the standard of review for EBSA’s action is not an abuse of discretion standard, but rather is a *de novo* standard of review. *Id.* at 20-21.¹⁵

IV. ANALYTICAL FRAMEWORK

A. Standard for Summary Decision

A motion for summary decision under the Act is governed by the regulations found at 29 C.F.R. § 18.72. Pursuant to Section 18.72, any party may “move for summary decision, identifying each claim or defense – or the part of each claim or defense – on which summary decision is sought.” 29 C.F.R. § 18.72(a). Summary decision may be entered “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” *Id.* A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether there is a genuine issue for trial, the court must view all the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *CelotEr. Ex.Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Id.* at 322-23.

EBSA filed a Motion for Summary Decision, Memorandum in Support and Statement of Undisputed Facts along with several supporting exhibits. EBSA’s motion maintains there are no material issues of fact in dispute in this case, contending WMAT failed to file an IQPA report with its Form 5500 annual report, failed to establish reasonable cause for such failure, and instead has asserted legally baseless excuses for its failure. EBSA Memo in Supp. at 1-2. Therefore, EBSA asserts summary decision should be entered in its favor affirming the \$50,000.00 penalty it assessed against WMAT for failing to comply with the ERISA reporting requirements. *Id.*

As the non-moving party with regard to EBSA’s motion, WMAT has the burden of coming forward with evidence showing a genuine issue of material fact exists and a decision should be entered in its favor. WMAT filed a Response In Opposition to EBSA’s Motion For

¹⁵ Respondent’s Reply in Support of Cross Motion reiterates the assertions and defenses included in its Response in Opposition to EBSA’s Motion for Summary Decision and Cross Motion for Summary Decision in Favor of Respondent.

Summary Decision And Cross Motion for Summary Decision, a Memorandum of Points and Authorities and Respondent's Opposing Statement of Material Facts and supporting documents. In response to EBSA's Statement of Undisputed Facts, WMAT submitted its Opposing Statement of Material Facts. WMAT's Opposing Statement of Material Facts agrees with most of EBSA's Undisputed Facts, but adds additional facts it asserts are disputed, and includes legal argument which serves to confuse and cloud the evaluation of whether material facts are disputed. WMAT's Response In Opposition to EBSA's Motion For Summary Decision And Cross Motion for Summary Decision contends EBSA's motion must be denied because material facts are in dispute, EBSA improperly denied its request for reasonable cause relief for its failure to comply with ERISA and offers legal arguments to excuse its failure.

On its cross motion for summary decision, Respondent asserts and contends the penalty assessment against it should be dismissed "on the ground that ambiguity under the PPA [Pension Protection Act] must be construed by EBSA in favor of the Tribe." WMAT Memo in Supp. at 10. Respondent's Cross-motion further requests the Court find WMAT is "not required to file an IQPA report as part of its operational compliance requirements under the PPA transition rules prior to the date that its plans must be fully separated between government and commercial programs thereunder." WMAT Memo in Supp. at 11.

B. Statutory Provisions

The Employee Retirement Income Security Act of 1974, or ERISA, 29 U.S.C. § 1001 *et seq.*, protects assets placed in retirement plans by setting minimum standards for pension plans in private industry. ERISA does not require an employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards. ERISA is a remedial statute designed to carry out the important purpose of protecting the integrity of employee benefit plans maintained by employers. *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981); *see Barrowclough v. Kidder Peabody & Co.*, 752 F.2d 923, 929 (3rd Cir. 1985); 29 U.S.C. § 1001. "To that end, . . . [Congress] established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

ERISA protects the security of employees and dependents affected by employee benefit plans by requiring administrators of covered employee welfare and pension plans to comply with its reporting and disclosure provisions. 29 U.S.C. §§ 1002(1), 1002(2)(A) and 1003(a)(1). The Secretary of Labor through the Employee Benefits Security Administration is responsible for enforcement of ERISA. Section 101(b)(1) of ERISA requires the plan administrator to file an annual report of the plan with the Secretary. 29 U.S.C. § 1021(b)(1); *see also U.S. Dep't of Labor, Emp. Benefits Sec. Admin. v. Plan Adm'r, Precision Wire Prods.*, No. 2007-RIS-00141, slip op. at 8 (ALJ Sept. 10, 2008). ERISA places the burden of accurate reporting and disclosure on plan administrators and fiduciaries. *U.S. Dept. of Labor, Pension and Welfare Benefits Admin. v. Spalding and Evenflo Cos., Inc.*, No. 92-RIS-00019, slip op. at 7 (P.W.B.A. Nov. 18, 1994).

An annual report must contain all information required by ERISA, including, where applicable, the opinion report of an independent qualified public accountant who conducts an examination of the plan's books and records to verify that the financial statements and schedules contained within the annual report are "in conformity with generally accepted accounting principles." 29 U.S.C. § 1023(a)(3)(A). The annual report, including the IQPA report, is to be filed within 210 days after the close of the plan year. 29 U.S.C. §§ 1023(a)(3)(A) and 1024(a)(1); 29 C.F.R. § 2520.104-20(b).

Upon a finding that an annual report is incomplete or the accountant's opinion contains a material qualification, the Secretary may reject the annual report. 29 U.S.C. § 1024(a)(4). If a revised filing is not made within forty-five days of rejection, the Secretary may, among other things, assess civil penalties against the plan of up to \$1,100.00 per day from the initial due date. 29 U.S.C. § 1024(a)(4); 29 C.F.R. §§ 2575.100 and 2575.502(c)(2). EBSA's policy is to assess a penalty of \$150.00 per day, to a maximum of \$50,000.00, for unfiled or unsatisfactory IQPA reports. EBSA treats rejected annual reports as if they had not been filed. 29 U.S.C. § 1132(c)(2). It is the responsibility of plan administrators to ensure that the annual report and any required IQPA report are properly completed and timely filed, and administrators bear liability for civil penalties assessed by EBSA for failure to file a compliant annual report. 29 U.S.C. §§ 1021(b) and 1024(a)(1) and 29 C.F.R. § 2560.502c-2(a).

In making its initial penalty assessment, EBSA shall consider "the degree and/or willfulness" of the administrator's failure to file the annual report. 29 C.F.R. § 2560.502c-2(b)(1). Once it receives the administrator's Reasonable Cause Statement, EBSA may determine that "mitigating circumstances regarding the degree or willfulness of the noncompliance" exist such that the proposed penalty should be reduced. 29 C.F.R. § 2560.202c-2(d)-(e). EBSA may reduce or waive penalties based upon the materiality of the administrator's failure to file or upon the level of "good faith and diligent efforts" demonstrated by the administrator notwithstanding its failure to file. *U.S. Dept. of Labor, EBSA v. Callaghan & Callaghan, Inc.*, 2005-RIS-99, slip op. at 3 (ALJ Apr. 24, 2006). Determining reasonable cause based on the above considerations is meant to be a flexible inquiry, and the regulations "do not define particular circumstances under which reasonable cause may exist." *U.S. Dep't of Labor, EBSA v. Synergy Manufacturing Technology, Inc.*, 2005-RIS-20, slip op. at 6 (ALJ Feb. 21, 2007).

C. Standard of Review

The parties disagree as to the appropriate standard of review in this case. EBSA contends that when reviewing EBSA's decisions to assess or abate civil penalties, an ALJ applies a deferential abuse of discretion and arbitrary and capricious standard. *U.S. Dept. of Labor PWBA v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-00062, slip op. at 3 (ALJ Mar. 29, 1995); *U.S. Dep't of Labor v. Plan Adm'r for Golden Day Schools, Inc. Ret. Plan and Golden Day Schools, Inc.*, 2013-RIS-00002, slip op. at 10 (ALJ May 28, 2014); EBSA Memo in Supp. at 9-10. Conversely, Respondent first asserts EBSA is not entitled to deference and its action in assessing the civil penalty in this case is an abuse of discretion. WMAT Memo in Supp. at 20. WMAT then appears to contend the standard of review is a *de novo* standard, citing *U.S. Dept. Of Labor v. Team Laurino 401(k) Plan*, 2008-RIS-00050 (ALJ Dec. 9, 2008) and

U.S. Dept. of Labor, EBSA v. Plan Adm'r Thibeault Corp., of NE/T-Quip Sales & Leasing 401(k) Plan, 2009-RIS-00068, slip op. at 10 (July 19, 2011). WMAT Memo in Supp. at 20-21; *see also U.S. Dept. of Labor v. Plan Adm'r Home of Economy 401(k) Plan, Home of Economy, Inc.*, 2010-RIS-00013 (ALJ June 26, 2013).

It is somewhat surprising that the proper standard of review is not uniform. As the cases cited above illustrate, some ALJs have applied the abuse of discretion and arbitrary and capricious standard and others have applied a *de novo* standard in reviewing the Department's assessment of civil penalties under ERISA. I am persuaded by the comprehensive discussion of the standards of review by the ALJs in *Team Laurino* and *Plan Adm'r Thibeault Corp. of NE/T-Quip Sales & Leasing 401(k) Plan*, that the *de novo* standard is the appropriate standard as it reflects the "ALJ is not an appellate court, but rather functions in many ways as a court of original jurisdiction." *U.S. Dep't of Labor, PWBA v. Northwestern Institute of Psychiatry*, 1993-RIS-00023, slip op. at 10 (PWBA July 26, 2008). *De Novo* review "includes taking into consideration mitigating circumstances and events that transpired after the Statement of Reasonable Cause was issued," in addition to any additional evidence the parties may present. *U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-00014, slip op. at 7 (ALJ Jan. 6, 2010). However, the ALJ is required to follow the statute and regulations, and cannot set aside penalties assessed by EBSA under 29 U.S.C. § 1132(c)(2), section 502(c)(2), unless the ALJ determines the penalties invalid. *U.S. Dep't of Labor, PWBA v. Spaulding and Evenflo Companies, Inc.*, 1992-RIS-00019, slip op. at 8 (PWBA Nov. 18, 1994).

DISCUSSION

1. *Is the White Mountain Apache Tribe Retirement Savings Plan Exempt from ERISA as a Governmental Plan?*

In this case, EBSA contends WMAT's Plan is not exempt from ERISA as a "governmental plan" as plan participants employed by the Tribe are engaged in the performance of commercial activities. EBSA asserts because the WMAT Plan was not a governmental plan, the Plan was required under ERISA's reporting requirements to file an IQPA report with its Form 5500 report for Plan Year 2012. Respondent did not file an IQPA report, arguing its Plan is exempt from ERISA as a governmental plan. WMAT Resp. to SD at 4-9; WMAT Reply In Supp. Cross Motion 6-9.

As noted, section 101(b)(1) of ERISA requires the plan administrator to file an annual report of the plan with the Secretary which includes an IQPA report. 29 U.S.C. §§ 1021(b)(1), 1024(a), and 1023(1)(A) and (3)(A).¹⁶

There is no dispute Respondent is the administrator of the White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan. Nor is there any dispute Respondent has

¹⁶ EBSA represents, and Respondent does not contest, that Plans file the Internal Revenue Service (IRS) Form 5500 with the IRS and EBSA obtains the forms from the IRS. *See* EBSA Mot. SD at 15 n. 14.

never filed an IQPA report with its Form 5500 for Plan Year 2012.¹⁷ Nor has Respondent asserted that EBSA failed to follow its own procedures in notifying Respondent of its deficient filing, providing an opportunity to correct, or in assessing the civil penalty.

The Pension Protection Act of 2006¹⁸ modified the definition of a “governmental plan” in ERISA section 3(32) and provides:

The term “governmental plan” means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by agency or instrumentality of any of the foregoing....The term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of Title 26), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of Title 26), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function.)

29 U.S.C. § 1002(32) (emphasis supplied). Thus, the PPA amended the statutory definition of “governmental plan” in ERISA to include certain Indian Tribal government plans. Pub. L. No. 109-208, § 806(a)(2)(A), 120 Stat. 780, 1051 (Aug. 17, 2006). To be eligible for treatment as a governmental plan and exempt from ERISA reporting requirements, all of the participants of a plan maintained by an Indian tribal government must be employees whose services “are in the performance of essential government functions but not in the performance of commercial activities (whether or not an essential government function).” 29 U.S.C. § 1002(32). As the Tenth Circuit determined, “a plan qualifies as a governmental plan only if it is established and maintained by an Indian tribal government and all of the participants are employees primarily engaged in essential governmental functions rather than commercial activities.” *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1285 (10thth Cir. 2010). The plain language of the PPA’s definition of governmental plan explicitly excludes plans that are sponsored by Indian tribal governments if the covered employees engage “in the performance of commercial activities (**whether or not an essential government function**).” 29 U.S.C. § 1002(32) (emphasis supplied).

Respondent argues that the language in 29 U.S.C. § 1002(32) is ambiguous, and any ambiguous terms should be construed in favor of tribes. Resp. Opp.to EBSA SD at 5. However, in support of its contention that the statutory provision is ambiguous, the Respondent cites to cases discussing the difficulties in determining what government functions are essential versus non-essential. *Id.* at 6-8. This is not the test laid out in Section 2(32); the statute unambiguously states that plans covering employees engaged in

¹⁷ Nor is it disputed that Respondent has failed to file an IQPA report with its Form 5500 report for Plan Years 2010, or 2011 for this Plan.

¹⁸ Pub. L. No. 109-280, § 906(a)(2)(A), 120 Stat. 780, 1051 (Aug, 17, 2006).

commercial activities “whether or not an essential government function” are not governmental plans for purposes of ERISA. Therefore, consideration of essential versus non-essential functions is not necessary, nor is it appropriate under the statutory provision.

Respondent argues that it reasonably, in “good faith,” construed the term “commercial” in Section 2(32) as not applying to the employees covered by its Plan because most of the employees are tribal members and all employees covered by its Plan work in activities that “generate[] revenue for public purposes and that was essential for WMAT to perform its government functions.” *See* Resp. Opp to EBSA SD at 8-9. WMAT’s contention that because employees covered by its plan work in activities, including in its casino, that generate revenue used by the Tribe for carrying out its governmental functions, it is a governmental plan exempt from ERISA, is unpersuasive as it ignores the plain language of the statutory definition of governmental plan under ERISA. The PPA expressly provides an Indian Tribal Gaming entity’s commercial activities will still be considered commercial even if they could also be deemed “essential government functions.” 29 U.S.C. § 1002(32); *see Coppe v. Sac & Fox Casino Healthcare Plan*, No. 2:14-cv-02598-GLR (D. Kan. Nov. 5, 2015). Respondent’s interpretation of the definition of governmental plan ignores this explicit statutory language. Moreover, Respondent fails to provide any authority for its construction of the term “commercial” that excludes hotel, casino, service station and convenience store employees.

In addition, following passage of the PPA, the Internal Revenue Service (IRS) issued transitional guidance addressing the narrow situations under which Indian tribal plans could continue to comply in light of the PPA’s amendment to the definition of “governmental plan” in section 414(d) of the Internal Revenue Code (“IRC”).¹⁹ IRS Notice 2006-89, 2006 I.R.B. 772 (Oct. 23, 2006).²⁰ The PPA amended the definition of “governmental plan” as the term appears in 414(d) of the IRC and Section 1002(32) of ERISA, and the definition of “governmental plan” is identical under Section 3(32) of ERISA and Section 414(d) of the IRC. *See* 29 U.S.C. § 1002(32) and 26 U.S.C. § 414(d.). IRS Notice 2006-89, 2006-43 I.R.B. 772 (“IRS NOTICE”). The IRS Notice permitted Indian tribal plans to be considered as meeting the amended definition of “governmental plan” if compliance was based upon a “reasonable and good faith interpretation” of the amendment. However, the Notice expressly stated it is not reasonable and in good faith to interpret a plan as a “governmental plan” if such plan includes employees engaged in commercial activities such as being “employed by a hotel, casino, service station, convenience store, or marina operated by the [tribal

¹⁹ The PPA’s definition of “governmental plan” changed the definition of “governmental plan” in Section 414(d) of the Internal Revenue Code (IRC). Section 414(d) modified the definition of governmental plan as it relates to IRC Section 401(a) qualified pension, profit-sharing and stock bonus plans. The PPA definition of governmental plan expressly excludes qualified pension plans under Section 401(a) of the IRC, that are sponsored by Indian tribal governments if covered employees engage “in the performance of commercial activities (whether or not an essential government function).” 26 U.S.C. § 414(d.).

²⁰ IRS Notice 2007-67, 2007-35 I.R.B. 467 (Aug. 27, 2007) extended the transitional relief period indefinitely.

government] from the first day of the first plan year beginning on or after August 17, 2006.” IRS Notice 2006-89, 2006-43 I.R.B. 772. Thus, the Notice clearly and explicitly indicates a “governmental plan” may not include employees working in commercial activities. Although the IRS Notice does not apply directly to ERISA, the Notice provides additional guidance and clarity that the term “commercial activities” includes covered participants or employees working in the operation of a hotel, casino, service station or convenience store.²¹

In addition, Courts that have considered the PPA’s “governmental plan” provision under ERISA have determined a plan does not qualify as a “governmental plan” if it includes participants or employees engaged in commercial activities, including positions at casinos, restaurants, and hotels. *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d at 1285; *Coppe v. Sac & Fox Casino Healthcare Plan*, No. 2:14-cv-02598-GLR, 2015 WL 6806540 (D. Kan. Nov. 5, 2015); *Bolssen v. Unum Life Ins. Co. of America*, 629 F. Supp. 2d 878, 881-83 (E.D. Wis. 2009); *Stopp v. Mut. of Omaha Life Ins. Co.*, No. CIV-09-221-FHS, 2010 WL 1994899, at *2 (E.D. Okla. May 18, 2010).

Respondent’s Form 5500 for plan year ending April 30, 2013, admits the Plan includes employees “engaged in activities identified as ‘commercial’ in Notice 2006-89...” EBSA SUF at EX A (attached statement). Respondent’s response to EBSA’s Request for Admission also concedes the Tribe “maintains a 401(k) plan that includes hotel, casino, service station and/or convenience store employees.” EBSA Mot. SD at EX K at 1-2. In its response to EBSA’s Request for the Production of Documents, WMAT indicates that it owns a “gaming facility, ski resort, hotels, restaurants, supermarket, convenience stores, tire shop and service station.” EBSA Mot. SD at EX J at 2. Moreover, as EBSA points out the White Mountain Apache Tribe’s website demonstrates the Tribe owns and operates, a ski resort, casino, gaming facility and hotel. EBSA Mot SD at EX I. The Plan includes employees employed in operating, managing and promoting these commercial activities.²² Respondent further concedes the Plan includes non-Tribe members. WMAT SDF at 5 (“most participants in the WMAT Plan are tribal members of the WMAT” (emphasis added)). Despite the Respondent’s clear admission that the WMAT Plan “maintains a 401(k) plan that includes hotel, casino, service station and/or convenience store employees” and its Form 5500 filing stating the Plan includes employees “engaged in activities identified as “commercial” in Notice 2006-89,” Respondent now attempts to disavow its admission by asserting an affirmative defense claiming, “[t]he Tribe affirmatively alleges that

²¹ EBSA acknowledges that the IRS Notice applies only to the requirements of the IRC, but argues the Notice provides additional guidance that the phrase “commercial activities” includes employees working in a hotel or casino. EBSA Opp. to Cross Motion for SD in Favor of Resp. at 7, 8.

²² I note WMAT’s response to EBSA’s Requests for Admission contends the Tribe now has two plans, one for employees not employed in the Tribe’s hotel, casino, service station or convenience store and a separate plan that does include employees who work in the Tribe’s hotel, casino, service station or convenience store. EBSA Mot. SD at EX K at 1-2. WMAT does not contend or provide any facts demonstrating this alleged two plans existed prior to the end of the plan year ending April 30, 2013, the Plan in question here. Furthermore, WMAT inconsistently states in its Opposition to EBSA’s Motion for Summary Decision that its “plan assets are not yet split into two separate trust funds.” 11, 12. Even if WMAT could establish it maintains a separate plan covering employees engaged in commercial activities it has not filed an IQPA report for the plan covering only employees working in commercial activities at its hotel, casino and ski resort.

all employees covered by the Plan perform functions that are not commercial in nature.” EBSA Mot. at EX H. However, this attempt to assert an affirmative defense “based upon the claim that all employees covered by the plan perform functions that are not commercial in nature” fails because it is contradicted by factual admissions. See *Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1318 (S.D. Fla 2005) (“By its very definition, ‘[a]n affirmative defense is established only when a defendant admits the essential facts of a complaint and sets up other facts in justification or avoidance.’” (quoting *Will v. Richardson-Merrill, Inc.*, 647 F. Supp. 544,547 (S.D. Ga 1986)); see also *Losada v. Norwegian (Bahamas) LTD., d/b/a Norweigen Cruise Lines*, 296 F.R.D. 688, 690 (S.D. Fla 2013). Respondent has failed to establish facts or offer any evidence demonstrating that any member of the plan was not engaged in commercial activities, despite having had the opportunity to do so.²³

After careful consideration of the evidence presented, namely Respondent’s Form 5500 filing, its admission and its response to discovery, I find there is no material fact in dispute as to whether the Plan includes at least some participants engaged in commercial activities working in Respondent’s casino, hotels, gaming facility, ski resort, restaurants, supermarket, tire shop, service station or convenience stores. These participants of the Respondent’s Plan who are working in its casino, hotel and convenience store are engaged in “commercial activities.” Respondent failed to present evidence establishing that participants in the Plan were not engaged in commercial activities. Under the plain language of the definition of “governmental plan,” the guidance provided in the IRS Notice, or by any commonsense understanding of “commercial activities,” a casino, hotels, gaming facility, ski resort, restaurants, supermarket, tire shop, service station or convenience stores open to and inviting the public are commercial activities and individuals employed by such entities are engaged in commercial activities. Because I have found on the evidence presented that some Plan participants are admittedly engaged in commercial activities, the Plan is not a governmental plan, and therefore, is not exempt from the ERISA reporting requirements. Based upon the undisputed facts outlined herein, I find WMAT’s White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan

²³ In this regard, it is important to note I permitted limited discovery in this matter as I found WMAT had raised a potential factual dispute as to whether participants in the plan were engaged in commercial activities. The potential factual dispute was created because WMAT’s statement that “none of the Plan participants were involved in commercial activities” is inconsistent with its Form 5500 filing which stated the Plan includes employees engaged in activities identified as “commercial” in IRS Notice 2006-89. See Complainant’s Motion for Order to Conduct Discovery, Request for Admissions, Request for Production or Documents; WMAT Response to Complainant’s Motion for Order to Conduct Discovery; October 28, 2015 Order Granting Complainant’s Motion for Order To Conduct Discovery. In response to my order permitting discovery on whether any plan participants were engaged in commercial activities, EBSA filed requests for Production of Documents seeking “a copy of the position and job description for each employee who is or was a plan participant in the White Mountain Apache Retirement Savings and 401(k) Profit Sharing Plan beginning May 1, 2012 until present.” WMAT objected to the request stating in part: “[t]he Tribe does not maintain written position and job descriptions with details relevant to commercial or governmental function determinations for each employee who is eligible to participate in the Plan and it would be unduly burdensome to require the Tribe to create such documents solely for purposes of this matter.” EBSA Mot. SD at EX J at 2-3. Respondent cannot have it both ways. It cannot on the one hand, claim none of the employees covered by the Plan and working in its casino, ski resort, hotels, restaurants, convenience stores, tire shop and service station are engaged in commercial activities, and then on the other hand, state it does not have position and job descriptions for employees who are plan participants which presumably would detail job duties or other information relevant to the specific positions held by plan participants and whether the job duties indicate employees could be engaged in commercial activities.

does not qualify as a governmental plan and is not exempt from ERISA. Accordingly, EBSA's Motion for Summary Decision asserting Respondent's Plan fails to qualify as a government plan exempt from ERISA's reporting requirements because its participants include employees engaged in commercial activities is GRANTED. Respondent's Cross-Motion on this question is DENIED.²⁴

2. *Is Respondent's Failure to Comply with the Reporting Requirements in ERISA Willful?*

Having found the WMAT Plan is not exempt from ERISA reporting requirements and that the Plan failed to comply with the reporting requirements, the next issue to be determined is whether Respondent has established mitigating circumstances surrounding the non-compliance, and whether there is reasonable cause to adjust the civil penalty levied by EBSA. *See* 29 C.F.R. §§ 2560.502c-2(b), 2560.502c-2(e). EBSA contends WMAT's failure to comply with the Reporting Requirements in ERISA is willful.

The ERISA civil penalty regulations provide the amount assessed by the Department of Labor for failure to file an annual report shall be determined "taking into consideration the degree and/or willfulness of the failure or refusal to file the annual report." 29 C.F.R. § 2560.502c-2(b)(1). The regulation provides further, the Department "may determine that all or part of the penalty...shall not be assessed on a showing that the administrator complied with the requirements in section 101(b)(1) or on a showing of mitigating circumstances regarding the degree or willfulness of the noncompliance." 29 C.F.R. § 2560.502c-(d). The administrator is afforded an opportunity to submit a statement of reasonable cause as to why the penalty should be reduced, or not assessed. 29 C.F.R. § 2560.502c-(e). Following the Department's review "of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, [the Department] shall notify the administrator, in writing, of its determination to waive the penalty, in whole or in part, and/or to assess a penalty." 29 C.F.R. § 2560.502c-(g). If the Department decides "to assess a penalty, the notice shall indicate the amount of the penalty..." *Id.* Determining reasonable cause based upon the regulatory considerations described above is intended to be a flexible review, and the regulations "do not define particular circumstances under which reasonable cause may exist." *U.S. Dep't. of Labor, EBSA v. Synergy Manufacturing Technology, Inc.*, 2005-RIS-20, slip op. at 6 (ALJ Feb. 21, 2007).

As discussed above, I have determined the proper standard of review in 29 C.F.R. § 2560.502(c)(2) penalty proceedings is *de novo*. *De Novo* review "includes taking into consideration mitigating circumstances and events that transpired after the Statement of

²⁴ To the extent Respondent continues to rely on its contention that Executive Order 13175 and or the Department's Tribal Consultation Policy provide it a defense to this action, it is mistaken. Both Executive Order 13175 and DOL's Tribal Consultation Policy state they do not create a cause of action. *See* 77 Fed. Reg. at 71842 (Tribal Consultation Policy) and Exec. Order No. 13175, 65 Fed. Reg. at 67252, § 10. The Tribal Consultation Policy expressly states "enforcement policy, planning, investigations, cases and proceedings are not appropriate subjects for consultation under this policy." 77 Fed. Reg. 71833 (Dec. 4, 2012). Administrative and court adjudications have agreed that neither the Department's Tribal Consultation Policy or executive orders create private rights of action. *See Turning Stone Casino Resort*, 21 O.S.H. Case (BNA) ¶ 1059 (O.S.H.R.C. Apr. 18, 2005); *Zhang v. Slattery*, 55 F. 3d 732, 747 (2d Cir. 1995). Even if EBSA had violated either the Tribal Consultation Policy or Executive Order 13175, no right of action for Respondent existed which would overcome the present enforcement action.

Reasonable cause was issued,” along with additional evidence the parties may present. *Dutch American*, 2009-RIS-14, slip op. at 7.

EBSA’s determination the Respondent’s violation of the ERISA reporting requirements was deliberate and willful is based on the undisputed fact Respondent has failed to comply with ERISA for the plan year at issue here even as late as this date.²⁵ EBSA also points out it has attempted to work with the Tribe to encourage and facilitate its compliance by reducing or waiving penalties for prior year violations and affording WMAT additional time to come into compliance.

In support of its position there are mitigating facts warranting a reduction or total waiver of the penalty, WMAT relies, in part, on the affidavit of Deron Peaches, submitted with Respondent’s Opposition to EBSA’s Motion for Summary Decision/Cross-Motion for SD in its favor/Respondent’s Opposing Statement of Material Facts at EX A. Mr. Peaches, treasurer of the Tribe, generally complains WMAT’s failure to obtain a timely IQPA report is due partly to the lack of guidance for plan administrators and CPAs to follow under section 906 of the PPA. WMAT SDF at EX A at ¶ 5 pgs. (2-4). As discussed above, Respondent cannot hide behind its assertion EBSA has not provided guidance as the statutory language is clear, if an Indian Tribal government’s plan includes employees engaged in commercial activities, it is covered by ERISA’s reporting requirements.

Mr. Peaches also maintains the Tribe did not willfully or intentionally refuse to comply with ERISA’s reporting requirements citing costs the Tribe has incurred and will incur in the future “if the Tribe is required to issue IQPA reports for all post PPA years” as well as several other difficulties including those by its CPAs in splitting its plan, lost data and difficulties with Wells Fargo Bank, the Tribe’s recordkeeper. WMAT SDF at EX A at ¶ 6 pgs. (4-5); ¶7 pgs. (5-6); ¶ 8 pgs. (6-7). Claims of reasonable cause for failing to comply with ERISA similar to those raised by WMAT here have consistently been rejected. For example, *U.S. Dept. of Labor v. Precision Wire Prods.*, No. 2007-RIS-141, slip op. at 8 (ALJ Sept. 10, 2008) (no reasonable cause to *completely* waive penalty when failure to file annual report was due to “illness, death, and difficulty gathering information for the audit”)(emphasis supplied); *U.S. Dept. of Labor v. Comgraphix, Inc.*, No. 1999-RIS-53, slip op. at 8 (ALJ Oct. 14, 1999)(no reasonable cause shown when failure to file IQPA report claimed impossible because of insolvency); *U.S. Dept. of Labor (EBSA) v. Synergy Mfg. Technology, Inc.* No. 2005-RIS-20 (ALJ Feb. 21, 2007) (no reasonable cause when company pointed to unavailable records, filing for bankruptcy, a deceased CFO and unhelpful comptroller who left company as reasons for failure to file IQPA report); *USDOL EBSA v. Plan Admin., Home of Economy 401(k) Plan, Home of Economy, Inc.*, 2010-RIS-00013 (ALJ June 26, 2013) (difficulties due to a change in service providers does not establish reasonable cause); *see also FTC v. Pub’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1977)(“conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create genuine issue of material fact”). Thus, financial hardships, unavailable records and/or difficulties with the Tribe’s bookkeeper or its bank do not establish reasonable cause for its non- compliance.

²⁵ Respondent has not complied with ERISA reporting requirements for this same Plan for prior plan years 2009, 2010, and 2011.

Additionally, WMAT's claim of mitigating circumstances due to difficulty splitting its plan into two separate plans, one for commercial employees and one for all others, is not persuasive. EBSA did not require WMAT to split its plan into a commercial plan and a governmental plan for Plan Year 2012; rather EBSA correctly found that as long as WMAT had a combined plan which encompassed employees in commercial activities, WMAT was not exempt from ERISA requirements, including the filing of a IQPA report. There is no evidence that WMAT split its plans for Plan Year 2012; in fact WMAT argues that it is still in the process of splitting its plans. Without a split, the requirements of ERISA continue to apply to the entire Plan, that is, WMAT was required to file an IQPA report covering all Plan assets for Plan Year 2012. Accordingly, WMAT's assertion that the CPAs have difficulty separating assets for ERISA and ERISA-exempt groups is irrelevant as the IQPA report would cover all assets for Plan Year 2012, without the need to separate out assets. Absent a split WMAT failed to explain why it could not file an IQPA report for all the Plan's assets. EBSA has afforded WMAT additional time to comply and the Tribe has failed to do so.

WMAT also asserts EBSA has applied the IQPA requirement inconsistently. Specifically, Respondent contends EBSA has waived the penalties for this same WMAT Plan for the same reasons WMAT has advanced to establish reasonable cause and mitigating circumstances in the instant proceeding. Respondent's Opp. to EBSA Mot. SD/Cross Mot. for SD at 13-14. Mr. Peaches' affidavit asserts when EBSA granted a waiver of the penalty assessed for failure to meet the filing requirements for Plan Year 2010, the Tribe construed this waiver as applying to 2010 and future year filings. WMAT SDF at EX A at ¶ 18-20. This assertion is disingenuous. EBSA's letter dated August 1, 2011, withdrawing the Notice of Intent to Assess a Penalty for Plan year ending April 30, 2010 explicitly stated "[t]he Department's withdrawal of the Notice is limited to the issues discussed in the Notice. The Department is not precluded from taking any further action on issues under the Employee Retirement Income Security Act, as amended, surrounding your duties and obligations as the Plan Administrator." WMAT SDF at EX C. This letter cannot reasonably be construed as a blanket waiver excusing WMAT from complying with ERISA thereafter. Moreover, the EBSA letter waiving penalties for WMAT's failure to comply with the reporting requirements for Plan year 2010, does not preclude EBSA from regulating WMAT compliance with ERISA two years later. Nor can EBSA's letter waiving penalties for WMAT's prior violations in an effort to provide WMAT additional time to comply, be fairly turned on its head by WMAT to argue EBSA has applied the IQPA requirement inconsistently.

WMAT also fails in its attempt to establish EBSA has a policy of not enforcing ERISA against Indian Tribes. In this regard, WMAT's reliance upon an internal document from an EBSA analyst Madeline Olivera, stating "it has been OCA's²⁶ policy not to pursue cases against Indian tribes" is misplaced. WMAT SDF at EX B at 4. The document references enforcement action EBSA initially began against a different Indian Tribe. Ms. Olivera's note does not bind the Department of Labor or EBSA to a policy or enforcement position, only policy decision-makers at the Department of Labor or EBSA possess the authority to do so. Ms. Olivera's note is in the context of a specific case. There is no evidence her note represents official EBSA policy or that Ms. Olivera has the authority to make such policy. I conclude therefore, Ms. Olivera's note regarding a different Tribe, and different plan year offers no cover for WMAT's failure to

²⁶ OCA is the acronym for EBSA's Office of Chief Accountant.

comply with the reporting requirements for the Plan Year at issue herein and is not a mitigating circumstance supporting a waiver of the penalty.

Finally, EBSA has reduced penalties in circumstances where the Plan files a compliant annual report even after a civil penalty is assessed. *U.S. Dep't of Labor, EBSA v. P.E.C. Contracting Engineers*, 2009-RIS-00080 (ALJ Nov. 15, 2010); *U.S. Dep't of Labor, EBSA v. Dutch American Import Co.*, 2009-RIS-14 (ALJ Jan. 6, 2010). Here, to date WMAT has not filed a compliant annual report for the Plan year ended April 20, 2013. In fact, WMAT has not filed IQPA reports for prior years of 2009, 2010, and 2011 either. For the 2011 Plan Year, Respondent participated in the Delinquent Filer Voluntary Compliance Program in exchange for a reduced penalty. WMAT SDF at 12-13 No. 9 and EX A ¶ 26 (Decl Deron Peaches). WMAT still failed to file a IQPA report through the DFVCP for Plan Year 2011. WMAT SDF at 12-15 and EX A ¶ 26 (Decl Deron Peaches). Accordingly, the circumstances do not warrant a reduced penalty based on eventual compliance with ERISA, and in fact WMAT's continued failure to come into compliance for Plan Year 2012, as well as for prior years, is consistent with the \$50,000.00 penalty assessed by EBSA. *See Dep't of Labor v. Compgraphix, Inc.*, No. 1999-RIS-53 (ALJ Oct. 14, 1999) (ALJ relying on the fact that the IQPA report had never been filed as a reason to not find reasonable cause to justify setting aside or modifying the penalty).

I find there exist no genuine issues of material fact, and that WMAT has not demonstrated mitigating circumstances or reasonable cause for its failure to comply with the ERISA reporting requirements. Accordingly, EBSA's penalty assessment is consistent with ERISA and EBSA is entitled to summary decision with regard to the \$50,000.00 penalty assessed.

V. ORDER

EBSA's Motion for Summary Decision is **GRANTED**. Respondent's Cross Motion For Summary Decision is **DENIED**. It is further ordered that within 45 days of this Decision and Order, the Respondent shall pay to the U.S. Department of Labor a civil penalty in the amount of \$50,000.00. 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 permit.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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 1-2011 (Dec. 21, 2011) (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.