



MAY 28 2019

In the Matter of:

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

Date: May 28, 2019

Complainant-Appellee

OALJ CASE No. 2015-RIS-00023

v.

**PLAN ADMINISTRATOR,
WHITE MOUNTAIN APACHE TRIBE
RETIREMENT SAVINGS AND 401(k)
PROFIT SHARING PLAN**

Respondent-Appellant

**DECISION AND ORDER
AFFIRMING THE ADMINISTRATIVE LAW JUDGE DECISION AND ORDER
DATED NOVEMBER 30, 2016**

This proceeding is on appeal from the United States Department of Labor, Office of Administrative Law Judges (“OALJ”), and arises under the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”) and the implementing regulations at 29 C.F.R. Parts 2520 (rules and regulations for reporting and disclosure), 2560 (rules and regulations for administration and enforcement), and 2570 (procedural regulations under ERISA).

BACKGROUND

The White Mountain Apache Tribe Retirement Savings and 401(k) Profit Sharing Plan (the “Plan”) is an employee pension benefit plan established or maintained, and administered, by the White Mountain Apache Tribe, a federally recognized Indian tribal government, to provide retirement income to employees. At issue in this appeal is whether the Plan is an ERISA covered plan that is required to file an annual report that includes an independent qualified public accountant (“IQPA”) report. The Plan is ERISA covered if its participants perform commercial activities.

ERISA Section 502(c)(2) provides for a civil penalty to be assessed by the Secretary for a plan administrator's failure or refusal to file the required annual report. The regulations provide that the amount assessed under Section 502(c)(2) of the Act shall be determined by the Department of Labor, 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). After the Department has provided an administrator a written notice of intent to assess a penalty, the administrator may file a statement of reasonable cause regarding why the penalty, as calculated, should be reduced, or not be assessed. The statement must set forth all the facts alleged as reasonable cause for the reduction or non-assessment of the penalty. 29 C.F.R. § 2560.502c-2(e). The Department 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 requirements of ERISA Section 101(b)(1) 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). Following a review of all the facts alleged in support of a complete or partial waiver of the penalty, the Department notifies the administrator of its determination whether to waive the penalty, in whole or in part, or to fully assess the penalty. 29 C.F.R. § 2560.502c-2(g).

The Plan Administrator (“WMAT”) did not file with the U.S. Department of Labor, Employee Benefits Security Administration (“DOL” or “EBSA”) a Form 5500 Annual Return/Report of Employee Benefit Plan (“Annual Report”) that included an independent IQPA report for the Plan for the 2012 Plan Year ending April 30, 2013. WMAT appended a statement with the Annual Report, which stated that there was a good faith determination made under section 906 of the Pension Protection Act (“PPA”)¹ that WMAT employees performed essential government functions that are not commercial in nature and therefore, did not have to file an IQPA report. WMAT noted that the Plan also included employees engaged in activities identified as “commercial” in Internal Revenue Service Notice 2006-89.²

On September 15, 2014, EBSA issued a Notice of Rejection of the Plan’s Form 5500 Annual Report to the WMAT for failing to attach an IQPA report for the Plan Year ending April 30, 2013. The Notice of Rejection informed WMAT it could be subject to civil penalties of \$1,100.00 per day.

On October 30, 2014, WMAT sent a letter to EBSA asserting the penalty for the delinquent filing should be waived because: (1) the Plan is exempt from reporting requirements under

¹ The PPA amended the definition of “governmental plan” as the term appears in Internal Revenue Code Section 414(d) and ERISA Section 3(32). Of relevance here, 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).

² Internal Revenue Service Notice 2006-89 advises of the change in the definition of governmental plans and provides transitional relief. The Notice permits Indian tribal plans to be considered as meeting the amended definition of “governmental plan” if compliance was based upon a “reasonable and good faith interpretation” of the amendment. However, the Notice expressly stated it is not reasonable and in good faith to interpret a plan as a “governmental plan” if such plan includes employees engaged in commercial activities such as being “employed by a hotel, casino, service station, convenience store, or marina operated by the tribal government.”

ERISA 3(32); (2) the Plan did not cover employees engaged in commercial activities; and (3) EBSA should waive the filing requirements under Executive Order 13175.

On March 23, 2015, the Department issued a Notice of Intent to Assess a Penalty against the WMAT for its deficient Form 5500 filing for Plan Year 2012.

By letter dated April 27, 2015, WMAT filed a Statement of Reasonable Cause and Request for Waiver of Penalties; Request for Relief under Executive Order 13175; and Request for Pre-decisional Conference and to Supplement the Record. WMAT asserted the Department failed to provide sufficient guidance related to the new amendments to the PPA's definitions of "non-governmental tribally sponsored plan," an "essential governmental function" or the term "commercial" in the context of Section 3(32) of ERISA.³ It also alleged the Department had an inconsistent enforcement policy, and requested a Pre-decisional conference.

On May 4, 2015, EBSA issued a Notice of Determination on Statement of Reasonable Cause: White Mountain Apache Tribe Retirement Savings and 401(k) Plan Annual Report. This document stated that EBSA found there was no reasonable cause to waive the penalty because: (1) no IQPA report was submitted for the Plan's 2012 year; (2) requirements in the Department's Tribal Consultation Policy and Executive Order 13175 did not apply to enforcement actions for violations of ERISA Section 103; (3) the WMAT did not present reasonable cause for its failure to file an acceptable annual report initially, and failed to correct this mistake in a timely manner; and (4) WMAT had a fiduciary duty to meet the reporting requirements. The Department assessed a penalty of \$50,000 under Section 502(c)(2) of ERISA.

On June 4, 2015, WMAT filed an Answer and Request for Hearing. In this document, WMAT admitted that an IQPA report was not filed with respect to the 2012 plan year. However, in contrast to the WMAT's statement appended to its Form 5500 filing for the 2012 plan year, this document stated that "all employees covered by the Plan perform functions that are not commercial in nature."

On June 4, 2015, WMAT filed a motion to conduct discovery.

On August 19, 2015, the Administrative Law Judge ("ALJ") issued a Notice of Assignment and Hearing and Pre-Hearing Order setting the hearing for December 14, 2015.

On September 1, 2015, EBSA argued that discovery should not be permitted.

On September 10, 2015, the ALJ denied WMAT's discovery except for two requests for admission, two interrogatories, and two requests for production.

³ Section 906 of the PPA amended both the Code and the ERISA to legislatively classify, for the first time, tribally-sponsored employee pension plans as either governmental or commercial plans depending on the nature of the tribal employer's activities. Section 906 defines governmental plans to include plans established by "an Indian tribal government, a subdivision of an Indian tribal government or an agency of or instrumentality of either, and 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 governmental functions)."

On November 13, 2015, EBSA filed a motion for summary decision seeking summary decision in its favor affirming the penalty assessed against WMAT.

The ALJ granted continuances of the matter and set deadlines for the parties' responses.

On February 25, 2016, WMAT filed a Response in Opposition to EBSA's Motion for Summary Decision and Cross Motion for Summary Decision in Favor of Respondent.

On March 14, 2016, EBSA filed a Response in Opposition to Respondent's Cross Motion for Summary Decision.

On April 7, 2016, Respondent filed a Reply in Support of Cross Motion.

On June 1, 2016, the ALJ held a telephone conference with the parties and subsequently received filings responsive to the questions raised by the ALJ.

On November 30, 2016, the ALJ issued the Decision and Order Granting EBSA's Motion for Summary Decision and Denying Cross Motion for Summary Decision.

WMAT timely appealed the ALJ's Decision and Order to the Secretary of the Department of Labor on December 22, 2016.

On May 5, 2017, this Office issued a briefing schedule that provided a deadline of June 9, 2017 for WMAT to file its brief and a deadline of July 7, 2017 for DOL to file its brief. Both parties timely filed their briefs.

CONSIDERATION OF ISSUES ON APPEAL

WMAT's brief presents the following seven points of error in support of its request for reversal of the Opinion on Appeal:

1. The ALJ erred by denying discovery needed by WMAT to fully present its case.
2. The ALJ erred by failing to correctly apply the proper statutory rule of construction in interpreting the PPA.
3. The ALJ erred by failing to consider the proper impact of Executive Order 13175 (both consultation and waiver rights).
4. The ALJ erred by misapplying the IRS Transition Relief.
5. The ALJ erred by applying an incorrect standard for determining reasonable cause and mitigating factors.
6. The ALJ erred by disregarding WMAT's right to due process, equal protection and the Administrative Procedures Act.
7. The ALJ erred by failing to provide proper weight to key disputed and undisputed facts.

Below I consider each of these 7 points, and in each case conclude that the ALJ did not err as WMAT claims.

1. The ALJ did not err by denying discovery requested by WMAT.

The ALJ did not err by denying discovery requested by WMAT. WMAT argues that broad discovery was necessary for the tribe to fully present its case to the ALJ. The ALJ granted discovery that related to a genuine issue as to a material fact that is relevant to this proceeding, while properly denying discovery that did not so relate. Facts relevant to this proceeding include those that bear on whether WMAT was required to file an Annual Report that includes an IQPA report for the Plan for the year ending April 30, 2013, and on whether there were mitigating circumstances surrounding WMAT's failure to file that warrant a reduction or waiver of the assessed penalty.

The ALJ permitted discovery on "whether participants in the Plan were engaged in commercial activities," a question that bears on whether WMAT was required to file an IQPA report. She properly denied the other discovery that WMAT requested because the facts sought were not relevant to this proceeding, and could not have changed its outcome. The denied discovery generally pertained to EBSA's internal procedures and activities. WMAT asserts that such internal procedures and activities could undermine EBSA's conclusion that Plan participants are engaged in commercial activities, or demonstrate that WMAT's failure to file an IQPA report was not willful. This is incorrect. Rather, EBSA's internal workings have no effect on the PPA's relevant statutory provisions, on Plan participants' activities, or on WMAT's ability to comply with ERISA's reporting and disclosure requirements.

2. The ALJ did not err in its application of the statutory rule of construction in interpreting the PPA.

The relevant question under the PPA is whether participants in the Plan were engaged in "commercial activities." WMAT, in its Appellant's Brief, contends that "reasonable minds can differ on what should be treated as 'commercial'" under the PPA. However, WMAT offers no explanation as to why the specific activities at issue here should be subject to such differences of opinion. WMAT admits that the Plan includes participants working in its casino, ski resort, hotels, restaurants, and stores. The ALJ notes in her decision that IRS guidance, court decisions, the natural reading of the PPA itself, and "any commonsense understanding" all would deem such work to be commercial activity. EBSA, in its Appellee's Brief, accurately quotes express support for this view in Congress's own explanation of the PPA itself.

WMAT argues that the distinction between commercial activities and governmental functions is ambiguous. However, neither the PPA nor EBSA's enforcement action draw, or need to draw, such a distinction. The PPA expressly anticipates instances where commercial activities are essential government functions. Plan participants' activities are clearly commercial, so it matters not whether their activities are also essential government functions.

WMAT argues that before imposing any penalty, EBSA should have consulted with tribes to develop and issue guidance as to what constitutes commercial activity under the PPA. While such a step by EBSA might be helpful, particularly around any unclear edges of what constitutes commercial activity, it should not stand in the way of EBSA's enforcement of ERISA reporting requirements where, as in this instance, the commercial nature of participants' work is clear.

3. The ALJ correctly concluded that Executive Order 13175 is not relevant to this proceeding.

The ALJ correctly concluded that Executive Order 13175 creates “no right of action...which would overcome the present enforcement action,” and noted that the EBSA policy on consultation states that “enforcement policy, planning, investigations, cases and proceedings are not appropriate subjects for consultation.”

WMAT argues that nonetheless, EBSA’s failures under Executive Order 13175 to consult with tribes or to more fully consider WMAT’s request for a waiver of ERISA reporting requirements mitigate the willfulness of WMAT’s noncompliance. However, WMAT does not explain how the absence of consultation or waiver impaired its ability to come into compliance once it received from EBSA the Notice of Rejection dated September 15, 2014. WMAT’s argument boils down to a purported justification for its willful noncompliance, rather than a demonstration that its noncompliance was not willful.

WMAT also notes that courts have required agencies to follow their own consultation policies before adopting and implementing new policies. In this case, EBSA is merely implementing a policy specified in statute, not adopting a new policy. Under the PPA, the Plan is not a governmental plan and therefore is subject to ERISA reporting requirements, which EBSA properly enforced in this instance.

Executive Order 13175 consequently is not relevant to this proceeding.

4. The ALJ did not misapply the IRS Transition Relief.

WMAT points to the ALJ’s references to the IRS transition relief to cast doubt on her conclusion that Plan participants are engaged in commercial activities under the PPA. WMAT notes that the IRS guidance itself expressly does not apply to ERISA reporting requirements. However, the ALJ’s decision applies the IRS guidance as only one of multiple touchpoints, all of which indicate that Plan participants are engaged in commercial activities. As noted above, the IRS guidance, court decisions, the natural reading of the PPA itself, and “any commonsense understanding,” all indicate that participants’ work constitutes commercial activity.

5. The ALJ did not err in application of the standard for determining reasonable cause and mitigating factors.

WMAT argues that its noncompliance was not “willful” because it reflected good faith understanding that it was not required to file an IQPA report. This argument might have merit with respect to WMAT’s initial failure to timely file an IQPA report, although even this is questionable given earlier communication between WMAT and EBSA about filings from prior years. Nevertheless, it has no merit with respect to WMAT’s continued failure to file an IQPA report after EBSA issued a Notice of Rejection. The Notice of Rejection necessarily made clear that the Plan was not a governmental plan and that ERISA’s reporting requirements consequently applied. WMAT’s apparent disagreement with EBSA’s reading of the law is not reasonable

cause for its failure to comply with it. As noted above, WMAT's argument boils down to a purported justification for its willful noncompliance, rather than a demonstration that its noncompliance was not willful.

6. The ALJ did not err regarding WMAT's right to due process, equal protection and the Administrative Procedures Act.

WMAT argues that EBSA treats tribes inconsistently, in violation of due process and equal protection, but offers no response to the ALJ's reasoned rejection of this argument. The ALJ rightly found no material inconsistency between EBSA's current action against WMAT and its past actions (or lack thereof) against WMAT or other tribes. WMAT additionally argues that the Administrative Procedures Act bars EBSA from adopting and enforcing a policy that treats Plan participants' activities as commercial without first publishing that policy in the Federal Register. This argument lacks merit because, as noted above, in this case, EBSA is merely implementing a policy specified in statute, not adopting a new policy.

7. The ALJ did not fail to provide proper weight to key disputed and undisputed facts.

Here WMAT lists eight purported facts that it says the ALJ did not properly weight. First is an absence of evidence that EBSA appropriately considered mitigating factors. Yet the ALJ herself considered WMAT's mitigation claims and found them wanting, and there is no evidence that EBSA's own consideration was flawed. Second, WMAT references steps EBSA did not take to help WMAT comply, but does not explain why the ALJ should weight this heavily in light of the steps EBSA did take. Third, WMAT points to an internal EBSA document, despite the ALJ's correct observation that there is no evidence that the document either represents or establishes official EBSA policy. Fourth, WMAT asserts there is no evidence that its noncompliance was willful, when the operative issue is that WMAT failed to establish that it was not willful. Fifth, WMAT notes the ALJ's observation that the plan includes non-tribe members, while neither ERISA nor the PPA reference Tribe membership. Yet the ALJ's conclusion that Plan participants are engaged in commercial activities relies on the activities themselves (e.g., working in a casino), and not on Tribe membership. It is these activities, and not lack of Tribe membership, that the ALJ connects with the IRS guidance, court decisions, the PPA's plain language, and commonsense understanding, to reach her conclusion that the activities are commercial. Sixth, WMAT notes that certain case law cited by the ALJ involves litigants not entitled to government-to-government consultation, ignoring the ALJ's correct conclusion that such consultation rights are not relevant here. Seventh, WMAT asserts there is no evidence that EBSA has been consistent, neglecting the ALJ's thorough consideration of EBSA's consistency and conclusion that there is no evidence of material inconsistency. Eighth and finally, WMAT notes its compliance with IRS notices and intent to split the Plan, facts not relevant to this action.

DECISION

The ALJ decision must include findings of fact and conclusions of law with reasons therefore upon each material issue of fact or law presented on the record, and must be based upon the whole record. The penalty (if any) which may be included in the decision of the ALJ shall be

limited to the penalty expressly provided for in Section 502(c)(2) of ERISA, and it shall be supported by reliable and probative evidence. 29 C.F.R. § 18.57.

The Secretary of Labor delegates authority and assigns responsibility to the Director of the Office of Policy and Research for the review of decisions of ALJs under regulations implementing the Department's authority to assess civil penalties under ERISA Sec. 502(c)(2) and (i). Here, the ALJ properly found that the WMAT Plan is not a governmental plan, but rather an ERISA-covered plan that is required to file an annual report that includes an IQPA report. WMAT failed to provide an IQPA report for plan year 2012. The ALJ properly found that there exist no genuine issues of material fact, and that WMAT has not demonstrated mitigating circumstances or reasonable cause for its failure to comply with the ERISA reporting requirements. The ALJ's decision met the requirements set forth in 29 C.F.R. § 18.57.

Having concluded that the ALJ committed none of the errors that WMAT alleges, I find no fault with the ALJ's opinion. Consequently, the ALJ decision is affirmed in whole. I hereby order that the penalty amount, \$50,000, be paid by the Respondent-Appellant, WMAT, to the U.S. Department of Labor within thirty (30) days from the date of service of this decision. Amounts not paid by that time shall be subject to penalties and interest provided for by ERISA and its implementing regulations.



Joseph S. Piacentini
Director, Office of Policy and Research