

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 08 June 2018**

**Case Number: 2018-RIS-00014**

*In the Matter of:*

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

*Complainant*

v.

**PLAN ADMINISTRATOR,  
MARIN HOSPITALITY CORPORATION 401(K) PROFIT  
SHARING PLAN & TRUST  
(Case No. 17-0128N)**

*Respondent.*

**DECISION AND ORDER OF DISMISSAL**

**Background**

This matter arises under Section 502(c)(2) of the Employee Retirement Income Security Act (“ERISA”) of 1974, as amended, and the regulations at 29 C.F.R. Parts 2560 and 2570. On September 18, 2017, the Employee Benefits Security Administration (“Complainant”) issued a Notice of Determination (“NOD”) against the Plan Administrator, Marin Hospitality Corporation 401(k) Profit Sharing Plan & Trust (“Respondent”),<sup>1</sup> assessing a \$4,000.00 civil money penalty for failing to file a timely 2015 Form 5500 annual report.<sup>2</sup> Respondent filed an Answer with the

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<sup>1</sup> The letter was sent via United Parcel Service – Next Day Air on September 18, 2017 and addressed to “Plan Administrator, Marin Hospitality Corporation 401(k) Profit Sharing Plan & Trust, Marin Hospitality Corporation, 901 Hennepin Ave, Minneapolis, MN 55403.” The letter was delivered on September 19, 2017 and signed by a “McCarthy” at the Marin Hospitality Corporation’s front desk. (Exhibit 4, Complainant’s Reply to Respondent’s Response to Second Order to Show Cause).

<sup>2</sup> The initial assessed \$30,000.00 penalty was subsequently reduced to \$4,000.00. The NOD warned Respondent that “[u]nless you file a request for hearing and answer with the Office of Administrative Law Judges (“OALJ”) within 30 days of receipt of this Notice of Determination (“Notice”), this Notice will become a Final Order. The penalty, described above, will become immediately due and payable 45 days after the date of this Notice as defined in 29 CFR § 2570.61(g). Failure to pay the penalty promptly will result in enforcement action by the Department to

Office of Administrative Law Judges (“Office”), dated November 7, 2017 and received on November 15, 2017,<sup>3</sup> requesting a hearing and contesting the penalty issued.<sup>4</sup>

On November 24, 2017, I issued a *Notice of Docketing and Order to Show Cause* (“Order to Show Cause”) instructing Respondent to show cause within thirty (30) days why this matter should not be dismissed for lack of jurisdiction, as it appeared Respondent did not file the request for hearing within the 30-day period provided for in 29 C.F.R. § 2560.502c-2(h).

On February 13, 2018, having not received a response from Respondent, I issued a *Second Order to Show Cause* instructing Respondent to show cause within fifteen days why a default judgment should not be entered.<sup>5</sup> On March 27, 2018, Respondent filed a response to the Second Order to Show Cause.<sup>6</sup> Complainant filed a *Reply to Respondent’s Response to Second Order to Show Cause* (“Reply”) on April 18, 2018.

### **Legal Framework**

The Office of Administrative Law Judges is an administrative tribunal of limited jurisdiction. Subject matter jurisdiction over civil money penalties assessed by EBSA for violations of Section 502(c)(2) of ERISA originates from the regulations at 29 C.F.R. § 2560.502c-2(e)-(h). Pursuant to those regulations, this Office has jurisdiction to adjudicate claims where a plan administrator files an Answer and request for hearing in accordance with §§ 2570.60 through 2570.71.

These regulations provide that service of the NOD is complete upon receipt by the addressee if service is made by regular mail to the last known address of the plan administrator. 29 C.F.R. § 2560.502c-2(i)(iii)(2). The plan administrator must file an Answer and request for hearing within 30 days of the date of service of the NOD in order to preserve the right to a hearing. Section 2560.502c-2(h) provides in full:

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collect the penalty in the amount assessed plus costs of collection.” The Notice also provided the address Complainant would use to mail a request for hearing and answer to this Office.

<sup>3</sup> Respondent sent its Answer to this Office by U.S. Postal Service on November 8, 2017. The filing was received by the Chief Docket Clerk, Office of Administrative Law Judges, on November 15, 2017. The handwritten return address on the envelope reflects “Marin, 901 Hennepin, Minneapolis, MN 55403.”

<sup>4</sup> In its Answer, Respondent explained that, at the end of 2014, the plan was terminated, it was no longer making contributions to the plan, and only 11 plan participants remained with account balances. Respondent further explained that it mistakenly believed that it was not required to file a 2015 Form 5500 because it distributed all of the remaining accounts in 2015. Respondent stated that it “immediately engaged a CPA firm to file its 2015 Form 5500 when it became aware that it was required,” and that the firm filed the Form 5500 in March 2017.

<sup>5</sup> At my direction, after the Second Order to Show Cause was issued, a member of my staff contacted Respondent, who indicated that it intended to file a response.

<sup>6</sup> The Response is dated March 19, 2018, but not received by this Office until March 27, 2018. In it, Respondent avers that since the Plan was terminated in 2014 and the accounts distributed in 2015, he believed the 2014 Form 5500 would be the final form filed and that no 2015 Form 5500 would be required. Once informed of the requirement, one was prepared and, as noted above, filed in March 2017. However, the Response does not provide an explanation why the November 7, 2017 request for hearing was untimely.

A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.61(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.60 through 2570.71 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.62 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

The NOD becomes a final agency action<sup>7</sup> 45 days after service of the NOD if the plan administrator fails to file a request for hearing within the time period specified in subpart (h). Section 2570.64 states:

For 502(c)(2) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c-2(g) of this chapter within the 30 day period provided by § 2560.502c-2(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.61(g) of this subpart, forty-five (45) days from the date of service of the notice.

§ 2570.64. *See also* § 2560.502c-2(g)(2) (stating that the NOD becomes a final order 45 days from the date of its service in the event that a hearing is not requested within 30 days).

A request for hearing is filed on the date that it is received by the Chief Docket Clerk. *See* § 18.30(b)(vi)(2). The regulations state that “the request for hearing must be filed in accordance with § 18.4,”<sup>8</sup> 29 C.F.R. § 2560.502c-2(h), which dealt with computing and extending time. Section 18.4 has since been removed and replaced by § 18.32.<sup>9</sup>

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<sup>7</sup> This Office does not have jurisdiction to adjudicate issues determined in a final order as defined by 29 C.F.R. § 2570.61(g), which states:

*Final Order* means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(2) against a particular party. Such final order may result from . . . the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. § 704.

<sup>8</sup> The procedures regarding service of documents found at 29 C.F.R. § 2560.502c-2(i) apply only to service of EBSA’s Notice of Intent to Assess a Penalty and Notice of Determination.

<sup>9</sup> *See* 80 FR 28768, 28785 (May 19, 2015). I note that § 18.4 allowed an additional five days for filings by mail. Section 18.32(c) grants an additional three days for filing after certain kinds of service.

## **Positions of the Parties**

### **Respondent's Arguments**

Respondent submits it did not believe a 2015 Form 5500 was required as the Plan was terminated in 2014. Respondent filed the 2015 Form 5500 once learning one was required.<sup>10</sup> Given the 2015 Form 5500 is now filed and in compliance with the applicable regulations, Respondent requests that the remaining \$4,000.00 penalty be abated.

### **Complainant's Arguments**

Complainant asserts that Respondent's November 7, 2017 Answer was untimely and that the Office of Administrative Law Judge lacks jurisdiction over the matter because EBSA's NOD became a final order on November 3, 2017. (Reply at 3-4.) Complainant contends that service of the NOD was complete on September 19, 2017; the deadline for filing an Answer was October 19, 2017; and the NOD became a final order on November 3, 2017. (Reply at 3.)

Complainant attaches the Declaration of Lynne McMennamin, Acting Senior Reporting Compliance Specialist, Division of Reporting Compliance, EBSA; the NOI, (Exhibit 1); the Statement of Reasonable Cause, (Exhibit 2); the NOD, (Exhibit 3); and a printout of the shipment details of the NOD, (Exhibit 4).

## **Discussion**

Service of the NOD is complete upon receipt by the addressee if service is made by regular mail to the last known address of the plan administrator. 29 C.F.R. § 2560.502c-2(i)(iii)(2). The NOD issued by Complainant in this case was sent by United Parcel Service, Next Day Air on September 18, 2017, and was correctly addressed to the plan administrator.<sup>11</sup> It is undisputed that Respondent received the NOD, and service was complete, on September 19, 2017.

Respondent's November 7, 2017 Answer was filed with this Office on November 15, 2017, upon receipt by the Chief Docket Clerk. Accordingly, Respondent's Answer and request for hearing was filed fifty-seven days after service of the NOD, or twenty-seven days too late.

Respondent's failure to timely file its Answer and request for hearing within the period described in Section 2560.502c-2(h) resulted in forfeiture of the right to contest the assessed penalty. The NOD became a final agency action on November 3, 2017, forty-five days from the date of its service, and four days before Respondent mailed its Answer and request for hearing.

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<sup>10</sup> On April 10, 2018, a member of my staff provided Respondent's response to Complainant, who had not been served with it.

<sup>11</sup> The return address on the envelope containing Respondent's Answer and Respondent's letterhead use the same address as Complainant's Notice of Determination.

## ORDER

Based on the foregoing, I find that Respondent's failure to timely file an Answer and Request for Hearing within the period described in § 2560.502c-2(h) resulted in forfeiture of the right to contest the \$4,000.00 assessed penalty and that the NOD subsequently became a final agency action on November 3, 2017. Accordingly, as this Office does not have jurisdiction over this matter, the above-captioned matter is **DISMISSED** for lack of subject matter jurisdiction.<sup>12</sup>

SO ORDERED:

**STEPHEN R. HENLEY**  
Chief 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, Suite 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.

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<sup>12</sup> Given the small size of the Plan, the minimal number of participants, that the Plan was evidently terminated in 2014 and that Respondent apparently filed the requisite 2015 Form 5500 in March 2017 as soon as it learned one was necessary, I am sympathetic to its position that the penalty appears excessive under the circumstances. However, as I find that the NOD became a Final Order before Respondent filed its request for hearing, I do not have jurisdiction to determine the reasonableness of the penalty. That said, nothing in this decision precludes the parties themselves from negotiating a mutually acceptable settlement of this matter, to include either a reduction in or abatement of the \$4,000.00 civil money penalty.