U.S. Department of Labor

Pension and Welfare Benefits Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Date: July 26, 1995
Case No.: 93-RIS-23

In the Matter of:

**U.S. DEPARTMENT OF LABOR,
PENSION AND WELFARE BENEFITS
ADMINISTRATION,**

Complainant-Appellee

v.

**NORTHWESTERN INSTITUTE OF
PSYCHIATRY,**

Respondent-Appellant

DECISION AND ORDER

This proceeding is on appeal from the United States Department of Labor (hereinafter "the Department" or "DOL") Office of Administrative Law Judges ("ALJ") , and arises under Sections 2, 101, 103, 104, 502 (c) (2) and 505 of the Employee Retirement Income Security Act of 1974 (ERISA) , as amended (29 U.S.C. Sec. 1001, 1021, 1023, 1024, 1132 (c) (2) and 1135) , and the implementing regulations at 29 CFR 2520.103, 2520.104a-5, 2560.502c-2, and 2570.60 - 2570.71.

BACKGROUND

This case involves the question of the validity of civil penalties levied as a result of alleged deficiencies in the filing of the 1988 Form 5500 for the Northwestern Institute of Psychiatry (NIP) Pension Plan ("Plan") . In order to understand the legal issues raised here, a brief summary of the relevant facts is in order.

On January 10, 1990, through its third party administrator, TYCOR Benefit Administrators, Inc., NIP filed a Form 5500 with the Internal Revenue Service (IRS) for the NIP Plan year ended March 31, 1989.

By letter dated February 14, 1990, the IRS informed NIP of certain deficiencies in the Form 5500. The deficiencies relevant to this case were missing Schedules B and C and a missing report of an Independent Qualified Public Accountant (IQPA) The IRS warned NIP that, if the

deficiencies were not timely corrected, NIP would be subject to certain penalties under the tax law and might also be subject to DOL penalties of up to $1,000 per day.

On February 28, 1990, NIP forwarded to the IRS certain corrections to the Form 5500 Schedule C, an explanation of why it thought Schedule B was not necessary, and a statement that the IQPA's opinion letter "is currently being prepared and will be forwarded to you when completed."

The IRS sent NIP a second deficiency letter on March 20, 1990, noting that Schedule. B and the IQPA's opinion was still missing, and that some information was missing from the Schedule C that was provided, and reiterated the penalties which could be levied by the IRS and the DOL if the missing items were not provided in a timely manner and requested a response within 30 days of the date of the letter[1] .

NIP did not respond to the March 20, 1990, letter. The IRS then sent NIP its third letter on May 21, 1990, again giving it 30 days to correct deficiencies, and reiterating the potential IRS and DOL penalties NIP could be subject to if it failed to correct the deficiencies.

NIP replied under cover of a letter dated June 6, 1990[2] transmitting some (but not all) of the missing information from the Schedule C, but not transmitting Schedule B and stating that the IQPA's opinion letter was delayed "due to lack of information that needs to be submitted from the insurance carrier that was dismissed during the plan year" and stated that the opinion letter would be sent "under separate cover" when it was received.

Four months later, on October 26, 1990, the DOL sent NIP a notice of rejection of NIP's 1988 annual report, citing the lack of an IQPA opinion, the absence of Schedule B and the need to provide certain information on Schedule C. The letter contained a warning to NIP, under the heading "Notice of Intent to Assess a Penalty" that "unless a revised report satisfactory to the Department is filed within 45 days of the date of this Notice of Rejection", the Department could treat the report as not having been filed and could levy a penalty of up to $1, 000 per day from the date on which the annual report was due.

NIP responded to the DOL by letter dated November 8, 1990[3]. The response included an amended Form 5500 dated November 21, 1990, along with a completed IQPA's report and stated

---

[1] This letter was mistakenly referred to as being sent on March 20, 1993 in the ALJ opinion.

[2] While NIP's letter was dated June 6, 1990, the enclosed Form 5500 was dated June 7, 1993. In the ALJ opinion, this letter was described as sent on June 20, 1993.

[3] The Administrative Law Judge's opinion refers to this letter as filed on November 23, 1993. This is a mistaken reference to the date it was received by the Department, which was November 23, 1990.

that, " if additional information is required, please contact my pension administrators at the TYCOR Benefit Administrators..." Curiously, the IQPA's opinion letter was dated April 16, 1990, even though NIP's June 20 letter stated that the IQPA's opinion letter was not yet prepared.

On March 15, 1991, the DOL formally 'notified NIP of its intent to assess a penalty for the continued deficiencies in NIP plan's 1988 annual return because NIP had failed to make a revised filing satisfactory to the DOL within 45 days of the Notice of Rejection.

The Notice of Intent notified NIP that the IQPA report received in response to the Notice of Rejection was deficient because it did not present the statement of net assets in comparative format, as required by regulation 29 CFR 2520.103- 1(b)(2)(i). It also stated that the IQPA report was deficient because it did not extend to the required separate schedules of assets held for investment and of reportable transactions as required by 29 CFR 2520.103-1(b)(5)(iii)(A), because the Plan had not prepared and included these schedules. The Notice of Intent also requested that the schedules of assets held for investment and of reportable transactions be attached, as required by regulation 29 CFR 2520.103-10. The Notice of Intent informed NIP that a penalty of $36,500 had been calculated for the missing financial reporting items (the schedules) , and a penalty of $50, 000 had been calculated for the deficient accountant's report. This Notice also informed the plan administrator that he had 30 days from service of the Notice to file a written statement of reasonable cause setting forth all the facts alleged for failure to file a complete annual report or why the penalty, as calculated, should not be assessed. The Notice stated that the statement must contain a declaration that the statement is made under the penalties of perjury.

TYCOR responded to the Notice of Intent by letter dated April 12, 1991. This letter enclosed the Statement of Net Assets in comparative format, a Schedule of Assets Held for Investment, and a Schedule of Reportable Transactions, along with another copy of the previously submitted IQPA's opinion. The IQPA's opinion had not been amended to extend to the separate schedules, even though the DOL's March 15, 1991 notice explicitly stated that applicable Department regulations "requires that the opinion of the IQPA extend to the information covered in the separate schedules." Further, the letter did not state any reasonable cause for NIP's failure to timely file a complete annual report or why the penalty should not be assessed. Finally, despite being required to do so by. applicable regulations and by instructions contained in the DOL's notice, TYCOR, filing on behalf of NIP, failed to declare. that the statements made in its April 12, 1991 letter were made under the penalties of perjury.

On September 10, 1991, the DOL sent NIP a "Notice of Penalty Assessment", reciting the deficiencies contained in the filed Annual Report and stating that the April 21, 1991 letter sent by NIP in response to the DOL's Notice of Intent to Assess a Penalty was not a timely statement of reasonable cause because it "did not contain a declaration that it was made under penalties of perjury, as required under 29 CFR section 2560.502c-2(e) as cited in the Notice." The DOL's Notice of Penalty Assessment further stated that such failure to file a timely statement of reasonable cause was deemed to constitute a waiver of NIP's right to contest the facts alleged in the Notice of Intent to Assess a Penalty, which had now become a final order.

In response to a collection letter sent to NIP by the DOL on October 11, 1991, NIP sent a letter to the DOL dated October 21, 1991, requesting that the DOL "waive all penalties associated with the 3/31/89 filing, since we are enclosing a satisfactory report in compliance with the letters that we've received from your office." However, this letter enclosed an unsigned Form 5500, with the same deficient IQPA's report that had been submitted to the DOL twice previously.

In mid January, 1992 NIP did two things of import. on January 16, 1992, it filed suit in District Court for the Eastern District of Pennsylvania, alleging that the Department's failure to consider NIP's letter of April 12, 1991, as a timely statement of reasonable cause unfairly deprived it of its rights to an administrative appeal. On January 17, 1992, NIP filed a signed Form 5500, accompanied by the appropriate schedules, along with a signed IQPA's report which, for the first time, extended to the supplemental schedules of assets and reportable transactions.

On November 23, 1992[4] , NIP filed NIP Plan's Form 5500 for the 1988 plan year with the Department under the Department's Grace Period Program.

On February 24, 1993, the District Court rendered judgment for NIP, holding that the Department's position that the failure by NIP to sign a declaration that its reasonable cause statement was being made under penalty of perjury constituted a waiver of NIP's right to a review of NIP's otherwise timely filed statement of reasonable cause was arbitrary and capricious. The court ordered that NIP amend its April 12, 1991 reasonable cause statement within 10 days of the order to include a declaration that it was made under penalties of perjury and that the DOL issue a determination evaluating NIP's reasonable cause statement within 30 days of the filing by NIP of the declaration that its reasonable statement was made under penalties of perjury.

On March 5, 1993, NIP's attorneys filed a statement of reasonable cause dated March 4, 1993, signed by NIP under penalties of perjury, which contained new assertions of reasonable cause, essentially to the effect that: (1) NIP relied on its accountants and third party administrator who "held themselves out as eminently qualified" certified public accountants and pension administration service providers, respectively, and (2) that NIP believed that the prior filings satisfied the Department's needs, and in any event, they came into compliance on January 17, 1992. It concluded, in relevant part, that "we reasonably relied in good faith on professional accountants and pension administrators to perform their obligations in accordance with applicable law. Thus, no penalty should be assessed against Northwestern."

On April 7, 1993, the Department issued a Notice of Determination of Reasonable Cause. Based upon NIP's statement of reasonable cause, DOL found reasonable cause to waive (75%) of the assessed penalty because:

---

[4] The ALJ's opinion mistakenly refers to this filing as having taken place on November 23, 1993.

"1. The 1988 plan year filing has finally been brought into compliance with applicable requirements; and

2. the plan administrator has expended considerable effort to have his Statement of Reasonable Cause considered."

However, the DOL also found that there was no reasonable cause to waive the other 25% because (1) the plan administrator failed to present a satisfactory reasonable cause for its original failure to file a satisfactory annual report or for its failure to file a correct report within 45 days of the Notice of Rejection; (2) the mistaken reliance on professional accountants and pension does not constitute reasonable administration service providers does not constitute reasonable cause, as administrators have a fiduciary duty to ensure that service providers are performing properly; (3) the administrator failed to file a correct report for nearly one year after the Notice of Rejection; and (4) the lack of substance to the first statement of reasonable cause.

Northwestern timely filed an appeal on April 27, 1993 of this Determination to the DOL's Office of Administrative Law Judges.

On June 17, 1993, PWBA issued a correction to its April 7, 1993 Notice of Determination, stating that an acceptable IQPA report was not received until January 28, 1992.

By Decision and Order dated December 21, 1993, Ainsworth H. Brown, the ALJ assigned to this case, ruled in favor of the DOL and upheld the $21,625 penalty against NIP.

The ALJ found that NIP did not file a correct Form 5500 until over two years after it was due to be filed under section 104 of ERISA. He further found that the IRS and DOL sent NIP "no less than six letters outlining deficiencies in the Form 5500" and that, "even after receiving the Notice of Rejection from the DOL on October 26, 1990, in which NIP was given 45 days to correct any errors, it took over one year for NIP to file a complete report[5] ."

The ALJ found that "the DOL afforded NIP every opportunity under law to correct and explain the errors" in the NIP Plan's 1988 Form 5500, that the penalty assessed was reasonable, and that "the evidence demonstrates that the DOL has fully considered the statement of reasonable cause dated March 4, 1993, and has adjusted the penalty to be assessed accordingly."

The ALJ rejected NIP's argument that the maximum penalty it is subject to is $1,000 based on its filing of November 23, 1992 under the Annual Report Grace Period announced by the DOL on April 20, 1992 (57 Fed. Reg. 14437) . The ALJ noted that "there are separate penalties for failure to file timely as opposed to penalties for non-compliance with reporting requirements",

---

[5] This was the report which the NIP filed by letter dated January 17, 1992.

and that "the penalties sought to be assessed by the DOL are directly related to filing deficiencies... and are unrelated to the lateness of the filing."

The ALJ rejected NIP's argument that the DOL's acceptance and cashing of the $1,000 check as part of the Grace Period filing was in accord and satisfaction of the penalty, stating that NIP failed to show that there was a "mutual agreement" relating to a "bona fide dispute."

Similarly, the ALJ rejected NIP's arguments that there was legal significance to the statement in the DOL's April 7, 1993 letter that an acceptable IQPA report was submitted on October 21, 1991 and that, once an appeal to the ALJ was filed the DOL was without jurisdiction to issue a correction letter on June 17, 1993, which stated that an acceptable IQPA report not received until January 28, 1992. The court noted that the June 17, 1993 letter "did not effect (sic) the rights of the parties in any material way because NIP had reached its statutory maximum for the violations sought to be enforced months before the date in either letter."

Finally, the ALJ stated that "considering the extraordinary length of time that transpired before NIP filed a complete Form 5500 and the severity of the omissions, including the absence of a proper IQPA opinion letter, the Court could find no basis to set aside the DOL assessment of penalty or its subsequent modification."

The ALJ ordered NIP to pay DOL $21,625, less a credit of $1,000 for the payment which NIP made under the Grace Period program.

NIP appealed from the ALJ decision and order, on four grounds: First, that the ALJ erred as a matter of law by failing to grant NIP summary judgment for its filing under the DOL's Grace Period filing program; second, that the ALJ erred as a matter of law by failing to grant NIP summary judgment based on DOLI s admission that NIP filed in a timely manner; and finally, in any event, the ALJ erred in granting summary judgment because issues of fact existed as to whether NIP substantially complied with its filing duties and as to whether NIP presented reasonable cause to justify a full abatement of DOL's penalty. I shall deal with the issues raised by NIP's appeal in turn.

NIP's CONTENTION THAT THE ALJ ERRED AS A MATTER OF LAW BY FAILING TO GRANT NIP SUMMARY JUDGMENT FOR ITS FILING UNDER DOL's GRACE PERIOD FILING PROGRAM.

NIP's argument, briefly summarized, is that the DOL's Grace Period program was open to it, that it properly availed itself of the program, and that even if it were not properly open to it, the DOL, by accepting and negotiating NIP's $1,000 check, entered into an accord and satisfaction of the penalty and was estopped from preventing entry of NIP into the Grace Period program.

The thrust of NIP's argument that the Grace Period program was properly available to it can be briefly summarized as follows:

Technically, under section 502(c)(2) of ERISA, an annual report that is rejected under 104 (a) (4) is to be treated as not having been filed. Because NIP's report was so rejected, NIP was a nonfiler and therefore eligible under the Grace Period program for late and non-filers, as promulgated in the DOL's April 20, 1992 notice in the Federal Register as extended by its July 24, 1992 Federal Register notice to plan administrators who filed late annual reports prior to the effective date of the program.

The ALJ rejected this argument in his opinion, citing the following language of DOL's April 20, 1992 notice:

"Annual reports received during the Grace Period are subject to the usual edit checks. Plan administrators will be given an opportunity to correct deficiencies, in accordance with the procedures contained in the regulations located at 29 C.F.R. section 2560.502c-2 and 2570.60 et seq. However, uncorrected deficiencies may result in the assessment of further penalties."

NIP argues, correctly, in my view, that the above language in the April 20, 1992 notice relates to possible deficiencies in annual reports received in response to the notice. However, NIP totally ignores the following language in the July 24, 1992 notice, which extended the program to late filers (such as NIP) who had filed prior to the effective date of the program:

"The Department notes that the payment of the foregoing civil penalties only serves to avoid the assessment of otherwise applicable higher civil penalties for filing late annual return/reports. Payment of such penalties does not serve to reduce, abate, or otherwise mitigate civil penalties which may be or have been assessed for annual reports which are determined to be deficient." 57 Fed. Reg. 33020

This language makes abundantly clear that the Grace Period program does not extend to situations such as this, in which civil penalties had been assessed in September 1991 for an annual report which was determined to be deficient. Furthermore, both the April 20, 1992 and July 24, 1992 notices explicitly state that they are applicable to plan administrators who "voluntarily file" overdue annual reports. Under the facts of this case, where NIP consistently failed to provide the DOL with the information was necessary under the applicable regulations to have a non-deficient annual report, and was in the midst of litigation with the DOL with respect to the DOL's penalty determination, the filing cannot be considered voluntary in the manner meant in the regulation, using the ordinary meaning of the word -- namely, "acting or done without compulsion or obligation" -- that is, the compulsion or obligation of being found out by the DOL to have filed a deficient return. Rather than being a voluntary coming forth, this was a

legal ploy of NIP to try to abort the DOLI s previously levied penalty for noncompliance with the DOL's reporting requirements.

The NIP's argument that the DOL's acceptance of its filing under the Grace Period program somehow constituted an accord and satisfaction of its debt or constituted an estoppel of the DOL's claims for deficiencies similarly does not survive even cursory scrutiny. The legal standard for accord and satisfaction cited in NIP's brief is "when a debtor sends a check for less that the amount claimed, clearly expressing his intention that it is sent as a settlement in full and not in part payment, 'retention and use of the money or the cashing of the check is almost always held to be an acceptance of the offer operating as full satisfaction'[6] ." However, an examination of plaintiff's letter, enclosing the check, clearly shows that there was no clear expression of an intention that the payment was meant to be settlement in full of an outstanding claim. Indeed, it was not directed to the officials at the DOL who were dealing with NIP with respect to the penalty assessment; it made no reference to the penalty assessment; and made no statement that the filing and payment of $1000 was meant to be settlement in full of the penalty assessment. Rather it was a bland cover letter to a post office box number, under a program which received thousands of filings. The letter gives no indication that there was an outstanding dispute or that the payment was meant to be in full satisfaction of the dispute[7] . I therefore find that the DOL's acceptance of NIP's check did not effectuate an accord and satisfaction. Furthermore, acceptance by, the DOL of NIP's check did not estop the DOL from. denying NIP's, eligibility for the Grace Period program, given the clear language in the July 24, 1992 Federal Register Notice stating that payment of penalties under the program would not "reduce, abate or otherwise mitigate civil penalties which... have been assessed for annual reports which are determined to be deficient". Furthermore, it appears that NIP was repeatedly informed by the DOL that it was not eligible for the Grace Period program[8]. Given the facts, DOL's acceptance and retention of NIP's check was merely the partial collection of a debt owed. "(I] t is clear that the Government has the same right as any other creditor to apply monies of his debtor, in his hands, in extinguishment of debts

---

[6] Appellant's brief, pp.16-17, quoting the standard for accord and satisfaction set forth in McDonald v. United States, 13 Cl. Ct. 255 (1987).

[7] NIP's letter, addressed to "Dear Sir or Madam," states in its entirety, the following:

> "Pursuant to the United States Department of Labor's Grace Period Program, enclosed is Northwestern Institute of Psychiatry's Form 5500 for Northwestern Institute of Psychiatry's Pension Plan for fiscal plan year April 1, 1988 through March 31, 1989, together with the required attachments and the One Thousand Dollar ($1,000.000) check made payable to the U.S. Department of Labor. I note that Northwestern's Employer Identification No. is 23-1673341; and the Plan No. is 001."

[8] Appellee's brief, pp.6-7. The Appellant's brief does not contradict this statement.

due him. See United States v. Munsey Trust Co., 332 US 234, 67 S. Ct. 1559, 91 L. Ed. 2022 (1947)." Blake Construction Co., Inc. v. United States, 585 F2d 998, 1005 (Ct. Cl. 1978).

NIP's CONTENTION THAT THE ALJ ERRED AS A MATTER OF LAW BY FAILING TO GRANT NIP SUMMARY JUDGMENT BASED ON DOL's ADMISSION THAT NIP FILED IN A TIMELY MANNER

The gist of NIP's argument that the DOL admitted that NIP filed in a timely manner can be summarized as follows: By stating in its April 7, 1993 Notice of Determination that "an acceptable IQPA Report was submitted to the Department on October 21, 1991," the Department was in effect admitting that the IQPA Report submitted by NIP on November. 8, 1990 was acceptable because the IQPA reports were identical and therefore there was no basis for levying any penalty on NIP. Furthermore, NIP asserted that the DOL was foreclosed from correcting its April 7, 1993 Notice of Determination by issuing a second Notice of Determination on June 17, 1993 after NIP filed its notice of appeal because, in NIP's view, the DOL violated "its own regulations which guarantee [NIP] an Administrative Hearing on the terms of the initial determination," and further, that the second notice violated the terms of the Federal District Court order granting NIP a reasonable cause hearing, which directed the DOL to file a Determination on NIP's Reasonable Cause Statement within 30 days after the statement was submitted.

NIP's assertions cannot survive close scrutiny. First, the documentary evidence shows that an acceptable IQPA report filed in compliance with the DOL reporting requirements was not filed until January 1992. The incorrect statement in the DOL's April 7, 1993 Notice of Determination does not change that fact, and NIP cannot show any detrimental reliance on the DOL's mistaken description of past events. Second, the mistaken reference states that the October 21, 1991 filing of the IQPA's report was acceptable, not the November 8, 1990 filing. Although the October 21, 1991 filing of an amended annual report contained the same IQPA report as the November 8, 1990 filing, it contained the additional schedules which were conspicuously absent in the November 8, 1990 filing. While the IQPA report was still materially deficient, inasmuch as it was not revised to indicate that the IQPA had examined and audited these schedules, this may have misled the DOL into incorrectly stating that the IQPA report was acceptable. However, even if one accepted NIP's premise that the IQPA report which was filed on October 21, 1991, was an acceptable accountant's report and that therefore the report filed on November 8, 1990, was acceptable, inasmuch as it was the same report, that still does not change the fact that the November 8, 1990 filing was still materially deficient in that it failed to include a Schedule of Assets Held for Investment and a Schedule of Reportable Transactions. These were filed on April 12, 1991 in response to the DOL's Notice of Intent to File a Penalty. Therefore, even if the IQPA's report were deemed to be acceptable, NIP did not file a satisfactory annual report within

45 days of the DOL's October 26, 1990 notice of rejection, and DOL could, under its regulations, levy a penalty for failure or refusal to file an annual report[9].

NIP's final argument is that, once having stated that an acceptable IQPA Report was filed on October 21, 1991 in its April 7, 1993 Notice of Determination, the DOL was foreclosed from changing the factual determination after NIP appealed the DOL's Determination to the ALJ. Analogizing to appeals of District Court decisions to Courts of Appeal, where 'the District Court loses jurisdiction upon the filing of appeal, NIP argues that the DOL is divested of its right to correct its Determination. I will not discuss this argument in detail, because even if it were valid, it would not change my determination, for the reasons stated above. Suffice it to say that I believe that NIP has chosen the wrong analogy. The ALJ is not an appellate court, but rather functions in many ways as a court of original jurisdiction, hearing evidence.

If anything, the appropriate analogy would be to view the DOL's Determination as similar to a complaint, which could be enforced only if the ALJ, after hearing the evidence presented, agrees with the DOL's determination. In such a situation, a complaint which is factually inaccurate may be amended.

NIP'S ASSERTION THAT THE ALJ ERRED IN GRANTING SUMMARY JUDGMENT TO THE DOL BECAUSE THERE EXIST GENUINE ISSUES OF MATERIAL FACT REGARDING NIP'S COMPLIANCE.

The gist of NIP's argument is that "it had provided all required data to the DOL prior to receiving either the March 15, 1991 DOL Notice of Intent to Assess a Penalty or the September 10, 1991 DOL Notice of Penalty Assessment[10] ." NIP faults the ALJ, stating that he "totally disregards the critical factual issue upon which this case hinges: whether Northwestern, contrary to the DOL's allegations, complied with ERISA reporting requirements before the time alleged[11]."

This allegation illustrates NIP's misunderstanding of ERISA's reporting requirements. Under DOL's regulations, for a plan administrator to avoid the levy of a penalty, the administratormust file an annual report with no material deficiencies within 45 days of the date of the notice of rejection. 29 CFR 2560.502c2(b)(3). This was clearly stated to NIP in the DOL's October 26, 1990 Notice of Rejection. However, the record in this case abundantly shows that neither an acceptable accountant's report nor the requisite separate schedules of assets held for investment

---

[9] See 29 CFR 2560.502c-2(b)(3)

[10] Appellant's briefs, p.25

[11] See F.n. 10, supra.

and five percent reportable transactions were included with the annual report filed on November 8, 1990. Therefore, there is no genuine issue of material fact as to whether NIP complied with ERISA's reporting requirements within the requisite time period.

Having rejected all of NIP's legal arguments as to whether it has complied with the law or has at least raised factual issues as to whether it has complied with the law, I turn now to NIP's last argument.

NIP'S ASSERTION THAT THERE EXISTS AN ISSUE OF FACT AS TO WHETHER NIP HAS PRESENTED REASONABLE CAUSE TO JUSTIFY FULL ABATEMENT OF THE DOL'S PENALTY.

NIP' s argument, in brief, is that DOL's reporting requirements are technical and it relied on its outside accountants and third party administrators to comply with the requirements, and that this reliance justified a full abatement of the penalty, rather than a 75 percent abatement.

To this argument, I can only repeat what the ALJ concluded:

> "Considering the extraordinary length of time that transpired before NIP filed a complete Form 5500 and the severity of the omissions... the court can find no basis to set aside the DOL assessment of penalty or its subsequent modification."

To the extent that NIP believes that it was poorly served by its professional service providers, its remedy lies elsewhere. It certainly cannot complain that it was not put on notice in plain English by the IRS and DOL as to the deficiencies which were required to be remedied and the consequences if they were not remedied within the specified time frames. However, it chose to dance a dance of disregard and delay, extending from its receipt of the first IRS deficiency letter dated February 14, 1990, through January 17, 1992, when it finally filed a complete Form 5500 with no material deficiencies. Having danced the dance, it must now pay the piper. The judgment of the ALJ is affirmed in all respects. I hereby order that NIP pay DOL $21,625 within thirty (30) days from the date of service of this decision, with credit given to NIP for $1,000 previously paid to the DOL. Amounts not paid by that time shall be subject to penalties and interest provided for by ERISA and its implementing regulations.

MORTON KLEVAN
Senior Policy Advisor