



Issue Date: 22 July 2019

CASE NO.: 2017-RIS-00007

In the Matter of

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

v.

PLAN ADMINISTRATOR,
WHITE MOUNTAIN APACHE TRIBE
RETIREMENT SAVINGS AND 401(k) PLAN,
(Case No. 16-0010N)
Respondent.

**ORDER GRANTING COMPLAINANT’S MOTION FOR SUMMARY DECISION
AND DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION**

This matter involves penalty assessments made by the U.S. Department of Labor (“DOL”), Employee Benefits Security Administration (“Complainant” or “EBSA”) against the Plan Administrator for White Mountain Apache Tribe Retirement Savings and 401(k) Plan (“Respondent” or “WMAT”) pursuant to the provisions of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”). The implementing regulations relevant in this proceeding are published at 29 C.F.R. §§ 2520, *et seq.*, which are the rules for reporting and disclosure, and at 29 C.F.R. §§ 2560, *et seq.*, which include the procedures for assessment of civil penalties. Procedure is governed by the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“OALJ”), 29 C.F.R. §§ 18.10, *et seq.*, and by the Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(2), 29 C.F.R. §§ 2570.60, *et seq.*

Currently pending are cross-motions for summary decision. For the reasons set forth below, Complainant’s Motion for Summary Decision is granted and Respondent’s Motion for Summary Decision is denied.

I. Procedural Background

This matter was initiated with OALJ on December 12, 2016, when Respondent filed an Answer and Request for Hearing contesting EBSA’s November 8, 2016, assessment of a civil monetary penalty of \$90,000.00 for failure to file complete Form 5500 annual reports for plan years ending on April 30, 2014, and April 30, 2015 (plan years 2013 and 2014). On February 13, 2017,

Judge William King set this matter for hearing to begin on September 11, 2017, in Phoenix, Arizona. The parties filed a Joint Motion to Stay Proceedings on June 6, 2017. On June 30, 2017, Judge King transferred this matter to me and on July 11, 2017, I granted the motion to stay proceedings, vacated the hearing, and stayed the proceedings for 180 days. The stay was continued on several occasions. On November 14, 2018, I issued a Notice of Hearing setting this matter for hearing in Phoenix on June 25, 2019. Several discovery disputes emerged in the intervening months, resulting in orders on February 5, 2019, and May 21, 2019. On May 29, 2019, the parties filed a joint motion to continue the hearing so that cross-motions for summary decision could be briefed and a recently issued appellate decision could be considered. On June 5, 2019, I granted this request due to the recent appellate decision, froze the record as of May 31, 2019, and set the hearing for October 29-30, 2019.

Respondent's Motion for Summary Decision ("RMSD") was filed on May 29, 2019.¹ On June 4, 2019, the parties filed a joint motion to extend the deadline for oppositions to the cross-motions to summary decision to June 21, 2019. This request was granted telephonically, but my office informed Complainant that it had not yet filed a motion for summary decision. Complainant then discovered that the motion had been served on Respondent, but sent to the incorrect address for OALJ. Complainant's Motion for Summary Decision ("CMSD") was filed on June 6, 2019.² Complainant's Opposition to Respondent's Motion for Summary Decision ("COSD")³ and Respondent's Opposition to EBSA's Motion for Summary Decision ("ROSD") were both filed on June 21, 2019.

II. Legal Background

ERISA is a comprehensive remedial statute designed to protect the integrity of employee benefit plans. *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981); *U.S. Dep't of Labor (PWBA) v. Sociedad Para Asistencia Legal Money Purchase Plan*, 1994-RIS-62, slip op. at 1-2 (ALJ, Mar. 29, 1995.) In line with its purpose, ERISA contains extensive reporting and disclosure requirements. 29 U.S.C. § 1021(b) requires that a plan administrator file an annual report with the Secretary of Labor. This report must contain a financial statement and other information about the plan, as well as additional information and reports depending on the size and type of plan. *See* 29 U.S.C. § 1023(a); *see also* 29 C.F.R. § 2520.103-1. For plans with 100 or more participants, the annual report must include a report of an independent qualified public accountant ("IQPA"). 29 U.S.C. § 1023(a)(3); 29 C.F.R. § 2520.103-1(b)(5). The Secretary is empowered to determine the forms to be used in filings. 29 U.S.C. § 1029(a). The plan administrator must file the annual report within 210 days after the close of the plan year. 29 U.S.C. § 1024(a)(1); *see also* 29 C.F.R. § 2520.104a-5. Filings may be rejected if they are incomplete. 29 U.S.C. § 1024(a)(4)(A).

However, as important here, a "governmental plan" is exempt from the requirements. 29 U.S.C. § 1003(b)(1). Under ERISA,

[t]he term "governmental plan" includes a plan which is established and maintained by an Indian tribal government [], a subdivision of an Indian tribal government [], or an agency or instrumentality of either, and all of the participants of which are

¹ Respondent's motion is supported by a "Separate Statement of Facts in Support of Motion for Summary Decision," ("RS") and 19 exhibits ("RX 1-19"). RX 3 is a Declaration from Respondent's counsel with eight exhibits.

² Complainant's motion is supported by a Statement of Issues and Undisputed Facts ("CS") and eight exhibits ("CX A-H").

³ Complainant's opposition is supported by two exhibits ("CX 1-2").

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) (parentheticals omitted).

Congress has authorized DOL to assess civil penalties from the date a plan administrator fails or refuses to file a satisfactory annual report. ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2). 29 C.F.R. § 2560.502c-2 sets forth the procedures governing the assessment of those civil penalties when “there is a failure or refusal to file the annual report required to be filed under section 101(b)(1).” 29 C.F.R. § 2560.502c-2(a)(1). The amount assessed is determined by EBSA “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). Penalties are capped at \$1,000 per day⁴ calculated from the date on which a plan administrator failed to file an acceptable annual report and continuing to the day on which an acceptable report is filed. *Id.* Before assessing a penalty, EBSA must issue a written notice of its intent to do so. 29 C.F.R. § 2560.502c-2(c). The plan administrator is given 30 days to file a statement of reasonable cause “explaining why the penalty, as calculated, should be reduced or not be assessed.” 29 C.F.R. § 2560.502c-2(e). Then EBSA “may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the [annual report requirements] or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.” 29 C.F.R. § 2560.502c-2(d). “[F]ollowing a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty,” EBSA must notify the plan administrator in writing of its determination. 29 C.F.R. § 2560.502c-2(g)(1). EBSA’s determination becomes final after 45 days, unless the plan administrator seeks an administrative hearing within 30 days. 29 C.F.R. § 2560.502c-2(g)(2)-(h).

Hearings are conducted before OALJ pursuant to its Rules of Practice and Procedure, as modified by the implementing regulations of ERISA contained in 29 C.F.R. §§ 2570.60, *et. seq.* Parties are permitted to conduct discovery only upon motion to the ALJ and on a showing of good cause. 29 C.F.R. § 2570.66. Summary decision is permitted when there are no issues of material fact. 29 C.F.R. § 2570.67(a)(1). When there are issues of material fact in dispute, the ALJ conducts an evidentiary hearing. 29 C.F.R. § 2570.67(b). After the hearing, the ALJ issues a written decision on the record, making findings of facts and conclusions of law and stating the reasons for his conclusions. 29 C.F.R. § 2570.68(b). That decision becomes final, unless further appealed by either party to the Secretary within 20 days of the decision. 29 C.F.R. § 2570.69(a). No new evidence may be submitted in this appeal and the Secretary issues a decision based on the briefs of the parties. 29 C.F.R. §§ 2570.70-71. “The review of the Secretary shall not be *de novo* proceeding but rather a review of the record established before the [ALJ].” 29 C.F.R. § 2570.70. Appeals to the Secretary are decided by the Director, Office of Policy and Research at EBSA (“Director”). Secretary’s Order 1-2011 (Dec. 21, 2011); *see also* U.S. Dep’t of Labor, *EBSA v. Plan Adm’r, Thibeault Corp. of NE/T-QUIP Sales & Leasing 401(k) Plan*, No. 2009-RIS-00068 (EBSA June 14, 2013) (“*Thibeault* EBSA”); U.S. Dep’t of Labor, *EBSA v. Dutch Am. Imp. Co., Inc. Plan Adm’r*, No. 2009-RIS-00014 (EBSA Jan. 26, 2012) (“*Dutch Am.* EBSA”).

⁴ As adjusted by the implementing regulations to the Federal Civil Penalties Inflation Adjustment Act. 29 C.F.R. § 2560.502c-2(b)(1).

OALJ's jurisdiction and the scope of this adjudication is defined by the regulations. An ALJ is only authorized to review EBSA's determination as part of the process of reaching final agency action. Two issues are relevant: 1) whether the administrator complied with the requirements of ERISA (the "liability question"); and 2) whether the administrator made a showing "of mitigating circumstances regarding the degree or willfulness of the noncompliance" (the "mitigation question"). 20 C.F.R. §§ 2560.502c-2(a)(1), (b)(1), (d); *see also U.S. Dep't of Labor, EBSA v. Plan Adm'r, Hago Mfg. Co., Inc. Ret. Plan*, No. 2013-RIS-00055, slip op. at 3-4 (ALJ Feb 3, 2017). As part of the liability question, it may be necessary to consider both whether the respondent *is* subject to the relevant requirements and whether the respondent complied with those requirements. As part of the mitigation question, an ALJ must examine the circumstances of the noncompliance—particularly the degree or willfulness of the noncompliance. EBSA has burden of establishing non-compliance. If that is done, the respondent has the burden of showing mitigating circumstances.

III. Contentions of the Parties

A. Respondent's Motion for Summary Decision

Respondent seeks summary decision on three independent grounds: 1) that EBSA "abused its discretion in denying [WMAT's] request for waiver of penalties based upon reasonable cause"; 2) EBSA "erred in its interpretation of the applicable law"; and 3) EBSA "denied [WMAT] due process and equal protection under the law, including EBSA's failure and refusal to honor its distinctive obligation of trust incumbent upon [EBSA] in its dealings with [WMAT]." RMSD at 1.

Many of the issues raised in this case relate to the background to the application of ERISA to tribal plans. Respondent recounts the history of the Pension Protection Act ("PPA") that introduced the current ERISA language regarding tribal plans and commercial activity. It avers that the language was a surprise out of the conference committee and lacks legislative history. It states that after the PPA was enacted, the Department of Treasury and the IRS engaged in a consultation process with tribes to attempt to provide guidance, but that such consultations never produced guidance or a final rule, which Respondent contends provides tribes with an open-ended extension to develop separate commercial plans. *Id.* at 3-5; *see also* RS at ¶¶1-14, 30-38; RX 1-2; RX 3, Ex. B-F; RX 4-7.

During this period Respondent began to file annual reports with EBSA, but did not attach an IQPA. This was questioned for the first time in 2011, but the penalties were withdrawn based on Respondent's statement of reasonable cause. In 2014, EBSA again questioned the lack of an IQPA with the report for the plan year ending April 30, 2013, but this time did not accept the statement of reasonable cause. That penalty assessment was adjudicated separately. EBSA has continued to assess penalties for subsequent reports, leading to this action based on the reports for plan years ending on April 30, 2014 and 2015. RMSD at 5-7; *see also* RS at ¶¶ 15-23; RX 3, Ex. A; RX 8-13.

As to the basis for summary decision, Respondent first contends that Complainant abused its discretion in not granting a waiver because a) it had previously accepted Respondent's request for a waiver of penalties; b) it changed its enforcement policies "without warning and in violation of its own consultation policies" and Executive Order ("EO") 13175; c) Complainant made "patently false assumptions" in making its reasonable cause determination; d) Complainant violated its own regulations; and e) "Complainant misconstrued what is required for operational compliance under Notices 2006-89 and 2007-67, including a characterization, if upheld, that would punish tribes that

make partial filings in good faith while rewarding the decision to file nothing at all.” RMSD at 7; *see also id.* at 7-24 (argument); RX 17 (DOL consultation policy); RX 16 at 2 (admission of no consultation); RS at §§ 24-27 (evidence of prior practices); RX 14-15 (same).

Next, Respondent argues that Complainant’s interpretation of the PPA is legal error because it ignores rules of statutory constructions requiring liberal interpretation in favor of tribes and clear and reliable evidence that Congress intended to infringe on tribal rights. Respondent avers that ERISA’s language as to “essential government functions” and “commercial” are ambiguous and must be construed in its favor pending further guidance. It contends that under some interpretations, activities that generate funds for tribal government could be deemed essential government functions. RMSD at 24-28; *see also* RS at ¶¶ 30-38; RX 3; RX 16 at 1 (admission that EBSA promulgated no guidance concerning application of the PPA to tribes).

Finally, Respondent makes a brief equal protection and due process argument. Respondent contends that EBSA has treated it inconsistently in different years regarding penalties for not filing an IQPA. It also contends that EBSA treats different tribes inconsistently because it penalizes tribes who file annual reports without an IQPA but does not penalize tribes who don’t file an annual report at all. Respondent further argues that EBSA failed to comply with the Administrative Procedure Act (“APA”) in regards to publication of substantive policies and legislative-type rules. Last, Respondent alleges that EBSA’s refusal to consult with WMAT violated its consultation policy and the special trust obligations owed to tribes. *Id.* at 28-31; *see also* RS 24-27, 40 (evidence of inconsistency); RX 14-15, 19 (same); RX 17 (consultation policy).

B. Complainant’s Motion for Summary Decision

Complainant’s cross-motion for summary decision seeks an order affirming the penalty assessment of \$90,000.00 and finding that it was not an abuse of discretion, as well as an order to file all required annual reports. It contends that this matter is “routine” and “straightforward” because WMAT was required to file an annual report with an IQPA for plan years ending April 30, 2014 and 2015 (plan years 2013 and 2014), but did not do so. CMSD at 1-3. In Complainant’s view, the undisputed facts are simple: Respondent is the Plan Administrator for an ERISA covered plan and has not filed compliant annual reports for the plan years in question. Respondent’s plan includes workers engaged in “commercial” activities and so is not a government plan. EBSA followed the procedural steps to assess a penalty and considered Respondents’ various arguments. It assessed a \$90,000.00 penalty based on continued willful non-compliance. *Id.* at 3-6, 10-13; *see also* CS at ¶¶ 1-14; CX A (annual reports without IQPA report); CX D (Notice of Determination with penalty).

Per EBSA, the annual report is an important part of ERISA’s enforcement scheme and the primary means by which participants, beneficiaries, the Department of Labor, and the public can gain information about and assess the operation of a plan. CMSD at 6-7. EBSA maintains that it has flexibility in assessing penalties under the regulations and that although an ALJ reviews facts de novo, EBSA’s penalty assessment decisions are reviewed for an abuse of discretion. *Id.* at 7-8, 10. It contends that there is no dispute that it followed the proper procedures and argues that its penalty assessment is not arbitrary, capricious, or an abuse of discretion given the non-compliance, EBSA’s internal guidelines, and the much larger statutory maximum. It avers that “Respondent’s willful, continuing failure at the expense of the Plan’s participants more than justifies EBSA’s assessed

penalty” and argues that there are no mitigating factors since Respondent has not come into compliance or taken steps toward doing so. *Id.* at 13-15.

EBSA acknowledges that governmental plans are not subject to the reporting requirements, but argues that there is no dispute that WMAT’s plan includes employees engaged in commercial activities and that as a matter of law the plan is thus not a governmental plan. It argues that the plain text of ERISA (post-PPA) requires a government plan for a tribe to include only employees engaged in essential government functions and that if any employee is engaged in commercial activities, even if it is also an essential government function, the plan is outside the definition. EBSA further argues that the IRS guidance indicates that it is not a good faith interpretation of the definition to include employees engaged in commercial activities like casino and hotel operation. It adds that the guidance in question is in accordance with the congressional history. Complainant contends that there is no ambiguity in the definition as applied to this case and that since some plan members were engaged in activities that are clearly commercial in nature, the plan is subject to ERISA. CMSD at 15-20.

As to Respondent’s invocation of EO 13175, Complainant argues that it was under no obligation to consult with WMAT because this is an enforcement action and neither the executive order nor the Department’s consultation policy apply. Complainant contends that enforcement decisions are explicitly exempted and that this case involves a case-specific enforcement decision, not a matter of general agency policy. Moreover, Complainant argues that even if the executive order were relevant, by its own terms it would not provide a defense to Respondent. *Id.* at 20-24.

Complainant also argues that it has enforced ERISA’s reporting requirements in a consistent manner. WMAT and other tribes have sought waivers and consultation after failing to comply with the reporting requirements and that EBSA has engaged in a process of using incentives to achieve compliance and providing time where plans might need to be separated. In several instances it has reached settlements where tribes agreed to come into compliance. Complainant maintains that these settlements cannot be construed as a waiver of compliance—rather it indicates flexibility in achieving compliance. In this instance Complainant alleges that the non-compliance is clearly willful, leading to no reason to waive or abate the penalty. Moreover, Complainant argues that even if there is some inconsistency, this is no defense for non-compliance since enforcement is necessarily a case by case decision that turns on the particular facts and situation. *Id.* at 24-28; *see also* CS at ¶¶15-18.

C. Intervening Developments

EBSA previously assessed ERISA civil money penalties against WMAT for plan year 2012 based on WMAT’s failure to include an IQPA report with its annual report. That assessment was litigated at OALJ as No. 2015-RIS-00023. On November 30, 2016, Judge Colleen A. Geraghty issued a Decision and Order Granting EBSA’s Motion for Summary Decision and Denying Cross Motion for Summary Decision. *See U.S. Dep’t of Labor, Employee Benefits Sec. Admin. v. Plan Adm’r, White Mountain Apache Tribe Ret. Savings and 401(K) Profit Sharing Plan Annual Report*, No. 2015-RIS-00023 (ALJ Nov. 30, 2016) (“*WMAT I* (ALJ)”).⁵ Judge Geraghty affirmed EBSA’s assessment of a \$50,000.00 penalty for plan year 2012. *Id.* at 19. WMAT appealed that decision to the Director.

⁵ A copy of the decision is found in CX F and RX 12.

On May 28, 2019, the Director issued a Decision and Order Affirming *WMAT I* ALJ. *U.S. Dep't of Labor, Employee Benefits Sec. Admin. v. Plan Adm'r, White Mountain Apache Tribe Ret. Savings and 401(K) Profit Sharing Plan*, No. 2015-RIS-00023 (EBSA May 28, 2019) ("*WMAT I* (EBSA)").⁶ In *WMAT I* (EBSA), the Director addressed a number of issues that are also pertinent to the disposition of this case. *WMAT I* (EBSA) held that given the activities WMAT acknowledge some participants engaged in, the plan was not a governmental plan and was subject to ERISA's reporting requirements. *Id.* at 5-6. The Director held that EO 11375 was not relevant to the enforcement action and that it was proper for the ALJ to look to IRS Transition Relief guidance as a touchpoint for determining whether activities were commercial. *Id.* at 6. Further, the Director affirmed the finding that WMAT's non-compliance was willful. *Id.* at 6-7. He rejected WMAT's arguments based on due process, equal protection, and the APA alleging inconsistent enforcement and failure to properly publish a policy. *Id.* at 7. And the Director disagreed with WMAT's claims that the ALJ had improperly weighed the various undisputed and disputed facts in the case. *Id.*

Accordingly, the Director affirmed Judge Geraghty's decision granting summary decision to EBSA and ordered WMAT to pay the assessed \$50,000.00 civil money penalty. *WMAT I* (EBSA) at 8. WMAT is free to seek further review of the Director's decision in *WMAT I* (EBSA), and may elect to do so. But in the context of this case, *WMAT I* (EBSA) is binding appellate authority and insofar as the issues presented in the two cases are the same, the resolution in *WMAT I* (EBSA) dictates the resolution here.

D. Complainant's Opposition

Complainant's Opposition largely argues that the Director's decision in *WMAT I* (EBSA) is on point and resolves the issues presented in this matter in Complainant's favor. COSD at 2-3. It argues that the case determined that EBSA did not abuse its discretion in rejection Respondent's claim of reasonable cause and that the decision adopted the reading of ERISA and the PPA that it has urged in this case. *Id.* at 4. Complainant also asserts that *WMAT I* (EBSA) disposed of the same equal protection, due process, and APA arguments Respondent has made here. *Id.* at 4-5.

According to Complainant, there are no disputed material facts in that it is undisputed that WMAT did not file timely annual reports for plan years 2013 and 2014 and never filed an IQPA report for either year. As EBSA understands the cause, the only issue is whether Respondent had "reasonable" cause" for the violation. *Id.* at 5-6. Complainant maintains that the evidence submitted by Respondent does not go to the actual dispute here and cannot show reasonable cause. It argues that the IRS does not speak for DOL and that it cannot rely on waiting for guidance from the IRS to justify not complying with DOL requirements. *Id.* at 6-7. It later adds that its interpretation of the PPA is in line with that of the IRS and derivative from the language of the statute. *Id.* at 13-14.

Complainant further argues that WMAT has not been singled out or treated differently than others. Rather, each enforcement action has its own independent facts and responses from plan administrators. Complainant contends that *WMAT I* (EBSA) settled this issue and that no new facts have been presented that would lead to a different result. It dismisses an internal memo from an analyst as not creating policy and explains that prior actions lead to different results because WMAT represented that it intended to come into compliance by engaging an auditing firm to

⁶ *WMAT* EBSA I is submitted as CX 1.

produce an IQPA report. When the compliance did not materialize, further enforcement was pursued—as the earlier forbearance indicated it might. *Id.* at 7-9; *see also* CX 2.

In addition, Complainant argues that it did not violate EO 11375 or the Department’s Tribal Consultation policy because both exempt enforcement matters and this is an enforcement proceeding, not a development of policy. It distinguishes the various cases Respondent cites in this regard on the grounds that they did not involve enforcement decisions. Complainant avers that there could be no reasonable expectation by WMAT that it would be consulted prior to enforcement since both the executive order and departmental policy exempt enforcement matters. *Id.* at 9-11. Complainant dismisses Respondent’s challenges to the reasonable cause determination as focusing on minute differences between the understanding of Respondent’s argument. That determination, per Complainant, was simply based on continued willful noncompliance. *Id.* at 11-12.

Further, Complainant rejects the claim that it has adopted a strict liability standard for penalty assessments, pointing to prior decisions in which it abated penalties. As Complainant understands Respondent’s position, it asserts that it may continue to refuse to comply so long as it adopts a different interpretation of the law. *Id.* at 12-13. But Complainant argues that this interpretation is wrong and that ERISA, properly construed, does not include Respondent’s plan in the meaning of a governmental plan. *Id.* at 15-17. Finally, Complainant asserts that there is no basis to contend that EBSA has denied Respondent due process and equal protection, stating that it has acted consistently and within its prosecutorial discretion. *Id.* at 17-18.

E. Respondent’s Opposition

Respondent contends that *WMAT I* (EBSA) does not control the outcome in this case and that Complainant has “abused its discretion, [] committed legal error, and [] relied upon facts in dispute.” ROSD at 1. Respondent maintains that it is “not clear” that its plan is not a governmental plan and that even if it was not, it is not clear that it had to file an IQPA report until after it was required to separate its plans by the IRS, which has not yet occurred. *Id.* at 3. Respondent highlights Complainant’s representations that in earlier years it had excused non-compliance due to the difficulty of separating co-mingled plans. It contends that this same rationale is relevant to later years and that EBSA’s rationale was never communicated to it until the motion for summary decision. In Respondent’s view, this points to an informal non-enforcement policy that it has provided other evidence of and that is relevant to the mitigation question in the case. *Id.* at 4-5. It contends that this case differs from *WMAT I* (EBSA) in that there is additional evidence about EBSA’s policies and practices, which goes to show an abuse of discretion. *Id.* at 3-5.

Respondent takes issue with Complainant’s contention that it offered to help tribes come into compliance, maintaining that there is no evidence that this actually occurred and that a declaration submitted indicates the opposite. Respondent casts doubt on Complainant’s explanations of its enforcement actions, asserting that any incentive for compliance EBSA is reading back into the history cannot be maintained since this was never communicated to the tribes. *Id.* at 5-7. Respondent accuses EBSA of keeping the reasonable cause factors a secret and only in its motion revealing its use of incentives to encourage compliance. But since it avers there were no actual uses of incentives, Respondent maintains that EBSA has violated its newly announced policy. *Id.* at 7-8. In addition, Respondent argues that Complainant has violated the IRS Notices in requiring splits of plans before final guidance from the IRS on implementing the PPA. It maintains

that if EBSA is going to enforce the PPA, this amounts to an amendment of the IRS Notice, which must be subject to an administrative process involving notice and consultation. *Id.* at 8-9.

Last, Respondent contests some of Complainant's factual assertions as lacking support. It contends that it did not know that it had to file an IQPA report because EBSA had previously waived penalties. It maintains that Complainant misread its reasonable cause statement. Respondent also asserts that it has never admitted that plan members are engaged in commercial activities—it has admitted that plan members engaged in what the IRS deemed commercial activities but reserved argument on whether that definition is proper. And it maintains that EBSA's statements regarding incentives are unsupported. *Id.* at 9-10.

IV. Findings of Fact and Conclusions of Law

A. Summary Decision Standard

Summary decision is available in ERISA penalty proceedings “[w]here no issue of a material fact is found to have been raised.” 29 C.F.R. § 2570.67(a)(1); *see also* 29 C.F.R. § 18.72; Fed. R. Civ. P. 56(a). A decision on a motion for summary decision must contain “[f]indings of facts and conclusions of law, and the reasons therefor, on all issues presented” as well as “[a]ny terms and conditions of the rule and order.” 29 C.F.R. § 2570.67(2). “Where a genuine issue of material [] fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.” 29 C.F.R. § 2570.67(b). In a motion for summary judgment, the burden is on the moving party to present evidence that shows “an absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party presents such evidence, the non-moving party “may not rest upon mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n.*, 809 F.2d 626, 630-31 (9th Cir. 1987). To prevent summary decision, however, the non-moving party must have more than a mere “scintilla” of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). The non-moving party must designate certain facts in dispute, *Anderson*, 477 U.S. at 250, and “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In ruling on a motion for summary the decision, the ALJ does not weigh evidence or determine the truth of the matter, but evaluates “whether there is the need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 249-50.

B. Standard of Review

Review of civil penalties issued by EBSA under ERISA is defined by the regulations, but the regulations do not specify the appropriate standard of review. ALJs have taken different approaches, some engaging in *de novo* review while others use an arbitrary and capricious or abuse of discretion standard to evaluate the penalties. *See WMAT I* (ALJ) at 10-11 (reviewing different

approaches). As discussed in prior discovery orders, the standard of review of EBSA's decision appears to vary with the question at issue. In an ERISA civil money penalty proceeding, there are two core issues: the liability question and the mitigation question. 20 C.F.R. §§ 2560.502c-2(a)(1), (b)(1), (d). As to at least this second question, and perhaps more broadly, Complainant advocates a deferential abuse of discretion standard of review. CMSD at 10. Respondent does not directly discuss the standard of review, but at times frames the dispute as over whether EBSA abused its discretion. *E.g.* COSD at 4.

It is clear that the standard of review for factual questions in ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2) penalty proceedings is *de novo*. *U.S. Dep't of Labor, PWBA v. Spaulding & Evenflo Companies, Inc.*, No. 92-RIS-19, slip op. at 7 (PWBA Nov. 18, 1994); *U.S. Dep't of Labor, EBSA v. Plan Adm'r, Team Laurino 401(k) Plan*, No. 2008-RIS-00050, slip op. at 4 (ALJ, Dec. 9, 2008); *see also U.S. Dep't of Labor, PWBA v. Northwestern Inst. of Psychiatry*, No. 93-RIS-23, slip op. at 10 (PWBA July 26, 1995.) The ALJ is bound by the governing statute and regulations and cannot set aside the method of calculating the penalty. *See Spaulding*, No. 92-RIS-19 at 7; *see also U.S. Dep't of Labor, EBSA vs. Plan Adm'r for Golden Day Sch. Ret. Plan*, No. 2013-RIS-00002, slip op. at 10 (ALJ May 28, 2014); *U.S. Dep't of Labor, EBSA v. Plan Adm'r, Dutch Am. Imp. Co., Inc. Employee Stock Ownership Plan*, 2009-RIS-00014, slip op. at 6 (ALJ Jan. 6, 2010) ("*Dutch Am.* ALJ"). But the facts underlying the application of the penalty, *e.g.* whether an administrator did file the required report, is open for determination after a hearing. A *de novo* standard of review also applies to legal questions, *e.g.* whether a respondent is subject to the regulations. So here, the question of the meaning of the PPA definition of a governmental plan is not one where EBSA receives any deference—especially since it has not adopted any interpretation or policy that could be given deference. Hence, a *de novo* sort of review applies to the liability question, which combines a legal question about whether the respondent is subject to the regulatory requirements and a factual question of whether the respondent complied with those requirements.

The standard of review is for the determination of the mitigation question is more difficult. *Compare Team Laurino*, No. 2008-RIS-00050 at 4 n.6 *and Dutch Am.* ALJ, No. 2009-RIS-00014 at 7 (*de novo* review) *with Golden Day Sch.*, No. 2013-RIS-00002 at 10 *and U. S. Dep't of Labor, EBSA v. Plan Adm'r, Arenson Office Furnishings, Inc. P/S 401(k) Plan*, No. 2007-RIS-111, slip op. at 5 (ALJ May 2, 2008) (arbitrary and capricious review). The Director has issued three decisions in recent years. In *Thibeault EBSA*, the Director affirmed an ALJ who had applied a *de novo* standard of review to the mitigation question and ruled in favor of EBSA. No. 2009-RIS-00068; *see U.S. Dep't of Labor, EBSA v. Plan Adm'r, Thibeault Corp. of NE/T-Quip Sales & Leasing 401(K) Plan*, No. 2009-RIS-00068, slip op at. 10-13 (ALJ July 19, 2011) (discussing standard of review). The rationale, however, was that the respondent had sought review of whether EBSA had acted arbitrarily and capriciously, and the Director held that such review would require *de novo* review on his part of the ALJ's decision, which was forbidden by the regulations. *Thibeault EBSA*, No. 2009-RIS-00068 at 4-5.

In the other recent appellate opinion, the Director reversed an ALJ who had applied the *de novo* standard of review to the mitigation question and found for the respondent, reducing the penalty. *Dutch Am. EBSA*, No. 2009-RIS-00014. As for the standard of review, the Director observed that "the ALJ has the power to try facts *do novo*. However, in deciding issues of law, the ALJ is bound by the governing statute and regulations, except to the extent the ALJ finds them to be invalid. Whether applying the arbitrary and capricious standard or the *de novo* standard of review, the ALJ could only reach the conclusion that DOL properly applied the law." *Id.* at 5. The decision does not directly answer the question of whether, in determining if EBSA properly applied the law,

the ALJ must give deference to the judgment of EBSA as to mitigation or may review the mitigation decision, and amount of abatement, *de novo*, making his own judgment about the penalty to be assessed. That is a quite different issue than whether EBSA properly followed the law, since the law does not decide the mitigation question in individual cases. Based on *Dutch Am. EBSA*, it is impermissible to consider mitigating factors that developed after EBSA made its determination. Instead, the question is whether the determination was correct at the time it was issued. Additionally, it is impermissible to consider “policy” matters because “[p]olicy judgment is not an appropriate judgment based on facts or related matters of law” and “policy argument would usurp DOL’s policymaking role.” *Id.* at 5-6. The decision also contains language criticizing the ALJ for “substituting her own judgment for the DOL’s,” *id.* at 5, that would suggest deferential review of the mitigation question.

Subsequent ALJ decisions have held that the standard of review in determining whether EBSA properly mitigated/abated the penalty is “abuse of discretion and whether the decision was arbitrary and capricious.” *Golden Day Sch.*, slip op. at 10 (citing *Northwestern Institute of Psychiatry v. Martin*, 1993 WL 52553, 1993 U.S. Dist. LEXIS 2633 (E.D. Pa. Feb. 24, 1993)); *see also Hago Mfg. Co.*, No. 2013-RIS-00055, slip op. at 3-4. *WMAT I* (EBSA) is the Director’s most recent decision, but it did not address the appropriate standard of review for an ALJ’s decision. In the underlying decision the ALJ officially adopted a *de novo* standard. *See WMAT I* (ALJ) at 10-11. But in applying that standard to the mitigation, the ALJ was engaged with factual questions surrounding WMAT’s willfulness, EBSA’s policies and consistency, and the existence of mitigating factors. *Id.* at 16-19. These are distinct from the separate question of whether the weighing of those circumstances was proper and the particular penalty calculation appropriate.

The standard of review for the mitigation question turns on what is being reviewed in the case. Factual questions pertinent to the mitigation question are reviewed *de novo*. There is also *de novo* review of whether EBSA followed the law/regulations in making its determination. The determination of whether and what amount of mitigation is appropriate based on the facts of the situation involves a discretionary judgment. The regulations point to what must be considered, but provide no guidance on how those points must be considered and applied in individual cases. This suggests a more deferential sort of review as to this particular sub-question. Hence, I will apply a *de novo* standard of review to legal questions and to factual determinations, but an arbitrary and capricious or abuse of discretion standard in reviewing EBSA’s mitigation determination.

C. Undisputed Facts

This case concerns penalties for Respondent’s ERISA annual reports for plan years 2013 and 2014. Respondent filed annual reports, though it filed the forms late and maintained that during the “transitional” period after the PPA it did not have to file and had been granted a waiver. Though it contended that its plan could properly be deemed governmental, at least pending further IRS guidance, it filed after being informed by EBSA that it should do so.⁷ It is undisputed, however, that Respondent did not include an IQPA report with either filing. *See CX A* (filings for plan years 2013 and 2014 containing Respondent’s disclaimer); *RX 10*; *CX H* at 3 (admission that no IQPA was filed).

⁷ In its filings WMAT also reserved rights to sovereign immunity and consultation under Executive Order 13175.

It is also undisputed that EBSA followed the procedural steps in assessing a penalty and that WMAT properly filed its allowed objections. *See* CX H at 2, 4. EBSA issued a Notice of Intent to Assess Penalty in the amount of \$90,000.00 for the two plan years at issue on March 14, 2016. *See* CX B; *see also* RX 13. WMAT responded on April 18, 2016, with a statement of reasonable cause/request for waiver, request for relief under E.O. 13175, and request for a pre-decisional conference and to supplement the record. *See* CX C; RX 9; *see also* RX 13. EBSA rejected WMAT's arguments and issued a Notice of Determination assessing a \$90,000.00 penalty on October 11, 2016, with an amendment on November 7, 2016. *See* CX D; *see also* RX 8. WMAT filed an answer and request for hearing on December 12, 2016. *See* CX H.

The parties dispute whether or not WMAT's plan includes employees who are engaged in "commercial" work in the meaning of ERISA as amended by the PPA. But it is undisputed that WMAT's plan includes workers who are engaged in activities that the IRS Notice 2006-89 identified as commercial in nature. *See* CX G at 1; *see also* CX E. IRS Notice 2006-89 identified commercial employees as including those "employed by a hotel, casino, service station, convenience store, or marina."⁸ WMAT acknowledges that during the relevant period it operated Sunrise Park Resort, Hawley Lake Cabins, and Hon-Dah Resort Casino and Conference Center. It also acknowledges that its plan includes employees of these operations. CX G at 2.

D. The Liability Question

Based on the above, it is undisputed that *if* Respondent was obligated to file an ERISA annual report with an IQPA report in plan years 2013 and 2014, it did not do so and has not remedied the shortcoming. The liability question is thus only whether or not Respondent *was* obligated to file the annual report, which turns on whether or not Respondent's plan is a "governmental plan" or whether there is a waiver for filing pending further guidance. Respondent contends that the statutory language in ERISA is ambiguous and that EBSA violated rules of construction requiring liberal construction in favor of tribes by reading the PPA amendments to require a report by Respondent. *See* RMSD at 24-28. Complainant contends that there is no ambiguity and that plans that include employees who work at casinos and resorts cannot be government plans. *See* CMSF at 15-20; COSD at 3.

ERISA, as amended by the PPA, exempts "governmental plans" from various requirements. 29 U.S.C. § 1003(b)(1).

The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government [], a subdivision of an Indian tribal government [], 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) (parentheticals omitted); *see also* *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1285 (10th Cir. 2010) (explaining "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").

⁸ The relevant IRS notices are also found in RX 7.

This definition appears unambiguous in most respects. To be a government plan, *all* members of the plan must be in employment where substantially all of their services are in the performance of essential government functions, as opposed to commercial activities. Moreover, Congress anticipated that the two categories could overlap in the parenthetical at the end of the definition. By providing that a plan's inclusion of an employee engaged in commercial activities "whether or not an essential government function," Congress determined that if an activity was both commercial and an essential government function, the employee could not be part of a government plan. Parts of Respondent's argument and evidence contests the wisdom of this definition, the drafting process, and the problems that the definition creates. *See generally* RMSD 3-5, 24-28; RS at ¶¶ 1-14, RX 1-7. But this is not the forum to debate the statute. While based on the submissions one can appreciate the difficulties the language has created for WMAT and similarly situated tribes, that point goes well beyond my authority.

Respondent attempts to introduce ambiguity in cases where various activities that appear commercial are arguably essential government functions. RMSD at 27-28 (discussing RX 3, Ex. 6). But this presumes that there cannot be an overlap. The PPA language has a different understanding and excludes employees who engage in functions that fit both descriptions from participation in a government plan. There may be strong equitable arguments against this approach and in favor of one that would treat tribal governments in a manner similar to state governments. But that isn't the route Congress went and there is no argument that Congress exceeded its authority in the PPA definition.⁹

Where the statute might contain some ambiguity is in cases where it is unclear whether a particular function is commercial. There is certainly some uncertainty around the boundaries of that word, and in close cases canons of construction favoring tribes might have a role to play. But this is not a close case. The IRS guidance discussed by both parties lists various activities that are paradigmatically commercial. These include working in a casino or hotel/resort. IRS guidance is not dispositive. It does not fix the meaning of the provisions for this proceeding at the Department of Labor. But it is indicative. Common sense is indicative as well. Running a casino is a commercial venture. So is running a hotel. Tellingly, Respondents challenge to the point comes down to the argument that commercial activities of these sorts can be essential government functions. RMSD at 27-28. But that is just the question of overlap in the categories, which is something Congress considered and dealt with by adding the parenthetical at the end of the definition.

Regardless, the Director held in *WMAT I* (EBSA) that the distinction between commercial activities and governmental functions was not ambiguous given the text of the PPA and other materials, at least in reference to activities like working at a casino, ski resort, restaurants, hotels and stores. He rejected the contention that these might also be essential government functions, insofar as they raise revenue, for the reasons stated above. The Director stated that any ambiguity "around any unclear edges" was irrelevant on the facts concerning WMAT's plan. *WMAT I* (EBSA) at 5. The Director held that "[u]nder the PPA, [WMAT's] Plan is not a governmental plan and therefore is subject to ERISA reporting requirements, which EBSA properly enforced in this instance." *Id.* at 6. Since in both *WMAT I* (EBSA) and this case it is undisputed that some plan members work in a casino or resort, WMAT's plan in the relevant period was not a governmental plan in the meaning of ERISA.

⁹ Even were this presented as an issue, it is not one that I would have the authority to address in this proceeding.

WMAT makes several additional arguments contesting ERISA's application, or at least EBSA's application of ERISA to it. For one, parts of its argument can be understood as a claim that it had been granted a waiver from EBSA based on past practices. *E.g.* ROSD at 4-5. But although WMAT has alleged inconsistency, which could go to other arguments it makes, it does not point to evidence of any waiver going forward. At most, a reasonable fact finder could conclude that EBSA exercised its prosecutorial discretion to forebear enforcement given the difficulties the PPA amendments created for tribes. A reasonable fact finder could not construe the submissions as an affirmative waiver of the filing requirements perpetually.

On that point, Respondent points to the IRS guidance regarding separating governmental and commercial plans, which could be construed as a waiver of compliance until final guidance was issued. Thus Respondent argues that it is not required to come into compliance with the ERISA reporting requirements until it is required to separate its plans. *See, e.g.*, ROSD at 3. Though this might be a good argument at the IRS, it cannot work here. The IRS cannot make enforcement decisions for the Department of Labor and it cannot change the statute. The IRS can opt to forebear enforcement, but WMAT cannot parlay that into an ongoing exemption from ERISA's reporting requirements to EBSA. WMAT is not required to separate its plans in order to comply with those requirements, it need only procure an IQPA report for the plan as it exists. It is uncontroverted that this is a difficult and costly endeavor, but that is not relevant to the question presented: whether WMAT's plan, as it exists and as the law exists, must comply with the reporting requirements.

The material facts on that question are undisputed. WMAT did not file an IQPA report and its plan includes employees who work at casinos and resorts. Based on the language of the statute and the decision in *WMAT I* (EBSA), I conclude that Complainant is entitled to summary decision on this question.

E. Is Enforcement Barred by EO 13175 and DOL's Tribal Consultation Policy?

Another facet of Respondent's argument contends that enforcement is barred by EO 13175 and/or DOL's Tribal Consultation Policy. *See* RMSD at 10-14; *see also* ROSD at 7-8. It is undisputed that EBSA did not engage in a consultation process with WMAT prior to commencing the enforcement action.¹⁰ Complainant, however, contends that EO 13175 and the DOL Tribal Consultation Policy are not relevant to this proceeding and even if they were relevant, would not afford Respondent an enforceable right. CMSD at 9-11, 20-24.

Executive Order 13175 of November 6, 2000, seeks to "establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes."¹¹ 65 FR 67249, 67249. Section 3 delineates various policymaking criteria favoring respecting the sovereignty of tribes and Section 5 specifies that "[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." It also requires consultation, to "the extent practicable and permitted by law"

¹⁰ Though it is also undisputed that WMAT was afforded its procedural rights to respond to the enforcement action after it was initiated.

¹¹ EO 13175 is published at 65 FR 67249-67242 (Nov. 9, 2000).

before promulgating regulations that post “substantial direct compliance costs on Indian tribal governments.” *Id.* at 67249-51. Section 6 specifies that

Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

Id. at 67251.

DOL’s Tribal Consultation Policy became effective on December 4, 2012.¹² It espouses the same principles as EO 13175 and provides that

when formulating and implementing policies that will have tribal implications, it is the Department's policy that, to the extent practicable and permitted by law, consultation with affected Indian tribes will occur. As stated in the executive order, this refers to proposed legislation, regulations, policies, or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

77 FR 71833, 71838. Moreover, “[e]ach DOL operating agency will have an accountable process to ensure meaningful and timely input by Indian tribes on policies or actions that have tribal implications.” *Id.* In promulgating regulations that have tribal implications, agencies will notify and consult with tribes to the “extent possible and permitted by law.” *Id.*; *see also id.* at 71839-40 (process guidelines). The policy also directs agencies to review waiver processes and “consider the relevant factors with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is not inconsistent with the applicable federal policy objectives and is otherwise appropriate as determined by the agency.” *Id.* at 71839.

Section 10 of EO 13175 specifies that “[t]his order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.” 65 FR 67249, 67252. By its terms, discussed above, it applies to promulgation of regulations and policy. It does not apply to enforcement matters. DOL’s Tribal Consultation Policy is the same. It specifies that “To the extent consistent with applicable laws and administrative requirements, consultation can involve any DOL matter having tribal implications, including but not limited to: tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; and other matters of tribal interest.” 77 FR 71833, 71839. But it also makes very clear that “[e]nforcement policy, planning, investigations, cases and proceedings are not appropriate subjects for consultation under this policy.” *Id.*; *see also id.* at 71834 (rejecting comment requesting that enforcement be included as a subject of consultation). DOL’s policy also contains this disclaimer:

¹² The policy, along with discussion of the comments, is published at 77 FR 71833-71842 (Dec. 4, 2012). It is also submitted as RX 17.

This document is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. DOL has no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

77 FR 71833, 71842.

Recognizing that the policy does not apply to enforcement, Respondent contends that this “begs the question” because its argument is that EBSA was required to engage in consultation before it changed its policy about what suffices as reasonable grounds for waivers. RMSD at 14 n.3. But this begs the question as well in that it presumes that EBSA had some official policy on what constituted reasonable grounds for waivers. Based on the submissions—which include prior waivers in some circumstances and a stray reference to a “policy” of not pursuing enforcement against tribes, a reasonable fact finder could not conclude that EBSA ever had any official policy that would apply generally. All of the submissions come in the context of a particular enforcement action and do not carry any of the touchstones of official, promulgated agency policy. The most that could be inferred is that at some point some portion of EBSA adopted an informal enforcement policy of not pursuing actions against tribes. But there is no evidence that this was ever adopted by appropriate authorities as agency policy, that any consultation for the policy occurred, that anyone was informed of the policy, or that it was anything more than an expression of EBSA's prosecutorial discretion.

EBSA has not promulgated any regulations implementing the PPA and there is no evidence that it issued any policy guidance. It apparently decided that this was unnecessary and has opted simply to engage in enforcement within the scope of its prosecutorial discretion. WMAT would prefer that EBSA promulgate regulations or other guidance and do so in accordance with EO 13175 and the Tribal Consultation Policy. But there is no basis to assert that EBSA's decision not to adopt policy precludes enforcement based on EO 13175 or the Tribal Consultation Policy, since neither apply to this situation by their own terms. Complainant is also correct that even if they apply, both are very explicit that they do not create any enforceable rights that could bar this enforcement action.

This issue was decided by *WMAT I* (EBSA). The Director held that EO 13175 was “not relevant to this proceeding” on the grounds that this was an enforcement matter “implementing a policy specified in statute, not adopting a new policy.” *WMAT I* (EBSA) at 6. The Tribal Consultation Policy parrots the language of EO 13175 and leads to the same result. Respondent may contend that the decision in *WMAT I* (EBSA) was incorrect on this point and that EBSA has not *merely* engaged in an enforcement proceeding. But that is an argument that will need to be pressed to another authority. Applying *WMAT I* (EBSA), I conclude that Respondent is not entitled to summary decision based on EO 13175 and/or DOL's Tribal Consultation Policy and that neither are a bar to granting summary decision to Complainant.

F. Due Process, Equal Protection, and APA Arguments

Respondent makes a brief series of arguments based on due process, equal protection, and the APA that, if accepted, could provide a basis to grant it summary decision in this matter. It argues that EBSA has engaged in inconsistent treatment of different tribes and of the same tribes in different years. It points to settlements with other tribes, waivers in prior years, as well as the claim that EBSA enforces ERISA's reporting requirements against tribes that file incomplete annual reports but not against tribes that elect to file no annual report at all. Respondent's APA argument contends that EBSA was required to publish its enforcement policy here. RMSD at 28-31; *see also* RS 24-27, 40. To support its allegations of inconsistency, WMAT points to different determinations EBSA made on prior reports that lacked an IQPA. *See* RX 8, RX 11. It has also submitted internal EBSA documents, including a July 19, 2011, memo about Respondent's plan indicating that a Notice of Intent was being withdrawn pending the split of the plans after that PPA, a no enforcement action determination from 2009 related to another tribe on similar grounds, and a 2012 memo related to a third tribe that references a "policy" of not enforcing against tribes. *See* RX 14; RX 15. In its opposition, Respondent elaborates that it views the IRS guidance as requiring EBSA to engage in a further official process of adopting guidance if it is going to engage in enforcement. ROSD at 8-9.

Complainant maintains that it has acted consistently and has merely been exercising its prosecutorial discretion to encourage compliance in different circumstances. It stresses that it engages in a flexible approach to achieving compliance by Plan Administrators and that prior settlements with tribes and decisions not to enforce the reporting requirements in different cases should not be construed as a general waiver of compliance or as limiting EBSA's ability to pursue enforcement going forward. *See* CMSD at 24-28. In its opposition, it maintains that it has not singled out WMAT for compliance and dismisses reliance on prior individual decisions as a basis for policy. Complainant again argues that different results have come about in different cases because of the particular circumstance of each case and the ways it has attempted to get Plan Administrators to come into compliance with the reporting requirements. COSD at 7-9.

These various challenges can be dealt with quickly. *WMAT I* (EBSA) rejected similar arguments sounding in due process, equal protection, and the APA that were based on alleged inconsistent treatment. The Director found that there was no "material inconsistency" in EBSA's actions and that since EBSA was merely implementing a statutory requirement, there was no need to publish a policy before enforcing it. *WMAT I* (EBSA) at 7. Based on the submissions made here, the most a reasonable fact-finder could conclude is that EBSA has pursued enforcement differently in different situations. In the past it appears to have elected not to pursue enforcement against tribal plans, but as time passed has become more aggressive in requiring compliance. It has reached settlements in some cases, which involve efforts to come into compliance.

There is no due process or equal protection violation here. Respondent is not entitled to a perpetual exemption based on past forbearance. There is a rational basis for the evolution of EBSA's exercise of prosecutorial discretion over time. In the years after the change, it may have judged that it was reasonable to forebear, but as additional time has passed opted to pursue enforcement to encourage compliance. It is now more than a decade since the PPA amendments to ERISA. Further, each case in question involves different circumstances. I fail to see, for instance, why EBSA's willingness to reach settlements with other tribes that involve the tribes based on a mutual agreement functions to provide WMAT an exemption from the requirements altogether.

Again, the most that a reasonable fact-finder could infer from the submissions is that parts of EBSA had an informal enforcement policy of not pursuing cases against tribes, but that this has shifted over time with different circumstances. WMAT has not adequately explained how shifts in EBSA's exercise of prosecutorial discretion with changing circumstances amounts to a due process and equal protection violation. In any event, the arguments raised here appear to be identical to those in *WMAT I* (EBSA), so the appellate decision in that case resolves the question in favor of Complainant.

As to the alleged APA violation, the additional facet of Respondent's argument is the assertion that the IRS guidance requires EBSA to engage in some formal promulgation process, involving tribal consultation, before it pursues a different approach. This does not follow. The IRS and EBSA are different agencies in different Departments. Though the PPA amendments had implications for both, IRS guidance does not bind EBSA's enforcement. *WMAT I* (EBSA) held that there was no need for EBSA to promulgate or publish a policy before enforcing ERISA's reporting requirements in accordance with the PPA and Respondent has not offered any additional evidence or argument here that would change that conclusion. Ultimately WMAT disagrees with the ways in which EBSA has opted to exercise its prosecutorial discretion. But that disagreement, whether reasonable or not, is not a basis to defeat an enforcement action in this forum.

Complainant is entitled to summary decision as to the liability question. Based on the undisputed facts about the employees included in Respondent's plan, the text of ERISA, and binding legal authority, Respondent is subject to ERISA's reporting requirements, including filing an annual report with an IQPA report. It is undisputed that it did not do so. In addition, Respondent's various affirmative basis for summary decision lack merit.

G. The Mitigation Question

The remaining issue is the "mitigation question." The mitigation question asks whether the respondent has made a showing "of mitigating circumstances regarding the degree or willfulness of the noncompliance." See 20 C.F.R. § 2560.502c-2(d). In making determinations of the amount assessed, EBSA takes "into consideration the degree and/or willfulness of the failure or refusal to file the annual report." See 20 C.F.R. § 2560.502c-2(b)(1).

Complainant argues that it is entitled to summary decision as to the assessment of the penalty because Respondent's noncompliance has been willful and continued. It asserts that there are no mitigating factors because Respondent has not come into compliance or taken steps to do so. CMSD at 13-15. Complainant argues that most of Respondent's arguments and contentions are not on point and do not go to the question of whether or not there are mitigating factors. COSD at 5-6. It contends that Respondent's dispute of the reasonable cause determination pertain to minute differences of opinion that do not go to the central issue, WMAT's continued willful noncompliance. *Id.* at 11-12.

The bulk of Respondent's arguments can be read as in some manner directed to the mitigation question, though some of the points have been considered above. First, Respondent contends that Complainant abused its discretion in deciding to not accept grounds for waiver that it had previously found adequate in that prior enforcement decisions had declined to pursue actions against tribes. CMSD at 7-10. But though the parties dispute the significance of the prior actions Respondent points to, even making all reasonable inferences in favor of Respondent, the most a

reasonable fact finder could conclude is that a component of EBSA decided, some years ago, not to pursue enforcement against tribes. That changed and Respondent has not provided a convincing legal basis for treating changed enforcement strategy as a mitigating factor. Moreover, based on the submissions about the different cases Respondent relies on, there can be no reasonable dispute that they involve different facts and lengths/degrees of noncompliance.

Second, Respondent argues that the enforcement position was changed without warning and that EBSA failed to adhere to DOL's consultation policies. *Id.* at 10-14. Though Respondent contends that this is a distinct issue from whether the consultation policies bar the complaint, the underlying issue is identical. As determined above, EBSA was not under any obligation to engage in a consultation with WMAT before it engaged in enforcement of ERISA. EBSA's undisputed failure to do so is thus not evidence that it abused its discretion or a mitigating factor that needed to be considered in deciding whether to impose a penalty and what penalty to impose. Later, Respondent alleges that Complainant misunderstood what was required for compliance under the IRS notices and has thus abused its discretion in relying on those notices. *Id.* at 23-24. Complainant argues otherwise, claiming that it has properly interpreted the notices. COSD at 13-14. This dispute is not really relevant. The only reliance EBSA seems to have made of the IRS Notices in this case is in establishing the point that running a casino or a resort are commercial activities. That is a proper implication and in accord with common sense. As to the more involved issue of what the IRS is requiring in the notices, it isn't relevant since this isn't an IRS enforcement matter.

The difficulty with many of Respondent's lines of argument is that they focus on EBSA's conduct and the way EBSA has gone about pursuing enforcement. Some of these may be legitimate complaints—or may not—but the missing piece in Respondent's argument is what bearing these complaints have on the mitigation question as it is described in the regulations, which points solely to the degree or willfulness of the plan administrator's noncompliance. As such, many of these points come down to an attempt to change the subject and expand the narrow issues presented by the regulations into consideration of points of policy that this forum has no authority to address.

In a more relevant line of argument, Respondent contends that Complainant violated its own regulations by turning enforcement into a strict liability offense in that it treats failure to comply (the liability question) as a determination of willfulness that resolves the mitigation question. RMSD at 20-21. If Complainant used an erroneous legal standard in its analysis, that might be grounds to find for Respondent on the mitigation question. But Complainant's response is persuasive on this point. *See* COSD at 12-13. Respondent has maintained that EBSA acts inconsistently in waiving enforcement, sometimes withdrawing enforcement efforts and sometimes reaching settlements. It cannot simultaneously maintain that EBSA has adopted a strict liability standard that removes the mitigation question from the calculus. The mitigation question looks to the degree or willfulness. These are not just a question of liability. A plan administrator might not realize a report is required, may send it to the wrong place, or may take steps to remedy the noncompliance after being informed. All of these points would not change the answer to the liability question, but they would be considerations for the mitigation question since they go to factors affecting the degree or willfulness of noncompliance.

More substantively, Respondent contends that Complainant's reasonable cause determination was based on "false assumptions," which could be grounds to find for Respondent on the mitigation question insofar as the false assumptions led to an abuse of discretion. Respondent complains that the reasonable cause statement does not provide an explanation of why

Respondent's mitigation arguments were insufficient. Respondent alleges that the summary of its position that is reflected in the committee notes demonstrates that Complainant did not understand Respondent's argument insofar as it did not include points that Respondent found important and misstated other points. Respondent also argues that it was improper for Complainant to rely on what happened in *WMAT I* (EBSA) because at the time of the determination that case was on appeal. It adds that the committee notes do not distinguish prior decisions from the one at issue. RMSD at 14-17. Respondent takes particular issue with the claim in the committee notes that Respondent's counsel had not reached out to a government entity to seek clarification of the requirements, when in fact Respondent's counsel had engaged in multiple efforts with the Treasury/IRS and later DOL. *Id.* at 18-20.

This last line of argument misses the mark. The reasonable cause determination was based on the material Respondent presented at that time, not what has been subsequently added. *See* RX 9. In addition, many of the alleged failings are minor or even irrelevant—Complainant is not required to perfectly understand what a Plan Administrator means in an argument in order to assess penalties—that would create an incentive to opaqueness. Even accepting Respondent's version of its arguments, a reasonable fact finder would still have to conclude that EBSA understood the central argument that Respondent made in its Statement of Reasonable Cause and continuing through the current briefing. Complainant disagrees starkly with the validity and import of the points that Respondent made and is making, but that is not a basis to find an abuse of discretion in the decision-making process.

Nonetheless, both the reasonable cause letter and the committee notes are somewhat sparse. *See* CX D (letter); RX 16, Ex. S1 (notes). In addition, since Respondent was exercising its rights in appealing the determination in *WMAT I* (EBSA), I do not see the fact that there was a prior assessment as important. It would tend to show that Respondent was on notice that EBSA required an IQPA report and would enforce that provision. But it is not an aggravating factor. Respondent asserts that the it has presented a number of points indicating its good faith and supporting mitigation: WMAT has been more significantly affected by regulatory delays because it traditionally maintained only one plan, there is significant movement of employees between jobs that creates difficulties in how pension may need to be converted, some employees have job functions that are governmental and commercial, there are numerous complications in complying with rules for both governmental and ERISA plans, it has taken steps to ensure compliance with IRS notices, the tribe incurred \$97,500.00 in CPA fees to attempt to secure IQPAs and estimates that \$200,000.00 more will be needed to produce IQPAs for all back years, and a May 2012 computer failure resulted in lost data making compliance with prior years impossible. RMSD at 21-22; *see also* RS at ¶ 39; RX 2.

The regulations, however, are fairly narrow in what is considered in the mitigation question: “the degree or willfulness of the noncompliance.” 29 C.F.R. § 2560.502c-2(d); *see also* 29 C.F.R. § 2560.502c-2(b). Many of Respondent's mitigating factors do not go to these points. So, for instance, the cost of compliance might affect the instrumental decision of WMAT in deciding whether or not to come into compliance, but it does not render its noncompliance lesser in degree or willfulness. The notes and decision are sparse, but they indicate that EBSA focused on the fact that Respondent was aware of the law and EBSA's interpretation, but opted not to comply based on a different reading of the law. It does not appear to have given importance to other aspects Respondent points to now. Respondent challenges this, but some of those consideration were irrelevant and while the regulations provide direction on what is to be weighed, they do not provide guidance on how EBSA should exercise its discretion.

Ultimately, *WMAT I* (EBSA) resolves the issue presented here. In that case the ALJ considered the same series of arguments presented now and reviewed a series of cases in which similar claims had been rejected. The ALJ then granted summary decision to EBSA on the mitigation question. *WMAT I* ALJ at 17-19. In *WMAT I* (EBSA), the Director affirmed that decision. The Director determined that noncompliance is willful when it is based on disagreement about the meaning of the law because this is “a purported justification for its willful noncompliance, rather than a demonstration that its noncompliance was not willful.” *WMAT I* (EBSA) at 6-7. Willfulness might be understood in various ways and Respondent may disagree with that understanding of willfulness—based on the various considerations it has stressed through this litigation, it does. In Respondent’s understanding, the noncompliance should be found less willful when it is based on a disagreement with the legal requirements, i.e. a different reading of the law and the import of other things, like IRS guidance. But whatever conclusion I might draw about those arguments on a blank slate, *WMAT I* (EBSA) is binding authority and settles the issue: disagreement with the meaning of the law is not a willfulness factor.

More generally, the factors in play in *WMAT I* (EBSA) are the same as those in play here. Given the intervening appellate authority finding that it was not incorrect or an abuse of discretion to assess a full penalty on the facts in *WMAT I*, the same result follows here. Respondent contends otherwise, asserting that there is additional evidence in this case about EBSA’s policies and practices that presents a different question on the mitigation question. *See* ROSD at 3-5. However, the new evidence does not alter the analysis as to Respondent’s claims about past practices, changes in practices, or differential treatment. Those points were all discussed above. At most they show that EBSA’s enforcement strategy has changed over time and that its enforcement decisions are context-dependent. More importantly, the mitigation question is focused on *Respondent’s* conduct, not Complainant’s enforcement strategies and other conduct. Mitigating factors go to the degree or willfulness of the non-compliance. WBSA has not articulated a meaningful difference in the presentation of the relevant factors from *WMAT I* (EBSA) and reviewing the submissions here and the decisions in that case, I see none. I thus conclude that under *WMAT I* (EBSA), Complainant is entitled to summary decision on the mitigation question.

H. Conclusion

For the reasons set forth above, I find that Complainant is entitled to summary decision on both the liability question and the mitigation question. I also find that Complainant is entitled to summary decision rejecting Respondents various affirmative arguments to prevent enforcement based on the alleged need for consultation, the APA, or due process/equal protection. Based on those determinations, Complainant is entitled to summary decision in this matter ordering Respondent to pay a civil money penalty in the amount of \$90,000.00.¹³

ORDER

1. Complainant’s Motion for Summary Decision is granted.
2. Respondent’s Motion to for Summary Decision is denied.

¹³ Complainant also sought a more general order directing Respondent to file annual reports. CMSD at 3. However, the regulations that define the nature of this proceeding at 29 C.F.R. §§ 2570.60, *et seq.* relate only to the assessment of civil money penalties.

3. 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 \$90,000.00. 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.

RICHARD M. CLARK
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 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, 77 Fed. Reg. 1088 (signed Dec. 21, 2011; published in Federal Register on Jan. 9, 2012) (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.